GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2021 Session

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(Under the jurisdiction of Ministry of Corporate Affairs)
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

PROFESSIONAL PROGRAMME EXAMINATION

JUNE 2021

ADVANCED COMPANY LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer **ALL** Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

Question 1

(a) How would you deal with the following situations under the provisions of the Companies Act, 2013 :

(i) The Board of directors of a company decides to revise the accounts already submitted to the auditors of the company, which have not yet been approved by the shareholders in general meeting; and

(ii) The Board of directors of a company decides to revise the accounts which have already been adopted by the shareholders in annual general meeting. *(5 marks)*

(b) Manu Marbles Ltd is a company registered in Anuradhapuram, Sri Lanka. The company wants to establish a place of business in Tamil Nadu, India. State the various documents to be filed. With whom the documents are to be filed ? *(5 marks)*

(c) Appu Hotels Ltd. has the following balances :

Authorised Equity Share capital	*₹75 crore*
Paid up Equity share capital (₹100 shares of 50,00,000)	*₹50 crore*
Reserves and Surplus	*₹550 crore*

The Board of Directors plans to issue bonus shares in the ratio 1 : 1.

What are the main conditions to be checked before the issue ? Can a Bonus Issue once announced be withdrawn ? *(5 marks)*

(d) (i) What is meant by 'Private placement of shares' ?

(ii) Medha Garments Ltd contemplates the issue of equity shares by private placement. Managing Director of the Company suggests that the letter offering the shares can be made out in the prescribed format and issued to the following number of persons :

- *Relatives of the present directors – 35 persons*
- *Friends of the present directors – 75 persons*
- *Selected persons from business associates like sellers of raw materials, buyers of products, service providers etc. – 100 persons*

- *Officers of the company, who may be interested in investing the Medha Garments Ltd. – 40 persons.*

As a Company Secretary of the Company, draft a note to the Managing Director, on the legality of the above proposal and your suggestion therefor. (5 marks)

Answer 1(a)

(i) In case where Board of Directors of a company has decided to revise the accounts already submitted to the auditors of the company, but not yet approved by the shareholders in General Meeting, there are no fetters for revision. They can opt for Voluntary Revision of Financial Statement or Board Report as per Section 131(1) of the Companies Act, 2013.

(ii) In the second scenario where the Board of Directors of a company has decided to revise the accounts which have been already adopted by the share-holders in Annual General Meeting, they can opt for voluntary revision of Financial Statement or Board Report as per Section 131(1) of the Companies Act, 2013.

However as per Section 131(2) of the Companies Act, 2013, the extension of revision must be limited to the correction in respect of which the previous financial statement or board report, has not complied with the provisions of Section 129 or Section 134 of the Companies Act, 2013; and any necessary consequential alternation.

Answer 1(b)

As per Section 2(42) of the Companies Act, 2013, a "foreign company" means any company or body corporate incorporated outside India which, -

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

As per Section 380 read with Rule 3 of the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall, within 30 days of the establishment of its place of business in India, file the following documents to the Registrar of Companies in Form No FC-1 for registration:

a. A certified copy of the charter, statute or memorandum of association and articles of association of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in English language, a certified translation thereof in the English language;

b. The full address of the registered or principal office of the company;

c. A list of directors and secretary of the company with particulars as prescribed;

d. The name(s) and address(s) of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

e. The full address of the office of the company in India which is deemed to be its principal place of business in India;

f. Particulars of opening and closing of place of business in India on earlier occasion(s);

g. Declaration that none of the directors of the company or authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

h. Other prescribed particulars.

Answer 1(c)

Section 63 read with Rule 14 of the Companies (Share Capital and Debentures) Rule, 2014 deals with the issue of Bonus shares. A company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of its free reserves, securities premium account or capital redemption reserve account.

However, no bonus shares can be issued by capitalizing reserves created by the revaluation of assets. Further, the bonus shares shall not be issued in lieu of dividend.

Following conditions are required to be satisfied before issuance of Bonus shares:

i. It is authorised by the Articles of Association;

ii. It has, on the recommendation of the Board, been authorised in the general meeting of the company;

iii. The company has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;

iv. The company has not defaulted in respect of the payment of statutory dues of the employees, such as, contribution to the provident Fund , gratuity and bonus;

v. The partly paid-up shares, if any outstanding on the date of allotment, ought to be made fully paid up;

vi. It complies with such conditions as prescribed.

Rule 14 of the Companies (Share Capital and Debentures) Rules, 2014 provides that the company which has once announced the decision of its Board of Directors recommending a bonus issue, shall not subsequently withdraw the same.

Answer 1(d)

(i) According to Explanation I. to Section 42 (1) of the Companies Act, 2013, the term **"Private Placement"** means any offer or invitation to subscribe or issue of securities to a selected group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in Section 42 of the Companies Act, 2013.

(ii) **Note to Managing Director of Medha Garments Ltd.**

Respected Sir,

This is reference to your note dated ……., 2021, suggesting to issue private placement letters as per the arrangement, mentioned below:

- Relatives of the present directors-35 persons;

- Friends of the present directors- 75 persons;
- Selected persons from business associates like sellers of raw materials, buyers of products, service providers etc.- 100 persons;
- Officers of the company, who may be interested in investing in the Medha Garments Ltd.- 40 persons

Total number of persons to whom the Letter of Offer is sought to be given: 250 persons

In this regard, your kind attention is drawn to the relevant applicable provisions of the Companies Act, 2013, as mentioned hereinafter:

Section 42 of the Companies Act, 2013 read with Rule 14(2) of The Companies (Prospectus and Allotment of Securities) Rules, 2014, provides that the offer or invitation to subscribe securities under private placement shall not be made to more than 200 persons in aggregate in a financial year excluding qualified institutional buyers and the employees of the company being offered securities under a scheme of employees stock option.

Accordingly, subject to exclusion of the 40 officers of the company, the total number of selected person to whom the offer is proposed to be made under the originally suggested arrangement, would be 210 (250-40).

Hence, from the above arrangement, it can be inferred that issuing offer letters to these 210 persons will be in violation of Section 42 of the Companies Act, 2013.

Therefore, it is requested that the proposed list of selected persons may kindly be reviewed so that subject to exclusion of the 40 officers of the company, the total number of persons eligible to receive the Private Placement Offer remains within the permissible limit of 200 persons.

XXXX

Company Secretary

Attempt all parts of either Q.No 2 or Q. No. 2A

Question 2

(a) The Articles of Association of XYZ Limited fixed 3 as the quorum for a meeting of the Board. At a meeting of the Board, all the 5 directors were present. They allotted the shares of the company to 3 of the directors. Is it valid ? (4 marks)

(b) Green Pvt Ltd is a wholly owned subsidiary of Century-men Ltd. Green Pvt Ltd invests in the Securities of Century–men Ltd. amounting ₹80 Lakhs.

The Balance sheet extract of Green Pvt Ltd :

LIABILITIES	*₹*	*ASSETS*	*₹*
Paid up Share Capital	*100 lakh*	*Fixed Assets*	*130 lakh*
Security Premium	*20 lakh*		
Reserves & Surplus	*10 lakh*		

State the Formalities required for Green Pvt Ltd ? (4 marks)

(c) *At a meeting of Board, the proposal to consider related party transactions require compliances to be made. Indicate laid down limitations in cases of (i) hiring of directors' relative's property for office of the Company and (ii) payment of remuneration to relative of director and (iii) giving small value contract to another associate company on commercial terms. (4marks)*

(d) *Due to internal problems in the working of M/s Infighting Detergents Ltd., Mr. Satyam and Mr. Shivam, a Director, have submitted their resignations and decided to disassociate themselves with the working of the company. Mr. Sundram, the Managing Director, decides to refuse their resignations. Examine whether the Managing Director can compel Mr. Satyam and Mr. Shivam to continue as per the provisions of the Companies Act, 2013. (4 marks)*

OR (Alternate question to Q. No. 2)

Question 2A

(i) *What is meant by rotation of auditors? Discuss the provisions on rotation of auditors as per the Companies (Audit and Auditors) Rules, 2014.*

(ii) *You are the Company Secretary of ABCD Ltd. You have planned to hold the board meeting in August, 2020 for the adoption of Accounts for the year 2019-20. The chairman of the company has planned a long vacation in August, 2020. He would like to know from you, whether it is in order, if he attends the Board meeting through video conference. Prepare a note answering his doubt.*

(iii) *Managing Director of Lalitha Lubricants Ltd, wants to know the following from you, as a Company Secretary in practice, (a) the qualification, if any for appointment as a cost auditor (b) the authority who appoints the cost auditor (c) the prescribed format of cost audit report, if any and (d) the form in which the company is to report to the Registrar of companies for the replies to the qualifications made by the cost auditor. Write a brief note to him.*

(iv) *The company secretary of a company, having a paid up share capital of more than ₹10 crores, resigned and left the company. The company has not appointed his successor. Meanwhile, it has started incurring losses. Its sales have declined and financial position became weak. Can it be a valid reason for not appointing a whole-time secretary ? How long can the company delay the appointment ? What penalty can be imposed ? Will the liability extend to all the directors or only to the managing director ? (4 marks each)*

Answer 2(a)

The provisions in regard to quorum for a Board meeting are contained in Section 174 of the Companies Act, 2013. It is provided therein that the quorum for a Board meeting shall be one-third of total strength of Board of Directors of a company (any fraction contained in that one-third shall be rounded of as one) or two directors whichever is higher. However, Article of Association can prescribe higher quorum.

In the given case all the 5 directors were present at the Board Meeting where 3 directors are allotted with shares and the Articles of Association of the Company prescribes 3 as quorum for Board Meetings.

The Directors to whom shares have been allotted shall be considered to be "Interested Directors" since the term Contract or Arrangement under Section 184(2) of the Companies Act, 2013 may not constitute a contract in strict sense. In the case of *Seth Mohanlal* v. *Grain Chambers Ltd.*, AIR 1959 All 276 it was held that the word contract or arrangement is intended to cover transactions in which a director acquires some right or incurs some liability "qua" director, as a result of it.

However, Section 174(3) of the Companies Act, 2013 provides that where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the number of disinterested directors present at the meeting, being not less than two, shall form the quorum during such time. Thus, the Board Meeting conducted and the transaction of the business for allotment of shares to 3 Directors is valid, as other 2 Directors are not interested.

Answer 2(b)

Green Pvt. Ltd. is the wholly owned subsidiary of Century-men Ltd. and as per Section 19 of the Companies Act, 2013, a subsidiary company is not allowed to invest in the shares of its holding company, except in certain specified cases.

Accordingly, Green Pvt. Ltd., while investing into the securities of Century-men Ltd. shall ensure to comply with the following conditions:

1. The Investments shall not be into the shares of Century-men Ltd except where Green Pvt. Ltd. will be holding those shares either as a legal representative of a deceased member of Century-men Ltd. or as a Trustee.

2. The Investment into Securities (Other than Shares) of Century-men Ltd shall be in compliance of sub-sections (2) & (3) of Sec 186 of the Companies act, 2013, as detailed hereinafter:

Section 186(2) of the Companies Act, 2013, stipulates that no company shall directly or indirectly:

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Further, where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under Section 186(2) of the Companies Act, 2013, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

So, in the given case, Green Pvt. Ltd., the wholly owned subsidiary company wants to invest in the holding company (Century-men Ltd), amounting to Rs.80 lacs, wherein:

Liabilities

Paid-Up Share Capital= Rs. 100 Lakhs

Securities Premium = Rs. 20 Lakhs

Reserve & Surplus= Rs. 10 Lakhs

Assets

Fixed Assets= 130 Lakhs

Thus, as per Section 186(2) of the Companies Act, 2013

(a) 60% of Rs. 130 Lakhs = Rs. 78 Lacs

(b) 100% of 30 = Rs. 30 Lacs

Higher amount is Rs.78 Lacs

Therefore, as amount proposed to be invested is Rs. 80 Lakhs which is exceeding the stipulated amount of Rs. 78 Lacs. Hence, prior approval by Special Resolution at General Meeting is required to be taken in terms of Sec 186(3) of the Companies Act, 2013.

Further, in terms of 2nd Proviso to Sec 186(3), the company is required to disclose to the members in the financial statement the full particulars of the investment made.

Answer 2(c)

(i) Hiring of directors' relative's property for office of the company

As per rule 15(3)(a)(iii) of the Companies(Meetings of Board and its Powers) Rules, 2014, leasing of property of any kind amounting to 10% or more of the turnover of the company, as mentioned in clause (c) of Section 188(1) of the Companies Act, 2013 requires prior approval of the company by passing ordinary resolution in General Meeting. Any leasing agreement below this threshold may be considered and approved in the Board Meeting.

No member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party.

(ii) Payment of Remuneration to relative of Director

Appointment of a related party to any office or place of profit in the company, its subsidiary company or associate company is covered under Section 188(1) (f) of the Companies Act, 2013.

As per rule 15(3)(b) of the Companies(Meetings of Board and its Powers) Rules, 2014, for appointment of a related party to any office or place of profit in the company at a monthly remuneration exceeding Rs. 2.50 Lakh requires prior approval of the company by passing ordinary resolution in General Meeting.

Any payment of remuneration to related party below this threshold may be considered and approved in the Board Meeting.

(iii) Giving small value contract to another associate company on commercial terms.

In this case the price charged from the associate company is on commercial terms. Therefore, it is governed by market forces and, therefore, is on arm's length basis.

So as long as the contract being given to the associate company is in ordinary course of business of the company and on Arm length basis, the approval of disinterested Directors will not be required to be taken at a meeting of the Board.

Answer 2(d)

Section 168(1) of the Companies Act, 2013 read with Rule 15 of the Companies (Appointment & Qualification of Directors) Rules, 2014 provides that a director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall give intimation to the Registrar of Companies in Form DIR-12 within 30 days from the date of receipt of notice of resignation from a director.

The proviso to section 168(1) of the Companies Act, 2013 read with Rule 16 of the Companies (Appointment & Qualification of Directors) Rules, 2014 states that a director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar of Companies within 30 days of resignation in Form DIR-11.

Furthermore, section 168(2) of the Companies Act, 2013 states that the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

Therefore, the law does not give an option to the Managing Director or the Company or the Board to reject the resignation of a director from his office or to force him to continue.

Hence, in the given case, the Managing Director of M/s Infighting Detergents Ltd. doesn't have the legal authority to compel Mr. Satyam and Mr. Shivam to continue as directors in view of the above provisions.

Answer 2A(i)

Rotation means changing auditors of the company after a given term.

The section 139(2) of the Companies Act, 2013 has introduced the system of rotation of auditors which is applicable to –

(i) listed companies; or

(ii) all companies belonging to such class or classes of companies as prescribed under Rule 5 of the Companies (Audit and Auditors) Rules 2014.

Class of companies covered in rotation scheme

According to Rule 5 of the Companies (Audit and Auditors) Rules, 2014, the class of

companies shall mean the following classes of companies excluding one person companies and small companies:-

(a) all unlisted public companies having paid up share capital of Rs. 10 crore or more;

(b) all private limited companies having paid up share capital of Rs. 50 crore or more;

(c) all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of Rs. 50 crore or more.

The concept of rotation of auditors shall not apply to one person companies and small companies.

Following is the manner in which the auditors are to be rotated:

In case of an individual as auditor:

(a) No individual shall be appointed or re-appointed as auditor for more than one term of 5 consecutive years and

(b) An individual auditor, who has completed his term of 5 consecutive years, shall not be eligible for re-appointment as auditor in the same company for 5 years from completion of his term.

In case of a firm as an auditor:

(a) No audit firm shall be appointed or re-appointed as auditor for more than two terms of 5 consecutive years.

(c) An audit firm which has completed its two terms of 5 consecutive years, shall not be eligible for re-appointment as auditor in the same company for 5 years from the completion of such terms.

Further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Answer 2A(ii)

Section 173(2) of the Companies Act, 2013 prescribes that the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio-visual means, as prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Rule 4(1) of the Companies (Meeting of Board and its Powers) Rules, 2014 provides that approval of the annual financial statements shall not be dealt with in a meeting through video conferencing or other audio visual means.

However, where there is quorum presence in a meeting through physical presence of directors, any other director may participate conferencing through video or other audio visual means.

As per Rule 4(2) of the Companies (Meeting of Board and its Powers) Rules, 2014, for the period beginning from the commencement of the Companies (Meetings of Board and its Powers) Amendment Rules, 2020 i.e., 19/03/2020 and ending on 30/06/2021, the meetings on matter related to approval of financial statement may be held through video conferencing or other audio visual means in accordance with Rule 3 of the Companies (Meeting of Board and its Powers) Rules, 2014.

Hence, in the present case the Chairman can participate through video-conferencing, since the meeting is to be held in August 2020 i.e., between 19/03/2020 and 30/06/2021 irrespective of whether if quorum is present in a meeting through physical presence of directors or not by adhering to Rule 3 of the Companies (Meeting of Board and its Powers) Rules, 2014.

Answer 2A(iii)

Note to Managing Director of Lalitha Lubricants Ltd.

Respected Sir,

Subject: With reference to the query on the qualifications, appointment etc. of Cost Auditor, the clarifications are provided as under:

a) Qualification of Cost Auditor:

As per Section 148(3) of the Companies Act, 2013 Cost audit shall be conducted by a Cost Accountant.

Provided that no person appointed under section 139 as an auditor (Statutory Auditor) of the company shall be appointed as the Cost Auditor. Also, Section 148(5) read with Section 143(14) of the Companies Act, 2013 provides that the qualifications, disqualifications, rights, duties and obligations applicable to Statutory Auditors and Secretarial Auditor shall, so far as may be applicable, also apply to a Cost Auditor.

b) Appointing authority:

Section 148(3) read with Rule 14 of the Companies (Audit & Auditors) Rules, 2014 prescribes that the Board of Directors shall appoint an individual, who is a cost accountant, or a firm of cost accountants in practice, as cost auditor on the recommendations of the Audit committee *(if the Company has such a Committee, as the case may be)* which shall also recommend remuneration for such cost auditor.

The remuneration recommended by the Audit Committee shall be considered and approved by the Board of Directors and ratified subsequently by the shareholders.

c) Cost Audit report format:

Every cost auditor, who conducts an audit of the cost records of a company, shall submit the cost audit report along with his or its reservations or qualifications or observations or suggestions, if any, in *Form CRA-3 [Rule 6(4) of the Companies (Cost Records & Audit) Rules, 2014].*

d) Filing by company:

As per Rule 6(6) of the Companies (Cost Records & Audit) Rules, 2014, every

eligible company shall, within a period of 30 days from the date of receipt of a copy of the cost audit report, furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein, in Form CRA-4 in Extensible Business Reporting Language format along with fees specified in the Companies (Registration Offices and Fees) Rules, 2014.

Hope the queries raised are clarified.

XYZ

Company Secretary

Answer 2A(iv)

According to Section 203 read with Rules 8 and 8A of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a company having a paid-up share capital of Rs. 10 crore or more must appoint a whole-time Company Secretary possessing the prescribed qualifications.

According to Section 203(4) of the Companies Act, 2013, in case the Company Secretary resigns and leaves the company, the resulting vacancy shall be filled up by the Board at a meeting of the Board within a period of six months from the date of such vacancy. Therefore, the company should take all the necessary steps for the appointment of the new Company Secretary within the stipulated period of six months.

Here the company has not appointed a new Company Secretary on the ground that it has started incurring losses, its sales have declined and financial position has become weak. The argument will not find favour with the authorities.

As per Section 203(5) of the Companies Act, 2013, the company shall be liable to a penalty of Rs. 5 Lakhs and every director and key managerial personnel of the company who is in default shall be liable to a penalty of Rs. 50,000 and where the default is a continuing one, with a further penalty of Rs. 1000 for each day after the first during which such default continues but not exceeding Rs. 5 Lakhs.

Attempt all parts of either Q.No.3 or Q.No. 3A

Question 3

(a) As per the provisions of Companies Act, 2013,

(i) Who are called KMPs ?

(ii) Can a KMP hold office in two companies ? *(4 marks)*

(b) Write any four grounds for the rejection of application for DIN. *(4 marks)*

(c) Kamakshi Steels Ltd wants to acquire the equity shares of Meenakshi Steels Ltd for a value of ₹4 crore. The following are the balances of Kamakshi Steels Ltd as on date :

Authorised share capital	*₹50 crore*
Paid up share capital	*₹5 crore*
Free Reserves	*₹1 crore*

Kamakshi Steel Ltd is financially sound and is prompt in repayment of its loans and interest to all its creditors including Public Financial Institution with which ₹ 3 crore is outstanding. Kamakshi Steels Ltd does not hold any shares of Meenakshi Steels Ltd as on the date.

State if the company wants to acquire shares for ₹4 crore, the procedure to be followed by Kamakshi Steels Ltd as per the Companies Act 2013. (4 marks)

(d) Smriti Co. Ltd is an associate of Smriti Co Inc, a Malaysian company. The Indian company has April-March financial year. The Malaysian company has the calendar year as financial year, from the inception. The Malaysian company advises the Indian company to follow the same financial year as the Malaysian company. The Director (Finance) of the Indian company, feels that the Indian company cannot apply for the changing the financial year to align with the Malaysian company, as it is not a subsidiary company. Advise the Director (Finance). (4 marks)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on the following :

(i) 'Appointed date' in a scheme of amalgamation.

(ii) Right issue Vs. Preferential issue.

(iii) Directors and officers liability insurance policy.

(iv) Shelf prospectus and Red herring prospectus. (4 marks each)

Answer 3(a)

(i) Key Managerial Personnel are called as KMPs. As per Section 2(51) of the Companies Act, 2013, a KMP is defined as:

a) the Chief Executive Officer or the Managing Director or the Manager;

b) the Company Secretary;

c) the Whole-time Director;

d) the Chief Financial Officer

e) Such other officer not more than one level below the directors who is in whole-time employment, designated as Key Managerial Personnel by the Board; and

f) such other officer as may be prescribed.

(ii) Section 203(3) of the Companies Act, 2013, provides that a whole-time Key Managerial Personnel is to be appointed by the Board and shall not hold office in more than one company except in its subsidiary company at the same time. However a key managerial personnel is permitted to be appointed as a Director of any other company with the permission of the Board.

Answer 3(b)

Some of the grounds for rejection of application for DIN are:

a) Non-submission of supporting documents

- The proof of identity of the applicant is not submitted.
- The proof of father's name of the applicant is not submitted.
- The proof of date of birth of the applicant is not submitted.
- The proof of residential address of the applicant is not submitted.
- The copy of passport (for foreign nationals) is not submitted

b) Invalid Application/supporting Documents

- The supporting documents are invalid or expired.
- The proof of identity submitted has not been issued by a Government Agency.
- The application/enclosed evidence has handwritten entries.
- The signatures are not appended to the prescribed place.

c) The applicant's name filled in application form does not match with the name in the enclosed evidence.

d) The applicant's date (DD/MM/YY) of birth filled in application form does not match with the date of birth in the enclosed evidence.

e) The address details filled in the application do not match with those contained in the enclosed supporting evidence.

f) Particulars filled in form DIR-3 or SPICe+ do not match with the details given in the supporting documents.

g) Residence proof like

(i) Bank statement

(ii) Electricity bill

(iii) Telephone bill

(iv) Passport

Submitted (older than 2 months - Indian applicant / 1 year-Foreign Applicant) from the submission of application

h) Documents supported are not duly attested

Answer 3(c)

The problem given is based on the provisions of the section 186 of the Companies Act, 2013 which deals with inter-corporate loans and investments by the company.

As per Section 186(2) of the Companies Act, 2013, No company shall directly or indirectly —

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Further, where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under Section 186(2) of the Companies Act, 2013, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

In the given scenario:

Paid-Up Share Capital= Rs. 5Crore

Free Reserves= Rs. 1 Crore

So, 60% of (Rs. 5 Crore + Rs. 1Crore) = Rs. 3.6 Crore or

100% of 1 Crore= 1Crore

So, Higher amount is Rs.3.6 Crore

Since the amount of proposed investment along with outstanding amount (Rs.4 crore+ Rs.3 crore=Rs.7 crore) is more than the above stipulated limit, following procedure is to be followed by Kamakshi Steel Ltd. before investment:

i. Prior approval of all the directors present at the Board meeting is required.

ii. Prior approval of concerned public financial institutions, where term loan is subsisting is required.

iii. Passing of special resolution through postal ballot.

iv. The company shall disclose to the members in the financial statement the full particulars of such investment and the purpose for which is proposed to be utilised by the recipient of the loan or guarantee or security.

v. Enter the prescribed particulars in the Register of Loans and Investments maintained by the company

vi. File a copy of the special resolution in Form MGT-14 with Registrar of Companies within 30 days of passing of the resolution.

Answer 3(d)

In the present case Smiriti & Co. Ltd. is an Indian company which is an associate of a Malaysian company. Malaysian company has calendar year as financial year for its accounts. Malaysian company advises Indian company to follow the same financial year as the Malaysian company.

Section 2(41) of the Companies Act, 2013 provides in its proviso that a company or body corporate, which is a holding company, or a subsidiary company or associate company of a company incorporated outside India and is required to follow a different

financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as prescribed, allow any period as its financial year, whether or not that period is a year.

Considering that, Smriti Co. Ltd, is the Associate Indian Company of the Smiti Co Inc. (Malaysian Company), Smriti Co. Ltd, is eligible to apply to the Central Government under Section 2(41) of the Companies Act, 2013, requesting permission to change its financial year so as to align with its Malaysian counterpart and follow calendar year as its financial year.

Answer 3A(i)

"Appointed date" being a date required under Section 232(6) of the Companies Act, 2013, to be specifically mentioned in a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies means the exact date (and not at a date subsequent) on which the said scheme shall be deemed to be effective.

"Appointed date" in case of a Scheme for merger and amalgamation of two companies, is the date on which the amalgamation of the transferor with the transferee is to take effect. In other words, it is on this date that the transferor will be deemed to have merged with the transferee. Upon merger of one company with another, the balance sheet of the transferee is usually revised and restated in order to reflect the transfer of assets and liabilities of the transferor, the revision and restating of the balance sheet of the transferee will have to be carried out from the date the merger takes effect.

Thus, the only purpose of the appointed date is to identify the assets and liabilities of the transferor on that date that are to be transferred to be transferee and to notify the shareholders of the same. The same is necessary in order to facilitate the shareholders who are voting on the scheme of amalgamation to decide exactly what assets and liabilities, as on that appointed date are being transferred under the scheme of amalgamation. Also, the appointed date is relevant for the purpose of fixing the share valuation/share exchange ratio, as such valuation is made with reference to the assets and liabilities as on particular date (the appointed date) and such date cannot be a prospective date but necessarily has to be an antecedent date. Further that there can never be a prospective appointed date in as much as it is not possible to precisely identify or value the assets and liabilities of a company in future.

Answer 3A(ii)

Right issue vs. Preferential issue

Right Issue:

- The right issue is governed through Section 62(1)(a) of Companies Act 2013.
- It is an offer provided to the existing shareholders in proportion to their existing shareholding in the share capital of the company.
- No specific format has been prescribed for Offer letter.
- Only board approval through Board Meeting is required.

- Offer period remains open for the minimum period of 15 days and maximum period of 30 days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined.
- Company shall allot the shares within 60 days of receipt of application money.
- No need for a valuation report.
- Shareholders under this option have right to renounce, reject or approve the offer letter.

Preferential Issue:

- Preferential issue is governed through Section 62(1)(c) read with Section 42 of the Companies Act 2013.
- "Preferential Offer" means an issue of shares or other securities, by a company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.
- Both board resolution and special resolution is needed to approve preferential issue.
- No specific provision for offer period is specified under the Companies Act, 2013.
- Letter of offer shall be as per the prescribed format in PAS-4 and record of preferential offer in PAS-5.
- The allotment of securities on a preferential basis made pursuant to the special resolution is required to be completed within a period of twelve months from the date of passing of such special resolution. If the allotment of securities is not completed within twelve months from the date of passing of the special resolution, another special resolution shall be passed for the company to complete such allotment thereafter.
- The price of the shares or other securities to be issued on a preferential basis, either for cash or for consideration other than cash, shall be determined on the basis of valuation report of a registered valuer.

Answer 3A(iii)

The Directors and Officers Liability Insurance policy is designed to protect the personal properties of directors and officers of a company against the consequences of their personal liability for financial losses arising out of wrongful act and or omissions done or wrongfully attempted in their capacity as directors for officers.

Wrongful act is defined as any actual or alleged error, omission, misstatement, misleading statement, neglect, breach of duty or negligent act by any of the Directors or officers, solely in their capacity as Directors or officers of the company.

The liability coverage comprises of two sections (a) damages awarded against directors and officers including legal cost (b) reimbursement to the company if the claim on director is paid by the company as per the Articles of Association.

According to Section 197(13) of the Companies Act, 2013, where any insurance is taken by a company on behalf of its Managing Director, Whole-time Director, Manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

However, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

Criminal behaviour, libel, slander, defamation, fraudulent act, professional inability, environmental damage or pollution, bodily injury or property damage fines penalties and other penal liability are excluded in the policy.

Answer 3A(iv)

Shelf prospectus and Red-herring prospectus

a) Shelf prospectus means a prospectus in respect of which the securities are issued for subscription over a certain period without the issue of a further prospectus. Red herring prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities offered

b) Shelf prospectus is governed by section 31 of the Companies Act, 2013 and Red herring prospectus is governed by Section 32 of the Companies Act, 2013.

c) Shelf prospectus is issued by class or classes of companies, as prescribed by the SEBI, where the issue takes place in stages, like the ones issued by scheduled banks, public financial institutions, non-banking financial companies. Red herring prospectus is issued by all companies except those are given under shelf prospectus.

d) A company filing a Shelf prospectus is required to file information memorandum between the first offer of securities or the previous offer of securities and the succeeding offer of securities. A company proposing to issue a Red herring prospectus should file it with the ROC at least three days prior to the opening of the subscription list and the offer.

Question 4

(a) A company has received request for transfer of 1000 fully paid equity shares. The transferor has submitted the duly signed share transfer form for 1000 shares. It is learnt that the transferee is fifteen years old grand daughter of the shareholder. Since the transferee is a minor, who does not have capacity to contract, the company is unable to decide. Advise the company. (4 marks)

(b) Trump Inc. a foreign Company has establishment in India to carry out execution of an infrastructure Project in India. Are the provisions with regard to CSR applicable to foreign companies ? Elaborate. (4 marks)

(c) Explain the provisions of re-submissions (under Rule 10 of the Companies (Registration Offices and Fees) Rules, 2014. (4 marks)

(d) (i) Is it mandatory for a company to keep its documents records, registers and minutes in electronic form ?

(ii) What are the provisions with respect to signing of financial statements under the Companies Act, 2013 ? (4 marks)

Answer 4(a)

The Companies Act, 2013 does not impose any restrictions on the qualification of membership in the company. Membership confers a right enforceable in law. Hence the appropriate provisions of the Contract Act, 1872 are to be taken in to consideration.

It is well settled principle in law in India that a contract with minor is null and void. A member who is not a *sui juris* e.g., a minor, is wholly incompetent to enter into a contract and as such cannot become a member of a company. Consequently, an agreement by a minor to take shares is *void ab-initio*.

It has been held by the Company Law Board (replaced by the Tribunal under the Companies Act, 2013) that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid cannot be refused on the ground of the transferee being a minor [*Miss Nandita Jain* v. *Benett Coleman and Co. Ltd., Appeal No. 27 of 1972 dated 17.2.78*].

After attaining majority, the minor, if he does not want to be a member, must repudiate his liability on the shares on ground of minority, and if he does so, the company can not plead estoppel on the ground of his having received dividends during his minority or that he had fraudulently misrepresented his age in his application for shares [*Sadiq Ali* v. *Jai Kishori, (1928) 30 Bom. L.R. 1346*].

In the present case of a fully paid share, there is no scope of any further liability, as further call money is not payable and the liability is limited. The shareholder is entitled only to the benefits of shareholding in the company. On the basis of this principle, a minor can be admitted to the benefits of shareholding in the company. Hence a minor can be a transferee of the shares in a company. The company can carry out the share transfer. Though, the Company also has the option to refuse to register the transfer, unless the transfer is made through the legal guardian.

Answer 4(b)

In terms of Rule 3(1) of the Companies (Corporate Social Responsibility Policy) Rules, 2014, a foreign company defined under clause (42) of section 2 of the Companies Act, 2013, having its Branch office or project office in India which fulfils the criteria specified in Section 135(1) of the Companies Act, 2013 is required to comply with the provisions of Section 135 of the Companies Act, 2013 and the Rules made there under.

The net-worth, turnover or net profit of a foreign company is to be computed in accordance with the balance sheet and profit and loss account of the foreign company prepared with respect to its Indian business operations in accordance with the provisions of clause (a) of sub-section (1) of section 381 and section 198 of the Companies Act, 2013 for each financial year.

Therefore, Trump Inc., a foreign company having its branch office or project office in India, if it fulfils the criteria specified under section 135(1) is required to constitute a CSR Committee and comply with Section 135 *inter alia* requiring the spending, in every financial year, 2% of average net profits of the company made during the three immediately preceding financial years as per financial statement of its Indian business operations in CSR activities in India.

Answer 4(c)

As per Rule 10 of the Companies (Registration Offices and Fees) Rules 2014, where the Registrar, on examining any such application or e-form or document, required or authorised to be filed or delivered under the Companies Act, 2013 and rules made thereunder for approval, registration, taking on record or rectification by the Registrar, as the case may be, finds it necessary to call for further information or finds such application or e-form or document to be defective or incomplete in any respect, he shall give intimation of such information called for or defect or incompleteness noticed by e-mail on the last intimated e-mail address of the person or the company, which has filed such application or e-form or document, directing him or it to furnish such information or to rectify such defects or incompleteness or to re-submit such application or e-form or document.

In case the e-mail address of the person or company in question is not available, such intimation shall be given by the Registrar by post at the last intimated registered office address of the company or the last intimated address of the person, as the case may be. The Registrar shall preserve the fact of such intimation in the electronic record.

The Registrar shall allow 15 days' time to the person or company which has filed the application or e-form or document for furnishing further information or for rectification of the defects or incompleteness or for re-submission of such application or e-form or document.

Further, Registrar shall allow fifteen days, time for re-submission in case of reservation of a name through web service -"RUN" for rectifications of defects if any.

In case where such further information called for has not been provided or has been furnished partially or defects or incompleteness has not been rectified or has been rectified partially or has not been rectified as required within the period allowed, the Registrar shall either reject or treat the application or e-form or document, as the case may be, as invalid in the electronic record, and shall inform the person or company, as the case may be.

Where any document has been recorded as invalid by the Registrar, the document may be rectified by the person or company only by fresh filing along with payment of fee and additional fee, as applicable at the time of fresh filing, without prejudice to any other liability under the Companies Act, 2013.

In case the Registrar finds any e-form or document filed under Straight Through Process as defective or incomplete in any respect, at any time *suo-motu* or on receipt of information or compliant from any source at any time, he shall treat the e-form or document as defective in the electronic registry and shall also issue a notice pointing out the defects or incompleteness in the e-Form or document at the last intimated e-mail address of the person or the company which has filed the document, calling upon the person or company to file the e-form or document afresh along with fee and additional fee, as

applicable at the time of actual re-filing, after rectifying the defects or incompleteness within a period of 30 days from the date of the notice.

Any further information or documents called for, in respect of application or e-form or document, filed electronically with the Ministry of corporate Affairs shall be furnished in Form No. GNL-4 as an addendum.

Answer 4(d)

(i) According to Section 120 of the Companies Act, 2013, the documents, records, registers, minutes required to be kept by a company or allowed to be inspected or copies to be given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form.

As per Rule 27 of the Companies (Management and Administration) Rules, 2014, it gives option to every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders, to maintain its records, as required to be maintained under the Companies Act, 2013 or rules made there under, in electronic form.

Thus, it is not mandatory for company to maintain its documents, records, registers, minutes in electronic form.

(ii) As per section 134(1) of the Companies Act, 2013, the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by:

- the Chairperson of the company where he is authorised by the Board or by two Directors out of which one shall be Managing Director; if any; and
- the Chief Executive Officer;
- the Chief Financial Officer; and
- the Company Secretary of the company, wherever they are appointed.

In the case of a One Person Company, the Financial Statement is required to be signed only by one Director.

Question 5

(a) ABC Limited plans to hold its 16th Annual General Meeting on 28th September. Draft a Notice for such meeting. Besides usual items, Company seeks to obtain consent for resorting to borrowing of funds by the Board beyond the prescribed limit.

(b) Indicate steps to be taken for conversion of existing Private Limited Company into Limited Liability Partnership. (8 marks each)

Answer 5(a)

NOTICE

Notice is hereby given that the 16th Annual General Meeting of the Members of ABC Limited will be held on 28th September…… (day), the_____ (date) at …… (time) at the registered office of the Company at..... (venue address) to transact the following business:

ORDINARY BUSINESS

1. To receive, consider and adopt the audited Financial Statements of the Company comprising the Balance Sheet as on March 31,……, statement of Profit & Loss and Cash Flow Statement and Notes thereto for the financial year ended on March 31,……. together with the Report of the Board of Directors and Auditors' thereon.
2. To consider declaration of dividend on equity. (If being declared)
3. To consider appointment of a Director in place of _____who retires by rotation at the ensuing annual general meeting.
4. To consider appointment of Auditors and to fix their remuneration. (if present term of five year ended)

SPECIAL BUSINESS:

5. To consider and if thought fit to pass with or without modification(s) the following resolution as a special resolution:

   "**RESOLVED THAT** subject to the provisions of Section 180 (1) (c) and other applicable provisions, if any, of the Companies Act, 2013 and relevant rules made thereto including any statutory modifications or re-enactments thereof, the consent of the shareholders of the company be and is hereby accorded to the Board of Directors to borrow money, as and when required, from, including without limitation, any Bank and/or other Financial Institution and/or foreign lender and/or anybody corporate/ entity/entities and/or authority/authorities, either in rupees or in such other foreign currencies as may be permitted by law from time to time, as may be deemed appropriate by the Board for an aggregate amount not exceeding a sum of Rs.___crores (Rupees _____only) for the company, notwithstanding that money so borrowed together with the monies already borrowed by the company, if any (apart from temporary loans obtained from the company's bankers in the ordinary course of business) exceeds the aggregate of the paid-up share capital of the company and its free reserves and securities premium."

By Order of the Board

Name of Director

DIN:

Address:

Place :

Date :

NOTES FOR MEMBERS' ATTENTION:

1. A member entitled to attend and vote at the Annual General Meeting (the "Meeting") is entitled to appoint a proxy to attend and vote on a poll instead of himself and the proxy need not be a member of the company. The instrument appointing the proxy should, however, be deposited at the registered office of the Company not less than forty-eight hours before the commencement of the Meeting.

2. Explanatory Statement pursuant to Section 102 of the Act in respect of item no. 5 is annexed hereto and forms part of this Notice.
3. The Register of Directors and their shareholding, maintained u/s 170 of the Companies Act, 2013 and Register of Contracts or Arrangements in which Directors are interested maintained u/s 189 of the Companies Act, 2013 and all other documents referred to in the notice and explanatory statement, will be available for inspection by the members of the Company at Registered office of the Company during business hours 10:00 A.M. to 06:00 P.M. (except Saturday and Sunday) up to the date of Annual General Meeting and will also be available during the Annual General Meeting.
4. A Route Map along with Prominent Landmark for easy location to reach the venue of Annual General Meeting is annexed with the notice of Annual General Meeting.
5. Members/proxies attending the meeting are requested to bring their duly filled admission/ attendance slips sent along with the notice of annual general meeting at the meeting.

EXPLANATORY STATEMENT PURSUANT TO SECTION 102 OF THE COMPANIES ACT, 2013

Keeping in view the existing and future financial requirements to support its business operations, the company may need additional funds. For this purpose, the company may, from time to time, raise finance from various Banks and/or Financial Institutions and/ or any other lending institutions and/or Bodies Corporate and/or such other persons/ individuals as may be considered fit, which, together with the moneys already borrowed by the company (apart from temporary loans obtained from the company's bankers in ordinary course of business) may exceed the aggregate of the paid-up share capital, free reserves and securities premium of the company. Hence it is proposed to increase the maximum borrowing limits from Rs._____ crores to Rs_____ for the company: Pursuant to Section 180(1)(c) of the Companies Act, 2013, the Board of Directors cannot borrow more than the aggregate amount of the paid-up share capital of the company, its free reserves and securities premium at any one time except with the consent of the members of the company in a general meeting through special resolution. In order to facilitate securing the borrowing made by the company, it would be necessary to create charge on the assets or whole or part of the undertaking of the company.

None of the Directors or Key Managerial Personnel of the company and their relatives is concerned or interested, financially or otherwise, in the Special Resolution except to the extent of their shareholding in the Company.

By Order of the Board

Place :

Date :

Name of Director

DIN:

Address:

Answer 5(b)

A Private Limited Company may convert into a Limited Liability Partnership in accordance with the provisions of Section 56 and the Third Schedule of the LLP Act, 2008.

The following steps to be initiated for conversion of existing Private Limited Company into Limited Liability Partnership are as under:

- Call the meeting of the Board of Director.
- Pass Board Resolution for Conversion of Private Company into LLP and to authorize any director to file all the necessary forms with MCA.
- Take the written consent of all the shareholders for conversion of Private Company into LLP.

APPLICATION FOR NAME AVAILABILITY:

- File application for name availability in web based form 'RUN-LLP' with the RoC. Attach the Board Resolution and proposed object clause with the name availability application.

DRAFTING OF LIMITED LIABILITY PARTNERSHIP AGREEMENT:

Contents of Agreement are:

- Name of LLP
- Name of Partners & Designated Partners
- Form of contribution
- Profit Sharing ratio
- Rights & Duties of Partners
- Proposed Business
- Rules for governing the LLP

FILLING OF INCORPORATION DOCUMENTS:

File FiLLip Form with ROC along with following attachments, including:

- Proof of Address of Registered office of LLP.
- Subscription sheet signed by the promoters. (Notice of Consent & Appointment of Designated Partners with their personal details)
- NOC of owner of registered office, if taken on rent / lease.
- Latest Utility bill of registered office
- Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner
- In principle approval of regulatory authority, if required

- Copy of Board resolution of the existing company or consent of existing LLP as a proof of no objection
- Optional Attachments, if any

FILLING OF APPLICATION FOR CONVERSION:

File E-Form- 18 with ROC along with following Attachments:

Attachments:

- Statement of shareholders. It is the document given by each shareholders giving their consent and statement.
- Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.
- List of all the Secured creditors along with their consent to the conversion.
- NOC from Income Tax authorities and Copy of acknowledgement of latest income tax return.
- Approval from any other body/authority as may be required.
- Particulars of pending proceedings from any court/Tribunal etc.

Once conversion is approved by the RoC execute LLP Agreement and file the same with the RoC in e-form 3 within 30 days of approval of conversion by RoC.

Question 6

(a) State the provisions of Australian Corporation Law in respect of Auditors. *(4 marks)*

(b) Audit committee has to review certain information mandatorily, what are these items ? *(4 marks)*

(c) (i) The directors of XYZ Limited are responsible for calling a general meeting and having failed to call such a meeting and thereby contravened section 166 of the Companies Act.They however preferred to file annual return with the concerned Registrar of Companies. Explain as to whether is it a condition precedent to hold the general meeting and then to file the annual return.

(ii) Mr. M, a member, appointed Mr. P as his proxy for the annual general meeting of a company in the form as set out in Form No. MGT-11. The company did not permit Mr. P to attend the meeting on the ground that the special requirement for the instrument in the articles have not been fulfilled. Advise on the matter. *(4 marks)*

(d) SKD an employee of Moreh Ltd. met with an accident and died. The accident occurred when SKD was on Company's duty. He held one hundred shares partly paid. Normally the Company has a first and paramount lien on the shares. The Board of Directors, however, relaxed the said provision with regard to the hundred shares held by SKD as a goodwill gesture on the part of the company. Is the action of the company valid ? State the reasons. Also state whether the

Company's lien can be extended to dividend payable on such shares.

(4 marks)

Answer 6(a)

As per Australian Corporations Act, 2001 following persons may be appointed as auditor of a company:

a. An Individual

b. A Firm

c. A Company

In case of Proprietary Company, the Directors may appoint an auditor for the company if an auditor has not been appointed by the company in general meeting.

The company may have more than one auditor. The appointment of a firm as auditor of a company is taken to be an appointment of all persons who, at the date of the appointment, are (a) members of the firm; and (b) registered company auditors. This is so whether or not those persons are resident in Australia.

The appointment of the members of a firm as auditors of a company or registered scheme, that is taken to have been made because of the appointment of the firm as auditor of the company or scheme, is not affected by the dissolution of the firm.

A report or notice that purports to be made or given by a firm appointed as auditor of a company is not taken to be duly made or given unless it is signed by a member of the firm who is a registered company auditor, both:

(a) in the firm name; and

(b) in his or her own name.

A notice required or permitted to be given to an audit firm under the Corporations legislation may be given to the firm by giving the notice to a member of the firm.

For the purposes of criminal proceedings under this Act against a member of an audit firm, an act or omission by:

(a) a member of the firm; or

(b) an employee or agent of the audit firm;

acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is also to be attributed to the audit firm.

The Directors of a public company must appoint an auditor of the company within one month after the day on which a company is registered as a company unless the company at a general meeting has appointed an auditor.

A public company must appoint an auditor of the company at its first AGM and appoint an auditor of the company to fill any vacancy in the office of auditor at each subsequent AGM. An auditor holds office until the auditor dies; or is removed, or resigns, from office; or ceases to be capable of acting as auditor; or ceases to be auditor.

Answer 6(b)

As per Regulation 18(3) read with Part C of Schedule II of the SEBI (LODR) Regulations, 2015, the audit committee shall mandatorily review the following information:

1. management discussions and analysis of financial condition and results of operations;
2. statement of significant related party transactions (as defined by the audit committee), submitted by management;
3. management letters/letters of internal control weakness issued by the statutory auditors;
4. internal audit report relating to internal control weaknesses; and
5. the appointment, removal and terms of remuneration of chief internal auditor shall be subject to review by audit committee.
6. statement of deviations:
   (a) quarterly statement of deviation(s) including report of monitoring agency, if applicable, submitted to stock exchange(s) in terms of Regulation 32(1).
   (b) annual statement of funds utilized for purposes other than those stated in the offer document/ prospectus/notice in terms of Regulation 32(7).

Answer 6(c)

(i) The directors of the company are responsible for calling a general meeting and having failed to call such a meeting, and thereby contravened Section 166 of the Companies Act, 2013. So, they cannot be permitted to take advantage of their own wrong and then plead that they could not file the annual return because no meeting was called.

Moreover, Section 92(4) of the Companies Act, 2013 specifically requires that even where no annual general meeting is held in any year, the company shall still file its Annual Return with the Registrar of Companies within 60 days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting.

Hence, it is clear that holding of an annual general meeting is not a condition precedent to filing of annual return.

(ii) In view of the express provisions of Section 105(7) of the Companies Act, 2013, which provides that an instrument appointing a proxy, in the prescribed Form MGT-11, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the articles of a company.

Therefore, company's stand in not permitting P to attend the meeting on the ground that the special requirement for the instrument in the articles have not been fulfilled is not correct.

Answer 6(d)

A company cannot have lien on shares unless provided in the Articles of Association. Therefore provision to this should be in the Articles. As per Regulation 9 of Table F of

the First Schedule to the Companies Act, 2013, in which standard Articles of Association of a company limited by shares are given, the company has first and paramount lien on every share (not being a fully paid share), for all monies (whether presently payable or not) called or payable at a fixed time in respect of that share and on all shares (not being fully paid shares) standing registered in the name of a single person, for all monies presently payable by him or his estate to the company.

However, in terms of Section 5(2) & (3) of the Companies Act, 2013, the companies are free to add such additional matters in its articles as may be considered necessary for its management or to include entrenchment related provisions in their Articles of Association. The key point is that lien is permissible only on partly paid shares and only if provided in the Articles of Association of the company.

The Board of Directors may, however, at any time declare any share to be wholly or in part exempt from the said lien. Hence the decision of the Board of Directors of M/s Moreh Ltd. to relax the provisions of lien in respect of shares held by SKD is in order and valid.

Further, the Company's lien can be extended to all dividends payable on such shares if provided for in the Articles of Association.

***

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *Answer **ALL** Questions.*

PART A

(Attempt all parts of either Q. No. 1 or Q. No. 1A)

Question 1

(a) ADN Ltd. an Indian Listed Company in real estate segment has participated in International Competitive Bidding process and successfully selected as L1 bidder for development of Air Linkage Bridge over the Arabian Sea for Saudi Arabian Country. The total contract value is USD 40 Million and tenure of the contract is 3 years. As per audited financial statements for financial year 2020-21, the networth of ADN Ltd. is ₹15,000 Crore (USD 2000 Million, assume ₹75 per dollar). ADN Ltd. is willing to complete the project in Joint Venture with AL-Habibi inc. a Dubai based Company in real estate business since last 25 years by overseas investment after entering into a Joint Venture Agreement. The Statutory Auditor of the Company makes the statement that Indian Company is prohibited from making investment in a foreign entity engaged in real estate business.

In this case, as a Company Secretary of the Company, answer the following :

(i) Whether ADN Ltd. can make direct investment outside India through Automatic Route or not. Whether RBI approval is required ?

(ii) What are the maximum investments permissible in this case ?

(iii) In case of 50% acquisition of shares of AL-Habibi inc., whether any valuation is required ?

(iv) In case of such transaction (investment in joint venture), which form is required to be filed in RBI and when ?

(v) How the transaction is made for such investment ? (1+1+1+1+1=5 marks)

(b) ABC Pvt. Ltd. is a subsidiary company of a XYZ Ltd. having a paid up capital of ₹60 Crore and Turnover of ₹180 crore as per the audited balance sheet as on 31st March, 2021. Referring to the provisions of the Companies Act, 2013, answer the following :

(i) Whether the ABC Pvt. Ltd. is obliged for conducting of secretarial audit ?

(ii) Whether the Cost Accountant in Practice who is also a Company Secretary can be a competent professional for the appointing as a 'Secretarial Auditor'?

(iii) To whom the secretarial audit report is required to be addressed ?

(iv) In which prescribed form secretarial audit report is required to be submitted by the auditor ?

(v) *What are the penal provisions, if Secretarial Auditor doesn't comply with the provisions of section 143 (12) of the Companies Act, 2013 ?*
(1+1+1+1+1=5 marks)

(c) *You are appointed as Secretarial Auditor by ESB Ltd, a Listed Company to conduct the secretarial audit for financial year 2020-21. While carrying out the audit, it was found that* Company has made the following major activity :

(i) Company has issued the Employee Stock Option for 20 lakh equity shares.

(ii) Company has issued 50000 Sweat Equity S*hares to X, the promoter and co-founder of the Company.*

(iii) *Company has bought-back the preferential shares amounting ₹900 crore.*

(iv) *Company has also raised a fund of ₹1500 crore through public deposit.*

(v) *Company declared the final dividend of ₹14.00 for equity share in its Annual General Meeting held on 26th August, 2020. In each of above event, describe the indicative list of documents to be checked. (1+1+1+1+1=5 marks)*

(d) *R Company Ltd. incorporated on 16th December, 2020. The Company adopted its first financial year as from 16th December, 2020 to 31st March, 2021. The profit and loss account prepared in accordance with the Schedule III of the Companies Act, 2013 has shown net profit. The company is willing to declare 25% interim dividend at their meeting to be held on 25th June, 2021, before holding its first Annual General Meeting (AGM). The Board of directors seeks your advice on the following aspects as per the provisions of the Companies Act, 2013 :*

(i) *Whether it is in order to declare the interim dividend and company has complied due diligence with respect to it ?*

(ii) *What are the penal provisions in case of failure to pay the interim dividend once it is declared by the Board ? (5 marks)*

(e) *Immediately upon conducting the last general meeting held in August, 2020, the Chairman went abroad for medical treatment. Due to non-availability of the Chairman, the minutes of the said meeting could not be signed by him. To meet the requirements of law, he sent a letter of authority to the 'A' the Director of the company authorizing him to sign the minutes on the former's behalf. Can the 'A' act on the letter of authority ? What are the provisions with respect to signing of the minutes of general meeting with specific reference to Secretarial Standards – 2 ? (5 marks)*

OR (Alternate Question to Q. No. 1)

Question 1A

(i) *The date of approval of Financial Statements by the Board of Directors of PQR Ltd. is 17th July, 2020 and the date of notice of Annual General Meeting (AGM) is 11th August, 2020. CFO of PQR Ltd. has advised that the time gap between date of approval of financial statements by the Board of Directors and the date of Notice of AGM should be 30 days. The Directors have approached you as*

Company Secreted to advise them regarding the same with specific reference to the provisions of Companies Act, 2013. (5 marks)

(ii) What are the powers vested with Board of Directors under section 179(3) of the Companies Act, 2013 ? Can any power be delegated to any authority, if so, elucidate. (5 marks)

(iii) Prepare the Checklist as per Secretarial Standard on General Meeting (SS-2) for the following items : 1. Conduct of Voting through Electronic Mode 2. Adjournment of Meeting 3. Preservation of Minutes and other Records 4. Chairman 5. Reading of Reports (1+1+1+1+1=5 marks)

(iv) List out the check points to be observed by Company Secretary in practice while conducting the Secretarial Audit with regard to issue and redemption of preference share under section 55 of the Companies Act, 2013. (5 marks)

(v) LMN Ltd. incorporated with paid-up capital of ₹40 Crore. During the financial year 2019-20, the paid-up capital was increased by ₹30 Crore. The Company Secretary advised that Company needs to appoint the Secretarial Auditor for Financial Year 2020-21. Due to festive season, few Directors were not available, hence Managing Director suggested to pass the requisite resolution by circulation for appointment of Saxena & Co., Company Secretaries as Secretarial Auditor. Check the validity of suggestion of Managing Director. (5 marks)

Answer 1(a)

Indian parties are prohibited from making investment in a foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.

However, any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route (i.e., within 400% of the net worth as per the last audited balance sheet).

An overseas entity, having direct or indirect equity participation by an Indian party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank. Any incidence of such product facilitation would be treated as a contravention of the extant FEMA regulations and would consequently attract action under the relevant provisions of Foreign Exchange Management Act, 1999.

1. In view of above provisions, ADN Ltd. can make direct investment through Automatic Route, no prior approval of RBI is required.
2. The investment (total financial commitment) in overseas Joint Ventures/Wholly Owned Subsidiaries(WOS) should not exceed 400% of the net worth as on the date of last audited Balance Sheet of Indian Party. In the present case, ADN Ltd. can make investment upto USD 8000 million i.e. Rs. 60000 Crore.
3. In case of partial / full acquisition of an existing foreign company, where the investment is more than USD 5 million, valuation of the shares of the company

shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker / Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant.

4. The reporting of Overseas Direct Investment is made in "Form ODI" within 30 days from the date of transaction.
5. All transactions relating to JV/WOS is routed through one branch of an authorized dealer bank to be designated by Indian Party.

Answer 1(b)

(i) As per section 204 of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, every listed company or every public company having a paid-up share capital of fifty crore rupees or more; or every public company having a turnover of two hundred fifty crore rupees or more; or every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.

Secretarial Audit is also applicable to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies.

In view of above provisions, ABC Pvt. Ltd. is obliged to conduct the Secretarial Audit.

(ii) As per section 204 (1) of Companies Act, 2013, only Company Secretary in Practice has been exclusively recognised for conducting Secretarial Audit. Hence, the Cost Accountant in Practice cannot be appointed as Secretarial Auditor.

(iii) The Secretarial Audit Report is to be addressed to the members but is to be submitted to the Board.

(iv) Form No. MR.3.

(v) As per section 143 (15) of Companies Act, 2013, If any auditor, cost accountant or company secretary in practice do not comply with the provisions of sub-section (12) of section 143 of the Act:

(a) in case of a listed company, be liable to a penalty of five lakh rupees; and

(b) in case of any other company, be liable to a penalty of one lakh rupees.

Answer 1(c)

Indicative list of documents to be checked:

(i) *Employee Stock Option*

1. Minutes of Board Meeting.
2. Notice of general meeting and Special Resolution approving ESOP alongwith explanatory statement.
3. Minutes of General meeting.

4. Scheme of the ESOP approved by the shareholders.
5. Board's Report.
6. Register of Employee Stock Option (Form SH-6).
7. PAS-3, MGT-14.
8. Payment of stamp duty on allotment of shares.
9. Terms & Conditions, In-principle approvals, minutes etc. as per SEBI (Share Based Employees Benefit) Regulations, 2014.
10. Intimations, Disclosures, voting results etc. as per SEBI (LODR) Regulations, 2015.

(ii) *Issue of Sweat Equity Shares*

1. Minutes of Board Meeting.
2. Notice of general meeting Special Resolution with Explanatory Statement.
3. Minutes of General meeting.
4. Valuation Report of shares and technical knowhow.
5. Intimations, Disclosures, voting results etc. under SEBI (LODR) Regulations, 2015.
6. Intimations and Closing window as per SEBI (PIT), Regulations,2015.
7. Disclosures, certificates etc as per SEBI (Issue of Sweat Equity) Regulations, 2002.
8. Board's Report.
9. SH-3.
10. PAS-3, MGT-14.

(iii) *Buy-back of Shares/Securities*

1. Articles of Association.
2. Minutes of Board meeting.
3. Minutes of General meeting.
4. Notice authorising buy-back alongwith explanatory statement.
5. Letter of offer (SH-8).
6. Declaration of Solvency (SH-9).
7. Register of shares/ other securities bought back (SH-10).
8. Return of Buy-back (SH-11).
9. Certification of Compliance (SH-15).

10. MGT-14 .
11. Disclosures, Voting etc. results under SEBI (LODR) Regulations, 2015.
12. Filling, Public Announcements, Letter of Offer etc. under SEBI (Buyback of Securities) Regulations, 2018.

(iv) *Deposits*

1. Ordinary resolution approving the acceptance of deposits.
2. Circulars inviting deposits (DPT- 1).
3. Newspaper Advertisement.
4. Minutes of board meetings.
5. Contract of deposit insurance.
6. Instrument creating charge.
7. Written consent from trustee for depositors.
8. Deposit trust deed (DPT-2).
9. Written requisition calling meeting of depositors.
10. Application form for deposits.
11. Receipts of amount received by company.
12. Register of deposits.
13. Return of deposit (DPT-3).
14. Statement regarding deposits (DPT-4).
15. Financial statement.
16. Disclosures, Voting etc. results under SEBI (LODR) Regulations, 2015.
17. GNL-2, CHG-1, CHG-2, CHG-3, CHG-7, SH-13 and MGT-14.

(v) *Dividend*

1. Statement containing names of unpaid dividends.
2. Website of company.
3. Statement of transfer of unpaid dividend A/c to IEPF with receipt.
4. Financial statement.
5. Minutes of Board Meeting.
6. Bank account details of scheduled bank.
7. Details of payment of dividend.
8. Details of unpaid dividend account.

9. Form IEPF(If required).

10. Intimation, Disclosures, notice, voting results, Payments etc. under SEBI (LODR) Regulations, 2015.

11. Trading window under SEBI (PIT), 2018.

Answer 1(d)

(i) Declaration of Interim Dividend

As per Section 123 (3) of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.

In the given case, R Company Ltd. has complied due diligence in declaring interim dividend as the Interim Dividend is going to declare by Board of directors at their meeting to be held on 25th June, 2021 before holding its first Annual General. Alsothe financial statement shown net profit so the interim dividend can be paid out of profits of the financial year ending 31stMarch, 2021.

(ii) Penal Provisions

According to Section 127 of the Companies Act, 2013 where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall also be liable to pay simple interest at the rate of eighteen per cent per annum during the period for such default continues.

Answer 1(e)

According to section 118 of the Companies Act, 2013 and rule 25 of the Companies (Management & Administration) Rules, 2014 read with clause 17.5 of Secretarial Standard – 2, the minutes of proceedings of a general meeting are required to be signed and dated by the chairman of the said meeting within 30 days from the holding of the meeting. This section further specifies that in the event of death or inability of the chairman within the specified period to authenticate and date the same, a director can be authorized by the Board to sign and date the same. 'A' Director cannot carry out the said function although he has been authorized by the chairman. A letter of authority was issued to him by the chairman is not valid for the said purpose. The Chairman can't authorise some other director to sign on his behalf. It is therefore, necessary to pass a Board Resolution authorizing a director who was present in the meeting to sign the minutes of General Meeting. Resolution of the Board may be passed through circulation in accordance with the provisions of section 175 of the Companies Act, 2013.

Accordingly, Mr. A cannot act on the letter of authority alone, Board resolution is required.

Answer 1A(i)

Section 101 of the Companies Act, 2013 dealing with notice of meeting, states that a general meeting of a company may be called by giving at least clear 21 days-notice. Further in case the company sends the notice by post or courier, an additional two days shall be provided for the service of notice.

However, the Companies Act 2013 does not prescribe the time limit between the date of approval of financial statements by the Board of Directors of a company and the date of notice of AGM.

In the given question, the Board of Directors of PQR Ltd should ensure that the gap between the Board Meeting in which the financial statements are approved and the date of the AGM, should have a minimum gap of 21 clear days-notice, unless the meeting is at a shorter notice. Hence, the advice of CFO of PQR Ltd is not tenable.

Answer 1A(ii)

As per section 179 (3) of Companies Act, 2013, the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board:

i. Make call.

ii. Buy back of securities.

iii. Issuing securities.

iv. Borrowing monies.

v. Investing funds.

vi. Granting loans/ giving guarantees/providing securities.

vii. Approving financial statement and Board's report.

viii. Diversifying business.

ix. Approving amalgamation/merger/ reconstruction.

x. Taking over of a company/acquiring control in substantial stake in another company.

xi any other matter which may be prescribed.

The following matter are prescribed by Companies (Meetings of Board and its Powers) Rules, 2014:

a. Making political contributions.

b. Appointing or removing KMP.

c. Appointing internal auditor.

d. Appointing secretarial auditor.

The Board may by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the power specified in above serial no, iv, v and vi on such conditions as it may specify.

Answer 1A(iii)

1. Conduct of Voting by Electronic Mode

Check Whether

i. The Board appointed an Agency to provide and supervise electronic platform for voting by Electronic mode and had obtained their consent.

ii. The Board has duly appointed one or more scrutinizer, who may be Company Secretary, Chartered Accountant or Cost Accountant in practice or Advocate who was not an officer or employee of the company and is a person of repute for the e-voting process.

iii. The Chairman or any other person authorised by the Chairman in writing for this purpose had duly announced the final results as to whether the Resolution had been carried or not in accordance with section 108 read with rule 20 of the Companies (Management and Administration) Rules, 2014.

iv. Other requirements of the Standard w.r.t. conduct of voting by Electronic mode and placing/publishing of results had been duly complied with.

2. Adjournment of Meetings

i. Check that a duly convened Meeting was not adjourned arbitrarily by the Chairman.

ii. Check whether

- Notice of the adjourned Meeting was given in accordance with the provisions contained in the Companies Act, 2013 and applicable Secretarial Standard.
- If a Meeting, other than a requisitioned Meeting, stood adjourned for want of Quorum, the adjourned Meeting was held as per the law and Standard.
- Quorum requirements were fulfilled in adjourned meetings.
- Only the unfinished business of the original Meeting were considered at an adjourned Meeting.

iii. Check that any Resolution passed at an adjourned Meeting was deemed to have been passed on the date of the adjourned Meeting and not on any earlier date.

3. Preservation of Minutes and other Records

Check Whether

i. Minutes of all meetings are preserved permanently in physical or in electronic form with Timestamp in the custody of company secretary or any director duly authorised by the Board.

ii. Office copies of Notices, scrutiniser's report and other related papers are duly preserved in good order in physical or electronic form for the stipulated period.

iii. Office copies of Notices, scrutiniser's report and related papers of the transferor company, as handed over to the transferee company, are being duly preserved for the stipulated period.

iv. Necessary approval had been taken, where any records had been destroyed.

4. Chairman

i. Check that the Meetings was conducted either by Chairman of the Board or any other director or any other Member duly elected as per the Articles or the Standards, as the case may be.

ii. Check whether the Chairman had explained the objective and implications of the Resolutions before they were put to vote at the meeting.

iii. In case of public companies, check that the Chairman had not proposed any Resolution in which he was deemed to be concerned or interested or whether he participated in the discussion or voted on any such Resolution.

5. Reading of Reports

i. Check whether the qualifications, observations or comments on the financial statements or matters which have any adverse effect on the functioning of the company, if any, mentioned in the Auditor's Report and Secretarial Audit Report were read at the Annual General Meeting.

ii. Check whether the attention of the Members present was drawn to the explanations/ comments given by the Board of Directors in their report to the qualifications/observation and comments of the auditors.

Answer 1A(iv)

Issue and redemption of preference shares (Section 55)

Check whether:

1. A company is authorized by its articles to issue preference shares.
2. The issue of preference shares has been authorized by passing a special resolution in the general meeting of the company.
3. The company, at the time of such issue of preference shares has no subsisting default in the redemption of preference shares issued either before or after the commencement of the Act or in payment of dividend due on any preference shares.
4. The special resolution passed for issued of preference shares was set out the following matters relating to preference shares:

   (a) priority with respect to payment of dividend or repayment of capital vis-à-vis equity shares;

(b) participation in surplus dividend;

(c) participation in surplus assets and profits, on winding-up which may remain after the entire capital has been repaid;

(d) payment of dividend on cumulative or non-cumulative basis.

(e) conversion of preference shares into equity shares.

(f) voting rights;

(g) redemption of preference shares.

6. Check whether explanatory statement contains complete material facts and other disclosure as per rule 9 Companies (Share Capital and Debentures) Rules, 2014.

7. Check whether the company intending to list its preference shares on a recognized stock exchange issued such shares in accordance with the regulations made by the Securities and Exchange Board of India in this behalf.

8. Check whether the company redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.

9. Check whether such shares were fully paid-up before redemption.

10. Check whether Capital Redemption Reserve (CRR) was created equal to the nominal values of shares redeemed, in case redemption was done out of profits of the company.

11. Check in case the company was unable to redeem the any preference shares or pay the dividend, further preference shares were issued equal to the amount due,with the permission of the National Company Law Tribunal (NCLT).

Answer 1A(v)

According to section 179 (3) of the Companies Act, 2013, read with Rule 8.4 of the Companies (Meetings of Board and its Powers) Rules, 2014, In addition to the powers specified under said section, the powers to appoint internal auditors and secretarial auditor shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board as per said rule.

Accordingly, as per the above provisions, secretarial auditor is required to be appointed by means of resolution at a duly convened board meeting.

Therefore, suggestion of the Managing Director is not legally tenable.

PART B

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) MNF Software Ltd. entered into a Non-Disclosure Agreement with RST Broadcast Ltd. As per the agreement, MNF Software Ltd. requires to maintain the software

for media publishing. MNF Software Ltd. was restricted to disclose the Confidential Information. Define the meaning of 'Confidential Information' in Non Disclosure Agreement. *(5 marks)*

(b) As on 31.03.2021, the composition of Board of Management of Happy Hotels Ltd., an unlisted Public company comprising of 8 members is as under :

SN	*Name*	*Designation*
1	*A*	*Executive Chairman and Managing Director*
2	*B*	*Executive Director and CEO*
3	*C*	*Executive Director (Finance)*
4	*D*	*Independent Director*
5	*E*	*Independent Director*
6	*F*	*Independent Director (Woman Director)*
7	*G*	*Nominee Director of Popular Finance Corporation Ltd.*
8	*H*	*Company Secretary.*

As on 31.03.2021, the present Audit Committee comprised of the following directors as members :

SN	*Name*	*Designation*
1	*A*	*Chairman of the Audit Committee*
2	*B*	*Member*
3	*C*	*Member*
4	*F*	*Member*

The company is planning to list its shares on a recognize stock exchange. Referring to the relevant provisions, comment whether the present Audit Committee is in order as per Companies Act, 2013 and it can continue post listing of its shares in the stock exchange if not, constitute the Audit Committee, with the above mentioned directors in complying the requirements of SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015. *(5 marks)*

(c) V Ltd and A Ltd. both dealing in drugs and chemicals have entered into an agreement to jointly promote the sale of their products. A complaint has been received by the Competition Commission of India (CCI) stating that the agreement between the two companies are anti-competitive and against the interest of others in the trade. As a professional and an expert, examine with reference to the relevant provisions of the Competition Act, 2002, the different factors that needs to be taken into account by the CCI while determining whether the agreement in question will have any appreciable adverse effect on competition in the market. *(5 marks)*

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Why the Data Room is required ? What type of information is maintained in the Data Room ?

(ii) Subir is a newly startup and set up a factory recently in Greater Noida which is causing air pollution by releasing fly ash and discharging steam. This cumulatively caused inconvenience and discomfort to the people of that locality. A complaint was filed by the people. A notice was served by the state government to provide the 'Risk Analysis Matrix'. Subir has requested you as a professional to guide him for preparing of Risk Analysis Matrix.

(iii) Effective compliance program should have ability to monitor audit compliance in a 'real time manner'. To facilitate this, explain the role of Information Technology in compliance management. *(5 marks each)*

Answer 2(a)

Confidential Information

(a) means any information disclosed by one Party (the "Disclosing Party") to any other Party (the "Receiving Party") or which is otherwise communicated to or comes to the attention of the Receiving Party whether such information is in writing, oral or in any other form or media and whether such disclosure, communication or coming to the attention of the Receiving Party occurs prior to or during this Agreement; and

(b) includes without limit:

(i) any information which can be obtained by examination, testing or analysis of any hardware, any component part thereof, software or material samples provided by the Disclosing Party under the terms of this Agreement;

(ii) all information disclosed by one Party to any of the other Parties relating directly or indirectly to the Purpose;

(iii) the fact that the Parties are interested in or assessing the Purpose and/or are discussing the Purpose with each other; and

(iv) the terms of any agreement reached by the Parties or proposed by any of the Parties (whether or not agreed) in connection with the Purpose;

(v) all knowledge, information or materials (whether provided in hardcopy or electronic or other form or media) whether of a technical or financial nature or otherwise relating in any manner to the business affairs of the Disclosing Party (or any parent, subsidiary or associated company of that party) software, samples, devices, demonstrations, know-how or other materials of whatever description, whether subject to or protected by copyright, patent, trademark, registered or unregistered design.

Answer 2(b)

As per section 177 of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority. So complying with the provisions of the Companies Act, 2013, the committee should be re-constituted. So, in view of the above, the existing audit committee in not in order as per the requirement of law as it does not have majority of the members as independent directors.

Audit Committee as per Regulation 18 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 –

Every listed entity shall constitute a qualified and independent audit committee in accordance with the terms of reference, subject to the following:

(a) The audit committee shall have minimum three directors as members.

(b) Two-thirds of the members of audit committee shall be independent directors and in case of a listed entity having outstanding SR equity shares, the audit committee shall only comprise of independent directors.

(c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.

(d) The chairperson of the audit committee shall be an independent director and he /she shall be present at Annual general meeting to answer shareholder queries.

(d) The Company Secretary shall act as the secretary to the audit committee.

As per the facts given in the question, the Company is planning to list its shares on a recognised stock exchange in the month of July, 2021. In order to comply with the Requirements of SEBI (LODR) Regulations, 2015, the company requires to re-constitute the Audit Committee which shall have –

Chairman of Audit Committee - Independent

Member - Non-Independent Director

Member - Independent Director

Hence, once the company gets listed at least 2 (3 x 2/3) directors shall be independent directors and the chairman of the audit committee shall be an independent director so company is required to change the composition of audit committee once the company gets listed on stock exchange.

In view of the above, the existing audit committee cannot continue either under section 177 or after listing of its securities.

Answer 2(c)

It is not be lawful for any enterprise or association of enterprises or person or association of enterprise or persons or association of persons to enter into an agreement in respect of production, supply, storage, distribution, acquisition or control of goods or provision of service, which causes or is likely to cause an appreciable adverse effect on competition within India. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

According to section 19(3) of the Competition Act, 2002, the Commission has been put under obligation that while determining whether an agreement has an appreciable adverse effect on competition under section 3, to have due regard to all or any of the following factors, namely:

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

However, any agreement entered into by way of joint ventures, if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services, shall not be considered to be an anti-competition agreement.

Answer 2A(i)

Requirement of Data Room

1. Removes ambiguity in the minds of buyer about the profitability, growth prospectus, and sustainability of business that is proposed to be bought.
2. Provides material information that helps in doing a SWOT analysis.
3. It enables the buyer to do a better bargain through the analysis of the data.
4. May expose the weakness of the seller which is not directly provided to the buyer For example, a material off balance sheet transaction.
5. Provides data that helps in better Valuation of business for both buyer and seller.

Type of information provided under a data room

The following are the examples of information that is provided in a Data Room:

1. Financial documents such as Annual Reports, Financial statements filed with regulatory authorities, cash flow statements, documentation with bankers etc.
2. Basic corporate documents such as certificate of incorporation, Memorandum and Articles of Association, Share-holding agreement, various types of registrations, documents on General and Board Meetings, insurance contracts etc.
3. HR information.
4. Equipment and information on operational aspects.
5. Information relating to sales, marketing etc.
6. Compliance related information
7. Information published in media.
8. IPR details.
9. Information on litigation.

Answer 2A(ii)

PREPARING A RISK ANALYSIS MATRIX

Preparation of Risk Analysis matrix includes the following aspects

Nature of Business

It covers the nature of industry, amount of air/water/noise pollution in the process,

period of its existence, background of promoters, number of subsidiaries, stakeholders involved, turnover, profit from operations, contribution to CSR activities, business acquisition history etc.

Area of Operations

It covers location of site operations, Degree of diversification of products, location of sites of subsidiaries etc.

Identification of potential issues

It covers with interaction with internal stakeholders such as employees, contractual labourers and with external stakeholders such as local community, shareholders, regulators, NGOs etc. A questionnaire may be evolved for each stakeholder for identifying the potential hidden issues.

Potential issues may be:

1. Regulatory non-compliance.
2. Health hazard due to the operations to local community.
3. Location of industry near agricultural land.
4. Amount of noise.
5. Impact of effluents on the rivers etc.
6. Lack of disaster planning.
7. Inadequate safety systems.
8. Lack of sustainability initiatives.
9. Lack of occupational or safety measures.
10. Improper water disposal systems.

Impact analysis

It covers cost of regulatory non-compliance, low level of employee morale, degree of reputation risk, agitation of local community, degree of threat to long term sustainability, impact of potential issues on the financial health of the company.

Suggestions and mitigation measures

It covers compliance management system, proper disposal of wastes including e-waste, strong safety management systems, updated technology for manufacturing process, conservation in usage of water, energy, educating and training employees of environmental issues, frequent interaction with local community, sustainability initiatives and its reporting in the Annual Report.

Answer 2A(iii)

Role of Information Technology in Compliance Management Systems

A critical component of an effective compliance program is the ability to monitor and audit compliance in a "real time manner." Yet, as companies cross geographical and industry boundaries, it is becoming harder to perform this role in the traditional manner. As a result, companies are increasingly seeking technology solutions.

Information Technology can play an effective role in implementation of a Corporate Compliance Management Programme across various departments of an organization in terms of real-time compliance reminders, generation of reports, sending warning signals, generation of compliance calendar etc.

Many companies are introducing comprehensive web-based compliance systems that links various offices/units for better co-ordination and continued compliance. Companies prefer to introduce full-fledged compliance management systems for smooth compliance of multiple laws. Web-based compliance software are available industry-wise and tailormade compliance software can also be made according to company specifications which has to be updated on continuous basis.

Question 3

(a) Bank of STV is contemplating to infuse the capital to meet the requirement of the BASEL Norms. In this context, bank is proposing to issue additional equity shares of ? 10,000 crore having a face value of ? 10 each via Qualified Institution Placement allotment (QIP). The bank has provided you the following inputs extracted from the latest audited Balance sheet as at 31st March, 2021 :

Sr No.	*Particulars*	*Amount (₹ in Crore)*
1.	*Equity Share Capital of Rs. 10 each*	*20,000*
2.	*Reserve and Surplus*	*10,000*
3.	*Long Term Borrowings*	*40,000*
4.	*Current Liabilities & Provisions*	*20,000*

In the light of the relevant provisions of the SEBI (ICDR) Regulations, 2018, advise on the following aspects :

(I) What would be the conditions for qualified institutions placement ?

(II) Whether Bank would be eligible to raise this amount of funds through QIP ?

(III) Whether it would be possible to allot entire issue to three allottees ?

(3+3+2=8 marks)

(b) Fact of the case is as under :

LDF launched a Group Housing Complex (The Belaire) in Gurgaon, planned to construct 5 multistoried residential buildings. It was alleged that various clauses of the house agreement had imposed unilateral and one sided clauses. The informant filed an instant case under Section 19(1) (a) of the Competition Act, 2002. Whether informant will succeed and is there any contravention of provisions of the Competition Act, 2002 ?

Give your answer supported by decided case. (7 marks)

Answer 3(a)

Qualified Institution Placement as per the relevant provisions of the Chapter VI of SEBI (ICDR) Regulations, 2018:

(I) Conditions for qualified institutions placement(QIP) under Regulation 172:

(a) A listed issuer may make a qualified institutions placement of eligible securities if it satisfies the following conditions:

A special resolution approving the qualified institutions placement has been passed by its shareholders, and the special resolution shall, among other relevant matters, specify that the allotment is proposed to be made through qualified institutions placement and the relevant date referred to in Regulation 171(b)(ii);

It has been provided that no shareholders' resolution will be required in case the qualified institutions placement is through an offer for sale by promoters or promoter group for compliance with minimum public shareholding requirements specified in the Securities Contracts (Regulation) Rules, 1957;

It has been further provided that allotment pursuant to the special resolution referred above shall be completed within a period of 365 days from the date of passing of the resolution.

(b) the equity shares of the same class, which are proposed to be allotted through qualified institutions placement or pursuant to conversion or exchange of eligible securities offered through qualified institutions placement, have been listed on a stock exchange for a period of at least one year prior to the date of issuance of notice to its shareholders for convening the meeting to pass the special resolution.

It has been Provided that where an issuer, being a transferee company in a scheme of compromise, arrangement and amalgamation duly sanctioned, the period for which the equity shares of the same class of the transferor company were listed on a stock exchange having nation-wide trading terminals shall also be considered for the purpose of computation of the period of one year.

This shall not be applicable to an issuer proposing to undertake qualified institutional placement for complying with the minimum public shareholding requirements specified in the Securities Contracts (Regulation) 1957.

(c) An issuer shall be eligible to make a qualified institutions placement if any of its promoters or directors is not a fugitive economic offender.

2. All eligible securities issued through a qualified institutions placement shall be listed on the recognised stock exchange where the equity shares of the issuer are listed. The issuer shall seek approval under rule 9(7) of the Securities Contracts (Regulation) Rules,1957, if applicable.

3. The issuer shall not make any subsequent qualified institutions placement until the expiry of two weeks from the date of the prior qualified institutions placement made pursuant to one or more special resolutions.

(II) As there is no limit provided under SEBI (ICDR) Regulations, 2018 like its erstwhile ICDR regulations. Therefore, the Bank would be eligible to raise this amount.

(III) According to Regulation 180 of the said Regulations,The minimum number of allottees for each placement of eligible securities made under Chapter VI shall at least be:

a) two, where the issue size is less than or equal to two hundred and fifty crore rupees;

b) five, where the issue size is greater than two hundred and fifty crore rupees

Accordingly, in the given situation the issue size is more than 250 Crore. So, minimum allottees cannot be less than five.

Answer 3(b)

The facts of the given case is similar to DLF Case.

Facts:

DLF launched a Group Housing Complex (The Belaire) in Gurgaon, planned to construct 5 multistoried residential buildings. The informant filed an instant case under Section 19(1) (a) of the Competition Act, 2002(The Act) and alleged that DLF, by abusing its dominant position, imposed highly arbitrary, unfair and unreasonable conditions on the informant through its agreements. As a matter of fact, the rights of the informant in this agreement were affected by the DLF.

The Informant further, alleged that the various clauses of the house agreement had imposed unilateral and one sided clauses and the action of DLF pursuant thereto was prima facie unfair and discriminatory, thus attracting the provisions of Section 4 (2) (a) of the Act.

The Competition Commission of India (CCI) asked Director General (DG) to investigate the allegations on DLF, as a dominant player in market and whether there exist a relevant market. The DG's investigation report observed that allegations made by the informant were true and the Act was applicable in this respective case. It was observed that DLF in exercise of its market power and dominance violated the Section 19 (4) and also has imposed unfair conditions of sale to consumers, which violated Section 4(2) (a) (i) of the Act.

Held:

CCI held that DLF has contravened the Section 4 (2) (a) (i) and (ii), directly and indirectly, imposing unfair or discriminatory conditions in the sale of services. CCI found DLF guilty of abusing its dominant position in the market and imposed a penalty of Rs. 630 crores on DLF. The CCI further directed DLF to cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order on DLF. DLF challenged the CCI order before COMPAT which granted stay order against the CCI order of imposing penalty under section 27 (b) of the Act subject to DLF furnishing an undertaking to pay 9% interest on the amount of penalty to be determined by COMPAT for the period from the date of order by CCI till the date of payment by DLF. Further, COMPAT ordered that the directions of CCI for modifications of terms of the Agreement shall remain in abeyance. However, the direction of CCI to "cease and desist" with the implementation of the Agreement was not stayed.

Therefore, the applicant will succeed and there is contravention of the provisions of Competition Act, 2002.

Question 4

(a) You are Company Secretary of D3-D Productions Ltd. The Managing Director requires you to prepare a note on the various obligations of the Company as the company has made Public Announcement (PA) for acquiring the controlling interest of Sunny Productions Ltd. Explain the obligation of Company in this regard as per Regulation 26 of SEBI (SAST) Regulations, 2011. (5 marks)

(b) Under what circumstances, the Secretarial Auditor will report that there is diversion of the Fund. (5 marks)

(c) Prepare a List of Foreign Currency Exposures with Source for verification on the following points :

1. *Advance payments received against exports (exports not taken place)*
2. *Loans extended in Foreign Currency*
3. *Interest Rate Swaps and Forward Rate Agreements*
4. *Foreign Currency Convertible Bond (FCCB)*
5. *Post shipment credit in Foreign Currency. (1+1+1+1+1=5 marks)*

Answer 4 (a)

Obligations of the acquirer

Regulation 25 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011

(1) Prior to making the public announcement of an open offer for acquiring shares, the acquirer shall ensure that firm financial arrangements have been made for fulfilling the payment obligations and that the acquirer is able to implement the open offer, subject to any statutory approvals.

(2) In the event the acquirer has not declared an intention in the detailed public statement and the letter of offer to alienate any material assets of the target company or its subsidiarie(s) whether by way of sale, lease, encumbrance or otherwise outside the ordinary course of business, the acquirer, where he has acquired control over the target company, shall be debarred from causing such alienation for a period of two years after the offer period:

It has been provided that in the event the target company or any of its subsidiaries is required to so alienate assets despite the intention to alienate not having been expressed by the acquirer, such alienation shall require a special resolution passed by shareholders of the target company, by way of a postal ballot and the notice for such postal ballot shall inter alia contain reasons as to why such alienation is necessary.

(3) The acquirer shall ensure that the contents of the public announcement, the detailed public statement, the letter of offer and the post-offer advertisement are true, fair and adequate in all material aspects and not misleading in any material particular, and are based on reliable sources.

(4) The acquirer and persons acting in concert with him shall not sell shares of the target company held by them, during the offer period

(5) The acquirer and persons acting in concert with him shall be jointly and severally responsible for fulfillment of applicable obligations under these regulations.

Alternate Answer 4(a)

Obligations of the target company.

Regulation 26 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011

(1) On public announcement of an open offer for acquiring shares of a target company, the board of directors shall ensure that during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice.

(2) During the offer period, unless the approval of shareholders of the target company by way of a special resolution by postal ballot is obtained, the board of directors of either the target company or any of its subsidiaries shall not,—

(a) alienate any material assets whether by way of sale, lease, encumbrance or otherwise or enter into any agreement therefor outside the ordinary course of business;

(b) effect any material borrowings outside the ordinary course of business;

(c) issue or allot any authorised but unissued securities entitling the holder to voting rights:

It has been provided that the target company or its subsidiaries may,—

(i) issue or allot shares upon conversion of convertible securities issued prior to the public announcement of the open offer, in accordance with pre-determined terms of such conversion;

(ii) issue or allot shares pursuant to any public issue in respect of which the red herring prospectus has been filed with the Registrar of Companies prior to the public announcement of the open offer; or

(iii) issue or allot shares pursuant to any rights issue in respect of which the record date has been announced prior to the public announcement of the open offer;

(d) implement any buy-back of shares or effect any other change to the capital structure of the target company;

(e) enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party, outside the ordinary course of business, whether such contract is with a related party, within the meaning of the term under applicable accounting principles, or with any other person; and

(f) accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the target company by way of employee stock options or otherwise.

(3) In any general meeting of a subsidiary of the target company in respect of the matters referred to in above, the target company and its subsidiaries, shall vote in a manner consistent with the special resolution passed by the shareholders of the target company.

(4) The target company is prohibited from fixing any record date for a corporate action on or after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

(5) The target company shall furnish a list of shareholders and list of persons whose applications is pending for registration of transfer of shares.

It has been provided that the acquirer should reimburse reasonable costs payable by the target company to external agencies in order to furnish such information.

(6) Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations. It has been provided that the committee may seek external professional advice at the expense of the target company.

It has been further provided that while providing reasoned recommendations the committee shall disclose the voting pattern of the meeting

(7) The committee of independent directors shall provide its written reasoned recommendations on the open offer to the shareholders and such recommendations shall be published in such form as may be specified, at least two working days before the commencement of the tendering period, in the same newspapers where the public announcement of the open offer was published, and simultaneously, a copy of the same shall be sent to,—

(i) the Board;

(ii) all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public; and

(iii) to the manager to the open offer, and where there are competing offers, to the manager to the open offer for every competing offer.

(8) The board of directors of the target company shall facilitate the acquirer in verification of shares tendered in acceptance of the open offer.

(9) The board of directors of the target company shall make available to all acquirers making competing offers, any information and co-operation provided to any acquirer who has made a competing offer.

(10) Upon fulfillment by the acquirer, of the conditions required under these regulations, the board of directors of the target company shall without any delay register the transfer of shares acquired by the acquirer in physical form, whether under the agreement or from open market purchases, or pursuant to the open offer.

Answer 4(b)

Diversion of funds, would be construed to include any one of the under noted occurrences:

(a) utilisation of short-term working capital funds for long-term purposes not in conformity with the terms of sanction;

(b) deploying borrowed funds for purposes/activities or creation of assets other than those for which the loan was sanctioned;

(c) transferring funds to the subsidiaries/Group companies or other corporate by whatever modalities;

(d) routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender;

(e) investment in other companies by way of acquiring equities/debt instruments without approval of lenders;

(f) shortfall in deployment of funds vis-à-vis the amounts disbursed/drawn and the difference not being accounted for.

The secretarial auditor will report the diversion in above mentioned occurrences.

Answer 4(c)

1. **Advance payments received against exports (exports not taken place)**
   a. Copy of Purchase or Sale contract as the case may be
   b. Copy of FIRC
   c. If credited to EEFC A/c cross reference so as to avoid double counting
2. **Loans extended in Foreign Currency**
   a. General or Special Permission copy
   b. Copy of Loan Agreement
   c. Proof of remittance of foreign currency
   d. Ledger extract of Loan Account
3. **Interest Rate Swaps and Forward Rate Agreements**
   a. Certified copy of the agreement
   b. Term Sheet
   c. Last Payment/Receipt details
   d. Liability computation for broken period for each Interest Rate Swap/Forward Rate Agreement (IRS/FRA) deals.
4. **Foreign Currency Convertible Bond (FCCB)**
   a. Issuance Approval (if applicable)
   b. Form ECB-2 (if applicable)
   c. Board Memorandum copy on FCCB reporting
   d. Information filed with Stock Exchange
5. **Post shipment credit in Foreign Currency**
   a. Post shipment loan Ledger.
   b. Bill-wise advise from bank.
   c. Trial Balance/Internal MIS.
   d. Export Collection Bills
   e. Advance against FOBCs

Question 5

(a) Write the short notes on the following :

(i) Inspection of Register of Charges.

(ii) Exemption available for securities listed at SME exchange.

(iii) Risk Management Committee in case of listed entity. (3 marks each)

(b) Distinguish between the following :

(i) Relevant Geographic Market and Relevant Product Market.

(ii) ISO 14001:2015 and ISO 14004:2016 on environmental management systems. (3 marks each)

Answer 5(a)

(i) Inspection of Register of Charges

Section 85 of the Act read with rule 10 of the Companies (Registration of Charges) Rules,2014 provides that every company shall keep at its registered office a register of charges in Form CHG-7, which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed in the Rules.

It has been provided that a copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

The register of charges and instrument of charges, kept under this section shall be open for inspection during business hours:

(a) By any member or creditor without any payment of fees; or

(b) By any other person on payment of such fees as may be prescribed.

The Inspection shall be subject to such reasonable restrictions as the company may, by its articles, impose.

(ii) Exemption available for securities listed at SME exchange under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

- According to Regulation 229 of said regulations, Eligibility requirements for an IPO are relaxed.
- There is no additional requirements for offer for sale.
- Lock-in of partly paid up equity shares is not applicable.
- The allocation in case of SME is Minimum fifty percent to retail investor.
- No requirements of IPO Grading.
- The provisions of Minimum subscription is not applicable.
- According to Regulation 276 of the said regulations, a listed issuer whose post-issue face value capital is less than twenty five crore rupees may migrate

its specified securities to SME exchange if its shareholders approve such migration by passing a special resolution through postal ballot to this effect and if such issuer fulfils the eligibility criteria for listing laid down by the SME exchange.

(iii) Risk Management Committee in case of listed entity

Regulation 21 of SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015

(1) The board of directors shall constitute a Risk Management Committee.

(2) The majority of members of Risk Management Committee shall consist of members of the board of directors.

(3) The Chairperson of the Risk management committee shall be a member of the board of directors and senior executives of the listed entity may be members of the committee.

(4) The risk management committee shall meet at least once in a year.

(5) The board of directors shall define the role and responsibility of the Risk Management Committee and may delegate monitoring and reviewing of the risk management plan to the committee and such other functions as it may deem fit.

(6) The provisions of this regulation shall be applicable to top 500 listed entities, determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

Answer 5(b)

(i) Relevant Geographic Market and Relevant Product Market

According to section 2(s) of the Competition Commission Act, 2002, "Relevant Geographic Market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

According to section 2(t) of the Competition Commission Act, 2002, "Relevant Product Market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

(ii) ISO 14001:2015 and ISO 14004:2016 on environmental management systems.

ISO 14001:2015 helps an organization achieve the intended outcomes of its environmental management system, which provide value for the environment, the organization itself and interested parties. Consistent with the organization's environmental policy, the intended outcomes of an environmental management system include:

– enhancement of environmental performance;

– fulfilment of compliance obligations;

- achievement of environmental objectives.

ISO 14004:2016 provides guidance for an organization on the establishment, implementation, maintenance and improvement of a robust, credible and reliable environmental management system. The guidance provided is intended for an organization seeking to manage its environmental responsibilities in a systematic manner that contributes to the environmental pillar of sustainability.

Question 6

(a) 'The successful merger demands that strategic planners are sensitive to the human issues of the organizations'. For this purpose, as a Practicing Company Secretary outline the different checks which are to be made consistently.

(b) You as a practising Company Secretary has been approached by Popular Bank to carry out due diligence regarding the loan of ₹50 crore to be given to Weak Ltd. How would you find that the company has misused borrowed funds from banks/ financial institutions from the purpose for which they were borrowed and there has been Siphoning of Fund ?

(c) A company "issuer" was in the process of making an offer to Right Issue of the specified securities. All the process was completed and the arrangement was complete. Ms. Madhu, a director of the company was categoized as a "willful Defaulter" by a Bank in accordance with the guidelines issued by the RBI. Advise the "Issuer", whether it can proceed to offer the securities through the Right Issue. Will your answer differ, had it been a Public Issue ? (5 marks each)

Answer 6(a)

The successful merger demands that strategic planners are sensitive to the human issues of the organisations. For the purpose, following checks have to be made constantly to ensure that:

- Sensitive areas of the company are pinpointed and personnel in these sections carefully monitored;
- Serious efforts are made to retain key people;
- A replacement policy is ready to cope with inevitable personnel loss;
- Records are kept of everyone who leaves, when, why and to where;
- Employees are informed of what is going on, even bad news is systematically delivered. Uncertainty is more dangerous than the clear, logical presentation of unpleasant facts;
- Training department is fully geared to provide short, mediumand long term trainingstrategy for both production and managerial staff;
- Likely union reaction be assessed in advance;
- Estimate cost of redundancy payments, early pensions and the like assets;
- Comprehensive policies and procedures be maintained up for employee related

issues such as office procedures, new reporting, compensation, recruitment and selection, performance, termination, disciplinary action etc.; -

- New policies to be clearly communicated to the employees specially employees at the level of managers, supervisors and line manager to be briefed about the new responsibilities of those reporting to them;
- Family gatherings and picnics be organised for the employees and their families of merging companies during the transition period to allow them to get off their inhibitions and breed familiarity.

Answer 6(b)

Siphoning of funds, should be construed to occur if any funds borrowed from banks/ Financial Institutions are utilised for purposes un-related to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgment of the lenders based on objective facts and circumstances of the case.

The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/ incidents. The default to be categorised as willful must be intentional, deliberate and calculated.

Answer 6(c)

As per regulation 70(6) of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, an issuer shall make disclosures in the draft letter of offer, letter of offer and abridged letter of offer, if the issuer or any of its promoters or directors is a wilful defaulter. There is no disqualification provided for wilful defaulter is case of Right issue.

Therefore, the company can proceed to offer the securities through Right Issue.

According to Regulation 5 of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, an issuer shall not be eligible to make an initial public offer, if the issuer or any of its promoters or directors is a wilful defaulter.

According to Regulation 102 of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, an issuer shall not be eligible to make a further public offer, if the issuer or any of its promoters or directors is a wilful defaulter.

Therefore, in case of Public Issue, the company cannot proceed to offer the securities.

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CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer ALL Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

PART A

Question 1

(a) "Corporate restructuring strategies depend on the nature of business, type of diversification required with the object of profit maximization through pooling of resources in effective manner, utilization of idle resources, effective management of competition etc." Briefly comment on the statement specifying any 5 corporate restructuring strategies.

(b) "While according approval to the scheme of amalgamation of two banking companies, Board of Directors need to give careful and particular consideration in respect of certain matters." Discuss briefly as per Reserve Bank of India Guidelines.

(c) Competition Commission of India has received a notice from Alpha Ltd for their proposed combination with Beta Ltd. Briefly state the investigation procedure in terms of the provisions of the Competition Act, 2002.

(d) Indicate briefly the tax concessions available to a demerged company in terms of Income Tax, 1961. *(5 marks each)*

Answer 1(a)

The given statement is absolutely true. The restructuring process requires various aspects to be considered before, during and after the restructuring. Any or combination of one or more of the following strategies are adopted in an effective corporate restructuring. They are as under:

1. Merger

Merger is the combination of two or more companies which can be merged together either by way of amalgamation or absorption or by formation of a new company.

2. Demerger

It is a form in which the entity's business operations are segregated into one or more components.

3. Reverse Merger

Reverse merger is the opportunity for the unlisted companies to become public listed company, without opting for Initial Public offer (IPO) or a sick company acquires a profitable company to avail tax benefits.

4. Disinvestment

Disinvestment means the action of an organization or government selling or liquidating an asset or subsidiary. It is also known as "divestiture".

5. Takeover/Acquisition

Takeover occurs when an acquirer takes over the control of the target company. It is also known as acquisition. Normally this type of acquisition is undertaken to achieve market supremacy.

6. Joint venture (JV)

The parties agree to contribute equity to form a new entity and share the revenues, expenses, and control of the company. It may be Project based joint venture or Functional based joint venture.

7. Strategic Alliance

Any agreement between two or more parties to collaborate with each other, in order to achieve certain objectives while continuing to remain independent organizations is called strategic alliance.

8. Franchising

Franchising may be defined as an arrangement where one party (franchiser) grants another party (franchisee) the right to use trade name as well as certain business systems and process, to produce and market goods or services according to certain specifications.

9. Slump Sale

Slump sale means the transfer of one or more undertaking as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Answer 1(b)

While according approval to the scheme of amalgamation to two banking companies, Board of Director need to give careful and particular consideration of following matters:

a. The value at which the assets, liabilities and the reverse of the amalgamated company are proposed to be incorporated in the books of the amalgamating banking company and whether such incorporation will result in a revaluation at assets upwards or credit being taken for unrealized gains.

b. Ensure due diligence of the amalgamating companies

c. The nature of the consideration, which, the amalgamating banking company will pay to the shareholders of the amalgamated company.

d. Whether the swap ratio has been determined by independent values having required competence and experience and whether in the opinion of the Board such swap ratio is fair and proper.

e. The shareholder pattern in the two banking companies and whether as a result of the amalgamation and swap ratio the shareholding of any individual, entity or

group in the amalgamating banking company will not be violation of the Reserve Bank guidelines or require it specific approval.

f. The impact of the amalgamation on the profitability and the capital adequacy ratio of the amalgamating banking company.

g. The changes which are proposed to be made in the composition of the board of directors of the amalgamating banking company, consequent upon the amalgamation and whether the resultant composition of the Board will be in conformity with the Reserve Bank guidelines and shall be submitted to RBI for sanction.

Answer 1(c)

In the instant matter, on receipt of such notice Competition Commission of India (CCI) initiates the action in terms of Section 29 of the Competition Act, 2002. Section 29 of the Act specifies that:

(i) The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted.

(ii) After receipt of the response of the parties to the combination, the Commission may call for the report of the Director General.

(iii) When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission is, prima facie, of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven working days from the date of receipt of the response of the parties to the combinations or the receipt of the report from Director General under section 29 (1A) whichever is later, direct the parties to the combination to publish within ten working days, the details of the combination, in such manner as it thinks appropriate so as to bring to the information of public and persons likely to be affected by such combination.

(iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within fifteen working days of the publishing of the public notice, with the Commission for its consideration.

(v) The Commission may, within fifteen working days of the filing of written objections, call for such additional or other information as it deems fit from the parties to the said combination and the information shall be furnished by the parties above referred within fifteen days from the expiry of the period notified by the Commission.

(vi) After receipt of all the information and within 45 days from expiry of period for filing further information, the Commission shall proceed to deal with the case, in accordance with provisions contained in section 31 of the Act.

Thus, the provisions of section 29 provides for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required

to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on the Commission a time limit of 45 working days from the receipt of additional or other information called for by it under sub-section (4) of section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

Answer 1(d)

A Demerged Company can expect the following tax concessions are as under:

Capital gains tax not attracted [Section 47(vib)]

Where there is a transfer of any capital asset in case of a demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

Tax concession to a foreign demerged company [Section 47(vic)]

Where a foreign company holds any shares in an Indian company and transfers the same, in case of a demerger, to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under section 45 if the following conditions are satisfied:

a. The shareholders holding not less than three- fourths in value of the shares of the demerged foreign company continue to remain shareholders the resulting foreign company; and

b. such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated.

Reserves for shipping business:

Where a ship acquired out of the reserve is transferred in a scheme of demerger, even within the period of eight years of acquisition there will be no deemed profits to the demerged company.

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) What is the concept of Mandatory Open offer as per the provisions of Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ? Do you find any obligation of making Open offer in the following circumstances ? Give brief reasons whether your answer is affirmative or negative.

(i) Dinesh holding 23% shares in Target Company entered into a share purchase agreement with Mukesh to buy another 3% shares.

(ii) Rahul holding 29% shares in Target Company entered into a share purchase agreement with Manish to buy another 5% shares.

(iii) Vijay holding 35% shares in Target Company entered into a share purchase agreement with Ajay to buy another 3% shares on 1st May 2020 and then entered into another share purchase agreement with Sanjay to buy 4% shares on 1st June 2020. (5 marks)

(b) Competition Commission of India, while concluding favourable or adverse effect of any combination on the relevant market in India, looks into certain factors. Discuss briefly. (5 marks)

(c) The position of capital and reserves as on 31st March 2020 of King Ltd are given below :

Equity Share Capital (60,000 @ ₹10 each, Fully Paid up)	*6,00,000*
Preference Share Capital (3000 @ ₹100 each, Fully Paid up)	*3,00,000*
General Reserve	*2,50,000*
Security Premium Account	*3,00,000*
Statutory Reserves	*4,00,000*

The managing director of King Ltd wants to place proposal before board for buyback some of its Equity shares. You as a company secretary, advise your managing director on the following issues :

(i) Maximum Quantum upto which King Ltd can buy-back its own shares with Board approval.

(ii) Maximum Quantum upto which King Ltd can buy-back its own shares with shareholders' approval. (5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) How could the amount deposited into Escrow Account distributed in the event of nonfulfilment of obligations under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ?

(ii) Viva UK Ltd and Pipa Incorporation Ltd are Listed on London Stock Exchange and engaged in the same business. These two companies entered into an agreement in France to fix the prices of their products in International market with mutual consent. This agreement will have adverse impact on competition in India. Viva UK Ltd is a wholly owned subsidiary of Viva India Ltd. The Competition Commission of India Suo Motto initiated an enquiry in this case. Viva India Ltd has raised an objection on this enquiry by giving the reason that the parties to the agreement are not in India and the agreement was executed outside India. Explain the provisions relating to the jurisdiction of Competition Commission of India with reference to this case.

(iii) Define the term Slump Sale as per Income Tax Act, 1961 and explain the tax treatment of a Slump Sale Transaction. (5 marks each)

Answer 2(a)

The Mandatory Open Offer bids mentioned in Regulation 3 of the SEBI (SAST) Regulations, 2011 are triggered on occurrence certain events, to which the acquirer and/ or Person Acting in Concert (PAC) must provide an open offer to buy further shares from other shareholders of the target company. The triggering events for Mandatory Open Offer are in two cases, initial trigger and creeping trigger events.

Mandatory Public Offer : First Condition: Acquisition of 25% or more shares or voting rights: An acquirer, who (along with PACs, if any) holds less than 25% shares or voting rights in a target company and agrees to acquire shares or acquires shares which along with his/PAC's existing shareholding would entitle him to exercise 25% or more shares or voting rights in a target company, will need to make a public announcement of making an open offer to acquire the shares before acquiring such additional shares.

Second Condition : Acquisition of more than 5% shares or voting rights in a financial year: An acquirer who (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in a target company, can acquire additional shares in the target company as would entitle him to exercise more than 5% of the voting rights in any financial year beginning April 01, only after making a public announcement of making an open offer to acquire the shares.

Cases:

Case (i) Open Offer is required as First Condition of 25% or more is met.

Case (ii) Open Offer is not required as requirement of open offer as per second condition is when acquisition is beyond 5% of the voting capital of the target company.

Case (iii) For First Acquisition of 3%, Open Offer is not required but for second Acquisition of 4% Open Offer is required because 2nd Condition above is met.

Answer 2(b)

The Competition Commission of India shall have due regard to all or any of the factors for the purposes of determining whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, namely:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of combination in the market;

(d) degree of countervailing power in the market;

(e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competition or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The above yardsticks are to be taken into account irrespective of the fact whether an inquiry is instituted, on receipt of notice under section 6(2) or upon its own knowledge.

Answer 2(c)

(i) Maximum Quantum of Buy-Back with Board Approval:

Board of directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company and such buy back has to be authorized by the board by means of a resolution passed at the meeting.

(6, 00,000 + 2, 50,000 + 3, 00,000) x 10% = 1, 15,000 i/e/ 11500 shares can be bought back with board approval

(ii) Maximum Quantum of Buy-Back with shareholder's Approval:

Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company. In respect of any financial year, the shareholders can approve by special resolution upto 25% of total equity capital in that year.

(6, 00,000 + 3, 00,000 + 2, 50,000) x 25% = 2,87,500, i.e., 28,750 shares can be bought back with shareholder approval

Answer 2A(i)

In the event of forfeiture of amount, the entire amount is distributed in the following manner:

(i) one-third of the escrow amount to Target Company;

(ii) one-third of the escrow account to the Investor Protection and Education Fund established under Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009;and

(iii) one-third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open Offer.

Answer 2A(ii)

Section 32 of the Competition Act, 2002 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above clearly demonstrate that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

Hence the action taken by Competition Commission of India is valid.

Answer 2A(iii)

Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertaking as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Tax treatment:

Normally, any sale of a capital asset will give rise to a capital receipt and any profit derived may give rise to capital gains in certain cases. This is true in the case of sale of an undertaking also.

Determination of the value of an asset or liability (for sole purpose of payment of stamp duty, registration fees or other similar taxes or fee) shall not be regarded as assignment of values to individual assets or liabilities.

As per section 50B of the Income Tax Act, 1961 any profit or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains from the transfer of long-term capital asset and shall be deemed to be he income of the previous year in which the transfer took place.

Any profit or gains arising from the transfer under the slump sale of any capital assets being one or more undertaking owned and held by an assessee for not more than the thirty-six months immediately preceding the date of transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

Question 3

(a) External Commercial Borrowings (ECB) framework enables permitted resident entities to borrow from recognized non-resident entities. Explain briefly.

(b) Is it possible to restructure debts through reduction of capital ? Support your answer with a decided case law.

(c) What one would understand with the term de minimis exemption as per Competition Act, 2002 ?

(d) "Takeover is an inorganic corporate growth device whereby one company acquires control over another company, usually by purchasing all or a majority of its shares." Briefly explain the broad categories of Takeover.

(e) Present a short note on "Funding through Leveraged Buyouts". (3 marks each)

Answer 3(a)

External Commercial Borrowings (ECB) : ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB comprises the following three tracks.

Track 1 : Medium term foreign currency denominated ECB with Minimum average maturity of 3/5 years. Manufacturing sector companies may raise foreign currency denominated ECBs with minimum average maturity period of 1 year.

Track 2 : Long term foreign currency denominated ECB with minimum average maturity of 10 years

Track 3 : Indian Rupees denominated ECB with minimum average maturity of 3/5 years. Manufacturing sector companies may raise INR denominated ECBs with minimum average maturity period of 1 year.

The ECB Framework enables permitted resident entities to borrow from recognised non-resident entities in the forms such as Loans including bank loans; Securitised instruments (floating rate notes and fixed rate bonds, non-convertible, optionally convertible preference shares/debentures) ; Buyers' credit; Suppliers' credit; Foreign Currency Convertible Bonds (FCCBs); Financial Lease and Foreign Currency Exchangeable Bonds (FCEBs).

However, ECB framework is not applicable in respect to the investment in non-convertible debentures in India by Registered Foreign Portfolio Investors.

Answer 3(b)

The petitioner-company was referred to the Corporate Debt Restructuring ('CDR') forum for re-scheduling and restructuring its debt. As per restructuring package, as approved by CDR forum, for every 10 equity shares the company would cancel 4 equity shares and in lieu of such cancellation, 4 non-cumulative preference shares would be allotted and the existing equity shareholders would continue to hold remaining 6 shares without any alteration of rights. When the petitioner-company moved to the High Court for confirmation of its restructuring package, the objector opposed the scheme on the ground that it would suffer financial loss. Taking an overall view and considering the proposed scheme of reduction of share capital in larger perspective, the High Court found no reason not to confirm the proposed action of the company to reduce its share capital.

The High Court observed that the proposal is likely to improve the financial resources of the company, and to increase the share of profit available for expansion and growth of the company. Moreover, the proposal does not involve diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.[*Essar Steel Ltd. Re (2005) 59S CL 457: (2006) 130 Com cases 123(Guj)*].

Answer 3(c)

Section 54 of the Competition Act, 2002 empowers the Central Government in public interest to exempt the enterprises being parties to —

(a) any acquisition referred to in clause (a) of section 5 of the Competition Act;

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in section 5(b) of the Competition Act; and

(c) any merger or amalgamation, referred to in section 5(c) of the Competition Act, where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

The above exemption is de minimis exemption under the Competition Act, 2002.

Answer 3(d)

Takeovers may be broadly classified into:

(i) *Friendly Takeover* : Friendly takeover is with the consent of taken over company. In friendly takeover, there is an agreement between the management of two companies through negotiations and the takeover bid may be with the consent of majority or all shareholders of the target company. This kind of takeover is done through negotiations between two groups. Therefore, it is also called negotiated takeover.

(ii) *Hostile Takeover* : When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues efforts to gain control against the wishes of existing management.

(iii) *Bail Out Takeover* : Takeover of a financially sick company by a profit earning company to bail out the former is known as bail out takeover. There are several advantages for a profit making company to takeover a sick company. The price would be very attractive as creditors, mostly banks and financial institutions having a charge on the industrial assets, would like to recover to the extent possible. Banks and other lending financial institutions would evaluate various options and if there is no other go except to sell the property, they will invite bids.

Answer 3(e)

A leveraged buyout (LBO) is the acquisition of a company in which the buyer puts up only a small amount of money and borrows the rest. The buyer can achieve the desirable result because the targeted acquisition is profitable and throws off ample cash used to repay the debt. The expectation with leveraged buyouts is that the return generated on the acquisition will more than outweigh the interest paid on the debt, hence making it a very good way to experience high return whilst only risking a small amount of capital.

PART B

Question 4

(a) Roma Ltd is planning to acquire the business of Vision Ltd. The following information were provided by Vision Ltd :

Year	*Free Cash Flow to Equity (Millions)*
1	*100*
2	*150*
3	*200*
4	*250*
5	*300*

Issued Equity share capital of Vision Ltd is 200 Million (2 Million Shares of `100 each). The company neither issued any debenture nor taken any loan. The other relevant information is as under:

Risk free rate of return (Rf) : 8%

Return on market portfolio (Rm) : 12%

Cost of Capital (Ke) : 13%

Terminal Value (calculated) : 1400 Millions

Calculate the value of firm and value of per equity share (Rounded off to nearest rupee) of Vision Ltd with the help of Discounting Cash Flow method.

(Special Note : There is no need to provide mathematical table. Candidates may use a non-scientific calculator to calculate the discount factor.) (5 marks)

(b) Olive Ltd. is studying the possible acquisition of Cherry Ltd. by way of merger. The following data are available:

Particular	*Olive Ltd*	*Cherry Ltd*
Profit Before Tax	*25,00,000*	*7,50,000*
Number of Equity Shares	*4,00,000*	*1,00,000*
PE Ratio	*15*	*10*

Corporate Tax Rate is 20%

You are required to:

(i) Calculate EPS and Market Price per Share of both the companies before merger. (1 mark)

(ii) If the merger goes through by exchange of equity shares and the exchange ratio is set according to the current market prices, what will be the new earnings per share for Olive Ltd.? (2 marks)

(iii) Cherry Ltd. wants to be sure that its earnings per share is not diminished by the merger. What exchange ratio is relevant to achieve the objective? *(2 marks)*

(c) Gaurav Ltd that already holds 35% shares in Geeta Ltd entered into a share purchase agreement with Saurav Ltd. to acquire 10% shares of Geeta Ltd at 265 per share. The date of detailed public announcement was 1st April 2020. The following information with reference to acquisition of shares of Geeta Ltd by Gaurav Ltd during last 60 weeks is available from the investment account of Gaurav Ltd:

Date	*Number of Shares Acquired*	*Price Paid Per Share (in ₹)*
10.03.2019	*50,000*	*310*
12.04.2019	*10,000*	*280*
14.06.2019	*20,000*	*260*
20.12.2019	*10,000*	*270*
14.01.2020	*20,000*	*250*

Volume weighted average (VWA) market price for 60 trading days preceding the detailed public announcement is ₹272.

Using the above information, you are required to calculate offer price at which the acquirer shall announce to acquire shares from the public shareholders under the open offer in compliance with Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for frequently traded shares. *(5 marks)*

Answer 4(a)

Cost of capital should be used for discounting the cash flows of the firm value of the firm and per share be calculated as follows:

Year	*Cash Flow*	*Discount Factor @ 13%*	*Discounted cash Flow*
1	100	0.8850	88.50
2	150	0.7831	117.47
3	200	0.6931	138.62
4	250	0.6133	153.33
5	300	0.5428	162.84
TV	1400	0.5428	759.92
Value of Firm(Mn)			1,420.68
Number of shares (Mn)			2
Value per share			710.34 or 710.45
Rounded off to nearest Rupees			710.00

Answer 4(b)

(i) EPS and Market Price Per Share:

Particulars	*Olive Ltd.*	*Cherry Ltd.*
Profit Before Tax (a)	25,00,000	7,50,000
Profit After Tax (b) = (a) x 80%	20,00,000	6,00,000
Number of Equity Shares	4,00,000	1,00,000
EPS	5	6
PE Ratio	15	10
MPS = EPS X PE Ratio	75	60

(ii) Revised EPS of Merged Entity

Exchange Ratio = 60/75=0.80 or 4 shares for 5 shares held

Number of shares to be issued to shareholders of Cherry ltd.

1,00,000 x 60/75 = 80,000

Revised EPS = (20,00,000 + 6,000,000) / (4,00,000 + 80,000) = 5.42

(iii) The present earning per share of Cherry ltd. Is ₹ 6/- and that of Olive Ltd. ₹5/- if Cherry Ltd. wants to ensure that, even after merger, the earning per share of its shareholders should remain unaffected, then the exchange ratio will be 6 share for every 5 share (In the ratio EPS)

Number of shares to be issued to shareholders of Cherry ltd.

1,00,000 x 6/5 = 1,20,000

Revised EPS = (26,00,000)/ (4,00,000 + 1,20,000) = 5

Total Earning Per Share for Cherry Ltd.'s shareholders = 1,20,000 x 5 = 6,00,000

Answer 4(c)

Offer price is the price at which the acquirer announces to acquire shares from the public shareholders under the open offer. The offer price shall not be less than the price as calculated under Regulation 8 of the SEBI (SAST) Regulations, 2011 for frequently or infrequently traded shares.

If the target company's shares are frequently traded then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

a. Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;

b. Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");

c. Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;

d. Volume weighted average market price for sixty trading days preceding the PA.

Workings:

Date	*Share Acquired*	*Price Paid Per share*	*Product*
A	B	C	D = B x C
12.04.2019	10,000	280	28,00,000
14.06.2019	20,000	260	52,00,000
20.12.2019	10,000	270	27,00,000
14.01.2020	20,000	250	50,00,000
Total	60,000		1,57,00,000

a. Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer: Given ₹265 per share

b. Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement: 1,57,00,000/60,000 =₹260

c. Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA: ₹270 (Paid on 20.12.2019)

d. Volume weighted average market price for sixty trading days preceding the PA: ₹272

Hence the minimum offer price should be ₹272 per share (Highest amount a, b, c, d)

Question 5

(a) "An individual shall have certain qualifications and experience to be eligible for registration under rule 3 of The Companies (Registered Values and Valuation) Rules, 2017". Explain briefly.

(b) "Determining the value of a business is a complicated and intricate process." Explain the general principles of Business Valuation and list down the aspects involved in preliminary study to valuation.

(c) Explain the Pricing norms for issue or transfer of shares to a person resident outside India under the Consolidated Foreign Direct Investment Policy, 2017.

(5 marks each)

Answer 5(a)

An individual shall have the following qualifications and experience to be eligible for registration under Rule 4 of the Companies (Registered Valuer and Valuation) Rules 2017, namely:

(a) Post-Graduate Degree or post-graduate diploma, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least three years of experience in the specified discipline thereafter; or

(b) A Bachelor's degree or equivalent, in the specified discipline, from a University

or Institute established, recognised or incorporated by law in India and at least five years of experience in the specified discipline thereafter; or

(c) Membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership.

Answer 5(b)

General Principles of Business Valuation are as under:

1. Value is determined at a specific point in time.
2. Value is prospective. It is equivalent to the present value, or economic worth, of all future benefits anticipated to accrue from ownership.
3. The market determines the required rate of return.
4. Value is influenced by liquidity.
5. Principle of alternative
5. The higher the underlying net tangible asset value base, higher the going concern value.

Preliminary Steps in Valuation:

A business/corporate valuation involves analytical and logical application/analysis of historical/future tangible and intangible attributes of business. The preliminary study to valuation involves the following aspects:

1. Purpose of Valuation
2. Analysis of business history
3. Profit trends
4. Goodwill/Brand name in the market
5. Identifying economic factors directly affecting business
6. Study of exchange risk involved
7. Study of employee morale
8. Study of market capitalization aspects
9. Identification of hidden liabilities through analysis of material contracts.

Answer 5(c)

Price of shares issued to persons resident outside India under the Foreign Direct Investment Policy, shall not be less than –

Listed Shares : The price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed on any recognised stock exchange in India;

Unlisted Shares : The fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing

methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and

Preferential Allotment : The price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

Subscription to MOA : However, where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, as applicable, by way of subscription to its Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

PART C

Attempt all parts of either Q. No. 6 or Q. No.6A

Question 6

(a) Briefly explain the process of initiation of corporate insolvency resolution process by operational creditors under the Insolvency and Bankruptcy Code, 2016. *(5 marks)*

(b) Write a short note on Winding up under the Companies Act, 2013 in contrast with liquidation in terms of Insolvency and Bankruptcy Code, 2016. *(5 marks)*

(c) "The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law." Explain the aim and objectives of UNCITRAL Model Law. *(5 marks)*

(d) Define Assets Reconstruction Company (ARC) as per the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and explain the main objectives of an ARC ? *(5 marks)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) SIB Bank filed an application before NCLT on 3rd Feb 2020 for initiating corporate insolvency resolution process against Gamma Ltd. NCLT accepted the application on 14th February 2020 and appointed the Interim resolution professional on 21st February 2020. During the period between 14th February 2020 to 21st February 2020, the corporate debtor sold one of its properties and claimed that its action was in conformity with the law. Explain the effect of Moratorium and offer your view on the validity of action by the corporate debtor selling a property not being a normal course of business. *(5 marks)*

(ii) Give a short note on "Effect of recognition of a foreign main proceeding" under the UNCITRAL Model Law. *(5 marks)*

(iii) RPL Bank extended a term loan to Inspire Ltd. Debt Recovery Tribunal (DRT) has issued order against the company for recovery of outstanding dues. Aggrieved by the order of DRT, Inspire Ltd wants to file an appeal before the Debt Recovery

Appellate Tribunal under the provisions of The Recovery of Debt Due to Banks and Financial Institutions Act, 1993. Analyse the provision relating to appeal to Debt Recovery Appellate Tribunal (DRAT) State the portion of amount to be deposited for considering appeal by DRAT. (5 marks)

(iv) "Effective Insolvency Law Systems have a number of aims and objectives." Explain with reference to World Bank principles on effective insolvency law system. (5 marks)

Answer 6(a)

Demand notice or copy of invoice demanding payment of the debt – Section 8 of the Insolvency and Bankruptcy Code 2016(IBC) provides that in case of a default, the operational creditor has to deliver a demand notice or a copy of an invoice demanding payment of the debt in default to the corporate debtor.

Application by operational creditor before NCLT – Section 9(1) of the Code provides that if the operational creditor does not receive either the payment of the debt or a notice of existence of dispute in relation to the debt claim from the corporate debtor within a period of ten days from the date of receipt of the invoice or demand notice under section 8, he can file an application with the National Company Law Tribunal for initiating the insolvency resolution process in accordance with section 9 of the Code.

Admission / Rejection of application – The National Company Law Tribunal shall admit or reject the application and communicate such decision to the operational creditor and the corporate debtor within fourteen days of the receipt of such application. However, before rejecting the application, an opportunity shall be given to the applicant to rectify the defect within seven days of receipt of rejection.

Answer 6(b)

The Companies Act, 2013 contain provisions for winding up of companies on various grounds including inability of companies to pay their debts in terms of section 271 thereof. On promulgation of the Insolvency and Bankruptcy Code, 2016 the clause relating ground of inability to pay their debts and provision relating to voluntary winding up of companies have been deleted. The code will exclusively be governing the insolvency resolution and liquidation of corporates.

The Companies Act, 2013 shall continue to govern winding up of companies on various other grounds excluding inability to pay debts, companies formed with an intention to defraud the society, threatening the sovereignty of state or union, not filling statutory returns or just and equitable reasons. Sections 270 to 288, Sections 290 to 303, Section 324 and Sections 326 to 365 of Chapter XX of the Companies Act, 2013 contain the provisions related to winding up of the company.

Answer 6(c)

The UNCITRAL Model Law aims at harmonization of legislations across countries. The United Nations Commission on International Trade Law (UNCITRAL) has a mandate from the General Assembly of the United Nations to harmonize and unify the law of international trade. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that help in several significant ways to have harmony among regulatory frameworks.

The purpose of the Model Law is to provide effective mechanism for dealing with cases of cross -border insolvency so as to promote the objectives of:

(a) Cooperation between the courts and other competent authorities of different countries dealing with cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment

Answer 6(d)

"Asset Reconstruction Company" means a company registered with Reserve Bank under Section 3 of SARFAESI Act for the purposes of carrying on the business of asset reconstruction or securitisation, or both. The main objective of Asset Reconstruction Company ('ARC') are:

a) to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges,

b) to act as manager of the borrowers' asset taken over by banks, or financial institution,

c) to act as the receiver of properties of any bank or financial institution and

d) to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary.

If an ARC carries on any business other than the business of asset reconstruction or securitisation or the business mentioned above, it shall cease to carry on any such business within one year of doing such other business.

Answer 6A(i)

According to Section 14 of the Insolvency and Bankruptcy Code, 2016 on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

1. The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.
2. Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.
3. Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002.
4. The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Further, "Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under section 7, 9 or section 10, as the case may be. [Section 5(12) of the Code]

On the basis of the above provisions the moratorium period will start from the date of acceptance of the application i.e. 14th February 2020 and hence the action taken by the company is invalid.

Answer 6A(ii)

Once foreign proceeding is recognized which is a foreign main proceeding, the following are the effects:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The effects provided by Article 20 of the UNCITRAL Law are not discretionary in nature. These flow automatically from recognition of the foreign main proceeding. The automatic effects under Article 21 apply only to main proceedings.

Answer 6A(iii)

Section 20 of the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 deals with Appeal to the Appellate Tribunal. It states that:

(1) Save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of 30 days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed :

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of 30 days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1) or under sub-section (1) of section 181 of the Insolvency and Bankruptcy Code, 2016, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within 6 months from the date of receipt of the appeal.

Deposit of amount of debt, on filling appeal

According to Section 21 of the Act, where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 50% of the amount of debt so due from him as determined by the Tribunal under section 19:

Provided that the Appellate Tribunal may, for reasons to be recorded in writing, reduce the amount to be deposited by such amount which shall not be less than 25% of the amount of such debt so due to be deposited under this section.

Answer 6A(iv)

Effective insolvency law systems have a number of aims and objectives. Systems should aspire to:

(i) integrate with a country's broader legal and commercial systems;

(ii) maximize the value of a firm's assets and recoveries by creditors;

(iii) provide for both efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors and reorganization of viable businesses;

(iv) strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one proceeding to another;

(v) provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;

(vi) provide for timely, efficient and impartial resolution of insolvencies;

(vii) prevent the improper use of the insolvency system;

(viii) prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;

(ix) provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;

(x) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and

(xi) Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

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