# GUIDELINE ANSWERS

## PROFESSIONAL PROGRAMME

**DECEMBER 2022**

**MODULE 2**

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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These answers have been written by competent persons and the Institute hope that the **GUIDELINE ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be updated with the applicable amendments which are as follows:

| **CS Examinations** | **Applicability of Amendments to Laws** |
|---|---|
| December Session | upto 31 May of that Calender year |
| June Session | upto 30 November of previous Calender Year |

## C O N T E N T S



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**PROFESSIONAL PROGRAMME EXAMINATION**

DECEMBER 2022

# SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

*Time allowed : 3 hours* *Maximum marks : 100*

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

**PART - I**

**Attempt all parts of either Q.No. 1 or Q.No. 1A**

**Question 1**

*(a) After passing of the Professional Examinations, A has applied in renowned Company Secretary Practicing Firm. He was selected for 21 months training and assigned Annual Filing relating work. He has successfully registered himself on portal of MCA. A approached his senior, as he is facing other issues during the filing. Being a Company Secretary, list out requirements to overcome common errors noticed in E-Filing for reference of A. (5 marks)*

*(b) M is a Manager in Nationalized Bank. During the investors' meet, it was desired by Senior Management that a presentation on Customer Due Diligence and Know Your Client be put up. Being a professional, prepare a note on Customer Due Diligence (CDD), Know Your Client (KYC) and its importance to assist M. (5 marks)*

*(c) ABC Ltd., whose registered office situated in Vadodara, Gujarat, is in process to acquire 100%, shareholding of an NBFC whose Bonds are listed on National Stock Exchange (NSE). As per information provided by NBFC, there are 5 series of Bonds, which were issued by NBFC in year 2013, 2014, 2017, 2019 and 2021 respectively. The term of each series is 10 years and fixed interest rate of 8.90% per annum. As ABC Ltd. is an unlisted public company, therefore, it desired from Practicing Company Secretary to provide Search and Status Report of Stock Exchanges. Explain the process of preparing the Search and Status Report of Stock Exchanges. What are the disclosure obligations of high value debt listed Companies with respect to Related Party Transactions as per circular issued by SEBI on January 07, 2022. (5 marks)*

*(d) Records Management provides a professional approach to caring for the records and archives which is governed by certain key concepts. Explain the concepts that govern the care of records and archives. (5 marks)*

**Answer 1(a)**

Following are the requirements needs to be embraced to overcome the common errors noticed during the E-filing:

- Digital signature is valid and duly registered;

- The size of the form is within permissible limits;
- The e-forms are duly verified before filing;
- Use of updated version of e-form;
- Payment of challan not done before the expiry date;
- Duplicate Payments have been made;
- Correct particulars filled in the e-form;
- Using newer/updated versions of Adobe and Java.

**Answer 1(b)**

KYC stands for 'Know Your Customer' or 'Know your Client'. This is a process to be followed by every professional, bank or financial & lending institution that involves obtaining requisite information about the identity and address of the customer. This process has been made compulsory for Bank by RBI before opening an account, to guarantee that there must not be any misuse of any service provided by the banks. As per the order by RBI, banks have to update the KYC details information at regular intervals depending on the risk of the profile of the customer.

"Customer Due Diligence (CDD)" means identifying and verifying the customer and the beneficial owner and CDD refers to the monitoring of clients and their activities to see if the client does not change its status over time. In effect this contains the possibility that an individual (or more often an organization) that has passed KYC is still the same as was declared earlier and is doing the same what was declared earlier when they underwent KYC checks.

For example changes in the signatory of the account, changes in the partners, changes in the object, changes in the source of income, revenue etc. Hence without CDD the services provider would not know that there is changes in the ownership.

Banks and Financial Institutions (FIs) have been advised by Reserve Bank of India to follow certain customer identification procedure for opening of accounts and monitor transactions of suspicious nature for the purpose of reporting the same to appropriate authority. These 'Know Your Customer' (KYC) guidelines have been revisited in the context of the recommendations made by the Financial Action Task Force (FATF) on Anti Money Laundering (AML) standards and on Combating Financing of Terrorism (CFT). Detailed guidelines based on the recommendations of FATF and the paper issued on Customer Due Diligence (CDD) for banks by the Basel Committee on Banking Supervision (BCBS), with suggestions wherever considered necessary, have been issued. Banks/FIs were advised to ensure that a proper policy framework on 'Know Your Customer' and Anti-Money Laundering measures is formulated and put in place with the approval of their Boards.

The importance of KYC is to stop the corporate vehicles to be used intentionally or unintentionally, by criminal elements for illicit purposes such as money laundering activities, Fraud, bribery and corruption, shielding assets from creditors, illicit tax practices, Market fraud, Terrorist Funding, avoiding future risk and the KYC related procedures also enable institution to better understand their customers and their financial dealings. This helps in managing associated risks prudently.

**Answer 1(c)**

While preparing the Search and Status Report regarding Stock Exchanges, it is important for the professionals to conduct due diligence of the documents available in public domain on the NSE and BSE website in relation to the listed companies procedure:

1. *Understanding purpose and objective* : The professional should understand the purpose and objective of the search. This may be done in consultation with the authority/person, who is engaged for conducting the search.

2. *Preparing checklist* : The checklist should contain list of information required to understand the company's business, listing details, board meetings, results calendar, corporate actions, financial results, shareholding data, pledge data, scheme of arrangement etc.

3. *Analysing all documents carefully* : This activity is important as it helps to analyse the nature of documents which are available on public domain with respect to listing details, corporate actions, public notices, financial resultants, XBRL, sustainability reports, disclosures, offer document etc.

4. *Verifying facts and confirm that the information is correct* : This activity is important to verify the legality of documents or information.

5. *Drafting of search and status report* : The final report that is made available to the prospective buyer/investor should comprise of all the pertinent observations based on available information. It should also contain all associated risks and liabilities along with strategies to deal with such issues which would help the prospective buyer / investor understand the pros and cons of the transaction.

As per SEBI Circular No.: SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/00000 00006 dated January 07, 2022), high value debt listed companies are also required to comply with circular no. SEBI/HO/CFD/CMD1/CIR/P/2021/662 dated November 22, 2021, which specified following disclosure obligations of listed entities in relation to Related Party Transactions with respect to specified securities:

a. Information to be reviewed by the Audit Committee for approval of RPT's;

b. Information to be provided to shareholders for consideration of RPTs and

c. Format for reporting of RPTs to the Stock Exchange.

**Answer 1(d)**

Records management provides a professional approach towards caring for records. The care of records and archives is governed by three key concepts:

(i) *Keeping together*

The records must be kept together according to the department / Section responsible for their creation or accumulation, in the original order established at the time of their creation. This gives them their 'evidential' nature and distinguishes them from other kinds of information. It is the basis for retrieving information from records. Knowing who created or used a record, and where, when and why, is

the key to retrieval rather than their format, subject matter or content. This is true for paper-based records as well as the electronic records.

(ii) *Ensure life cycle*

Every records follow a 'life-cycle', in that they are created, used for so long as they have continuing value and then disposed of by destruction or by transfer to an archival institution. Every record passes through three main phases, i.e. current phase, semi-current phase and non-current phase.

In the current phase, they are used regularly in the conduct of current business and maintained in their place of origin or in the file store of an associated records office or registry.

In the semi-current phase, they are used infrequently in the conduct of current business and are maintained in a records center.

In the non-current phase they are destroyed unless they have a continuing value which merits their preservation as archives in an archival institution. The effective management of records throughout this life-cycle is a key issue in record management.

(iii) *Record Preservation*

The care of records and archives is that the care should be exercised through a coherent and consistent range of actions from the development of record-keeping systems, through the creation and preservation of records to their use as archives.

The concept suggests that four actions continue or reappear throughout the life of a record: i.e., identification of records; intellectual control; provision of access; and physical control. The management of this continuum of actions provides the basis for a strategic approach to records management.

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

**Question 2**

*(a) "Compliance Chart is only key component of Corporate Compliance Framework." Explain.* *(5 marks)*

*(b) Explain how each of the following major frauds can be taken place in case of loans/ funds transactions :*

*(i) Shot gunning*

*(ii) Concealing Liabilities*

*(iii) Misstatement*

*(iv) Advances Portfolio Accounts*

*(v) Higher lag time.* *(5 marks)*

*(c) X and Y partners of a ZK LLP undertakes ₹ 2,50,000/- each in the total contribution of ` 5,00,000 of the firm. X transferred the amount of ₹2,75,000/- in ZK LLP's bank account as the contribution. Referring the relevant provisions of the Limited Liability Partnership (LLP) Act, 2008 answer each of the following :*

*(i) What will be the contribution of Y in the LLP ?*

*(ii) Explain how the contribution contributed by X will be treated ? (5 marks)*

*(d) X Ltd. requires the services of a qualified professional for valuation of its asset class "Securities or Financial Assets" as per the provisions of the Companies Act, 2013. P who is appearing in the professional examination of ICSI in December 2022, approaches the X Ltd. and offered his services on a subsequent date subject to passing of the professional examination on declaration of the result. Can P do so ? Explain in terms of the relevant provisions of the Companies Act, 2013 and related rules the eligibility of the professional to be engaged for such purpose. Also explain the term "Securities or Financial Assets".*

*(5 marks)*

***OR (Alternate Question to Q. No. 2)***

**Question 2A**

*(i) Your client based in Delhi plans to enter into Aviation sector. As a Company Secretary in Practice, list out the specific laws applicable to the Aviation sector.*

*(ii) What does the term documentation connote ? Name the 10'Cs which form the guiding principles of good documentation.*

*(iii) Prepare a note on pre-certification.*

*(iv) SEBI emphasizes Listed entity to address and resolve the grievances raised by stakeholders and investors. The basic aim of Annual investors' meet is to protect the interest of stakeholders and prospective investors. In view of this, Grievance Redressal Mechanism is mandated by the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Prepare a note on Grievance Redressal Mechanism.*

*(5 marks each)*

**Answer 2(a)**

The corporate compliance framework consists of three key components:

Compliance Chart, Compliance Advisory and Compliance Scorecard. The Compliance Chart is a vital part of the framework. The Chart mentions applicable Laws relating a business' operation. It explains how compliance risk mitigation activities are embedded in business processes. The Compliance Advisory mentions advice on compliances of applicable laws and effect of non-compliances. The third key component in the Corporate Compliance Framework is the Compliance Scoreboard which is a tool to analyses the position of an organization in compliance. The Compliance Chart provides an overview of the applicable local, state, central and international laws, regulations and standards relating to a business' operations.

The compliance chart also outlines how compliance risk mitigation activities are embedded in business processes. In other words, how compliance with the laws, regulations and standards is embedded and ensured. The compliance chart help business in meeting its compliance obligations towards the customers, regulators, shareholders and employees because it provides a centralize compliance information of the company on a single chart. The compliance chart also reflects the key activities and compliance calendar which is to be followed and performed by a business unit to manage its compliance risks.

**Answer 2(b)**

All these are the major frauds which takes place with the help of incomplete KYC:

(i) *Shot gunning* : It is one of the major fraud which takes place with the help of incomplete KYC and refers to multiple loans for the same property being obtained simultaneously for a total amount greatly in excess of the actual value of the property.

(ii) *Concealing Liabilities* : In this fraud borrowers conceal obligations such as mortgage loans on other properties or newly acquired credit card debts in order to reduce the amount of monthly debt declared on the loan application.

(iii) *Misstatement* : In this fraud overstating or understating the property's appraised value is deliberately done.

(iv) *Advances Portfolio Accounts* : Frauds related to the advances portfolio accounts form the largest share of the total amount involved in frauds in the Indian banking sector.

(v) *Higher lag time* : Delay in action by the Institutions for declaration of frauds resulting the borrower getting considerable time to erase the money.

**Answer 2(c)**

As per the provisions of Section 33 of Limited Liability Partnership Act, 2008, the obligation of a partner to contribute money or other property or other benefit or to perform services for a limited liability partnership shall be as per the limited liability partnership agreement. The contribution to the capital of LLP by each partner shall be as per the subscriber sheet being filed by the Company with the Registrar of Companies at the time of its Incorporation and it shall be mentioned in the LLP agreement filled with the Registrar of Companies.

If a partner contributes in excess of the obligation undertaken by him at the time of LLP incorporation then there are three ways to treat the excess amount:

*Option-1 :* The LLP shall refund the excess amount to the partner as soon as possible.

*Option-2* : File Form 3 and increase the total contribution of the firm within 30 days of its receipt.

*Option-3* : If option 1 and 2 has not been exercised, then excess amount shall be treated as loan from partner and such partner shall rank pari-passu to any other creditor of LLP.

(i) As both the partners X and Y undertakes Rs. 2,50,000/- each i.e. in equal proportion in the total contribution of Rs. 5 lakhs of the firm. The contribution of Y will be Rs. 2,50,000/- in LLP.

(ii) X contributed Rs. 2,75,000/- instead of Rs. 2,50,000/- in the LLP and hence Rs. 25,000/- will be treated as extra contribution paid by him in the LLP. The excess contribution will be treated in any of the three options mentioned above.

**Answer 2(d)**

A Company Secretary in practice is recognized to be registered valuer for the asset class "Securities or Financial Assets" under the Companies (Registered Valuer and Valuation) Rules, 2017.

*Meaning of term "Securities or Financial Assets":*

Where valuation is required to be made in respect of any property, stocks, shares, debentures, securities, or goodwill or any other assets or net worth of a company or its liabilities of a company under the provisions of Companies Act, 2013, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as prescribed under Section 247 of the Companies Act, 2013 read with Companies (Registered Valuers and Valuation) Rules, 2017.

Under Section 2(81) of the Companies Act, 2013, "securities" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956;

Under Section 2(l) of SARFAESI Act, 2002, "financial asset" means debt or receivables and includes—

i. a claim to any debt or receivables or part thereof, whether secured or unsecured; or
ii. any debt or receivables secured by, mortgage of, or charge on, immovable property; or
iii. a mortgage, charge, hypothecation or pledge of movable property; or
iv. any right or interest in the security, whether full or part underlying such debt or receivables; or
v. any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
   (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
   (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or
vi. any financial assistance.

To act as a Registered Valuer in the Securities or Financial Assets the person should be the member of the Institute of Chartered Accountants or the Institute of Cost Accountants of India or the Institute of Company Secretaries of India; or MBA / PGDBM specialization in finance or; Post Graduate Degree in Finance and should have at least three years of experience in the discipline. Further, the person needs to complete and pass the Valuation Specific Education Course as per syllabus specified under Rule 5 of the Companies (Registered Valuers and Valuation) Rules, 2017.

According to Rule 3 of the Companies (Registered Valuers and Valuation) Rules, 2017, a person is eligible to be a registered valuer if he/she-

(a) is a valuer member of a registered valuers organisation;

*Explanation* - For the purposes of this clause, "a valuer member" is a member registered valuers organisation who possesses the requisite educational qualifications and experience for being registered as a valuer;

(b) is recommended by the registered valuers organisation of which he is a valuer member for registration as a valuer;

(c) has passed the valuation examination under rule 5 within three years preceding the date of making an application for registration under rule 6;

(d) possesses the qualifications and experience as specified in rule 4;

(e) is not a minor;

(f) has not been declared to be of unsound mind;

(g) is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt;

(h) is a person resident in India;

(i) has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed; and

(k) is a fit and proper person.

In view of above provisions P is not eligible to act as the valuer because he does not possess requisite qualifications as Member of ICSI, Member of the registered valuer organization and a minimum of three years' experience in the discipline.Answer 2A(i)

**Answer 2A(i)**

Specific Laws applicable to the Aviation sector includes:

- Aircraft Act, 1934
- Aircraft Rules, 1937
- Aircraft Public (Health Rules), 1954
- Drones Rules, 2021
- Unlawful Seizure Against Safety of Civil Aviation, 1982
- Anti-hijacking Act, 1982
- Anti-hijacking (Amendment) Act, 1994
- Air corporations (Transfer of undertakings and Repeal) Act, 1994
- The Suppression of unlawful acts against safety of civil aviation Act, 1982
- The Suppression of unlawful acts against safety of civil aviation Rules, 1994
- Aircraft Security Rules,2011
- Tokyo Convention Act, 1975
- The Aircraft (Carriage of Dangerous Goods) Rules, 2003

- The Air Corporations Act, 1953
- The Airports Authority of India Act, 1994
- The Airports Authority of India (Amendment) Act, 2003
- The Carriage by Air Act (Amended), 2009

**Answer 2A(ii)**

The term documentation means any material that provides official information or evidence or that serves as a record and includes any and all forms of documentation recorded by a person in professional capacity in relation to his professional duties and includes written and electronic records, audio and video tapes, emails, facsimiles, images (photographs and diagrams), charts, checklists, communication books, managements reports, incident reports and working notes or any other type or form of documentation. Good documentation promotes good corporate governance practices, and compliance level of the company and also improves communication and dissemination of information between and across various stakeholders. These guiding principles support professionals, employers, policy makers and managers in assessment, planning, execution and evaluation. Also the good documentation practices and policies demonstrate the professional obligation, accountability and legal requirement to communicate and record client information and good secretarial practice.

The guiding principles for good documentation are as follows:

1. Clear
2. Concise
3. Complete
4. Contemporary
5. Consecutive
6. Correct
7. Comprehensive
8. Collaborative
9. Client Centric
10. Confidential.

**Answer 2A(iii)**

Pre-certification refers to the certification of correctness of any document by a professional including Company Secretary in Practice, before the same is filed with the Registrar in terms of the requirements of the Companies Act, 2013. Pre-certification was introduced to avoid registration delays and eventually evolved to check correctness of documents filed by professionals. The professional checks the correctness of the particulars stated in the prescribed forms and after due consideration of the provision of the Act and the Rules made thereunder. He also ensures that the particulars stated in

the form are in agreement with the books and records of the company. If he notices any defect or finds that the information provided in the form is incomplete or defective, he appropriately advices / provides guidance for completion of documentation / rectification of defect and makes pre-certification only after completion of documentation / rectification of such defects.

Pre-certification acts as a pre-emptive check to ensure that the particulars stated in the form or return are as per the books and records of the company and are true and correct. This would mean that the Registrar can rely on the certification of the Company Secretary in practice and may take the document on record without further examination. Thus, Pre-certification by a Company Secretary in practice ensures that no form or Return is filed in the Office of the Registrar of Companies which is defective or incomplete.

The introduction of pre-certification by an independent professional in the e-form is aimed at self-regulation of companies and to reduce the involvement of government machinery, i.e. the Registrar of Companies. Once an e-form has been pre-certified by a professional towards its authenticity based on the particulars contained in the books of accounts and records of the company, the same can be taken on record without further examination. If a professional gives a false certificate or omits any material information knowingly, he is liable for punishment under the provisions of the Act as well as liable for professional and / or other misconduct under the Company Secretaries Act, 1980.

**Answer 2A(iv)**

According to Regulation 13(3) of the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, which deals with the Grievance Redressal Mechanism, the listed entity shall:

1. Ensure that adequate steps are taken for expeditious redressal of investor complaints.
2. Ensure that it is registered on the SEBI Complaints Redress System (SCORES) platform or such other electronic platform or system of the Board as shall be mandated from time to time, in order to handle investor complaints electronically in the manner specified by the Board.
3. Shall file with the recognised stock exchange(s) on a quarterly basis, within twenty one days from the end of each quarter, a statement giving the number of investor complaints pending at the beginning of the quarter, those received during the quarter, disposed of during the quarter and those remaining unresolved at the end of the quarter.
4. The statement as specified in sub-regulation (3) shall be placed, on quarterly basis, before the board of directors of the listed entity.

**PART-II**

**Question 3**

*(a) There are various provisions in the Corporate Laws, where the material information is required to be disclosed. It serves the purpose of the law makers to bring the transparency and to protect the interest of stakeholders. In view of this, describe the concept of materiality. (5 marks)*

*(b) X, Y and Z are three partners in JK LLP, a firm of Practicing Company Secretaries. X holds 1% paid-up share capital in ABC Ltd. Y holds shares of nominal value of ₹70,000/- in ABC Ltd. Referring the provisions relating to ICSI Auditing Standards, advise whether JK LLP can be engaged for the Secretarial Audit of ABC Ltd.* *(5 marks)*

*(c) Explain "Statement of Confidentiality" in Peer Review in detail. Who is required to file it and what are the consequences of non-compliance in this regard ?* *(5 marks)*

**Answer 3(a)**

Materiality is a concept or convention within auditing and accounting relating to the importance/significance of an amount, transaction, or discrepancy in the records of the company. Materiality can be defined as the magnitude of an omission or misstatement of information that, in the light of surrounding circumstances, makes it probable that the judgement of a reasonable person relying on the information would have been changed or influenced by the said omission or misstatement. Materiality is the threshold above which missing or incorrect information is considered to have an impact on the decision making of the Auditor. Information is considered as material if its omission or misstatement could influence the opinion of the Auditor

The disclosure of important matters helps the users, stakeholders in taking business decisions and thus, there should be neither suppression of vital facts nor misstatements.

The significance of materiality may be enumerated as under:

- The concept of materiality plays a decisive role in the whole audit process. The user of the audit report does not require the absolute accuracy to take informed decisions.
- The concept of materiality should be considered by the auditor while determining the nature, timing and extent of audit procedures and evaluating the effects of the misstatements.
- Materiality consists of both quantitative and qualitative factors. Materiality is often considered in terms of monetary value but the inherent nature or characteristics of an item or group of items may also render a matter material.
- Materiality is a matter of professional judgement and depends on the auditor's interpretation of the user's needs. A matter can be judged material if knowledge of it is likely to influence the decisions of the intended users.
- Materiality is determined for planning purposes, evaluating the evidence obtained and the effect of identified instances of misstatements or non-compliances and for reporting the results of the audit work.

**Answer 3(b)**

**ICSI Auditing Standards - CSAS 1: Auditing Standards on Audit Engagement.**

Substantial Conflict of Interest means:

(1) Holding of more than 2% in the paid up share capital or shares of nominal value

of rupees fifty thousand, whichever is lower or more than 2% voting power, as the case may be, by the Auditor singly or along with partners, spouse, parent, sibling, and child of such person or of the spouse, any of whom is dependent financially on such person.

(2) Indebtedness of the Auditor for an amount exceeding rupees five lakh other than that arising out of ordinary course of business of the Auditee:

Provided that any indebtedness that may seriously impair his independence shall also be considered as substantial conflict of interest.

(3) Where an Auditor was in employment of the Auditee, its holding or subsidiary company and 2 (two) years have not lapsed from the date of cessation of employment, the same shall be considered as substantial conflict of interest.

In the given case, though X holds only 1% of the paid up share capital in ABC Ltd., but according to para 3.1 of CSAS-1, he is having a substantial conflict of interest in ABC Ltd. as his partner Y is having a share capital of nominal value 70,000/- i.e, more than 50,000 in ABC Ltd. and therefore JK LLP is not eligible to become Secretarial Auditor of ABC Ltd.

**Answer 3(c)**

The process of Peer Review requires high level of integrity on the part of the Peer Reviewer and any Qualified Assistant who may assist him during the Review. The Board has prescribed a Statement of Confidentiality for this purpose. Before accepting to undertake a Peer Review, the Reviewer and any other Authorised Assistant who may assist him in the Peer Review, are required to sign this Statement of Confidentiality and shall send the same to the Peer Review Board.

This statement of confidentiality is to be filled in by the persons who are responsible for the conduct of Peer Review i.e., Reviewers, Qualified Assistant(s), members of the Committee and others who assist them, individually. The Reviewer shall be responsible for taking this undertaking from the Qualified Assistant(s) who assist him or are likely to assist him in conducting Peer Reviews, and shall send the same to the Committee. This statement of Confidentiality should be filed by the Reviewer with the Peer Review Committee whenever a new Peer Review assignment is undertaken.

Those persons subject to the secrecy provision:

1. shall at all times after their appointment preserve and aid in preserving secrecy with regard to any matter coming to their knowledge in the performance or in assisting in the performance of any function, directly or indirectly related to the process and conduct of Peer Review.

2. shall not at any time communicate any such matter to any other person; and

3. shall not at any time permit any other person to have any access to any record, document or any other material, if any, which is in their possession or under their control by virtue of their being or having been so appointed or their having performed or having assisted any other person in the performance of such a function.

Non-compliance with the secrecy provisions in the above clause shall amount to professional misconduct as defined under Section 22 of the Company Secretaries Act, 1980.

**Question 4**

*(a) What types of information with respect to 'Maintenance of Professional Skills and Standards' are sought by Quality Review Board during the peer review of Practicing Company Secretary/Firm. (3 marks)*

*(b) LMP Ltd. asks you as a Company Secretary to suggest an audit and explain objectives as well as its dimensions of the process in order to protect the sensitive data and intellectual property and also protection of networks to which multiple information resource are connected. (3 marks)*

*(c) What are the documents required for application for compounding under Foreign Exchange Management Act (FEMA), 1999 ? (3 marks)*

*(d) What are the special events which are required to be reported under Secretarial Audit Report ? (3 marks)*

*(e) Can a Company Secretary be appointed as an Internal Auditor of the Company? Explain the role of Internal Auditor. (3 marks)*

**Answer 4(a)**

**Maintenance of Professional Skills and Standards**

- Whether any partner/employee/associate of the Practice Unit (PU) who is a member of the Institute has received any order under Chapter V of the Institute of Company Secretaries Act, 1980 for Misconduct. If so, details thereof.
- Does the PU mandate that all Company Secretaries employed by it comply with the Guidelines for Compulsory Attendance of Professional Development Programmes by the Members issued by the ICSI?
- Is there an in-house mechanism for continuing professional education?
- Does the PU monitor the continuing professional education by way of maintaining records thereof?
- Does the PU sponsor the Company Secretaries appointed by it for various Professional Development Programmes organized by ICSI and other professional bodies?
- Does the PU maintain a repository/library/e-library containing case studies, Journals, magazines, books of interest, etc. for reference?

**Answer 4(b)**

Cyber security is an attempt to minimising any risk of financial loss, disruption or damage to the reputation of an organisation that may arise from the failure of its information technology systems. The objective of the cyber audit is to provide an assessment of the operating effectiveness of cyber security policies and procedures, identify, protect, detect, respond and recover processes and activities to the board. The Cyber audit program

generally covers sub-processes such as asset management, awareness training, data security, resource planning, recovery planning and communications, in order to identify internal control and regulatory deficiencies that could put the organization at risk.

Dimension of Cyber Security Audit Process are as under:

*Management:*

Management of the Company ultimately owns the risk of the decisions made for the organization. Therefore, it has a vested interest in ensuring that cyber security controls exist and are operating effectively. Decisions are typically made based on guidance received during the risk management processes, for taking appropriate decisions.

*Risk Management:*

Risk assessments are typically made based on guidance from the Cyber Security Officer at an organization and enterprise management to make decisions, employing risk management processes. The objective in any risk assessment is twofold. First, it is critical to communicate the state of the risk so that it is easy to understand and be clear on the level of risk involved. Secondly and significantly the ways in which to address that risk must be identified as well. This provides both problem and solution, and mitigates the negative impact of that risk to an enterprise. It is important to have defined processes, trained and competent cyber security resources, and a governance framework to ensure that appropriate actions are carried out by enterprise leadership and managed effectively to address current and emerging cyber security threats.

*Internal Audit:*

Internal auditors and risk management professionals have key roles to play, as does enterprise management. Cyber Auditing is a security measure not an inconvenience. It is critical to protecting an enterprise in today's global digital economy. The internal audit department plays a vital role in cyber security auditing in many organizations, and often has a dotted-line reporting relationship to the audit committee to ensure that an independent view is communicated at the board level of the enterprise.

**Answer 4(c)**

Compounding refers to the process of voluntarily admitting the contravention, pleading guilty and seeking redressal. The Reserve Bank of India is empowered to compound any contravention as defined under section 13 of FEMA, 1999 except the contravention under section 3(a) for a specified sum after offering an opportunity of personal hearing to the contravener. The documents prescribed are given below:

1. The application having details of applicant, nature of contravention and facts of the cases;
2. The details of irregularities whether relating to Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office/ Liaison Office, as applicable;
3. Undertaking that the applicant is not under investigation of any agency such as DOE, CBI, etc. in order to complete the compounding process within the time frame;
4. Mandate and details of their bank account.

**Answer 4(d)**

**Reporting of Specific Event under Secretarial Audit Report**

The Secretarial Auditor should report all events/actions having major bearing on Company's affairs/Governance in pursuance of the applicable laws, rules, regulations, guidelines, standards, etc. An event/action that may be considered having major bearing on Company's affairs includes the following:

- Events/actions altering the charter documents of the Company. Changes in the Capital structure of the company.
- Change in the affairs/management of the company.
- Change in the licensing or permission for the business operation of the company.
- Capacity expansion and utilization of the company.
- Sale/ Disposing of the substantial assets of the company.
- Entering in to Joint ventures agreements etc.

**Answer 4(e)**

The provisions of Companies Act, 2013 provides that an internal auditor appointed under section 138 shall either be a Chartered Accountant or a Cost Accountant, or such other professional (including Company Secretaries) as may be decided by the board to conduct internal audit of the functions and activities of the company. Thus, a Company Secretary can be appointed as an Internal Auditor of a Company.

The internal auditor should focus towards improving the internal control structure and promoting better corporate governance. The role of the internal auditor encompasses:

- Evaluation of the efficiency and effectiveness of controls;
- Recommending new controls where needed or unnecessary controls discontinuing;
- Using control frameworks;
- Developing controlled self-assessment techniques.

**Question 5**

*(a) The Board of Directors of ATP Ltd. authorized its one of the Directors X to appoint Secretarial Auditor of the Company. Can X do so as per the provisions of the Companies Act, 2013 ? Also explain pre-engagement meeting in the Audit Engagement Process. (5 marks)*

*(b) Z Ltd. is a listed Company, in pharma sector. During the Covid-19, for expansion, it acquired M Ltd., which is an unlisted Company. The medicine in Highly demand named 'ROLO' was produced by M Ltd. in large quantity. During the investigation, it was found that there was big scam, where the merged entity has given huge incentives amounting ₹2000 Crore approximately to medical professionals for recommending the ROLO. The government has also constituted a special*

*committee to report on the same. A Company Secretary firm was engaged to report on fraud. In view of this type of cases, what other types of transactions to be noticed under the term of 'Fraud'. Who is considered as an Auditor for fraud reporting ? (5 marks)*

*(c) How would you identify the events having major bearing on affairs of the Company during secretarial audit ? (5 marks)*

**Answer 5(a)**

Section 179(3)(k) of Companies Act, 2013 read with Rule 8(4) of Companies (Meeting of Board and its Powers) Rules, 2014 requires that the Internal Auditor and Secretarial Auditor of the company shall be appointed by passing a resolution at a duly convened meeting of the Board. Therefore, the appointment of Internal Auditor/Secretarial Auditor cannot be made by passing a resolution by circulation.

Further, the said appointment cannot be made by Key Managerial Personnel or Senior Management, even if authorised by the Board in this regard.

In view of above, X cannot appoint the Secretarial Auditor of ATP Ltd. even if authorised by the Board in this regard.

*Pre-Engagement Meeting in the Audit Engagement Process:*

Before accepting the Audit Engagement, the Auditor should have a pre- engagement meeting with the Auditee. The meeting may inter-alia include discussion about the terms of engagement, prior year audit findings and conclusions, appropriateness of reporting framework, understanding Auditee's business operations and environment including internal control system, commercial terms of the audit and the timelines and milestones, if any, for conducting the Audit and submission of the Audit Report. Auditor shall disclose in the pre- engagement meeting conflict of interest, if any, with the Auditee.

The Auditor shall be under Confidentiality obligation with respect to the information obtained during the pre-engagement meeting.

**Answer 5(b)**

Transaction which may involve the fraud:

In the past, "Fraud" has been noticed in many cases of scams in the following kinds of transactions:-

- Related Party Transactions;
- Excessive Managerial remuneration;
- Insider Trading;
- Inter Company transactions;
- Mergers/demergers/acquisitions;
- IPO frauds etc.

Other means of Corporate fraud are the inadequate disclosures, false or misleading

information, theft of assets, false expenses, corruption, theft in formation, fraudulent applications, misuse of assets, dishonest business partners, fraudulent billing.

These areas are not exhaustive but only some examples are given so as to guide fraud detection.

*Who is considered as an Auditor for Fraud Reporting?*

The auditor includes the:

- Statutory Auditors of the company appointed under section 139 of the Companies Act, 2013,
- Company Secretary in Practice conducting Secretarial Audit under section 204 of the Companies Act, 2013,
- Cost Accountant in practice conducting Cost Audit under section 148 of the Companies Act, 2013 and the Branch Auditors referred to in section 143(8) of the Companies Act, 2013.

However, the Internal Auditor or such other professionals appointed under any other statutes rendering other services to the company such as a tax auditor appointed under Income Tax Act, GST auditors appointed under the respective GST legislations are not covered under section 143 of the Companies Act, 2013.

**Answer 5(c)**

The Auditor should identify and report all events/actions having major bearing on the Company's affairs/ Governance in pursuance of the applicable laws, rules, regulations, guidelines, standards, etc. all information which have bearing on performance/operation of the company or is price sensitive or affect payment of interest or dividend of non-convertible preference shares or redemption of non-convertible debt securities or redeemable preference shares etc.

An event/action may be considered as having major bearing on Company's affairs includes the following situations:

a) Events/actions altering the Incorporation documents of the Company

b) Changes in the capital structure of the company.

c) Change in the affairs/management of the company.

d) Change in the licensing or permission for the business operations of the company.

e) Capacity expansion and utilization of the company.

f) Sale/Disposing of the substantial assets of the company.

g) Entering in to Joint ventures agreements etc.

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

**Question 6**

*(a) Objectivity is essential for any Secretarial Auditor in exercising professional*

*judgement during the audit. In light of above statement, explain the term objectivity and various threats to Auditor's Objectivity in detail.*

*(b) Describe various heads of Due Diligence of Competition Law.*

*(c) J Ltd., having paid up capital of ₹ 150 crore and turnover of ₹ 1000 crore, has appointed a Company Secretary in Practice to carry out its Audit as per provisions of the Companies Act, 2013. Name the applicable Secretarial Auditing Standard and explain in detail with respect to Forming of Opinion and Third Party Report or Opinion (including the situation(s) requiring Third Party Report) as per the applicable Standard. (5 marks each)*

***OR (Alternate Question to Q. No. 6)***

**Question 6A**

*(i) A Practicing Company Secretary Firm, while submitting its Secretarial Audit Report, observed that there are lot of non-compliances of the provisions of the Companies Act, 2013. In view of this, explain the process for reporting with qualification. Also brief about the signing of Secretarial Audit Report.*

*(ii) What do you mean by the term Non-Disclosure Agreement (NDA) ? Explain its functions and content.*

*(iii) Explain the role of an Internal Audit in the internal control mechanism of a company.*

*(5 marks each)*

**Answer 6(a)**

The Auditor must remain objective throughout the whole audit process, such that his integrity must not allow any malpractice in the audit process. Objectivity is essential for any professional person exercising professional judgment. Objectivity is the state of mind which has regard to all considerations relevant to the task in hand. It is sometimes described as 'Independence of Mind'. The need for objectivity is particularly evident in the case of the Auditor for carrying out an audit or some other reporting roles where their professional opinions can affect rights between parties and the decisions they take.

Threats to objectivity can arise in a number of ways, some general in nature and some related to the specific circumstances of an assignment or role. Auditor should identify the threats and consider them in the light of the environment in which he is working; he should also take into account the safeguards which assist them to withstand threats and risks to their objectivity.

The easiest way of avoiding such threats would be for Auditor to decline to act in any circumstance where the slightest threat to objectivity might exist.

Threats to objectivity might include the following:

- *Self-interest threat* : A threat to the Auditor's objectivity stemming from a financial or other self-interest conflict. This could arise, for example, from a direct or indirect interest in Auditee or from a fear of losing an audit work.
- *Self-review threat* : The apparent difficulty of maintaining objectivity and conducting

what is effectively a self-review, if any product or judgement of a previous audit assignment or a non-audit assignment needs to be challenged or re-evaluated in reaching audit conclusions.

- *Advocacy threat* : There is an apparent threat to the Auditor's objectivity, if he becomes an advocate for (or against) the Auditee's position in any adversarial proceedings or situations. Whenever the Auditor takes a strongly proactive stance on the Auditee's behalf, this may appear to be incompatible with the special objectivity that audit requires.
- *Familiarity or trust threat* : A threat that the Auditor may become over-influenced by the personality and qualities of the Directors and Management, and consequently too sympathetic to their interest.
- *Intimidation threat* : The possibility that the Auditor may become intimidated by threat, by dominating personality, or by other pressures, actual or feared, by a director or manager or by some other party.

**Answer 6(b)**

Due diligence of competition law may be made under the following heads:

1. Due diligence of various agreements (both existing and proposed)
2. Due diligence on dominance and its likely abuse if any, (existing)
3. Due diligence on combinations (i.e. effect of proposed mergers & Acquisition)

1. Due Diligence of various agreements includes:
   - Agreements relating to production, supply and distribution of goods or services.
   - Agreement if any with competitor relating to production, marketing or bidding, price etc.
   - Agreements with customers and distributors.
   - Purchase agreements.
   - Non-compete covenants.
   - Technology transfer/technical know-how agreements.
   - Concession agreements
2. Due diligence on abuse of dominance, if any includes:
   - Examination as to the existence of dominance.
   - Examination of relevant market, whether product or geographical Areas.
   - Cases of abuse if any.
3. Due diligence on regulation of combinations:

   The following aspects are to be analysed during due diligence process:
   - Nature of combination.
   - Acquisition of share, voting rights, assets or control or merger/amalgamation etc.
   - Examination of total value of Assets or Turnover and the valuation methodology.

- Status of merger notification to be filed with CCI.
- Status of dominance after merger.

**Answer 6(c)**

**CSAS-3** : Auditing Standard on Forming of Opinion is applicable to Auditor while carrying out Audit under the Companies Act, 2013 or SEBI Act, 1992 or any other law for the time being in force. This Standard deals with the basis and manner for forming Auditor's opinion on subject matter of the audit.

*Process for forming of opinion:*

Forming of opinion based on the audit observations which is an important part of any audit as through this process the outcome of audit are presented in the form of Audit Report to the intended users. Audit inter alia involves reporting compliance of or deviations from the applicable laws. The Auditor shall consider Materiality while forming his opinion and adhere to:

a) The principle of completeness that requires the Auditor to consider all relevant Audit Evidence before issuing a report;

b) The principle of objectivity that requires the Auditor to apply professional judgment and scepticism in order to ensure that all reports are factually correct and that findings or conclusions are presented in a relevant and appropriate manner;

c) The principle of timeliness that implies preparing the report in due time; and

d) The principle of a contradictory process that implies checking the accuracy of facts and incorporating responses from concerned persons. Judgment, Clarification and Conflicting Interpretation.

The Auditor may consider various judgments, clarifications, opinion, conflicting interpretations while framing the opinion to the best of his professional acumen.

*Third Party Report or Opinion*

Sometimes due to circumstances like geographical constraints or want of expertise an Auditor may be required to rely on the third party reports and third party reports may sometime also be arranged by the Auditee.

The Auditor shall adhere to the following while forming an opinion based on Third Party reports or opinions:

a) The Auditor shall indicate the fact of use of Third Party report or opinion and shall also record the circumstances necessitating the use of third party report or opinion;

b) The Auditor shall indicate the fact if Third Party report or opinion is provided by the Auditee;

c) The Auditor shall consider the important findings/ observation of Third Party;

d) The Auditor shall, if necessary and feasible, carry out a supplemental test to check veracity of the Third Party report or opinion.

**Answer 6A(i)**

**Reporting with Qualification**

1. A qualification, reservation or adverse remarks, if any, should be stated by the auditor at the relevant places in his report in bold type or in italics.
2. If the auditor is unable to express an opinion on any matter, he should mention that he is unable to express an opinion on that matter and the reasons therefor.
3. If the scope of work required to be performed is restricted on account of restrictions imposed by the company or on account of circumstantial limitations (like certain books or papers being in the custody of another person who is not available or a government authority), the report should indicate such limitations.
4. If such limitations are so material that the Auditor is unable to express any opinion, the Auditor should state that in the absence of necessary information and records, he is unable to report on compliance(s) relating to such areas by the Company.

Further, the Board of directors, in its report prepared under section 134(3) of the Companies Act, 2013, shall provide and explanation in full on any qualification or observation or other remarks made by the Company Secretary in practice in the secretarial audit report.

**Signing of Audit Report**

The auditor's signature is either in the name of the audit firm, the personal name of the auditor or both, as appropriate for the particular jurisdiction. In addition to in certain the auditor's signature, in jurisdictions, the auditor may be required to declare in the auditor's report the auditor's professional accountancy designation or the fact that the auditor or firm, as appropriate, has been recognized by the appropriate licensing authority in that jurisdiction.

However, in case of secretarial audit report the report should be signed by the secretarial auditor who conducted or under whose supervision the secretarial audit was conducted indicating his FCS/ACS number along with certificate of practice number issued by the Institute of Company Secretaries of India.

In case of PCS firm, the secretarial audit report may be signed by the partner who conducted or under whose supervision the secretarial audit was conducted indicating his FCS/ACS number along with his certificate of practice number. The secretarial audit report cannot be signed by an employee of the PCS firm even if he/she may be a member of the ICSI holding certificate of practice number.

As per Peer Review Guidelines of the ICSI, it is mandatory to mention the Peer Review Certificate Number in Secretarial Audit Report/Annual Secretarial Compliance Report and the signature of the PCS should be in following format

For XYZ & Associates

Company Secretaries Name ……

FCS ……..

Date: …… CP …..…….....

Place: …….. PR .....

**Answer 6A(ii)**

Non-Disclosure Agreements (NDAs) are common in business, as it provides a safeguard to protect trade secrets and other confidential information which are meant to be kept under wraps. Information commonly protected by NDAs might include research & development activities, innovations for a new product, client information, sales and marketing plans, or a unique manufacturing process. The non-disclosure agreement ensures that the business secrets will stay underground, and in case of any failure, the company is eligible to have legal recourse and to sue for damages.

The agreement explicitly spells out that the person receiving the information need to keep the same as secret and have limited use for the purpose it has been provided by the company. This means it will be considered as breach of agreement, when it encourages others to breach it, or allow others to access the confidential information through improper or unconventional methods. A non-disclosure agreement is defined as a legally enforceable contract that creates a confidential relationship between a person who holds some kind of trade secret and a person to whom the secret will be disclosed.

The Confidentiality agreements typically serve three key functions:

- To protect sensitive information. By signing an NDA, participants promise to not divulge or release information shared with them by the other people involved. If the information is leaked, the injured person can claim breach of contract.
- In the case of new product or concept development, a confidentiality agreement can help the inventor keep patent rights. In many cases, public disclosure of a new invention can void patent rights. A properly drafted NDA can help the original creator hold onto the rights to a product or idea.
- Confidentiality agreements and NDAs expressly outline what information is private and what's fair game. In many cases, the agreement serves as a document that classifies exclusive and confidential information.

Content of the Non-Disclosure Agreements:

- Definitions and exclusions of confidential information;

  Definitions of confidential information spell out the categories or types of information covered by the agreement. This specific element serves to establish the rules-or subject/consideration-of the contract without actually releasing the precise information.
- Obligations from all involved people or parties; and time periods.

  At the same time, nondisclosure agreements often exclude some information from protection. Exclusions might comprise information already considered common knowledge or data collected before the agreement was signed.

**Answer 6A(iii)**

Internal Audit is a vital constituent of internal control mechanism. It is important to constitute and maintain an audit committee that shall provide assistance to the board of directors in fulfilling their oversight responsibility to the shareholders relating to:

a) The integrity of the financial statements and the financial reporting process and principles;

b) Internal controls;

c) The qualifications, independence, remuneration, and performance of the independent auditors;

d) Staffing, focus, scope, performance, and effectiveness of the internal audit function;

e) Risk management; and

f) Compliance with legal, regulatory, and corporate governance requirements.

The board defines clearly the roles and responsibilities of the audit committee. Management however, has primary responsibility for financial statements and reporting process, internal controls, legal and regulatory compliance and risk management.

The internal auditor should examine and contribute to the ongoing effectiveness of the internal control system through evaluation and recommendations. However, the internal auditor is not vested with management's primary responsibility for designing, implementing, maintaining and documenting internal control. Internal audit functions add value to an organization's internal control system by bringing a systematic, disciplined approach to the evaluation of risk and by making recommendations to strengthen the effectiveness of risk management efforts.

The internal auditor should focus towards improving the internal control structure and promoting better corporate governance. The role of the internal auditor encompasses:

- Evaluation of the efficiency and effectiveness of controls;
- Recommending new controls where needed or discontinuing unnecessary controls;
- Using control frameworks;
- Developing Control self-assessment.

***

# CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING-UP

*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 I

**Question 1**

*(a) A Ltd. is engaged in the business of manufacturing designer clothes. Due to lower demand during the COVID-19 period, the company started facing financial difficulties. The company has a consortium of 9 lenders out of which 5 lenders have provided term loan and remaining lenders have provided working capital loan. The operating margin of the company is continuously shrinking and the collections from the debtors are also not within the due dates. The company is facing severe financial crisis and finding it difficult to honour its debt commitments. Explain the restructuring options available with the company to deal with the situation. (5 marks)*

*(b) Discuss the obligations of Merchant Banker under SEBI (Buy-back of Securities) Regulations, 2018. (5 marks)*

*(c) Regardless of their category or structure, all mergers and acquisitions have one common goal – 'they are all meant to create synergy that makes the value of the combined companies greater than the sum of the two parts'. Comment. (5 marks)*

*(d) Plasma Ltd. is contemplating making an open offer to acquire shares of Tic Toc Ltd. Director of Plasma Ltd. has approached you to understand that in the event of non-fulfilment of obligations under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (or Takeover Regulations) by the Company, can SEBI direct the manager to the open offer to forfeit the escrow account or any amounts lying in the escrow account, either in full or in part ? If yes, whether the amount lying in the escrow account can be released ? (5 marks)*

**Answer 1(a)**

In the given situation, the company is faced with financial crisis and is looking for options for Corporate Restructuring. Corporate financial restructuring is any substantial change in a company's financial structure, or ownership or control, or business portfolio designed to increase the value of the firm i.e., debt and equity restructuring.

Internal reconstruction of a company is the simplest form of financial restructuring. Under this various liabilities are reduced after negotiating with various stakeholders such as banks, financial institutions, creditors, debenture holders and shareholders. It deals with the restructuring of capital base and raising finance for new projects.

One of the options available with the company is debt restructuring.

*Debt Restructuring*

It involves reduction of debt and an extension of payment terms or change in terms and conditions, which is less expensive. It is nothing but negotiating with bankers, creditors, vendors. It is the process of reorganizing the whole debt capital of the company. It involves the reshuffling of the balance sheet items as it contains the debt obligation of the company. Debt restructuring can be achieved in the following ways:

1) Restructuring of the secured long-term borrowing for improving liquidity and increasing the cash flows for a sick company and reducing the cost of capital for healthy companies. Restructuring of the unsecured long-term borrowings.

2) Restructuring of the long-term unsecured borrowings can be in form of public deposits and/or private loans (unsecured) and privately placed, unsecured bonds or debentures.

3) Restructuring of other short-term borrowings: the borrowings that are very short in nature arc generally not restructured these can indeed be renegotiated with new terms. These types of short- term borrowings include inter-corporate deposits clean bills & clean overdraft.

4) Best method for corporate debt restructuring is Debt-equity swap. In the case of a debt-equity swap, specified shareholders have right to exchange stock for a predetermined amount of debt (i.e. bonds) in the same company. In debt-equity swap debt /bonds are exchanged with shares/stock of the company.

Considering the above, debt restructuring is a viable option that the company may pursue.

**Answer 1(b)**

As per Regulation 25 of SEBI (Buy-Back of Securities) Regulations, 2018, the obligations of Merchant Banker include ensuing the following:

a. the company is able to implement the offer

b. the provision relating to escrow account has been complied with

c. firm arrangements for monies for payment to fulfil the obligations under the offer are in place

d. the public announcement of buy-back is made and the letter of offer has been filed in terms of the Regulations.

e. the merchant banker should furnish to SEBI, a due diligence certificate which should accompany the draft letter of offer

f. the merchant banker should ensure that the contents of the public announcement of offer as well as the letter of offer are true. fair and adequate and quoting the source wherever necessary

g. the merchant banker should ensure compliance of Section 68, 69 and 70 of the Companies Act. and any other applicable laws or rules in this regard has been made

h. upon fulfilment of all obligations by the company under the Regulations, the merchant banker should inform the bank with whom the escrow or special amount has been deposited to release the balance amount to the company and send a final report to SEBI in the specified form, within 15 days from the date of expiry of the buy-back period.

**Answer 1(c)**

Mergers and acquisitions can have multifarious goals however arriving at a synergy that makes the combined value of the merged entity much higher than those of individual entities is always a target. The success of a merger or acquisition depends on whether the planned synergy is achieved or not. Synergy may take the form of revenue enhancement or cost savings or some other form which benefits the companies. By merging, the companies hope to benefit from the following:

1) *Becoming bigge*r : Many companies use M&A to grow in size and compete their rivals. While it can take years or decades to double the size of a company through organic growth, this can be achieved much more rapidly through mergers or acquisitions.

2) *Pre-empted competition* : This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles.

3) *Domination* : Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would have to face regulatory authorities.

4) *Tax benefits* : Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive.

5) *Economies of scale* : Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increased total output of a product.

6) *Acquiring new technology* : To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.

7) *Improved market reach and industry visibility* : Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.

**Answer 1(d)**

As per the provisions of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, the manager to the open offer shall not release the escrow account until the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, save and except for transfer of funds to the special escrow account as required under regulation 21 of the Takeover Regulations.

In the event of non-fulfilment of obligations under the Takeover Regulations, by the acquirer SEBI may direct the manager to the open offer to forfeit the escrow account or any amounts lying in the special escrow account either in full or in part.

The escrow account deposited with the bank in cash shall be released only in the following manner:

- the entire amount to the acquirer upon withdrawal of offer in terms of regulation 23 of the Takeover Regulations as certified by the manager to the open offer;
- for transfer of an amount not exceeding ninety per cent of the escrow account, to the special escrow account in accordance with regulation 21 of the Takeover Regulations;
- to the acquirer, the balance of the escrow account after transfer of cash to the special escrow account on the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer;
- the entire amount to the acquirer upon the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer upon certification by the manager to the open offer, where the open offer is for exchange of shares or other secured instruments;
- the entire amount to the manager to the open offer, in the event of forfeiture for non-fulfilment of any of the obligations under these regulations;
- for distribution in the following manner after deduction of expenses, if any, of registered market intermediaries associated with the open offer-
  (a) one third of the escrow account to the target company;
  (b) one third of the escrow account to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations; and
  (c) one third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open offer.

Accordingly, SEBI may direct the manager to the offer to forfeit the escrow account and the funds may be released in the circumstances mentioned above.

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

**Question 2**

*(a) Zoom Ltd. engaged in the business of software development is contemplating raising finance through ECB route. Explain different variants of ECB and the tenure for which the ECB can be raised to the Company Secretary of the Company. (5 marks)*

*(b) Approval of the National Company Law Tribunal in relation to a scheme of arrangement involving merger is a conclusive proof that the merger has become successful and will yield desired results. Examine the statement. (5 marks)*

*(c) Briefly describe the methods which are used for valuation of intangible assets.* *(5 marks)*

***OR (Alternate question to Q. No. 2)***

**Question 2A**

*(i) Kiran is a recently qualified lawyer who intends to appear before the National Company Law Tribunal (NCLT). Advise her on basic principles that shall be kept in mind while drafting of applications and petitions before NCLT.*

*(ii) Explain the term 'Economic Value Added'. Consider the facts below and determine whether the company is creating wealth or destroying wealth ?*

| | |
|---|---|
| *Weighted average cost of capital* | *16.30%* |
| *Tax rate* | *33%* |
| *EBIT margin* | *20%* |
| *Market value of capital* | *₹ 3,75,00,000* |
| *Operating profit before taxes* | *₹ 85,00,000* |

*(iii) Prepare a specimen disclosure to be made in accordance with Regulation 6(3) of SEBI (Issue of Sweat Equity Shares) Regulations, 2002. Suitable assumptions may be taken.*

*(5 marks each)*

**Answer 2(a)**

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity etc.

Minimum Average Maturity Period of ECB are as under:

- ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year-1 year
- ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans- 5 Years
- ECB raised for Working capital purposes or general corporate purposes and on-lending by NBFCs for working capital purposes or general corporate purposes-10 years
- ECB raised for repayment of Rupee loans availed domestically for capital expenditure and on-lending by NBFCs for the same purpose-7 years

ECBs can be raised as:

1. Loans. e.g., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g.
   (a) Securitized instruments (e g. floating rate notes / fixed rate bonds / non-convertible. optionally convertible or partially convertible preference shares/ debentures

(b) FCCB

(c) FCEB

3. Buyers' credit / suppliers' credit.
4. Financial lease.

However, ECB framework is not applicable in respect of the investment in non-convertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

**Answer 2(b)**

Approval of National Company Law Tribunal (NCLT) is a pre requisite for schemes of Mergers. However, a Merger cannot be said to be completely successful only upon approval of the scheme of arrangement by NCLT. The factors which are required to measure the success of any merger are briefly discussed below:

a) The earning performance of the merged company can be measured by return on total assets and return on net worth. It has been found that the probability of success or failure in economic benefits was very high among concentric mergers. Simple vertical and horizontal mergers were found successful whereas the performance of concentric mergers was in between these two extremes i.e. failure and success.

b) Whether the merged company yields larger net profit than before, or a higher return on total funds employed or the merged company is able to sustain the increase in earnings.

c) The capitalisation of the merged company determines its success or failure. Similarly, dividend rate and pay-outs also determines its success or failure.

d) Whether merged company is creating a larger business organisation which survives and provides a basis for growth.

e) Comparison of the performance of the merged company with the performance of similar sized company in the same business in respect of (i) sales, (ii) assets, (iii) net profit, (iv) earnings per share and (v) market price of share. In general, growth in profit, dividend pay outs, company's history, and increase in size provides base for future growth and are also the factors which help in determining the success or failure of a merged company.

f) Fair market value is one of the valuation criteria for measuring the success of post-merger company. Fair market value is understood as the value in the hands between a willing buyer and willing seller, each having reasonable knowledge of all pertinent facts and neither being under pressure or compulsion to buy or sell. Such valuation is generally made in pre-merger cases.

g) In valuing the whole enterprise, one must seek financial data of comparable companies in order to determine ratios that can be used to give an indication of the company position. The data is analyzed to estimate reasonable future earnings for the subject company. The following information must be made available and analyzed for post-merger valuation:

   i. All year-end balance sheets and income statements, preferably audited, for a period of five years and the remaining period up to the valuation date.

ii. All accounting control information relating to the inventory, sales, cost, and profit contribution by product line or other segment; property cost and depreciation records: executives and managerial compensation; and corporate structure.

iii. All records of patents, trademarks, contracts, or other agreements.

iv. A history of the company, including all subsidiaries.

Analysis of these items provides data upon which forecasts of earnings, cash flow, etc. can be made.

h) Gains to shareholders have so far been measured in terms of increase or decrease in share prices of the merged company. However, share prices are influenced by many factors other than the performance results of a company. Hence, this cannot be taken in isolation as a single factor to measure the success or failure of a merged company.

i) In some mergers there is not only increase in the size of the merged or amalgamated company in regard to capital base and market segments but also in its sources and resources which enable it to optimize its end earnings.

j) In addition to the above factors, a more specific consideration is required to be given to factors like improved debtors realisation, reduction in non-performing assets, improvement due to economies of large scale production and application of superior management in sources and resources available relating to finance, labour and materials.

Accordingly, the statement is does not appear to be correct.

**Answer 2(c)**

There are various methods for valuation of intangible assets such as human resources, technical know- how, patents, copyright, brands etc. The commonly used methods are:

- Historical cost method
- Replacement cost method
- Present value of future cash flows method
- The Lev and Schwartz method

Under the historical cost method, cost incurred in recruitment, training and development, cost of retaining, cost of attrition, etc. of human resources is considered in calculation. For other intangible assets, the cost incurred in bringing the intangible asset to its present state is taken.

Under the replacement cost method, the value of intangible asset is calculated based on the current cost which will need to be incurred to create the intangible asset. This method is more reasonable in the sense that it takes into consideration all the changes in the cost components.

Under the present value method, the future cash flows from the economic benefits of the intangible asset is estimated and discounted at the rate of cost of capital to arrive at the present value which is taken as the value of intangible asset.

The Lev and Schwartz method is used for human resources accounting. As per this model, the value of human capital of a person who is y' years old is the present value of his future earnings from employment. The following formula is used to calculate the present value:

$\Sigma(Vy) = \Sigma Py\ (t + 1)\ \Sigma I(t) / (1 + r)\ t - y$

Where:

$\Sigma(Vy)$ = expected value of a y year old person's human capital

t = the person's retirement age

Py (t) = probability of the person leaving the organisation

I(t)= expected earnings of the person in period

r = discount rate

**Answer 2A(i)**

Before any professional commences drafting of any Petition, Written Statement, Replication/Rejoinder or Miscellaneous application (cumulatively called pleadings) or an Interlocutory application before the NCLT, it is absolutely necessary to keep in mind the provisions of Companies Act, 2013, Code of Civil Procedure, Limitation Act, Indian Evidence Act, National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and also procedural laws and certain basic and fundamental principles of drafting and pleadings.

1. As per Order 6, Rule 2 of CPC every pleading shall contain only a statement in a concise form of material facts on which the party is relying upon. However, text of documents or evidence in the form of Agreement/MOU, Letters, e-mails, Negotiable instruments, Deeds, written documents or well settled position of law need not be elaborated in the pleadings but only reference is required to be made. Every pleading should not contain arguments. Further, (a) every pleading shall be divided into paragraphs numbered consecutively, catch allegation should be in a separate paragraph (b) dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

2. However, as per Order 6 Rule 4 of CPC, in all cases where the party alleges (a) misrepresentation (b) fraud (c) breach of trust (d) willful default (e) undue influence, the party alleging any of these must state clearly and specifically time, date month or year when any of the aforesaid happened - however, merely vague allegations are not sufficient and adequate and the court will not take cognizance.

3. Before any one proceeds to commence drafting, it is absolutely necessary to gather information/ documents/papers by having extensive discussions with the clients. The information could be gathered by asking the questions on the following points:

    - Whether all Factual Details have been taken out
    - Whether basic details of the parties have collated
    - All Evidence Necessary for Drafting

- Appointment of Additional Directors
- Cessation of Office of Existing Directors
- Removal of Promoter Directors
- Illegal Transfer of Shares / Removal of Directors
- Information can be obtained under Right to Information Act. 2005

4. As per Order 6 Rule 14 of CPC, every pleading shall be signed by the party and his pleader, if any, provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. The authorization to sign the pleadings could be either by way of (a) Board resolutions in case of body corporate or (b) Power of Attorney duly executed.

5. Generally, the rules prescribe the format of petition or application but does not prescribe the format for filing of Written Statement/Reply or Rejoinder or Replication. Therefore, the contents of petition must always be set out under various headings or sub-headings in accordance with the formal prescribed - otherwise, the Registry of the NCLT or NCLAT may raise objection and petition may not be listed for admission, hearing and consequently, grant of interim relief may be delayed. The petition must adhere to the following:-

   (a) Form prescribed

   (b) Set brief description of each of the petitioner and respondents

   (c) Narrate the Facts.

**Answer 2A(ii)**

The weighted average cost of debt and equity is known as the cost of capital. An enterprise invests this capital for business purpose and earns returns for the investors. The financial performance can be determined by excess earnings of the enterprise over and above the cost of capital. This is known as the “economic value added” (EVA).

EVA = NOPAT – (Invested Capital x WACC)

NOPAT - Net operating profit after tax

WACC - Weighted average cost of capital

NOPAT = EBIT (1-Tax Rate)

EBIT = Earnings before interest and tax

Invested Capital = (Total Assets - non interest bearing liabilities)

Basically, EVA reflects the profitability of the enterprise. If positive, means that the enterprise generates true economic profit. The purpose of a business enterprise is creation of wealth to investors. Unless the EVA is positive, the investors do not get any return on their investment.

| | |
|---|---|
| Market Value of Capital | Rs. 3,75,00,000 |
| X Cost of Capital | 16.30% |
| Cost of Capital at Market Value — A | Rs. 61,12,500 |

| | |
|---|---|
| Operating profit before tax | Rs. 85,00,000 |
| *Less* Tax @ 33% | Rs. 28,05,000 |
| Net operating profit after tax — B | Rs. 56,95,000 |
| Economic Value Added (B- A) | Rs. (4,17,500) |

Therefore, it can be said that the company is destroying the value since the EVA is negative.

**Answer 2A(iii)**

Specimen disclosures and its assumptions are given below:

| *S. No.* | *Particulars* | *Sample relevant disclosures* |
|---|---|---|
| 1. | Total no. of shares to be issued as sweat equity | 1,50,000 equity shares |
| 2. | The current market price of the shares of the company | Rs. 45 per share |
| 3. | The value of the intellectual property rights or technical know-how or other value addition to be received from the employee or director along with the valuation report / basis of valuation | Rs. 65,00,000/- arrived at on the basis of Valuation report received from Mr. X , Registered Valuer. |
| 4. | The names of the employees or directors or promoters to whom the sweat equity shares shall be issued and their relation-ship with the company | Mr. Z, Chief Financial Officer. He joined the company on 1st January, 2015 |
| 5. | The consideration to be paid for the sweat equity | The shares are allotted in lieu of the part remune-ration payable to Mr. Z |
| 6. | The price at which the sweat equity shares shall be issued | Rs. 35/- per share |
| 7. | Ceiling on managerial remuneration, if any, which will be affected by issuance of such sweat equity | None |
| 8. | Diluted Earnings Per Share pursuant to the issue of securities to be calculated in accordance with International Accounting Standards / standards specified by the Institute of Chartered Accountants of India | Rs.7.5 per share |

**Question 3**

*(a) Auditor of Jumbo Ltd. has informed following to the Board of directors :*

*(i) Tax neutrality of a demerger may get affected on adoption of IND-AS 103.*

*(ii) Appointed Date has lost relevance if a company accounts the transaction in accordance with IND-AS 103.*

*Examine the correctness of the observations made by the auditor.*

*(b) Board of directors of A Ltd. is evaluating merger of B Ltd. (wholly owned subsidiary of A Ltd.). B Ltd. has large parcels of land and several buildings in the same cities. Company Secretary of A Ltd. has adviced that "Stamp Duty is exempted when amalgamation is between Holding and Subsidiary Companies". Comment.*

*(c) Define demerger as per section 2(19AA) of the Income-tax Act, 1961.*

*(d) Explain the powers and functions of registrar under Rule 16 of National Company Law Appellate Tribunal Rules, 2016.*

*(e) Explain De Minimis Exemption under the Competition Act, 2002.*

*(3 marks each)*

**Answer 3(a)**

**(i) Tax neutrality of Demerger on Adoption of IND AS 103**

In the context of demergers, tax benefits are available only if the conditions of demerger provided in section 2(19AA) of the Income-Tax Act, 1961 are met. One such condition is that assets and liabilities are to be recorded by the transferee company at the book value of the transferor company.

However, under IND-AS 103, the requirement is to record assets and liabilities at fair value in case of non-common control business combination which may create problem in achieving a most tax efficient demerger.

**(ii) Relevance of Appointed date under IND-AS 103**

Appointed date refers to the date with effect from which the assets and liabilities of the transferor company vests in the transferee company. The appointed date is specified in the scheme of merger itself and once the scheme is approved with the approval of the NCLT, the accounting takes place with effect from the appointed date.

As per IND-AS 103 accounting for business combination should be done on the date on which the acquirer obtains control. Thus appointed date may not have relevance if IND AS 103 is adopted.

Accordingly, the observations of the auditor appear to be correct.

**Answer 3(b)**

A circular was issued in the year 1937 vide which exemption was granted on payment of Stamp Duty when there is an amalgamation/merger between holding and subsidiary company.

The exemption granted by the circular was applicable in three cases:

1. When the transferor company owns 90% of the issued capital of the transferee company, or

2. The transfer takes place between a holding a subsidiary company, or

3. When a transfer takes place between two subsidiary companies, and each of whose 90% shared capital is owned by a common parent company.

Provided, in all these three cases, a certificate is obtained by parties from the officer appointed in this behalf by the local government that the above conditions are fulfilled.

This exemption is only for those states, where the State government follows the Central government notification.

The Delhi High Court in a case made an observation about the aforesaid circular and its validity. It stated that even though, this notification is of pre-independence era, it is not superseded by any law made by the parliament. To revoke this circular, specific repeal is required.

*Withdrawal of circular dated January 16, 1937*

The notification was withdrawn by Delhi government, dated 1st June 2011. However, there is still no clarity whether the benefits of this notification will still persist in other states where the notification is not explicitly withdrawn.

Stamp duty being a State subject, the above would only be applicable in those States where the State Government follows the above stated notification of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said notification.

**Answer 3(c)**

Section 2(19AA) of the Income Tax Act. 1961 defines the term demerger as follows:

"Demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 231 to 232 of the Companies Act. 2013 by a demerged company of its one or more undertakings to any resulting company in such a manner that-

(i) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger:

(ii) all the liabilities relatable to the undertaking being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;

(iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger:

Provided that the provisions of this sub-clause shall not apply where the resulting company records the value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015.

(iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;

(v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or. its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;

(vi) the transfer of the undertaking is on a going concern basis;

(vii) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.

**Answer 3(d)**

**Powers and functions of the Registrar (Rule 16) of NCLAT Rules, 2016**

The Registrar shall have the following powers and functions, namely:-

(a) registration of appeals, petitions and applications:

(b) receive applications for amendment of appeal or the petition or application or subsequent proceedings:

(c) receive applications for fresh summons or notices and regarding services thereof.

(d) receive applications for fresh summons or notice and for short date summons and notices;

(e) receive applications for substituted service of summons or notices:

(f) receive applications for seeking orders concerning the admission and inspection of documents;

(g) transmission of a direction or order to the civil court as directed by Appellate Tribunal with the prescribed certificate for execution. etc; and

(h) such other incidental or matters as the Chairperson may direct from time to time.

**Answer 3(e)**

The Central Government has granted exemption to acquisition of small targets which is known as de minimis exemption. Combinations where the assets or the turnover is below the specific thresholds need not be notified to the Commission for its approval. According to Notification No.S.O.988(E) dated March 27, 2017, all forms of combinations involving assets of not more than Rs.350 crore in India or turnover of not more than Rs. 1,000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Following table gives an overview of the thresholds for availing of the De Minimis exemption:

| **THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION** | | | | |
|---|---|---|---|---|
| | | *Assets* | | *Turnover* |
| Target Enterprise | In India | < Rs 350 Cr | OR | < Rs 1,000 Cr |

Notification No. S.O.988 (E) dated March 27, 2017 has given a relaxation to the combinations where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise.

**PART II**

**Question 4**

*(a) State any five laws that were amended by Insolvency and Bankruptcy Code, 2016. (5 marks)*

*(b) Explain the term 'Financial Debt' as defined under the Insolvency and Bankruptcy Code, 2016. (5 marks)*

*(c) The Resolution Professional (RP) of a company receives a request from a member of the Committee of Creditors (CoC) (holding 30% share in the CoC) on 1 st July, 2022 at 5.30 PM to convene a meeting on an urgent basis to discuss the matter relating to raising interim finance. Considering the urgency and citing the reason that a request has come to convene a meeting, the RP circulates the notice of the meeting on 2nd July, 2022 in the morning itself at 11 AM. During the meeting, other members of the CoC have informed the RP that his action of convening the meeting based on the request received and the duration of notice is not sufficient as per the provisions of the Insolvency and Bankruptcy Code, 2016. Discuss the validity of the action taken by the RP. (5 marks)*

*(d) Consider the following scenarios and examine whether the following resolutions stand approved in the meeting of the Committee of Creditors ?*

| *S. No.* | *Agenda Item* | *% of members in value approving the item* |
|---|---|---|
| *1* | *Appointment of Valuers* | *50%* |
| *2* | *Replacement of the Resolution Professional* | *67%* |
| *3* | *Approval of the Resolution Plan* | *52%* |
| *4* | *Withdrawal of application u/s 12A of the Insolvency & Bankruptcy Code, 2016* | *85%* |
| *5* | *Appointment of technical consultant to assist the Resolution Professional* | *56%* |

*(5 marks)*

**Answer 4(a)**

The Insolvency and Bankruptcy Code, 2016 amended the following 11 Acts:

- The Indian Partnership Act, 1932,
- The Central Excise Act, 1944,
- The Income-Tax Act, 1961,

- The Customs Act, 1962,
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993,
- The Finance Act, 1994,
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,
- The Sick Industrial Companies (Special Provisions) Repeal Act, 2003,
- The Payment and Settlement Systems Act, 2007,
- The Limited Liability Partnership Act, 2008, and
- The Companies Act, 2013

**Answer 4(b)**

As per section 5(8) of the Insolvency and Bankruptcy Code, 2016 "Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes:

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent:

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures. loan stock or any similar instrument:

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on nonrecourse basis:

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction. only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution:

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.

**Answer 4(c)**

As per Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2022, a Resolution Professional (RP) may convene a meeting if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least 33% per cent of the voting rights.

A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least 33% of the voting rights.

Further, a meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means. The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit, however, if there is any authorised representative, the committee may reduce the period to not less than forty-eight hours. (Regulation 19 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016).

Considering the above provisions, the RP has violated the provisions of the Code since he has called the meeting based on the request received from the CoC members holding less than 33% voting rights and the notice for the meeting is also less than 24 hours.

**Answer 4(d)**

As per the relevant applicable provisions of the Insolvency and Bankruptcy Code, 2016, status of the following resolution is as under:

| *S. No.* | *Agenda Item* | *% of members in value approving the item* | *Approved / Not Approved* |
|---|---|---|---|
| 1. | Appointment of Valuers | 50% | Not approved |
| 2. | Replacement of the Resolution Professional | 67% | Approved |
| 3. | Approval of the Resolution Plan | 52% | Not approved |
| 4. | Withdrawal of CIRP u/s 12A of the Insolvency & Bankruptcy Code, 2016 | 85% | Not approved |
| 5. | Appointment of technical consultant to assist the Resolution Professional | 56% | Approved |

**Question 5**

*(a) Managing Director of Nimbo Ltd. (undergoing CIRP) states that since the powers of the Board of directors are suspended, he cannot be forced to perform duties as included in his employment contract with the company. Examine the correctness of the statement in light of the relevant provisions of Insolvency and Bankruptcy Code, 2016 along with relevant case law(s).*

*(b) Ram is appointed as Interim Resolution Professional of CoCo Ltd. During the first meeting of the Committee of Creditors, he has stated that being a person*

*from engineering background he cannot ensure compliances under all the laws applicable to the company. Examine the statement made by Ram in light of the relevant provisions of Insolvency and Bankruptcy Code, 2016.*

(c) *Roco Ltd. is undergoing Corporate Insolvency Resolution Process (CIRP). In order to achieve the objective of value maximisation, the Resolution Professional of Roco Ltd. is contemplating filing an application against the debtors, who have not paid their dues from last 1 year, under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code). However, his lawyer has opined that there exists no provision under the Code to initiate CIRP against another company by a company which itself is undergoing CIRP. Examine whether the opinion given by the lawyer is correct.*

(d) *Distinguish between Insolvency Commencement Date and Initiation of CIRP citing relevant case law(s).*

(e) *IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, lists down the mandatory contents of the resolution plan. Explain.*

*(3 marks each)*

**Answer 5(a)**

Section 17(1) of the Insolvency & Bankruptcy Code provides that from the date of appointment of the Interim Resolution Professional the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional. It is pertinent to note that only powers are suspended; however, the directors can continue to work and provide assistance to the Resolution Professional.

In the case of *M/s. Subasri Realty Private Limited* v. *Mr. N. Subramanian & Anr*, the NCLAT directed that after the appointment of the Resolution Professional and declaration of moratorium, the Board of Directors stands suspended, but that does not amount to a suspension of Managing Director, or any of the directors or officers or employees of the Corporate Debtor (CD). To ensure that the CD remains a going concern, all the directors/ employees are required to function and to assist the RP who manages the affairs of the CD during the moratorium. If one or other officer or employee had the power to sign a cheque on behalf of the CD prior to the order of moratorium such power does not stand suspended on suspension of Board of Directors nor can it be taken away by the RP. If the person empowered to sign cheque refuses to function on the direction of the RP or misuse the power it is always open to the RP to take away such power, after issuing notice to the person concerned.

Therefore, the statement made by Managing Director is not in accordance with the Code.

**Answer 5(b)**

Section 17(2)(e) of the Insolvency & Bankruptcy Code mandates the Insolvency Resolution Professional( IRP) / Resolution Professional (RP) to comply with the requirements under any law for the time being in force on behalf of the Corporate Debtor (CD). Any non-compliance has a cost to the CD and its stakeholders and attracts penal consequences. For example, a listed company has several continuing obligations under the securities laws. Failure to discharge these obligations compromises the interests of

investors in securities. This amounts to contravention not only of securities laws, but also of the provisions of the Code. The IRP/RP is responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct. There are, however, instances where an IRP/RP failed to comply with requirements of various laws. This reflects lack of competence and professionalism of the IP, compromises the interests of stakeholders, and burdens the CD with the liabilities for failure of the IP to make compliances.

Therefore, the statement made by Ram is not in accordance with the Code.

**Answer 5(c)**

Section 11 of the Insolvency & Bankruptcy Code lists out the persons who are not eligible to make an application to initiate the corporate insolvency resolution process. The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under Chapter II of Part II, namely:

(a) a corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process.

(aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or;

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application;

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application; or

(d) a corporate debtor in respect of whom a liquidation order has been made

However, Explanation II provides that for the purposes of this section. it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

Since there exists a provision in accordance with which a corporate debtor may initiate corporate insolvency resolution process against any other corporate debtor, the opinion of the lawyer is not correct.

**Answer 5(d)**

Hon'ble Supreme Court in the case of *Ramesh Kymal* vs. *M/s Siemens Gamesa Renewable Power Pvt Ltd* judgement dated February 9, 2021 observed that the date of the initiation of the CIRP is the date on which a financial creditor, operational creditor or corporate applicant makes an application to the adjudicating authority for initiating the process.

On the other hand, the insolvency commencement date is the date of admission of the application. This distinction is also evident from the provisions of sub-section (6) of

Section 7, sub-section (6) of Section 9 and sub-section (5) of Section 10. Section 7 deals with the initiation of the CIRP by a financial creditor; Section 8 provides for the insolvency resolution by an operational creditor; Section 9 provides for the application for initiation of the CIRP by an operational creditor; and Section 10 provides for the initiation of the CIRP by a corporate applicant.

**Answer 5(e)**

Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, lists down the mandatory contents of the resolution plan which are as follows:

(1) The amount payable under a resolution plan (a) to the operational creditors shall be paid in priority over financial creditors; and (b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past.

(2) A resolution plan shall provide:

- the term of the plan and its implementation schedule:
- the management and control of the business of the corporate debtor during its term; and adequate means for supervising its implementation.

(3) A resolution plan shall demonstrate that -

- it addresses the cause of default:
- it is feasible and viable:
- it has provisions for its effective implementation;
- it has provisions for approvals required and the timeline for the same; and
- the resolution applicant has the capability to implement the resolution plan.

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

**Question 6**

*(a) Elaborate the circumstances in which a liquidator can be removed by the Tribunal.*

*(b) As per Rule 6 of Security Interest (Enforcement) Rules, 2002, list down the terms and conditions which are required to be uploaded on the website of the secured creditor by the authorized officer in relation to sale of movable secured assets.*

(c) Explain salient features of Chapter 11–Reorganization under US Bankruptcy Code.

(5 marks each)

***OR (Alternate question to Q. No. 6)***

**Question 6A**

*(i) What are the procedural requirements for issuance of Public Notice under Section 102 of the Insolvency and Bankruptcy Code, 2016 ?*

*(ii) A practicing lawyer has sought your advice whether it is possible to terminate pre-packaged insolvency resolution process under Insolvency and Bankruptcy Code, 2016. Comment.*

*(iii) "Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Code yet there are marked differences." Elucidate.*

*(5 marks each)*

**Answer 6(a)**

Section 276 of the Companies Act, 2013 lays down that in case where the reasonable cause being shown and for reasons to be recorded in writing, the tribunal may remove the provisional liquidator or the Company liquidator, on any of the following grounds:

(a) Misconduct

(b) Fraud or misfeasance

(c) Professional incompetence or failure to exercise due care and diligence in performance of the powers and functions

(d) Inability to act as provisional liquidator or as the case may be, Company liquidator

(e) Conflict of interest or lack of independence during the term of his appointment that would justify removal

Further, in the event of death, resignation or removal of the liquidator the tribunal may transfer the work assigned to him or it to another Company liquidator for reasons to be recorded in writing

**Answer 6(b)**

The authorized officer shall upload the detailed terms and conditions of the sale of the movable secured assets on the web-site of the secured creditor, which shall include:

1) Details about the borrower and the secured creditor:
2) Complete description of movable secured assets to be sold with identification marks or numbers if any, on them;
3) Reserve price of the movable secured assets, if any, and the time and manner of payment;
4) Time and place of public auction or the time after which sale by any other mode shall be completed;

5) Deposit earnest money as may be stipulated by the secured creditor;

6) Any other terms or conditions which the authorised officer considers it necessary for a purchaser to know the nature and value of movable secured assets.

**Answer 6(c)**

American bankruptcy procedures enable sick companies to restructure its debt obligations even while remaining operational. In this context, one must recognise that in the US the well-known Chapter 11 bankruptcy proceedings are considered as re-organization/ resurrection process for corporates.

Many companies are known to have revived under Chapter 11. Further, Chapter 11 ensures the emergence of companies with sustainable debt levels and profitable working. Chapter 11 bankruptcy proceedings are available to every business, whether organized as a corporation, partnership or sole proprietorship, and to individuals, although it is most prominently used by corporate entities.

Salient features of Chapter 11 are as under:

- Chapter 11 is not a declaration of insolvency.
- Companies don't file under Chapter 11 to liquidate; they do so in order to continue operating and to take the necessary steps to emerge as a financially stronger business, reorganizing their operations or balance sheet or in some cases by selling substantially all its assets.
- Management remains in control of the business during the chapter 11 rehabilitative process. Trustees, administrators and monitors typically are not appointed.
- Chapter 11 normally does not cause interruption to business operations.
- The company is given breathing room during the process - an "automatic stay" generally prevents parties from taking legal action against the company or taking the company's assets.
- Most publicly-held companies prefer to file under Chapter 11 rather than Chapter 7 because they can still run their business and control the bankruptcy process. Chapter 11 provides a process for rehabilitating the business of the company.

**Answer 6A(i)**

Section 102 of the Code provides that the Adjudicating Authority shall issue a public notice within seven days of passing the order under Section 100 of the Code, for inviting claims from all creditors within twenty-one days from the date of issue of notice.

The notice issued by Adjudicating Authority for inviting claims from the creditors shall include:

(a) details of the order admitting the application;

(b) particulars of the Resolution Professional with whom the claims are to be registered; and

(c) the last date for submission of claims.

The notice issued by Adjudicating Authority for inviting claims:

- shall be published in at least one english and one vernacular newspaper which is in circulation in the state where the debtor resides;
- shall be affixed in the premises of the Adjudicating Authority and
- shall be placed on the website of the Adjudicating Authority.

**Answer 6A(ii)**

(1) Where the resolution professional files an application with the Adjudicating Authority. -

(a) under the proviso to sub-section (12) of section 54K; or

(b) under sub-section (3) of section 54D, the Adjudicating Authority shall, within thirty days of the date of such application, by an order, -

I. terminate the pre-packaged insolvency resolution process: and

II. provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.

(2) Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K. intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).

(3) Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.

Considering the above provisions, it is possible to terminate the pre-packaged insolvency resolution process under Insolvency and Bankruptcy Code, 2016 in the manner stated above.

**Answer 6A(iii)**

Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Insolvency & Bankruptcy Code yet there are marked differences:

1. To initiate voluntary liquidation proceedings, where the corporate debtor is a company, the directors have to provide a declaration of solvency and a declaration that the company is not being liquidated to defraud any person.

2. The declarations have to be accompanied by (a) the audited financial statements of the company and (b) a record of its business operations for the previous two years or the period's incites incorporation, whichever is later.

3. Further, a report of the valuation of the assets of the company prepared by a registered valour has to be provided.

4. A resolution in favour of the voluntary winding up of the company and appointment of an insolvency professional as the liquidator has to be passed within four weeks of the declaration under clause (a) of sub-section (3) of section 59.

5. Where the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

6. A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.

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## RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

*Time allowed : 3 hours* *Maximum marks : 100*

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

**Question 1**

*(a) Raj, is the promoter and director of Alpha Pvt. Ltd., a closely held company. He and his HUF owns 17.58% of equity, whereas his brother Saj along with other shareholders owns 82.42% of equity. Over a period of time, differences arose between them and an Extraordinary General Meeting (EGM) was proposed to be held on March 15, 2020 for removal of Raj from the Board of Directors of the company. Raj filed a petition before the NCLT and the NCLT allowed the holding of the EGM, but put a condition that the resolution passed thereat to be permitted by it, by ex-parte interim order dated March 14, 2020. More than two years elapsed since the Order, but the company petition could not be decided. Taking advantage of the interim order, Raj representing himself as a director of the Company had taken various steps which were detrimental and prejudicial to the interest of the Company and its shareholders. In this background, Saj and group of shareholders moved the application for holding an EGM under chairmanship of a person appointed by the Tribunal. After considering the submissions, NCLT passed an order allowing the application. Raj, aggrieved with this order, filed an appeal against the impugned order.*

*In the light of judicial pronouncement, comment whether appeal against the impugned order would be allowed or dismissed.*

*(5 marks)*

*(b) Group of MSME (Micro, Small and Medium Enterprises) traders who rely on trade of smartphones and related accessories, informed Competition Commission of India (CCI) that many such traders regularly list their smartphones for sale on online marketplaces to take the benefit of online distribution channels. Dkart and Pzon are onlinemarketplaces operating as a platform facilitating third party sellers to sell their goods to consumers on its online marketplace. The informant states that there are instances of several vertical agreements between Dkart, Pzon with their respective preferred sellers which have led to foreclosure of other non-preferred traders or sellers from these online marketplaces. It has been alleged that most of these preferred sellers are affiliated with or controlled by Dkart or Pzon, either directly or indirectly. They requested CCI to order for investigation in view of the aforesaid facts.*

*In the light of judicial pronouncement, analyse and comment whether Director General of CCI would order an investigation.*

*(5 marks)*

(c) *Pioneer Finance Ltd., is a Non-Banking Finance Company (NBFC) registered with the Reserve Bank of India (RBI). The object clause of its Memorandum states that the Company shall provide finance to public at interest, against security of gold ornaments. Atul, a shareholder of the Company is a Practising Chartered Accountant. While going through the Annual Report and Financial Statements of the Company, he observed that the Company had good amount of advances under the heading of unsecured creditors, which is contrary to the provisions of its object clause of the Memorandum. Atul made an application before the National Company Law Tribunal (NCLT) praying for perpetual and mandatory injtunction to restrain the Company from making such unsecured advances. The Company pleaded that the rule of majority will prevail.*

*Based on the above facts, comment whether Atul's application is tenable ?*

*(5 marks)*

(d) *Cars & Rides Ltd., is a company engaged in the trading of second-hand cars of any make. In the year 2020, it made an Initial Public Offer (IPO) of equity shares having face value of ₹10. Of which ₹5 as first call was only called for in the IPO. The paid up share capital of the Company consists of ₹1000 lakh. The proceedsof the IPO were to be utilised for the purpose of development of the on-line trading platform through Website / Mobile App, but the Company diverted the proceeds to purchase a flat for its Managing Director. During the course of the general meeting of the shareholders, the fact of the diversion of funds came to notice of some of members and they threatened the management of the Company to file a case of oppression and mismanagement. The Company demanded the second and final call of remaining amount of ₹5 due on equity shares from the members soon after the conclusion of the general meeting. Some of the members decided not to pay the second and final call, but to file a case of oppression and mismanagement against the Company.*

*In the background of Companies Act, 2013, evaluate whether the members will succeed.*

*(5 marks)*

**Answer 1(a)**

The facts of the given situation are similar to the decision by National Company Law Appellate Tribunal (NCLAT) in the case of *Amit Kumar Gupta* v. *LGW Ltd. & Ors (NCLAT)* on 22 January, 2020. The relevant part of the decision is discussed as under:

National Company Law Tribunal (NCLT) said that after hearing both parties, it cannot be argued that impugned order is detrimental and prejudicial to the interest of the Company. While passing the impugned order, the NCLT found that:

"Parties have given their respective versions of the story and levelled allegations and counter allegations but, one thing common in their argument is that neither of the parties has any objection if an Extra Ordinary General Meeting (EOGM) is allowed to be held by Board of Directors under the Chairmanship of Special Officer to be appointed by this Tribunal. What is challenged on the side of the respondent/petitioner in the petition is that no resolution is to be passed removing the director/petitioner. That objection is devoid of any merit in view of power of the Company under section 169 of the Act (Companies Act, 2013)."

With the above finding of NCLT, it is apparent that both the parties agreed to hold EOGM by the Board of Directors under the Chairmanship of Special Officer to be appointed by the NCLAT. Hence the impugned order is well reasoned order. We find no illegality or irregularity in the impugned order. Hence, appeal is dismissed.

In view of the above case, it can be said that the appeal by Raj against the impugned order would be dismissed.

**Answer 1(b)**

The facts of the given situation are similar to decision of Competition Commission of India (CCI) in *Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and its affiliated entities; Amazon Seller Services Private Limited and its affiliated entities* on 13th January, 2020. The relevant part of the decision is discussed as under:

On careful perusal of allegations levelled by the informant and the documents provided, the CCI notes that there are four alleged practices on the marketplaces, namely, exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting and preferential listing / promotion of private labels. CCI also noted several reports in the media as well as advertisements by e-commerce portals regarding exclusive launches.

Based on the evidence adduced by the informants and information available in the public domain, it can be *prima facie* inferred that there appears to be exclusive partnership between smartphone manufacturers and e-commerce platforms for exclusive launch of smartphone brands. Thus exclusive launch coupled with preferential treatment to a few sellers and the discounting practices create an ecosystem that may lead to an appreciable adverse effect on competition. Issue of deep discounting needs to be assessed in the context of exclusive agreement.

Therefore, it needs to be investigated whether the alleged exclusive arrangements, deep discounting and preferential listing are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Competition Act, 2002.

In view of this, CCI is of the opinion that there exists a prima facie case which requires an investigation by the Director General (DG) to determine whether the conduct of the Opposite Parties have resulted in contravention of the provisions of Section 3(1) of the Competition Act, 2002 read with Section 3(4) thereof and accordingly, CCI directs DG to cause an investigation to be made into the matter.

In view of the above decision, it can be said that the Director General of CCI would order and investigation.

**Answer 1(c)**

The facts of the given situation are similar to the decision of High Court in *Bharat Insurance Ltd.* v. *Kanhya Lal, A.I.R. 1935 Lah. 792*. The relevant part of the decision is discussed as under:

The plaintiff was a shareholder of the Bharat Insurance Company. One of the objects of the company was: “To advance money at interest on the security of land, houses, machinery and other property situated in India...” The plaintiff complained that "several investments had been made by the company without adequate security and contrary to the provisions of the memorandum and therefore, prayed for perpetual injunction to restrain it from making such investments". The Court observed:

"In all matters of internal management, the company itself is the best judge of its affairs and the Court should not interfere. But application of assets of a company is not a matter of internal management. As directors are acting ultra vires in the application of the funds of the company, a single member can maintain a suit".

It means that the rule in Foss v. Harbottle will operate in full force only when the majority of shareholders through their chosen directors act within the extent of the powers of the company.

Therefore, where the directors representing the majority of shareholders perform an illegal or ultra vires act, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company. In such case a shareholder has the right to restrain the company by an order or injunction of the court from carrying out an ultra vires act.

In view of the above mentioned case, it can be said that Atul's application is tenable.

**Answer 1(d)**

Chapter XVI of the Companies Act, 2013(the Act) comprising of Sections 241-246 contains the statutory provisions for Prevention of Oppression and Mismanagement in a company.

Section 241(1) of Act provides that any member of a company who complains that:

(a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.

Section 244(1)(a) of the Act states that the following members of a company shall have the right to apply under section 241 of the Act,

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

The words used in the clause (a) of sub-Section (1) of Section 244 is 'the issued share capital' subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares. This implies the words "issued share capital" as used in the section will always consist of paid-

up capital either fully paid to the extent of the calls already made by the company on such issued shares.

In the given case the company has made calls for making the shares fully paid up and thus all the members are required to pay their full dues i.e. the entire money called by the company, and any members have not paid such calls or any part thereof shall be construed to have not paid all their dues on their shares and accordingly such members who have not paid their dues w.r.t. such party-paid shares shall not be eligible under Section 244(1) of the Act to make an application with the Tribunal.

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

**Question 2**

*(a) Paras is a bank employee and is an expert in handwriting and identifying signatures. Due to annual job rotation, he was assigned the task of identifying and comparing signatures on cheques of the drawer. Only upon his confirmation, cheques were further processed and cleared for payment. In his regular task, he clears one cheque for processing, it was later identified that the signature on that cheque was not done by the drawer but was forged. Since signature was very resembling to the signature in bank's records, he cleared the same resulting in loss to bank. Bank Manager lodged a complaint against him for cheating under Indian Penal Code, l860 (IPC).*

*Is the contention of Bank Manager valid under IPC ? (4 marks)*

*(b) You are Company Secretary of Parshvan Potash Ltd., a Company engaged in producing pesticides. Draft a brief note to be circulated to the Board of Directors, about the importance of management of Environmental, Social and Governance (ESG) Risks.*

*(4 marks)*

*(c) Tamanna aged 21 years, has been arrested for a cognizable and non-bailable offence punishable with imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. She proceeded for bail before the Court. State whether she would scucceed.*

*(4 marks)*

*(d) Ron, a GST Inspector, seized invoice books, audited financial statements, all purchase invoices of assessee for last 2 years and driving license of Sukesh during search and seizure proceedings. Ron issued demand notice after going through all the invoices, payment challans and input credit related documents. Sukesh demanded Ron to return his driving license arguing that driving license has no role in issue of GST demand notice. But Ron is of the view that all the documents, books or things seized during search and seizure cannot be returned back unless assessment is completed. State whether Sukesh's demand is valid under the Central Goods and Services Tax Act, 2017.*

*(4 marks)*

***OR (Alternate question to Q. No. 2)***

**Question 2A**

*(i) ''Public prosecutors are different from Company Prosecutors. They are independent, unbiased and impartial while conducting prosecution.'' Comment.*

*(4 marks)*

*(ii) "Articles of the company are the protective shield for the majority of shareholders." Comment.* *(4 marks)*

*(iii) "There is a paradigm shift in initiation of a case before a consumer commission in cases of mis-selling from erstwhile Consumer Protection Act, 1986, to the new law, the Consumer Protection Act, 2019, which establishes new regulator in the regime of consumer protection." Elucidate.* *(4 marks)*

*(iv) "The Company Secretary has a vital role to play in the event of invocation of any action under the Companies Act, 2013." In light of this statement, outline the role of Company Secretary.* *(4 marks)*

**Answer 2(a)**

As per Sec 415 of the Indian Penal Code 1860, the main ingredients of cheating are as under:

1. Deception of any person.
2. a. Fraudulently or dishonestly inducing that person:
    i. to deliver any property to any person; or
    ii. to consent that any person shall retain any property; or
    b. Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

In *T.R. Arya* v. *State of Punjab, 1987 CrLJ 222*, it was held that negligence in duty without any dishonest intention cannot be amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

In view of the above, it may be said that contention of Bank Manager i.e. lodging a complaint against Paras is not valid.

**Answer 2(b)**

To

The Board of Directors

**Subject: Note on ESG Risk Management**

Environmental Social and Governance (ESG) risks represent a specific subset of general risks that a company must manage wherever required, by identifying and mitigating company-specific risks, such as environmental liabilities, labor standards, consumer and product safety and leadership succession, and contingency planning for macro-level risks, including by identifying supply chain and energy alternatives and developing backup recovery plans for climate change and other natural disaster scenarios. While boards have been overseeing management of such material risks for as long as they have existed, increasing scrutiny in 2017 to ESG issues by the public and some of the largest institutional investors in the world now call for special attention to be paid to ensuring

that the board is satisfied as to how ESG-related risks specifically are being evaluated, disclosed and managed.

In the 2017 proxy season, the most common shareholder proposal topics related to social and environmental issues, and in certain instances, these proposals were backed for the first time by major institutional investors, whose voting positions on such issues have evolved. A 2018 proxy season report by Ernst & Young revealed that, of the 79% of investors who believe climate change is a significant risk factor, 61% believe that enhanced reporting should be the biggest priority for companies (over changes in company strategy or business practices).

Boards and management teams can therefore expect that major investors will continue to assess companies' posture toward climate change related matters and risks. It is also notable that, for the 2018 proxy season, Institutional Shareholder Services Inc (ISS) expanded the conditions under which it will recommend voting in favor of shareholder proposals requiring such disclosures.

As the public conversation on the role of companies in addressing environmental and social issues continues to evolve, boards should consider how their risk oversight role specifically applies to ESG-related risk. In large part, the board's function in overseeing management of ESG-related risks, such as supply chain disruptions, energy sources and alternatives, labor practices and environmental impacts involves issue-specific application of the risk oversight practices discussed in this memo. However, due to the fact that the public and investors have increasingly begun to scrutinize how a company addresses ESG issues, the board should ensure that its risk oversight role is satisfied in regards to ESG risk management.

ESG matters often have important public, investor and stakeholder relations dimensions. The board should work with management to identify ESG issues that are pertinent to the business and its customers and decide what policies and processes are appropriate for assessing, monitoring and managing ESG risks. The board should also be comfortable with the company`s approach to external reporting of the company's overall approach, response and progress on ESG issues. It is also increasingly important for directors and management who engage with shareholders to educate themselves and become conversant on the key ESG issues facing the company.

Thanking You

Company Secretary

**Answer 2(c)**

According to section 45 of the Prevention of Money Laundering Act 2002, the offences under this act to be cognizable and non-bailable. It provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence under this Act shall be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

However, a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs.

Since, Tamanna is a woman, she can be released on bail on the direction of special court.

**Answer 2(d)**

According to second proviso to Section 67(2) of Central Goods and Services Tax Act, 2017 (CGST Act), the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under the CGST Act.

According to Section 67(3) of CGST Act, the documents, books or things referred to in section 67(2) or any other documents books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under the CGST Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.

In the given case, demand of Sukesh is valid as driving license is not relied upon for the issue of notice. Further, Ron, GST Inspector should return the driving license to Sukesh within 30 days of issue of notice irrespective of completion of assessment.

**Answer 2A(i)**

Criminal cases are prosecuted by the State representing the public and the society. Public prosecutors carry out the prosecution in such cases. The role of a prosecutor lies in placing before the Court all the material and evidences, whether it helps the accused or otherwise. Section 24(7) of the Code of Criminal Procedure, 1973 states that a person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor only if he has been in practice as an advocate for not less than 7 years.

In *S Thamizharasan* v. *The State of Tamil Nadu*, the Madras High Court held that:

*"the Office of the Public Prosecutor is a very responsible office and he has an important role to play in the Criminal Justice Delivery System. Public prosecutors are to be independent, unbiased and impartial while conducting prosecution. The Public Prosecutor is not a Police Prosecutor in the sense that he is not a mouthpiece of the Police, for he is not an Advocate engaged by the State to conduct its prosecutions. Therefore, the Prosecutors cannot be allowed to be controlled either administratively or in any other mode by the Police Department. It was further held that "as held repeatedly by the Hon'ble Supreme Court and various High Courts that there should be complete separation of Public Prosecutors, Additional Public Prosecutors, Special Public Prosecutors and Assistant Public Prosecutors from the control or supervision in any form by the Police, as otherwise, such control or supervision would only invade into the independence of the institution of Prosecutors, which would only bring harm to the Criminal Justice Delivery System".*

As held by Supreme Court in *Balwant Singh and Ors.* v. *State of Bihar*, Criminal Procedure Code is the only matter of the public prosecutor and he has to guide himself with reference to Criminal Procedure Code only.

However, when a Registrar or any other person duly authorized / entitled, to file a complaint for any offence under the erstwhile Companies Act, 1956 files a complaint, the prosecution is conducted in the trial Court by a special category of officers called Company Prosecutors. The company prosecutors have all the powers and privileges of public prosecutors appointed by State Government under section 24 of CrPC.

Section 443 of the Companies Act, 2013 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may appoint generally, or for any case, or in any case, or for any specified class of cases in any local area, one or more persons, as company prosecutors for the conduct of prosecutions arising out of this act and the persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Criminal Procedure Code, 1973.

**Answer 2A(ii)**

The general principle of company law is that every member holds equal rights with other members of the company in the same class. The scale of rights of members of the same class must be held evenly for smooth functioning of the company. In case of difference(s) amongst the members, the issue is decided by a vote of the majority. Since the majority of the members are in an advantageous position to run the company according to their command, the minorities of shareholders are often oppressed. The company law provides for adequate protection for the minority shareholders when their rights are trampled by the majority. But the protection of the minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a company. The court will not usually intervene at the instance of shareholders in matters of internal administration, and will not interfere with the management of a company but its directors so long they are acting within the powers conferred on them under the articles of the company. In other words, the articles are the protective shield for the majority of shareholders who compose the board of directors for carrying out their object at the cost of minority of shareholders. The basic principle of non-interference with the internal management of company by the court was laid down in a celebrated case of *Foss* v. *Harbottle* that no action can be brought by a member against the directors in respect of a wrong alleged to be committed to a company. The company itself is the proper party of such an action.

**Answer 2A(iii)**

India enacted a new consumer protection law in 2019. Unlike the erstwhile law which permitted a class to initiate a case before a consumer commission in cases of mis-selling, the 2019 law establishes a new regulator in the regime of consumer protection i.e. the Central Consumer Protection Authority (CCPA). The CCPA is tasked with protecting and enforcing the rights of consumers as a class. As per section 17 of the new Consumer Protection Act, 2019, a complaint relating to violations of consumer rights prejudicial to the interests of consumers as a class is to be forwarded to the CCPA or District Collector or the Commissioner of regional office. It would then conduct a preliminary inquiry as to whether there exists a prima facie case of violation of consumer rights and instruct for an investigation to be conducted. This has taken away the power to initiate class actions from individuals and vested them into the hands of the regulator. Unlike earlier, where a class of consumers could approach consumer commissions with their common grievance,

they are now required to meet the subjective satisfaction of the CCPA. This is then meant to result in an investigation, and consequent orders, if any. The difficulties of public management now impact the enforcement process in consumer grievances. Persons who have suffered harm are now supplicants before the regulator, requesting it to enforce consumer law. Several steps have been added in the process, which could lead to a lesser filing of class action suits.

The laws in India create a system which either prohibits or disincentives class actions. To achieve a sound law on class action, two changes have to be brought to Indian legislation. Laws that allow for such suits may provide for what constitutes an adequate portion of the class to approach a court. Further, the new consumer protection law could give more clarity on what constitutes a prima facie case of violation of consumer rights and the elements of the investigation thereon. We need to explore the possibility of transitioning away from the loser- pays principle in class actions and toward contingency fees for lawyers and third-party investors.

**Answer 2A(iv)**

The Company Secretary plays a vital role in the event of invocation of any action under the Companies Act, 2013(the Act). The current regulatory scenario demands the Company Secretary be more vigilant and diligent specifically about the applicability of multiple laws and timely compliances there under.

The role which a Company Secretary can play is briefly discussed below:

- To ensure timely compliances of the provisions of the Act to avoid any action for default or failure;
- To represent the Company before the Registrar of Companies (ROC), Regional Director (RD) or National Company Law Tribunal (NCLT), in the event of any action for default or failure;
- To develop a robust internal compliance system which generates the details of compliances undertaken and any compliance lapses in a timely manner;
- To initiate the compounding procedure in the event of any non-compliance(s) comes to light and to avoid recurrence of such non-compliances in future; and
- To ensure timely and appropriate disclosure pertaining to penalties or compounding offences or action by any authorities.

Further, since the Practicing Company Secretaries are also covered under section 447 of the Act, they should ensure that they are not certifying any returns or issuing any report which contains any false certification or information or omits any material information or facts.

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

**Question 3**

*(a) State whether the following offences under the Companies Act, 2013 are compoundable. If yes, also mention compounding authority :*

*(i) Tampering with the minutes of the proceedings of meeting.*

*(ii) Failure to keep proper financial statements.*

*(iii) Failure to disclose director's interest and participation in Board meeting by interested director.*

*(iv) Failure to provide information, books or papers etc. to inspector during investigation.*

*(4 marks)*

*(b) "Commitment to anti-corruption enforcement is on the rise across the globe." Elucidate with reference to Foreign Corrupt Practices Act, 1977.*

*(4 marks)*

*(c) Maha Tyres Ltd. (MTL) intends to amalgamate with Link Road Tyres Ltd. in order to have exponential growth. After the merger MTL will acquire monopoly status in northern region of India. MTL filed an application before the Competition Commission of India (CCI) for its approval. The CCI conducted an investigation of combination under the Competition Act, 2002.*

*Explain the procedure for investigation of combination by the CCI.*

*(4 marks)*

*(d) "Mediation and conciliation are all basically non-adjudicatory dispute resolution processes." State briefly the disadvantages of adjudicatory process which has led to rise of mediation and conciliation process.*

*(4 marks)*

***OR (Alternate question to Q. No. 3)***

**Question 3A**

*Write short notes on :*

*(i) Insolvent trading.*

*(ii) Factors which Competition Commission of India considers while determining "relevant geographic market" and "relevant product market".*

*(iii) Rectification of mistake by NCLT on Suo moto basis.*

*(iv) Authorities and mode of communication with the assessees under Faceless Assessment as per Income Tax Act, 1961.*

*(4* marks each)

**Answer 3(a)**

| *Answer no.* | *Section* | *Nature of offence* | *Compoundable or Not* | *Compounding Authority* |
|---|---|---|---|---|
| (i) | 118 (12) | Tampering with the minutes of the proceedings of meeting | Non-Compoundable | Not Applicable |
| (ii) | 129(7) | Failure to keep proper financial statement | Compoundable | Regional Director |

| | | | | |
|---|---|---|---|---|
| (iii) | 184(4) | Failure to disclose of director's interest and participation in Board meeting by interested director | Compoundable | Regional Director |
| (iv) | 217(8) | Failure to provide information, books or papers etc. to inspector during investigation | Non - Compoundable | Not Applicable |

**Answer 3(b)**

In November 2017, the Department of Justice (DOJ) announced a new Foreign Corrupt Practices Act, 1977 (FCPA) enforcement policy that codified and enhanced a pilot program launched in April 2016. Under the pilot program, companies were eligible for a range of mitigation credit if they voluntarily self-reported FCPA misconduct; fully cooperated with the DOJ's investigation, including disclosing all relevant facts and identifying culpable individuals, and implemented timely and appropriate remedial measures. The pilot program, as intended, appears to have sparked an increase in the number of companies voluntarily disclosing FCPA-related misconduct to the DOJ, with seven companies receiving DOJ decisions not to prosecute due to their participation in the pilot program.

As a result of the pilot program's success, the DOJ formally an enhanced version of the program to further encourage companies to voluntarily disclose FCPA-related misconduct.

Under the revised policy, when a company voluntarily self-discloses misconduct, fully cooperates, timely and appropriately remediates and agrees to disgorge any ill-gotten profits, there is a presumption that the DOJ will decline to prosecute the company. That presumption will be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, such as where the company was a repeat offender or where the misconduct was pervasive, involved executive management or resulted in significant corporate profits. Recently, DOJ officials indicated that they are applying the principles of the FCPA enforcement policy as "non-binding guidance" in corporate investigations outside FCPA arena.

**Answer 3(c)**

Section 29 of the Competition Act, 2002 deals with the procedure for investigation of combination.

It provides that-

(1) Where the Commission is of the 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, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

(1A) After receipt of the response of the parties to the combination sub- section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.

(2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General called under sub section (1A), whichever is later direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

(3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

(4) The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

(5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).

(6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31 of the Competition Act, 2002.

**Answer 3(d)**

Mediation and conciliation are all basically non-adjudicatory dispute resolution processes where neutral third party renders assistance to the parties to the dispute to reach a satisfactory settlement. Following disadvantages of adjudicatory process has led rise of mediation and conciliation process:

- Delay in resolution of the dispute
- Uncertainty of outcome
- Inflexibility in the result / solution
- High cost
- Difficulties in enforcement and
- Hostile atmosphere

Thus, Mediation gives a voluntary and flexible negotiated conflict reduction process with the assistance of experts. It involves a structured negotiation where the mediator

listens to the parties, ascertains the facts and circumstances as also the nature of the grievance, conflict or dispute, encourages the parties to open up to identify the causes therefore, creates conducive atmosphere to enable the parties to explore various alternatives and ultimately facilitates the parties to find a solution or reach a settlement. In short, it is a professionally and scientifically managed negotiation process.

***OR (Alternate question to Q. No. 3)***

**Answer 3A(i)**

**Insolvent trading**

Insolvent trading is a concept that says that if a company is insolvent and a director allows the company to incur a new debt, then the director can be personally liable for the new debts incurred. The law makes directors responsible for ensuring that their company does not trade while insolvent.

There is no doubt that corporate powers of the Board of Directors continues to exist until a company is ordered to be wound up. Section 277 (3) of the Companies Act, 2013 states that the winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued. However, even before winding up commences, which in the case other than voluntary winding up as stated in Section 357 of the Companies Act, 2013, is the date of presentation of a petition for the winding up of a company, or in the case of a voluntary winding up shall be deemed to commence on the date of passing of the resolution for voluntary winding up under section 304, the Board of Directors of the company must ensure that if there is no reasonable prospect of paying its debts, the company should not contract for further debts and obtain goods and services on credit. Such trading will constitute insolvent trading and it may expose its directors to consequences of insolvent trading (carrying on the business of a company with an intention to defraud).

In *Re: William C. Leitch Bros. [1932] 2 Ch. 71*, it was held that if a company continues to carry on business and incurs debts at a time when to the knowledge of the director, there is no reasonable prospect of the creditor ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud.

**Answer 3A(ii)**

As per Sec 19(6) of the Competition Act, 2002, the Factors which Competition Commission of India consider while determining "relevant geographic market" are:

- Regulatory trade barriers
- Local specification requirements
- National procurement policies
- Adequate distribution facilities
- Transport costs
- Language
- Consumer preferences and
- Need for secure or regular supplies or rapid after sales services

As per Sec 19(7) of the Competition Act, 2002, the Factors which Competition Commission of India consider while determining "relevant product market" are:

- Physical characteristics or end-use of goods
- Price of goods or services
- Consumer preferences
- Exclusion of in house production
- Existence of specialized producers and
- Classification of industrial products

**Answer 3A(iii)**

Sec 420(2) of the Companies Act, 2013 provides that NCLT may at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record:

i. Amend any order passed by it,

ii. And shall make such amendment, if the mistake is brought to its notice by the parties

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

The word 'may' suggest that the provision confers a discretionary power on NCLT in the matter of rectifying what it may find to be a mistake in its order.

Further, Rule 11 of the NCLT Rules, 2016 read with Rules 154 and 155 thereof, clearly indicates that noting in the NCLT rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.

Thus, the NCLT has power to rectify a mistake apparent from the record on its own motion or on an application by a party under the Act.

**Answer 3A(iv)**

Section 144B(4) of the Income-tax Act, 1961 (the Act) provides that the assessment unit, verification unit, technical unit and the review unit shall have the following authorities, namely:

a. Additional Commissioner or Additional Director or Joint Commissioner or Join Director, as the case may be;

b. Deputy Commissioner or Deputy Director or Assistant Commissioner or Assistant Director, or Income-tax Officer, as the case may be;

c. Such other income-authorities, ministerial staff, executive or consultant, as considered necessary by the Board.

**Communications between National Faceless Assessment Centre and the assesses**

Section 144B (5) of Income-tax Act, 1961 (the Act) provides that all communications

between the National Faceless Assessment Centre and the assessee, or his authorised representative, or any other person shall be exchanged by electronic mode, and all internal communications between the National Faceless Assessment Centre, Regional Faceless Assessment Centres and various units shall be exchanged exclusively by electronic mode.

However, the provisions of section 144B(5) of the Act shall not apply to the enquiry or verification conducted by the verification unit in the circumstances as may be specified by the Board in this behalf.

**Question 4**

*(a) In exercise of its powers, the Central Government directed investigation into the affairs of Xioman Ltd., by officers of Serious Fraud Investigation as nominated by Director, SFIO. Accused were accordingly arrested and Judicial Magistrate granted remand and directed that they be produced before Special Court. Thereafter, the accused were produced before Special Court with a fresh application for remand. The prayer for extension of custody was opposed by the accused inter alia on the grounds that the period of completion of investigation as stipulated in the order being mandatory in nature has expired and as such all further proceedings were illegal and without any authority of law.*

*In the context of a judicial pronouncement, comment whether extension of custody is justified ? (4 marks)*

*(b) Gama Ltd. issued purchase orders and paid advance for import of steel used in its manufacturing. In the meantime, as new Managing Director took charge of the Company, the finance and procurement teams were busy in briefing him about the Company's processes. Though the raw material arrived in India, the Company failed to submit bill of entries. Thus, the goods for which foreign exchange was remitted had reached the destination, but the same were not released and kept in bonded warehouse. Adjudicating Authority under the Act imposed penalty on Managing Director and the Company.*

*Explain whether this transaction constitutes contravention of the provisions of FEMA Act, 1999 and whether Managing Director can escape the penalty ? (4 marks)*

*(c) A group of creditors of Dodlab Trading Ltd. made a complaint to the Registrar of Companies (RoC), Bangalore alleging that the management of the Company is indulging in destruction and falsification of the accounting records. The complainants request the RoC to take immediate steps to seize the records of the Company so that the management may not be allowed to tamper with the records. The complaint was received at 10 AM on July 1, 2021 and the RoC entered the premises at 10.30 AM for the search.*

*State the powers of the Registrar to seize the books of the Company. (4 marks)*

*(d) Anmeda Ltd., is a listed company with consistent track record of profitability and 15% growth. Though there have been consistent profits, the Company did not declare any dividend or bonus for the last l0 years. Some of the members, who usually attend the general meetings of the Company raised such questions*

*before the directors. They had also made written representation to the Company Secretary of the Company as well. Some of the members approached a Practicing Company Secretary to seek opinion for filing a case before the NCLT for oppression and mismanagement on the part of the Company, for not paying any divided/bonus for the past so many years.*

*Is the member's contention tenable ?* *(4 marks)*

**Answer 4(a)**

In *Serious Fraud Investigation Office and Ors.* v. *Rahul Modi and Ors.*, the Supreme Court held that, it could not be said that the prescription of period within which a report was to be submitted by SFIO under sub-section (3) of Section 212 was for completion of period of investigation and on the expiry of that period the mandate in favour of SFIO must come to an end. If it were come to an end, the legislation would have contemplated certain results including re-transfer of investigation back to the original Investigating Agencies which were directed to transfer the entire record under sub-section (2) of Section 212. In the absence of any clear stipulation, an interpretation that with the expiry of the period, the mandate in favour of SFIO must come to an end, would cause great violence to the scheme of legislation.

If such interpretation was accepted, with the transfer of investigation in terms of Sub-section (2) of Section 212, the original Investigating Agencies would be denuded of power to investigate and with the expiry of mandate SFIO would also be powerless which would lead to an incongruous situation that serious frauds would remain beyond investigation. That could never have been the idea. The only construction which was, possible therefore, was that the prescription of period within which a report had to be submitted to the Central Government under sub-section (3) of Section 212 was purely directory.

It cannot therefore be said that in the instant case, the mandate comes to an end and the arrest effected under the orders passed by Director, SFIO is illegal or unauthorized by law.

In view of the above case, it can be said that extension of custody is justified.

**Answer 4(b)**

The facts of the given situation are similar to the case of *Suborno Bose (Appellant)* v. *Enforcement Directorate and Anr. (Respondents)* decided by Supreme Court.

In the given case, it was held that the goods had arrived in India, but the Company failed to submit Bill of Entry and did not take delivery of the goods due to which the import formalities were not completed for want of submission of Bill of Entry. Thus, though the goods for which foreign exchange was remitted had reached the destination of the users, but the same were not released and as such kept in bonded warehouse. That resulted in contravention of Sec 10(6) of Foreign Exchange Management Act, 1999 (FEMA) read with Sec 46 and 47 thereof.

The Supreme Court while hearing the appeal in the matter held that contravention in Section 10(6) of the Foreign Exchange Management Act, 1999 (FEMA) is a continuing actionable offence. The Company and the persons managing the affairs of the Company remain liable to take corrective measures in right earnest. Considering the admitted fact that the Managing Director (MD) took over the management of the Company and was

fully alive to the default committed by the Company, yet failed to take corrective steps in right earnest. MD now cannot be heard to contend that no liability could be fastened on him individually. Indeed, FEMA regulations provides for the period within which the foreign exchange ought to be surrendered if the Company was not wanting to take delivery of the goods imported. That does not mean that the contravention ceased to exist beyond the specified period. On the other hand, after the specified period had expired, it would be a case of deemed contravention until rectified.

Applying the above decision, it can be concluded that transaction under question is a deemed contravention of Sec 10(6) of FEMA read with Sec 46 and 47 thereof and MD cannot escape penalty as imposed the adjudicating authority.

**Answer 4(c)**

**Powers of the registrar to seize the books of Accounts**

Section 209 of the Companies Act, 2013 provides that where, upon information in his possession or otherwise, the Registrar or Inspector has reasonable ground to believe that the books and papers of a company or relating to the Key Managerial Personnel (KMP) or any director or auditor or Company Secretary in practice if the company has not appointed Company Secretary are likely to be destroyed, mutilated, alerted, falsified or secreted, he may, after obtaining an order from the Special Court for the seizure of such books and papers –

- Enter, with such assistance as may be required and search the place or places where such books or papers are kept; and
- Seize search books and papers as he considers necessary after allowing the Company to take copies or extracts from, such books or papers at its cost.

According to the above provisions, Registrar may enter and search the place where such books or papers are kept and seize them only after obtaining an order from the Special Court.

Since in the given question, Registrar entered the premises for the search and seizure of books of the company without obtaining an order from the Special Court, it is not authorized to seize the books of Dodlab Trading Ltd.

**Answer 4(d)**

Non-declaration of the dividend / bonus do not come within the meaning of the Oppression and mis-management on the part of the directors of the company. Although the precise definition of the words 'Oppression and Mis-management have not been defined under the Companies Act, 2013, however its meaning can be inferred from the various judicial pronouncements.

In the case of *Mr. Vasudev P Hanji & Others* v. *Ashok Ironworks Pvt. Ltd.* (2008, 145 Comp. Cases 717), and in the case of *Jaladhar Chakraborty & Ors.* v. *Power Tools and Appliances Co. Ltd.* (1994, 79 Comp. Cases 505), it was held that "declaration of dividend is left to the collective decision of the Board and its non-declaration cannot be termed to be an oppressive conduct".

In view of the above, it can be said that the member's contention is not tenable.

**Question 5**

*(a) Yasho Fashions Ltd., a Company floated by Yasho, a graduate from NIFT, Mumbai was initially formed to set up a retail store of niche boutiques. As part of growth plans, the Company had received funding from Venture Capital (VC) fund. Initially, the equity was held by Yasho, her family and the VC fund, but for organic growth, the Company came out with the Initial Public Offer (IPO) in the December 2019, which received great response. Soon due to the pandemic, the Company's business was not doing well. The share price dwindled to ` 50-55 as against its listing price of ` 500 per equity share. Many of the investors lost their money. Meanwhile, the Company recruited some technicians and also engaged some artists and paid them off the signing amount, with a plan of making big on OTT platforms. Some of the members of the Company thought it was an ultra vires act and they wanted to restrain the Company.*

*As a Practising Company Secretary, advise the members of the Company :*

*(a) Whether they can file a suit on the Company and*

*(b) Whether they can get the Company restrained from venturing into new businesses or doing ultra vires acts.*

*(8 Marks)*

*(b) Roma is a Professor of Corporate Laws in a reputed Management College in Chennai. She enrolled herself in the Independent Directors Databank maintained by the Indian Institute of Corporate Affairs (IICA). She also passed the Online Proficiency, SelfAssessment Test conducted by the IICA. She received an offer to be an independentdirector on Board of Megan Ltd., a Company listed on BSE. She intends to join the Company, but has some hesitation on account of the risk associated with the directorship. Roma reaches out to you, the Company Secretary of the Company, explaining her apprehensions. You explain to Roma, that Megan Ltd, has taken Directors & Officers (D & O) policy for its directors. Roma, wants to understand further about D & O policy and request you to send her a document covering various aspects she should be conversant about D & O policy.*

*Prepare a short note to be shared with Roma about D & O Policy.*

*(8 marks)*

**Answer 5(a)**

Section 245 of the Companies Act, 2013(the Act) and Rules applicable thereto, allows members having requisite strength, to initiate class suit actions for restraining the company from committing any ultra vires act. The relevant provisions are discussed hereinafter:

Matters for which Class Action is allowed under Section 245(1): Such number of member or members, depositor or depositors or any class of them, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company's memorandum or articles:

(c) to declare a resolution altering the memorandum or articles of the company as void, if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members:

(g) to claim damages or compensation or demand any other suitable action from or against -

i. the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

ii. the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

iii. any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

Further, as per Sec 245(3) the minimum strength required for initiation of a Class Action Suit by Members, Section 245(3)(i) as follows:

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares:

(b) In case of a company not having share capital, more than one-fifth of the total number of its members.

Also, as per National Company Law Tribunal Rules, 2016 under Rule 84(3) thereof, in case of a company having a share capital, the requisite number of member or members to file an application under sub- section (1) of section 245 shall be -

(i) (a) at least 5% of the total number of members of the company; or

(b) 100 members of the company,

whichever is less; or

(ii) (a) member or members holding not less than 5% of the issued share capital of the company, in case of an unlisted company;

(b) member or members holding not less than 2% of the issued share capital of the company, in case of a listed company

Accordingly, the members of the company comprising of the minimum required strength as mentioned above, may choose to file a class action suit for restraining the company from taking any action which is ultra vires the memorandum or the articles of association of the company or which is in breach of any provision of the memorandum of association of the company.

As regards the possibility of restraining the company from venturing into the new business, the same can be done on the grounds mentioned under Sec 245(1) of the Act as mentioned above. Section 245(1)(a) specifically provides for a ground of filling an application before the Tribunal to restrain the company from committing an act which is ultra vires the articles or memorandum of the company.

**Answer 5(b)**

**Director and Officers(D&O) Policy**

There is no exact science to determining the limits of D&O insurance a particular company should maintain. However, reputable commercial insurance brokers and other vendors have developed benchmarking data based on market caps, annual revenues, industry etc. that provide insight regarding how your company's limits stack up against similar / peer companies. You should ask the individual responsible for placing your D&O insurance for this data and review it to determine where your limits are at versus your peer companies. Ask questions if there are deviations in your limits versus those of your peers.

D&O insurance often covers all directors, officers and employees, as well as the company. This means that significant claims against the company and employees may deplete the limits available for individual officers and directors. You should determine if there are certain limits available only to directors and officers and whether your coverage contains a "priority of payments" clause that provides that in the event of claims against both the directors / officers and the companies, losses attributable to the directors / officers are entitled to payment before losses of the company.

D&O insurance coverage triggers have become much broader in recent years. In addition to coverage for lawsuits by shareholders, policies often now cover individual directors and officers for investigations by regulatory bodies, upon receipt of a summons etc. Therefore, one should inquire, particularly with respect to regulatory body investigations and summons, at what point coverage is triggered.

In addition to defence costs and the costs of settlements/ judgements arising from shareholder actions, many policies now cover attorneys' fees and other expenses related to responding to both formal and informal investigations and summons. Again, one should inquire at what point one coverage is triggered and what costs associated with such events are covered under one policy.

One has to look their claims paying ability ratings issued by reputable independent

ratings services. The individual responsible for procuring one coverage need to be consulted if they have had a conversion with your insurance broker regarding the claims payment philosophy of the insurers, and what those insurers' reputations are in the marketplace when it comes to claims handling procedures.

Take concern what happens to the coverage if another insured engages in fraud or criminal activity, but one is still named as a defendant in a lawsuit. Make sure that the bad acts of a 'black hat don't negate one coverage. Also, ask what happens to your coverage if someone else makes a misrepresentation in the application for the D&O policy. Try to ensure that someone else's misstatements don't lead to your loss of coverage.

Make sure you understand significant exclusions in your policy (exclusions for major shareholders, M&A activity, etc., are becoming more common). Have your policy reviewed by an outside professional to determine the scope of items that may not be covered under the policy.

Understand the claim notice requirements under the policy. One of the worst things that can occur is a loss of coverage due to inadequate or untimely notice.

Side A coverage is effectively the last line of defence against a director or officer having to pay their own costs related to a claim. It kicks in when the company is unable to provide indemnification (usually due to bankruptcy or a statutory prohibition on indemnification). Therefore, it is one of the most important coverages for individual directors and officers, as it directly protects against loss of personal assets as a result of claims.

Independent Director Insurance has been around for some time and provides a separate set of coverage limits dedicated solely to independent / outside directors of a company. To date, it has been purchased by very few companies. Generally, if adequate Side A coverage is already in place, this coverage should not be necessary.

**Question 6**

*(a) Adventure Voyage Ltd. is a company engaged in the business of providing travel related services to its customers. It has its own boats and ships and provides adventure tours through sea route from Chennai and Kolkata in luxury ships. The Company availed a loan of ₹50 lakh from a bank, but due to non-payment, the bank had declared its promoters and directors as wilful defaulters. Since the Company was not able to raise any finance from the bank, the Company decided to issue non-convertible debentures aggregating ₹100 lakhs on private placement basis. The Company collected the desired amount without seeking any approval of SEBI in this regard. One of the persons, who came to know that the Company has not sought any approval from the SEBI, made a complaint in writing to the SEBI.*

*Is SEBI's approval required for such issue of non-convertible debentures on private placement ? Does SEBI have powers for inspection ?*

*(4 marks)*

*(b) Lavish Cosmetics Ltd. is engaged in the business of the making and trading of luxury cosmetic items. The paid-up share capital of the Company is ₹50 crores (face value ₹10 per share). The Board of directors of the Company decided to*

*reduce the paidup share capital to ₹40 crores. The Company passed a special resolution to this effect in the general meeting of the shareholders and filed an application with the Tribunal for confirmation. The Tribunal directed to provide a list of the creditors anda confirmation that creditors have no objection for reduction of the paid-up capital. The Chief Financial Officer (CFO) did not disclose the names of some of the creditors, who could have objected to the reduction. The Tribunal presuming that there is no objection from all the creditors, confirmed the reduction of the capital. The aggrieved creditors represented the same before the Securities Appellate Tribunal and the matter of concealment of information by CFO was identified.*

*What are the consequences of such concealment of information by the CFO ?*
*(4 marks)*

*(c) Nice Foods Pvt. Ltd. is a company engaged in food delivery business. It collects deliveries from different restaurants in the Mumbai as per the orders of the customers and delivers it to their door step. There was a news report in the media which alleged that the Company collects personal information like name, address, mobile number, e-mail, choice of foods etc., from the customers and sells that data to other companies. You are the Company Secretary of the Company and the CEO seeks your inputs to address this issue proactively. Outline your strategy to handle such matters.*

*(4 marks)*

*(d) "Over the past several years, corporate India has become much more engaged with and sensitized to Enterprise Risk Management." Explain briefly the significant challenges which Indian boards face in designing and implementing an effective ERM system.*

*(4 marks)*

**Answer 6(a)**

According to section 42(1) of the Companies Act, 2013(the Act), a company may, subject to the provisions of section 42, make a private placement of securities.

According to section 42(2) of the Act, a private placement shall be made only to a select group of persons who have been identified by the Board of the company, whose number shall not exceed fifty or such higher number as may be prescribed.

Further, section 42(11) of the Act states that notwithstanding anything contained in 42(9) and 42(10), any private placement issue not made in compliance of the provisions of section 42(2) shall be deemed to be a public offer and all the provisions of Companies Act, 2013 and the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 shall be applicable.

If the company complies with the conditions provided for private placement as specified under section 42 of the Companies Act, 2013 and rules made thereunder, the company may issue non-convertible debentures without the approval of Securities and Exchange Board of India (SEBI).

However, if the company does not comply with the above said conditions the Company is required to comply with the provisions of Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021 (said regulations).

Regulation 3(b) of the said regulations states that the regulations shall apply to the issuance and listing of non- convertible securities by an issuer issued on private placement basis which are proposed to be listed.

Further, as per Regulation 5(1)(c) of the said regulation, a company shall not allowed to make an issue of non-convertible securities if as on the date of filing of draft offer document or offer document the issuer or any of its promoters or directors is a wilful defaulter except in case of private placement of non-convertible securities.

Accordingly, despite its promoters and Directors being wilful defaulters the Company is allowed to make an issue of the non-convertible securities on private placement, if the said securities are proposed to be listed in accordance with the Regulations.

Under the regulations, the Company is not required to obtain approval from the Securities Exchange Board of India for issue of non-convertible securities. However, as per Regulation 6 of the aforesaid Regulations, the company is required to obtain an in-principle approval for listing of its non-convertible securities from one or more stock exchange(s) where such securities are proposed to be listed.

Further, Regulation 52 of the said regulations deals with the inspection by the SEBI. It provides that -

(1) The Securities Exchange Board of India(SEBI) may suo-moto or upon information received by it, appoint one or more persons to undertake the inspection of the books of account, records and documents of the issuer or lead manager(s) or any other intermediary associated with the issue, for any of the following purposes, namely, -

   (a) to verify whether the provisions of the SEBI Act, 1992, the Companies Act, 2013, Securities Contracts (Regulation) Act, 1956, the Depositories Act, 1996 and/or the rules and regulations made thereunder in respect of issue of securities have been complied with;

   (b) to verify whether the requirements in respect of issue of non-convertible securities as specified in these regulations have been complied with;

   (c) to verify whether the requirements of listing conditions and continuous disclosure requirements have been complied with:

   (d) to inquire into the complaints received from investors, other market participants or any other persons on any matter of issue and transfer of non-convertible securities governed under these regulations;

   (e) to inquire into affairs of the issuer in the interest of investor protection or the integrity of the market governed under these regulations; and,

   (f) to inquire whether any direction issued by the Board has been complied with.

(2) While undertaking an inspection under these regulations, the inspecting authority or the SEBI, as the case may be, shall follow the procedure specified by the Board for inspection of the intermediaries.

**Answer 6(b)**

Section 66 of the Companies Act, 2013 deals with reduction of share capital of a company. Sub-section 10 of Section 66 provides that if any officer of the company:

(a) Knowingly conceals the name of any creditor entitled to object to the reduction

(b) Knowingly misrepresents the nature of amount of the debt or claim of any creditor

(c) Abets or is privy to any such concealment or misrepresentation as aforesaid

he shall be liable under section 447 of Companies Act, 2013.

Section 447 deals with the punishment for fraud, which provides that-

Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

**Answer 6(c)**

The company is facing a situation that requires Crisis Management. Crisis management is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. Crisis management often requires decisions to be made within a short time frame, and often after an event has already taken place. In order to reduce uncertainty in the event of a crisis, organizations often create a crisis management plan.

As a Company Secretary my endeavour shall be to protect the interest of the company as well as of its customers. To address this crisis, I shall take the following steps (after taking due approval of the management):

1. Review the details terms and conditions consented to by the customers before accepting the services of the company to identify the restrictions on the company in dealing with the said personal data of the customers and list out the clauses which supports/ justifies the action of the company;
2. Prepare in discussion with the Management and more specifically the legal experts, a draft public communication as a pointed response to the major allegations in the media.
3. Published the approved public communication using the Company's Official Twitter/ Instagram/ Face Book / LinkedIn pages. A possible draft of the public communication could be as follows with the following:

   *Your company 'Nice Foods Pvt. Ltd' have privilege to deliver at your door step,*

*the food items of Restaurants of your CHOICE. The company collects the personal information of YOURS to serve you better, within 30 Minutes. The company have a 'NO DATA BREACH POLICY' since its incorporation, to keep the UTMOST PRIVACY of the customer's personal information. So Rest Assure, Keep Ordering Us To Serve You, Tastier, Healthier and Faster*

*The Food of Best Restaurants, of YOUR Choice.*

4. Prepare detailed back up strategy for taking appropriate legal measures to control damage from unsubstantiated claims in the media.

   Thus making the provisions in advance for mitigating the possible risks emanating from a future crisis might help to achieve a position with comparably less harm. This is the benefit of managing crisis in advance.

**Answer 6(d)**

Indian boards face significant challenges in designing and implementing an effective ERM system, which are as under:

(i) *Effectively linking risk and strategy* : Integrating risk management into the overall corporate strategy is a challenge for many India firms. The challenge is to have ERM system that encompasses a process capable of being applied in strategy setting across the enterprise. "Effective risk management is not about eliminating risk taking, which is a fundamental driving force in business and entrepreneurship." In other words, taking appropriate risk needs to be at the heart of corporate strategy. For this to happen, the board must understand and guide the company's appetite and ability to take risk and communicate the same to the company's risk management team. ERM programs must be developed with input from various functions in the organization, such as finance, legal, sales etc.

(ii) *Implementing cost-effective risk management for small and medium sized enterprises* : While the costs of risk management failures can be high, designing and implementing efficient ERM can also be quite costly, especially for small and medium-sized firms. For example, hiring consultants or the necessary staff to develop stress-testing and early warning systems to alert the board regarding significant risks can be difficult to do in smaller companies. In addition, while larger firms can establish a chief risk officer' functions with direct report to the board, doing so is much harder for smaller companies.

(iii) *Addressing all major areas of risk* : ERM requires a firm to take portfolio view of risk, board must consider how various risks inter-relate, rather than treating each business and risk individually. This is a significant challenge for many boards.

(iv) *Mitigating new risks* : In India, many complex areas of risk have emerged in the last decade or so, which has made risk management particularly challenging. For example, some traditional areas of risk, such as political instability and strikes and unrest, appear to have subsided while others such as information and cyber security as well as terrorism and insurgency have increased substantially. Companies in wider variety industries have experienced the theft

of data and sensitive information. For companies in major cities, the threat of terror attacks has become a growing cause for concerns, which can be hard to manage by the company itself. According to 2015 survey, the top five risks for Indian firms include:

- Corruption, bribery and corporate fraud
- Information and cyber security
- Terrorism and insurgency
- Business espionage and
- Crime

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