GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2023

MODULE 2

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

JUNE 2023

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) ABC Private Ltd. requires to conduct a Board meeting in 5 days to transact an urgent business. You are the Company Secretary in Practice (PCS) of the company. The company seeks your advice in this regard, on conducting the Board meeting and the validity of the decisions taken in such meeting. Assume that it doesn't have any independent director on Board. Advice.

(5 marks)

(b) A strong compliance training and education program reinforces the company's compliance culture. In the light of the above statement, you are asked to give a "Compliance Education and Training Program" for the employees of Z Ltd. stating five suitable points which must be included in your above plan. Explain.

(5 marks)

(c) ABC Ltd. a listed company has been facing much litigation, before various legal and regulatory authorities, for a long time. Many documents have been produced in this regard, before various authorities. These documents are having overlapping effect of such production i.e. the same document(s) is to be produced before various authorities. In this situation, advise the company regarding the preservation of documents relevant to the various litigations, specifically with reference to the period of preservation.

(5 marks)

(d) You as a Company Secretary in Practice (PCS) are asked by the Managing Director of a client company to explain the need for Compliance Management in his company. Explain.

(5 marks)

Answer 1(a)

As per Section 173(3) of the Companies Act, 2013, a meeting of the Board of Directors shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the Company and such notice shall be sent by hand delivery or by post or by electronic means.

Provided that a meeting of the Board ·may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director.

As ABC Private Ltd. is a private limited company is advised to follow the above provisions to transact and validly decide on their urgent business. As sending notices by electronic means and attending meetings through VC (Video Conference) are approved measures, ABC Private Ltd, is facilitated to conduct the Board Meeting, by a shorter notice. Hence, ABC Private Ltd can conduct the Board Meeting by a shorter notice, as the Companies Act, 2013 does not mandate the presence of Independent Directors in the constitution of Board of a Private Limited Company.

Further, as per Para 1.3.11 of SS-1, in case the company does not have an Independent Director, the decisions shall be final only on ratification thereof by a majority of the Directors of the company, unless such decisions were approved at the Meeting itself by a majority of Directors of the company.

Answer 1(b)

A strong compliance training and education program reinforces the company's compliance culture. It builds awareness and understanding of compliance standards, procedures, guidelines and issues.

Hence, the plan for compliance training and education program must include -

a. Concise statements that capture the relevant internal and external compliance obligations and the risks arising from those obligations;
b. The business processes to which the compliance obligations are linked or on which they have an impact;
c. Brief description of the training or education activity;
d. Target audience (refresher for existing Employees, induction for new Employees or Adhoc when required);
e. Frequency of training or education.

Answer 1(c)

Documents arising out of various litigation wherein a company is a party in any manner, shall need to be preserved as per the directions/ orders of the court/s, tribunal/s, judicial and other authorities, as may be applicable, in absence of which the documents shall be preserved for a period of not less than 8 consecutive calendar years after conclusion of the litigation.

Any authority dealing with the litigation shall have the power to direct a company to produce/preserve and/or may destroy any document/s. However if the documents were destroyed as per the policy of one authority, it may not be possible for the company to produce such documents, before any other authority if required. So necessary permission is to be taken by the Company and/or a statement to that effect shall be given by the Company from/to the relevant authorities. Any other action/s shall be taken by the Company, as may be advised by these authorities.

Answer 1(d)

Need for Compliance Management

Every company needs to follow laws and regulations enacted by Central and State Governments or such other regulator from time to time. Corporate compliance is an ongoing process, and businesses especially ones that have incorporated under any statue need to make sure that they are following the rules set in place. In every organization top executive plays a significant role in complying with multiple rules and regulations under different laws. Many companies are adopting comprehensive compliance plans to address emerging regulatory paradigm and those fail to address the new regulations, pay huge fines, incur punitive restrictions on their operations and loose shareholders confidence by reduced share value which in turn damage the reputation of their businesses. Increased liability and regulatory oversight has amplified risk to appoint where it demands continuous evaluation of compliance management systems.

Onerous responsibility to guide to the management for compliance with the relevant laws casts upon the Company Secretaries. They have to advise companies in totality to provide full, timely and intelligible information. To enable companies to put in place an effective Compliance Management System, Company Secretaries should ensure that companies:

- Adhere to necessary industry and Government regulations.
- Change business processes according to legislative change.
- Realign resources to meet compliance deadlines.
- React quickly and cost-effectively if regulations change.

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

Question 2.

(a) *ABC Ltd. a listed company, maintains all its documents, records, registers and minutes in electronic form. A shareholder requests the company to inspect as well as get copies of the AGM minutes held in 2022, in electronic form. The company has 2,500 shareholders, debenture holders and other security holders.*
(i) Advise the company whether this can be allowed to the shareholder.
(ii) If the company is an unlisted company, whether the shareholder is eligible to inspect and get the copies of the minutes in electronic form.

(5 marks)

(b) *You are the Company Secretary in Practice (PCS) of XYZ Ltd. a section 8 company. The company informs you that it wants to give a guarantee in a 10 days' time, of loans borrowed by a third party, for which a Board resolution is needed. The company has 9 directors but none of them is available to attend the meeting for next 25 days either physically or through any other audio-visual means, though all of them are in favour of the proposal. No specific authority is given by the Board of the company in this regard to anyone. The company approaches you for your advice. Advice.*

(5 marks)

(c) ABC Ltd. is planning to merge with XYZ Ltd. which is listed in BSE and NSE. It approaches X to provide a search report on the information of XYZ Ltd. filed with BSE and NSE.
(i) State the possibility of providing such a Search Report to ABC Ltd.
(ii) Is the web-site of SEBI supportive in this regard?
(iii) Indicate at least six documents/information of listed companies, which are available in the public domain of the Stock Exchanges for due-diligence and analysis purposes to equip for providing the Search Report.

(5 marks)

(d) X, a member of the Institute of Company Secretaries of India (ICSI) is working as a whole-time Company Secretary in an Indian company. He provided some confidential information of his employer company to a multinational company on his own and received a fee. Citing the relevant provisions, state whether X can accept such fee.

(5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A.

(i) During the process of preparing the Form No. MGT-8 and Form No. MGT-7, for ABC Ltd. X, the PCS felt that there are some anomalies in information, which may need a reservation/qualification. How can X ensure the execution of the assignment as per the norms?

(5 marks)

(ii) ABC Ltd. a section 8 company has been incorporated on 15th April, 2013, with 19 directors in its Board. The first Board meeting was held on 13th May, 2013 with 7 directors as quorum.
(a) The company had approached you to advice on the validity relevant to the quorum and the date of its first Board meeting. Advice.
(b) Also advise the company in deciding the date of the next Board meeting.

(5 marks)

(iii) ABC Private Ltd. a company incorporated with a paid-up capital of ` 8 crore wants to appoint a full-time Company Secretary. The company seeks your advice as its PCS regarding the nomenclature of designation, to be fixed for such appointment, such as Key Management person or otherwise. Advice.

(5 marks)

(iv) Explain each of the following terms:
(a) Digital KYC
(b) Equivalent-e-Document.

(5 marks)

Answer 2(a)

Section 120 of Companies Act, 2013 states that without prejudice to any other provisions of this Act, any document, record, register, minutes, etc.,—

(a) required to be kept by a company; or
(b) allowed to be inspected or copies to be given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be prescribed.

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

Rule 29 of the Companies (Management and Administration) Rules, 2014, specifies, where a company maintains its records in electronic form, it is the duty of the company to make the records available for inspection in electronic form or to provide copies of those records containing a clear reproduction of the whole or part thereof, as the case may be on payment of not exceeding ten rupees per page.

i. ABC Ltd. hence, can allow the shareholder to inspect and get copies of the AGM minutes, held in 2022 by following the above provisions.

ii. In case ABC Ltd. is an unlisted company and if it is maintaining its records in electronic form, it is allowed to comply with the request of the shareholder, by following the above provisions.

Answer 2(b)

As per Section l79(3)(f) of the Companies Act, 2013, the Board of Directors of a Company shall exercise the power to grant loans or give guarantee or provide security in respect of loans, by means of a resolution passed at the meetings of the Board.

Provided that the Board may, by a resolution passed at a meeting, delegate to any Committee of directors, the Managing Director, or Manager or any other principal officer of the Company or in the case of a branch office of the Company, the principal officer of the branch office, the above cited power, on such conditions as it may specify.

However, such power as specified in Section l79(3)(f) of the Companies Act, 2013, may be exercised by Section 8 Companies by passing a resolution by circulation as provided under Section l75 of the Companies Act, 2013, read with its sub-sections and provisions.(Notification dated 5th June, 2015.)

Hence, XYZ Ltd can follow the provisions of Section 175 read with its sub-sections and relevant Rules, of the Companies Act, 2013 and pass the required resolution by circulation.

Answer 2(c)

(i) Yes. The information filed with BSE and NSE by listed companies (in this case XYZ Ltd.), which are available in public domain, can be utilized by X, for analysis and due-diligence and get equipped in providing a Search Report to ABC Ltd.

(ii) Yes. The SEBI website is supportive as it can assist X by providing updated Regulations, rules, circulars, notifications, etc. as well as the information of the listed companies (in this case XYZ Ltd.) which are available in public domain of SEBI, hence the website of SEBI may be utilized by X, for analysis and due-diligence and get equipped in providing a Search Report to ABC Ltd.

(iii) Information/documents which are available in the public domain of Stock Exchanges-

- Corporate Announcements
- Corporate Actions
- Financial Results
- Documents of Board Meetings
- Sustainability Reports
- Buyback / Redemption
- Corporate Information
- Documents of shareholders meetings
- Voting results
- Shareholding pattern
- Disclosures
- Offer documents
- Statement of investor complaints
- Related Party Transactions.

Answer 2(d)

X is wrong as he has committed the professional misconduct for the reasons prescribed under PART II of Second Schedule of the Company Secretaries Act, 1980.
PART-II: Professional misconduct in relation to members of the Institute generally.
A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he-

1. Contravenes any of the provisions of this Act or the regulations made thereunder or any guidelines issued by the council;
2. Being an employee of any company, firm or person, discloses confidential information acquired in the course of his employment, except as and when required by any law for the time being in force or except as permitted by the employer;
3. Includes in any information, statement, return or form to be submitted to the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority any particulars knowing them to be false;
4. Defalcates or embezzles moneys received in his professional capacity.

X, Being a Whole time Company Secretary of the Indian Company, can't disclose confidential information except as and when required by any law for the time being in force or except as permitted by the employer and can' accept fee also for the same, it is considered as Professional Misconduct under provisions of the Company Secretaries Act, 1980.

Answer 2A (i)

A PCS, while scrutinizing the client's information for certifying Form No. MGT-8, (Certification of Annual Return), observe all the relevant information/statements/documents and ensure that they are reflecting the true and fair status. If needed, the observations, limitations, reservations, qualification, adverse remarks, disclaimer, if any, shall be suitably incorporated in Form No. MGT-8.

A PCS may certify the Form No. MGT-7 (Annual Return), subject to certain reservations/qualifications/observations/adverse remarks, by way of an annexure to his/her, certification. However this course of action can only be resorted to in case where material facts are not stated correctly and completely in the Annual Return or where the Company has not complied with the applicable provisions of the statutes.

To ensure the execution of the assignment as per norms, X, shall adopt the above cited concepts, and check thoroughly the correctness of the information and documents provided by the company. Then, if needed beyond doubt, X can incorporate the reservations/qualifications, adverse remarks, disclaimers, if any in his report.

Answer 2A (ii)

As per Section 173(1) of the Companies Act, 2013 (the Act), every Section 8 Company incorporated under the Companies Act, 2013, shall hold its first Board meeting within 30 days of its incorporation as other Companies incorporated under the Companies Act, 2013, are required to do.

Section 173(1) also provides for the subsequent Board meetings of a Section 8 Company as," section 173(1) shall apply to section 8 companies, to the extent that the Board of Directors, of such Companies shall hold at least one meeting within every 6 calendar months.

Section 174 indicates the quorum for the Board meeting of a section 8 Company is "either 8 members or 25% of its total strength whichever is less, provided that lesser number is not less than 2.

(a) First Board meeting held on 13th May 2013:

Meeting held on 13th May, 2023, is in order regarding the date, as it was conducted within 30 days of its incorporation on 15th April, 2023.

Quorum as per requirement was, the lesser of the following -

(i) 8 Members of the Board or

(ii) 25% of the Total strength of 19, which is 4.75, rounded of to 5.
Lesser is 5. As 7 members attended the meeting, quorum was also in order.

(b) The first board meeting was held on 13th May, 2013 (i.e. for first six calendar months 01st January, 2013 to 30th June, 2013). The Board meeting is to be conducted in every 6 calendar months. The next can be held in between 1st July 2023 and 31st December, 2023.

Answer 2A (iii)

Rule 8 of the Companies (Appointment and Remuneration) Rules, 2014, which stipulates for appointment of Key Managerial Personnel covers the following companies-

- every listed company
- every other public company having a paid-up share capital of ten crores rupees

As per Rule 8A, every private company which has a paid up share capital of ten crore rupees or more shall have a whole -time company secretary.

Under Regulation 6 of the SEBI (LODR) Regulations, 2015, a listed company is required to appoint a qualified company secretary as the compliance officer.

A Whole-time-Company Secretary is a Key Managerial Personnel for the purposes of Section 203 of the Companies Act, 2013 read with its Rules.

As ABC Pvt Ltd. is not covered under Rule 8A of the Companies (Appointment and Remuneration) Rules, 2014, therefore it is not mandatory for the company to appoint a whole time company secretary. But it also does not prohibit the voluntary appointment of whole time Company Secretary. Therefore, ABC Pvt. Ltd. Can voluntarily appoint whole time company secretary and designate him as Whole-time Company Secretary/Corporate Secretary/Compliance officer/ Key Managerial Person/Key Management Person.

Answer. 2A (iv)

Both, Digital KYC and Equivalent-e-Documents, are the improvisation in the process of revisiting the guidelines of KYC norms relevant to Customer Due Diligence issued by the RBI through Master Direction on KYC dated 25th February 2016.

(a) Digital KYC, is capturing the live photo of the customer and officially valid documents or the proof of possession of Aadhaar, where offline verification cannot be carried out, along with latitude and longitude of the location where such live photo is being taken by an authorized officer of the Reporting Entity as per the provisions. Steps to carry out the Digital KYC process have also been stipulated.
(b) Equivalent e-Document is an electronic equivalent of a document, issued by the issuing authority of such document with its valid digital signature including document issued to the digital locker account of the customer as per Rule 9 of the Information Technology (Preservation and Retention of Information by Intermediaries Providing Digital Locker Facilities) Rules, 2016.

PART-II

Question 3.

(a) (i) Opening of an Escrow Account is mandatory in certain corporate actions. State the forms in which an Escrow Account can be maintained as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for settlement in the course of corporate actions.

(2 marks)

(ii) State the major points of coverage in the process of FEMA due diligence.

(3 marks)

(b) You are in the process of doing due diligence of ABC Ltd. a listed company on an assignment.
(i) How will you check the correctness of the Constitution of the Board, based on the status (executive/non-executive) of the Chairperson?

(3 marks)

(ii) You want to ensure yourself that the company is consistently striving to stick to Shareholder Value Enhancement. Mention any four parameters which you shall check in this regard.

(2 marks)

(c) Explain the High Power Advisory Committee (HPAC) of SEBI, constituted under New Settlement Regulation by SEBI and the provisions relevant to recusal by its members.

(5 marks)

Answer 3(a) (i)

As per regulation 17(3), an Escrow Account opened under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, may be maintained for settlement in course of corporate actions in the following forms-

(i) Cash deposited with any scheduled commercial bank;

(ii) Bank guarantee issued in favour of the manager to the open offer by way of scheduled commercial bank; or

(iii) Deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin, provided these securities are required to conform to the requirements set out in the SEBI Regulations.

Answer 3(a) (ii)

The following are the major points covered under the process of FEMA due diligence-

- Capital Account transactions;
- Current Account transactions;
- Currency Transactions;
- Regulations, Master Directions and Circulars issued by RBI;
- FDI / ODI Policy, approvals;
- Setting up of business through Liaison office, Branch office, Project office, Wholly Owned Subsidiaries, Joint Ventures, Foreign Institutional Investors and Foreign Venture Capital Investor, Non-Resident of India/person of Indian origin.

Answer 3(b) (i)

As per regulation 17(1)(b) of the SEBI (LODR) Regulations, 2015, the points to be checked based on the status of the Chairperson are -

- Is the Chairperson an Executive Chairperson?
- If the Chairperson is executive, does 50% or more of the Board consist of Independent Directors?
- If the Chairperson is non-executive and is a promoter of the Company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, does 50% or more of the Board consist of Independent Directors?
- If the Chairperson is non-executive and is not a promoter of the Company or is not related to any promoter or person occupying management positions at the Board level or at one level below the Board, does one third or more of the Board consist of Independent Directors?

Answer 3(b) (ii)

The parameters to be checked to ensure consistent Shareholder Value Enhancement are -

- Growth in net-worth;
- Details of dividend paid;
- Dividend policy, if any;
- Earnings Per Share;
- Details of public shareholding;
- No grievance complaints in any forum/s, by the shareholders, against the Company;
- Voting in required majority, in the general meetings, in favour of the proposed resolutions;
- Details of investment satisfaction survey, if any.

Answer 3(c)

Meaning and Constitution of HPAC:

As per regulation 11(1) and (2) Securities and Exchange Board of India (Settlement proceedings) Regulations, 2018- The High Power Advisory Committee (HPAC) constituted under the New Settlement Regulation of SEBI, to deal with the Settlement Application filed before SEBI, with a Judicial member who has been the Judge of the Supreme Court or a High Court and three external experts of securities market. Further, in order to impart transparency in the process, the role of the HPAC, (including instances of recusal by members of the HPAC) are specifically defined under the New Settlement Regulation.

Provisions relevant to recusal:

1. If any of the member of HPAC recused himself, the remaining two or more members may submit their recommendations on the terms of settlement;
2. Where no consensus or majority is arrived upon by the members of the HPAC, the Judicial member's recommendations would act as the veto;
3. If the Judicial member has recused himself then the recommendation of the remaining two or more members shall be submitted for consideration to the Panel of Whole Time Members; and
4. Where all or all but one of the members of the High Powered Advisory Committee recuse themselves in respect of an application, the Board may constitute another High Powered Advisory Committee.

Question 4.

(a) Explain Social Stock Exchange.

(b) Explain the procedure in case a person seeking appointment as a Director of a company is a national of a country which shares land border with India and consequence of non-compliance in this regard.

(c) Explain the relevant provisions for giving an intimation of receiving foreign funds from relatives under Foreign Contribution (Regulation) Amendment Rules, 2022.

(d) Explain the provisions relating to the physical verification of a registered office of the company by the Registrar of Companies (ROC).

(e) Outline various factors that are considered by an Auditor for deciding the audit fee. What precaution the auditor should keep in this regard?

(3 marks each)

Answer 4(a)

Social Stock Exchange means a separate segment of a recognised stock exchange having nationwide trading terminals permitted to register Not for Profit Organizations and/or list the securities issued by Not for Profit Organization in accordance with provisions of the SEBI Notification SEBI (Issue of Capital and Disclosure Requirements) (Third Amendment) Regulations, 2022.

Answer 4(b)

The Ministry of Corporate Affairs (MCA) vide its notification dated June 1, 2022 has notified the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 which has come into force on the date of its publication in the Official Gazette. The amendments *inter-alia* provide that:

i) In case the person seeking appointment is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs shall also be attached along with the consent (Form DIR-2).(Insertion of proviso to Rule 8)

Consequence of Non-compliance

ii) No application number shall be generated in case of the person applying for Director Identification Number (DIN) is a national of a country which shares land border with India, unless necessary security clearance from Ministry of Home Affairs has been attached along with application for DIN (Form DIR-3).{Insertion of proviso to Rule 10(1)}

iii) In form DIR-12 a declaration is inserted to be opted by person seeking appointment as director as to whether the national of a country which shares land border with India has sought necessary security clearance from Ministry of Home Affairs or not.

Answer 4(c)

The Ministry of Home Affairs has published the Foreign Contribution (Regulation) Amendment Rules, 2022 to further amend the Foreign Contribution (Regulation) Rules, 2011 which has come into force on the date of their publication in the Official Gazette i.e. 01-07-2022. Through this amendment, Rule 6 deals with an intimation of receiving foreign funds from relatives, which is amended to provide that the time period to notify the government regarding the overseas transaction has been extended from 30 days to three months. Accordingly, any person receiving a foreign contribution in excess of Rs. 10 lakh or equivalent thereto in a financial year from any of his relatives shall inform the Central government (details of funds) in FORM FC-1 within three months from the receipt of such contribution.

Answer 4(d)

The Ministry of Corporate Affairs (MCA) vide its notification dated August 18, 2022 has notified "The Companies (Incorporation) Third Amendment Rules, 2022" which has come into force on the date of its publication in the Official Gazette. According to the amendment, rule 25B is inserted in the Companies (Incorporation) Rules, 2014, stating:

(1) The Registrar, based upon the information or documents made available on MCA 21, shall visit at the address of the registered office of the company and may cause the physical verification of the said registered office for the purposes of sub-section (9) of section 12 of the Companies Act, 2013, in presence of two independent witness of the locality in which the said registered office is situated and may also seek assistance of the local Police for such verification, if required.

(2) The Registrar shall carry the documents as filed on MCA 21 in support of the address of the registered office of the company for the purposes of physical verification and to check the authenticity of the same by cross verification with the copies of supporting documents of such address collected during the said physical verification, duly authenticated from the occupant of the property whereat the said registered office is situated.

(3) The Registrar shall take a photograph of the registered office of the company while causing physical verification of the same. Further a report of physical verification of the registered office of the company is also required to be in the prescribed format.

Answer 4(e)

Audit fee which is to be charged by the auditor depends on several factors, which includes:

- Size of the organization;
- Nature of business;
- Internal Controls systems & Technology adopted;
- Scope of audit;
- Frequency of audit etc.

Auditors should not accept a very low level of fee as a result of competing for business. Also not to enter in to price competition and deplored in the profession, as it could impair the auditors' independence and deteriorate the quality of the auditing service. However, charging a lower fee than has previously been charged by another auditor for similar work is not restricted in any law.

Question 5.

(a) How will you appraise each of the following as an internal auditor:

(i) Management decisions

(ii) Investment Decisions.

(b) The Audit plan describes the processes and activities that are to be carried out in connection with a particular audit and for improving the quality of audit. For an effective audit, the availability of resources and skilled manpower is required. In view of above, mention the elements to be included in audit planning.

(c) Explain the cyber audit and its scope.

(5 marks each)

Answer 5(a)

(i) In appraisal of management's general decisions the following steps should be considered -

- Whether the management decisions are well defined or not;
- Whether the objectives and desired output has been set out clearly and relate explicitly with the policy or strategy adopted by the company to help in post even evaluation of the decisions;
- Whether the decisions are specific, measurable, agreed, realistic and time-dependent;
- Whether the management has considered the risk associated with the decisions, time availability, scale and location, scope for alternative arrangements;
- Degree of involvement of regulators and civic bodies;
- Capacity of the market to deliver the required output;
- Alternative asset uses, Use of established technology;
- Environmental issues.

(ii) In appraisal of investment decisions the following step should be considered-

- Whether the various possible options were considered;
- Whether such potential options are analyzed /reviewed m terms of value, costs, benefits, risk and uncertainties of options;
- Whether the options are selected after due analysis and a consensus decision is taken after such analysis;
- Whether the selected alternative implemented efficiently.

Answer 5(b)

The process of audit planning should include the following elements:

1. The purpose and objectives.
2. Legal framework under which the audit is being conducted.
3. Significant areas and issues involved.
4. Process and technique to be adopted.
5. Check points activities.
6. Allocation of work contents amongst the staff.
7. Time schedules for completion of various tasks/phases.
8. Determining time lines for submission of draft report, discussion thereon with the auditee and submission of final report.
9. Areas to be classified on "Risk" criteria to allocate suitable resources.
10. Determining the extent of detailed examination and coverage in terms of volume.
11. Evaluation of internal controls and professional work carried out by other agencies/ experts and placing reliance thereon.
12. Materiality considerations and determining the threshold therefore.
13. Structure, contents of the report.

Answer 5(c)

CYBER AUDIT

Cyber security is an attempt to minimizing any risk of financial loss, disruption or damage to the reputation of an organization that may arises 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, recover planning and communications, in order to identify internal control and regulatory deficiencies that could put the organization at risk.

The security and control issues which deals under cyber security audits includes-

1. Protection of sensitive data and intellectual property
2. Protection of networks to which multiple information resource are connected
3. Responsibility and accountability for the device and information contained in it

Scope of a cyber-security audit includes

1. Data security policies relating to the network, database and application in place.

2. Data loss prevention measures deployed.

3. Effective network access controls implanted.

4. Detection/prevention systems deployed.

5. Security controls established (physical and logical).

6. Incident response program implemented.

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

Question 6.

(a) The Auditor's Report shall include a section with heading "Auditor's Responsibility". In this context explain the Auditor's Responsibility.

(b) Explain the common causes of Loss of Ethics and Values.

(c) Explain various points the Auditor should go through while conducting the audit relating to each of the following:

(i) Audit Committee

(ii) Nomination and Remuneration Committee

(iii) Stakeholder Relationship Committee

(5 marks each)

OR (Alternate Question to Q. No. 6)

Question 6A.

(i) X has been appointed as the Peer Reviewer of AB LLP, by the Quality Review Board. Disputes arose between X and AB LLP, on the process and conclusions reached during the process of review. Explain the remedy points on the dispute for referrals to the ICSI.

(5 marks)

(ii) Labour Law Audit ensures a win-win situation to all the stakeholders. Enumerate the benefits of Labour Law Audit to various stakeholders.

(5 marks)

(iii)(a) As a Secretarial Auditor, state the activities which you shall concentrate during audit relevant to the SEBI (Share Based Employee Benefits) Regulations, 2014.

(3 marks)

(iv) If a company is required to Buy-back its shares, indicate the sources for getting such shares, as per the SEBI (Buy-back of Securities) Regulations, 2018.

(2 marks)

Answer 6(a)

Auditor's Responsibility

The auditor's report shall include a section with the heading "Auditor's Responsibility". Auditor's Report shall state that the responsibility of the Auditor is to express the opinion on the compliance with the applicable laws and maintenance of records based on audit. The Auditor's shall also state that the audit was conducted in accordance with applicable Standard. The auditor's Report shall also explain that those standards require that the Auditor comply with statutory and Regulatory requirements and plan and perform the audit to obtain reasonable assurance about compliance with applicable laws and maintenance of records.

Auditor's Report shall state that due to the inherent limitations of an audit including internal, financial and operating controls, there is an unavoidable risk that some misstatements or material non-compliances may not be detected, even though the audit is properly planned and performed in accordance with the standards.

The Auditor has a responsibility to perform procedures to identify, assess and respond to the risk of material misstatement or non-compliance arising from the Auditee's failure appropriately to account for or disclose an event or transaction.

Auditor's Report includes a separate section with heading "Auditor's Responsibility" that will state or express the opinion of the Auditor about the following:

- Whether the audit has been conducted as per the applicable Auditing Standards.
- Whether the auditor has obtained reasonable assurance about whether the statements prepared, documents or record maintained by the Auditee are free from misstatement.
- That Auditor has the responsibility to only express his opinion on the evidences collected, information received and records maintained by the Auditee or given by the Management.
- Whether the Auditee has followed applicable laws, Act, rules or regulations in maintaining their records, documents, statements, or have complied with applicable laws or rules while performing any corporate action.

Answer 6(b)

Common Causes of loss of Ethics and Values

1. **Unclear Policies in some cases:** Managers and employees exhibit poor ethical behavior because the company does not offer a clear model of ethics. Some businesses have no formal ethical policy documents and offer no guidance at all. Others have policies that are unclear, vague, inconsistent or not consistently enforce.

2. **Conflict between Organisational & Individual Goal:** When the Organizational & individual Goal overlap it becomes difficult to balance things. The problem arises when one thing has to be sacrificed for the sake of others. To achieve Organisational goal, has to be compromised and vice versa so this leads to Ethical Dilemma.

3. **Cultural Value & Background:** Every individual decision is based on background. For some people it may be ethical to give priority for self and then decide about others but for some others it may be others way round. Thus background of value system creates the ethical Dilemma.

4. **Situation when a decision is taken by a manager:** It may be so that situation demands him to decide on certain things which dealing with ethical dilemma. Each Company's culture is different, but some companies stress profits and results above all. In these environments, management may turn a blind eye to ethical breaches if a worker produces results, given the firm's mentality of "the end justifies the means. "are not beneficial for all but will benefit the company alone. Example- Automation of a plant.

5. **Dynamic & Different Human nature**: Ethical Dilemma arise due to difference of the opinion among the group of people. Whatever is ethical for one person, may be unethical for another.

6. Ambition and Discrimination individual workers may be under financial pressure or simply hunger for recognition. If they can't get the rewards they seek through accepted channels, they may be desperate enough to do something unethical, such as falsifying numbers or taking credit for another person's work to get ahead. Though diversity is an important part of business, some people may not be comfortable with people from different backgrounds and possibly be reluctant to treat them fairly. This kind of discrimination is not only unethical but illegal and still remains common.

7. **Pressure from Management:** Each company's culture is different, but some companies stress profits and results above all. In these environments, management may tum a blind eye to ethical breaches if a worker produces results, given the firm's mentality of "the end justifies the means". Whistle-blowers may be reluctant to come forward for fear of being regarded as untrustworthy and not a team player. Therefore, ethical dilemmas can arise when people feel pressurized to do immoral things to please their bosses or when they feel that they can't point out their co-workers' or superiors' bad behaviours.

8. **Negotiation Skills**: While these factors can cause ethical dilemmas for workers within their own companies doing business with other firms can also present opportunities for breaches. Pressure to get the very best deal or price from another business can cause some workers to negotiate in bad faith or lie to get a concession.

9. **Conflicting Values**: Ethical dilemmas may occur because of conflicting values between two or more people in an organization. One manager may value product quality over quantity while another may value

thriftiness. These managers may discuss charging to a cheaper supplier for a material used in production because of the potential to save money. However, the first manager may object because he knows the cheaper material will produce a product of lesser quality, which is not good for customers. Without a culture of shared values, the least ethical choice may be approved.

Organisation for economic Co -operation and Development (OECD) has also described various principles on "Corporate Governance" one of these Principle includes Disclosure and Transparency, which states "the corporate Governance" framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company"

Answer 6(c)

The Auditor should go through the following points while conducting the audit:

(i) **Audit committee:**
(a) brief description of terms of reference;
(b) composition, name of members and chairperson;
(c) meetings and attendance during the year.

(ii) **Nomination and Remuneration Committee:**
(a) brief description of terms of reference;
(b) composition, name of members and chairperson;
(c) meeting and attendance during the year;
(d) performance evaluation criteria for independent directors

(iii) **Stakeholder Relationship Committee:**
(a) brief description of terms of reference;
(b) composition, name of members and chairperson;
(c) meeting and attendance during the year.

Answer 6A(i)

Where a dispute arises over the powers of Reviewers or the process or conclusions reached after the review or to any other matter related to the review, the Practice Unit, the Reviewer or both may refer the dispute, in writing, to the Quality Review Board. Such referral shall have to be made within two months of occurrence of the Issue in dispute, in such manner as may be prescribed by the Quality Review Board (QRB).

Where the dispute is referred, after considering any submissions or representations (which shall be made in writing) made by the relevant Practice Unit and/or the relevant Reviewer, the QRB shall decide the dispute within six months of the reference and communicate such decision to each parties to the dispute, simultaneously.

The QRB issue directions relating to the matter in dispute to such Practice Unit or the Reviewer concerned and require such Unit or Reviewer to comply with them within 30 days and send a report to the QRB, of the said compliance within 15 days of such compliance.

The QRB shall convey its decision in these regards to each of the parties within 15 days from the date of the decision.

Where either of the parties are dissatisfied with the decision of the QRB, it may refer the matter to the Council of ICSI within two months in such manner as may be required.

Answer 6A (ii)

Yes. Labour Law Audit definitely ensures a win-win situation to all the stakeholders. Its benefits are:

a. A It enhances the morale and social security of the employees
b. It helps in maintaining the sense of belongingness between employers and employees

c. It ensures timely payment of wages, remuneration and other statutory amount of the employees such as pension, gratuity, provident fund etc
d. The positive outcome of the audit enhances the reputation of the employer in the industry

e. Audit eliminates the penalties, damages, compensation that can be imposed by the government on the organization
f. Labour Audit will ensure compliance of historical defaults committed by the organization under various labour laws

g. It reduces the burden of the government because audit will be conducted by an independent professional

h. It helps in preventing lockout, retrenchment, strikes etc.

i. It ensures higher productive and lower absenteeism
j. Co-operation and good understanding improves labour relations and this is indispensable for the good corporate governance.

Answer 6A (iii) (a)

The activities of concentration during Secretarial Audit relevant to the SEBI (Share Based Employee Benefits) Regulations, 2014 are -

1. Schemes - Implementation and Process
2. Administration of Specific Scheme
3. Eligibility for participation in scheme-
    a) Employee Stock Option Scheme (ESOS)
    b) Employee Stock Purchase Scheme (ESPS)

c) Stock Appreciation Rights Scheme (SARS)
d) General Employee Benefit Scheme (GEBS)
e) Retirement Benefit Scheme (RBS)
f) Sweat Equity Shares

Answer 6A (iii) (b)

As per regulation 4(ix) of the SEBI (Buy-back of Securities) Regulations, 2018-A company may undertake a buy-back of its own shares or other specified securities out of—
(a) its free reserves;
(b) the securities premium account; or
(c) the proceeds of the issue of any shares or other specified securities:
Provided that no such buy-back shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities

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) Explain the provision relating to 'Discovered Price' under the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021.

(5 marks)

(b) ABC Textiles Ltd., a listed company, is in the process of merger with XYZ Yarn Ltd., not being a listed company. As the Company Secretary of ABC Textiles Ltd., advise on importance and process of obtaining Observation Letter or No Objection Letter from the stock exchange.

(5 marks)

(c) The need for achieving economic growth and economies of scale are the main reasons for which the cross border mergers take place. Explain the parameters used for assessing post-merger performance of cross border mergers.

(5 marks)

(d) PQR Ltd. is a company listed on the Bombay Stock Exchange. The latest audited financial position of PQR Ltd. is as under:

	Amount (₹ in crore)
Paid up equity capital	*884*
Free Reserves	*40,694*
Total secured and unsecured debts	*2,550*

The company intends to buy-back its fully paid up equity shares of ₹ 10 each not exceeding 20,585,000 equity shares at ₹ 1900 per equity share payable in cash for aggregate consideration not exceeding ₹ 3,911.15 crore. Examine whether the above buy-back offer through tender route can be approved by the Board of directors, keeping in view the legal framework for buy-back of securities.

(5 marks)

Answer 1 (a)

Regulation 20 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021 deals with discovered Price. It states that:

(1) After fixation of the floor price under sub-regulation (2), the discovered price shall be determined through the reverse book building process in the manner specified in Schedule II of these regulations, and the Manager to the offer shall disclose the same in the detailed public announcement and the letter of offer.

(2) The floor price shall be determined in terms of Regulation 8 of SEBI Takeover Regulations as may be applicable.

(3) The reference date for computing the floor price would be the date on which the recognized stock exchange(s) was required to be notified of the board meeting in which the delisting proposal was considered and approved.

(4) The acquirer shall have the option to provide an indicative price in respect of the delisting offer, which shall be higher than the floor price calculated in terms of sub-regulation (2).

(5) The acquirer shall also have the option to revise the indicative price upwards before the start of the bidding period and the same shall be duly disclosed to the shareholders.

(6) The acquirer may, if it deems fit, pay a price higher than the discovered price determined in terms of sub regulation (1).

Answer 1 (b)

Regulation 37of the SEBI of the (Listing Obligations and Disclosure Requirements) Regulations provides that the listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal under Sections 230-234 and an scheme of arrangement by way of reduction of capital under Section 66 of the Companies Act, 2013, along with a non- refundable fee as specified in Schedule XI, with the stock exchange(s) for obtaining Observation Letter or No- objection letter, before filing such scheme with any Court or Tribunal, in terms of requirements specified by the Board or stock exchange(s) from time to time.

The listed entity shall not file any scheme of arrangement under sections 230-234 and scheme of arrangement by way of reduction of capital under Section 66 of the Companies Act, 2013, with Tribunal unless it has obtained observation letter or No-objection letter from the stock exchange(s).

The listed entity shall place the Observation letter or No-objection letter of the stock exchange(s) before the Tribunal at the time of seeking approval of the scheme of arrangement. The validity of the 'Observation Letter' or No-objection letter of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.

The listed entity shall ensure compliance with the other requirements as may be prescribed by the Board from time to time.

Answer 1 (c)

Cross border mergers can be truly assessed only by evaluating the post-merger performance of the merged entities.

The following parameters may be used to assess the post-merger performance:

• **Returns:** A comparative analysis of the returns being generated by the entity pre- and post-merger should be carried out. If the merged entity is earning significantly higher returns than the merger is deemed successful.

• **Cash flow and operational efficiency:** If post-merger the cash flow increases significantly and this increased cash flow is put to use to obtain operational efficiency, this too shows that the newly created entity is performing well.

• **Stock market reaction:** If the stock market reaction to the announcement of merger is positive then the merger appears to be a positive step.

Answer 1 (d)

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

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

The ratio of the aggregate of secured and unsecured debts owed by the company after buy-back should not be more than twice the paid-up capital and its free reserves i.e., the ratio shall not exceed 2:1.

In the present case, since the paid-up equity capital and free reserves is Rs. 41, 578 crores as per the latest audited financial statement, the Board can authorise through a resolution passed at a meeting the buyback of shares totalling Rs. 3911.15 crore, which is less than the prescribed 10% limit (i.e., Rs. 4157.80 crore).

After the completion of the buyback scheme for Rs. 3,911.15 crore, the company's paid up capital and free reserve would drop to Rs. 37,666.85 crore (Rs. 41578 crores minus Rs. 3911.15 crore) and total secured and unsecured debts is Rs. 2550 crore. Thus, the debt equity ratio is after by back scheme has been fully completed would be 0.068, which is less than the stipulated 2:1.

Hence, PQR Limited can proceed with the proposed buy back scheme by passing a resolution passed at the meeting of its Board of Director.

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

Question 2.

(a) 'Grown jewel' strategy as a defense mechanism for hostile takeover is almost impossible to be used in India. Explain.

(b) Hunny Ltd. is considering merger with Bunny Ltd. Hunny Ltd. has 3, 40,000 shares with current market price at ₹ 20 per share and its Profit After Taxes (PAT) amounts to ₹ 17,00,000. Bunny Ltd. has 80,000 shares with current market price of ₹ 15 per share and its PAT is ₹ 6, 00,000.

(i) If the merger goes through by exchange of equity shares and the exchange ratio is based on the current market price, what would be the new earning per share of Hunny Ltd.?

(ii) Bunny Ltd. wants to ensure that earnings available to its shareholders are not reduced due to proposed merger. What would be the exchange ratio in such a case?

(c) Explain the provision relating to extra territorial jurisdiction of the Competition Commission of India.

(5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A.

(i)The Competition Commission of India has power to initiate investigation of combination under section 29 of the Competition Act, 2002. What are the different stages involved in the procedure for investigation of combination?

(5 marks)

(ii) Zed Ltd. got demerged and the resulting company Zen Ltd. was formed. It was a demerger within the meaning of section 2(19AA) of the Income-tax Act, 1961. As a Company Secretary, advise Zed Ltd. regarding the tax concession available to the demerged company.

(5 marks)

(iii) From the following information related to Wise Ltd., calculate:

(a) EBITA

(b) PAT

(c) Super profit

	(₹ in lakh)
Net tangible assets	*600*
Operational Revenue	*1,120*
Employment Cost	*220*
(including one time payment of ₹ 40 lakh, not likely to occur in future)	
Managerial Remunerations (to be increased by ₹ 20 lakh from next year)	*80*
Cost of goods sold	*460*
Finance charges	*160*
Depreciation/Amortization	*60*

Tax provision is to be made @ 25%.

Expected rate of return on assets is to be assumed @ 30%.

(5 marks)

Answer 2 (a)

The central theme in this strategy is to divest the most coveted asset by the bidder, commonly known as the "crown jewel". Consequently, the hostile bidder is deprived of the primary intention behind the takeover bid. A variation of the crown jewel strategy is the more radical "scorched earth approach", vide which approach, the target sells off not only the crown jewel, but also properties to diminish its worth. Such a radical step may however be self-destructive and unwise in the company's interest.

However, as per the Companies Act, 2013, selling of whole or substantially the whole of its undertaking requires the approval of the shareholders in a general meeting by way of a special resolution and Regulation 26 of the SEBI (SAST) Regulations, 2011, the target company cannot alienate any of its material assets during the offering period (which commences once the public announcement is made) and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the "Crown Jewel" strategy as a defense mechanism in India.

Answer (b)

(i) Calculation of New EPS of Hunny Ltd

Number of Equity shares to be issued to shareholders of Bunny Ltd:	(80,000 x 15 / 20) =	60,000 shares

Total Number of Shares in Hunny Ltd. after merger	(3,40,000 + 60,000) =	4,00,000 shares
Total PAT post-merger	(Rs.17,00,000 + Rs. 6,00,000)	Rs.23,00,000
EPS post-merger	(Rs. 23,00,000/4,00,000 shares)	Rs. 5.75 Per Share

(ii) Exchange Ratio with Earning Assurance:

If the exchange ratio is decided with a view to maintain the pre-merger EPS of the Transferor Company, shareholders of both the companies should get the same share in earnings as they were getting before the merger.

Pre-merger EPS:

Hunny Ltd Rs. 17,00,000/3,40,000 shares = Rs. 5 per share

Bunny Ltd Rs. 6,00,000/ 80,000 shares = Rs 75 per share

Exchange Ratio: 7.5/5 = 1.5 or 3 shares in Hunny Ltd. for every 2 shares held in Bunny Ltd

Or 80,000 x 3 / 2 = 1, 20,000 shares

Total number of Shares after merger 3, 40,000 + 1, 20,000 = 4, 60,000 shares

EPS = Rs 23,00,000/4,60,000 shares = Rs. 5 per share

Earnings for Shareholders of Bunny Ltd. after Merger = 1, 20,000 * 5 = Rs 6,00,000 that confirms to pre-merger earnings of Bunny Ltd.

Answer 2 (c)

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

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

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

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

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

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

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

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

Answer 2A(i)

The procedure for investigation by the Commission has been stipulated under section 29 of the Competition Act. It involves the following stages:

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

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

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

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

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

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

Answer 2A(ii)

(i) Capital gains tax not attracted [Section 47(vib) of the Income-tax Act]

According to section 47(vib), where there is a transfer of any capital asset in case of a demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

(ii) Tax concession to a foreign demerged company [Section 47(vic) of the Income-tax Act]

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

(a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and (b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated:

Provided that the provisions of Sections 391 to 394 of the Companies Act, 1956 (1 of 1956) (Now Sections 230 to 232 of Companies Act, 2013) shall not apply in case of demergers referred to in this clause;

(iii) any transfer in a demerger, of a capital asset, being a share of a foreign company, referred to in Explanation 5 to clause (i) of subs-section (1) of section 9, which derives directly or indirectly its values substantially from the share or shares of an Indian Company, held by the demerged foreign company to

the resulting foreign company will not be regarded as transfer for the purpose of capital gains if the following conditions are satisfied:

(a) Shareholders holding not less than three-fourths in value of the shares of the demerged foreign company, continue to remain shareholders of the resulting foreign company and

(b) Such transfer does not attract tax on capital gains in the country in which the demerged foreign company is incorporated.

(iv) Reserves for shipping business: Where a ship acquired out of the reserve is transferred in a scheme of demerger, even within the period of eight years of acquisition there will be no deemed profits to the demerged company.

Answer 2A(iii)

(**a) Calculation of EBITA**

	(Rs. in lakhs)
Operational Revenue	1120.00
Less: Cost of goods sold	460.00
Employment Cost	220.00
Managerial Remuneration	80.00
EBITA	**360.00**

(b) Calculation of PAT

	(Rs. in lakhs)
EBITA	360.00
Less: Finance charges	160.00
Depreciation / Amortization	60.00
PBT	140.00
Less: Taxes @ 25%	35.00
PAT	**105.00**

(c) Computation of Super Profit

(i) Future Maintainable Profit

	(Rs. in lakhs)
PBT	140.00
Add: Employment Cost one-time payment not likely to occur in future	40.00
Less: Increase in Managerial Remuneration from next year	20.00
	160
Less: Taxes @ 25%	40.00
Future Maintainable Profit	**120.00**

(ii) Super Profit

	(Rs. in lakhs)
Expected return on assets (Rs. 600 lakh * 30%)	180.00
Less: Future Maintainable Profit	120.00
Super Profit	**60.00**

Question 3.

(a) The National Company Law Tribunal and the National Company Law Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908. Explain.

(b) An open offer for acquiring shares once made shall not be withdrawn except under specified circumstances under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. An open offer made by acquirer was withdrawn. As a Company Secretary, advise the acquirer on further course of action under the aforesaid regulations.

(c) What do you understand by the Competition Test?

(d) Between Inbound merger and Outbound merger, which one appears more beneficial to corporate India? Give reasons in support of your answer. (e) Explain the meaning of 'Offer Period' and 'Tendering Period' under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

(3 marks each)

Answer 3(a)

According to Section 424 of the Companies Act, 2013, the National Company Law Tribunal and the National Company Law Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016 the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit.

Answer 3(b)

In the event of withdrawal of the open offer, the acquirer shall through the manager to the open offer, within two working days:

(a) make an announcement in the same newspapers in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal of the open offer.

(b) simultaneously with the announcement inform in writing to SEBI, all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public and the target company at its registered office.

Answer 3(c)

Section 5 of the Competition Act, 2002 explain the combination. Section 6 of the Competition Act, 2002 prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void.

The Competition Commission of India shall have due regard to all or any of the following factors listed under section 20(4) for the purposes of determining whether the combination causes or is likely to cause an 'Appreciable Adverse Effect on Competition' (AAEC) in the relevant market. Most of the facts enumerated in section 20(4) are external to an enterprise. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words, if the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

Answer 3(d)

An Inbound merger is one where a foreign company merges with an Indian company resulting in an Indian company being formed. An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed. Accordingly, all properties, assets liabilities and employees of the Indian company will be transferred to the foreign company.

Inbound merger score over outbound merger for the following reasons: inflow of foreign direct investment, technology, widening the national market to international level, improving operational standards and human relations at global level apart from the elevation of brand globally.

Answer 3(e)

According to Regulation 2(1)(p) of the SEBI(SAST) Regulations, 2011, Offer Period means the period between the date of entering into an agreement, formal or informal, to acquire shares, voting rights in, or control over a target company requiring a public announcement, or the date of the public announcement, as the case may be, and the date on which the payment of consideration to shareholders who have accepted the open offer is made, or the date on which open offer is withdrawn, as the case may be.

According to Regulation 2(1) (za) of the SEBI (SAST) Regulations, 2011, Tendering Period means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares made under these regulations

Part -II

Question 4.

(a) Discuss the effect of moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016. (b) A corporate debtor is provided immunity from the liability for offences committed prior to initiation of Corporate Insolvency Resolution Process. Explain the legal provision. (c) The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms in India. Comment. Also, state key objectives and preamble of the Insolvency and Bankruptcy Code, 2016. (d) 'A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets'. Discuss the measures provided in regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016.

(5 marks each)

Answer 4(a)

Section 14(1) of the Insolvency & Bankruptcy Code provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Section 14(2) states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated

or suspended or interrupted during moratorium period.

As per Section 14(2A) of the Act, where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

Section 14 (3) provides that the provisions of sub-section (1) shall not apply to –

(a) such transaction, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

According to Section 14(4), the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Answer 4(b)

Section 32A of the Insolvency & Bankruptcy Code provides relief to the resolution applicant or the persons who shall be in charge of the management of the company in the future by way of immunity from the liability of offences that the promoters or the persons in charge of the corporate debtor had committed prior to the initiation of CIRP, subject to certain conditions.

Section 32A(1) states that notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

According to Section 32A(2), no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Section 32A (3) provides that subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

Answer 4(c)

The Insolvency and bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms). The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic jump in the ease of doing business rankings by consolidating the law and providing for resolution of insolvencies in a time-bound manner.

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism.

2. To ensure maximisation of value of assets,

3. To promote entrepreneurship,

4. To increase availability of credit,

5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues, and

6. To establish an Insolvency and Bankruptcy Board of India as a regulatory body,

7. To provide procedure for connected and incidental matters.

Answer 4(d)

Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following:

(a) transfer of all or part of the assets of the corporate debtor to one or more persons;

(b) sale of all or part of the assets whether subject to any security interest or not;

(ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(ca)cancellation or delisting of any shares of the corporate debtor, if applicable;

(d) satisfaction or modification of any security interest;

(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor; (f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;

(j) change in portfolio of goods or services produced or rendered by the corporate debtor; (k) change in technology used by the corporate debtor; and

(l) obtaining necessary approvals from the Central and State Governments and other authorities.

(m) sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets.

Question 5.

(a) What shall not be included in the liquidation estate assets under the Insolvency and Bankruptcy Code, 2016 ?

(3 marks)

(b) Explain the general duties of a debtor under the Fresh Start Process.

(3 marks)

(c) An interim resolution professional appointed under the provisions of the Insolvency and Bankruptcy Code, 2016 shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor. What are the assets that cannot be taken over ?

(3 marks)

(d) A default in financial debt has arisen on September 20, 2020. Can a petition be filed in May, 2023 for the same? Explain the legal provision with the help of decided case law.

(3 marks)

(e) A bank took over the management of XYZ Ltd., in terms of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and appointed six directors, consequently removing Vaibhav, an executive director of XYZ Ltd. Vaibhav claimed following amounts:

(i) ₹ 25 lakh as a compensation for loss of office; and

(ii) ₹ 6 lakh towards his unpaid salary for the last three months. Whether Vaibhav is entitled to compensation for loss of office and unpaid salary? Give reasons in support of your answer.

(3 marks)

Answer 5(a)

The following shall not be included in the liquidation estate assets under the Insolvency and Bankruptcy Code: -

(a) assets owned by a third party which are in possession of the corporate debtor, including –

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Answer 5(b)

According to Section 88 of the Insolvency and Bankruptcy Code the debtor shall -

(a) make available to the resolution professional all information relating to his affairs, attend meetings and comply with the requests of the resolution professional in relation to the fresh start process.

(b) inform the resolution professional as soon as reasonably possible of –

(i) any material error or omission in relation to the information or document supplied to the resolution professional; or

(ii) any change in financial circumstances after the date of application, where such change has an impact on the fresh start process.

Answer 5(c)

According to Section 18 of the Insolvency and Bankruptcy Code the following assets shall not include, namely: -

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Answer 5(d)

Section 10A of the Insolvency and Bankruptcy Code provides that notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

In the case of *Ramesh Kymal Vs. M/s Siemens Gamesa Renewable Power Pvt Ltd judgement dated February 9, 2021* Hon'ble Supreme Court observed that Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic. Parliament has stepped in legislatively because of the wide spread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern.

Answer 5(e)

Section 16(1) of the SARFAESI Act provides that notwithstanding anything to the contrary contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any

compensation for the loss of office or for the premature termination under this Act of any contract of management entered into by him with the borrower.

Further, According to Section 16(2), nothing contained in sub-section (1) shall affect the right of any such managing director or any other director or manager or any such person in charge of management to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

In view of the above legal provision Vaibhav, the removed director of XYZ Limited can claim his unpaid salary, but he can not claim any compensation for loss of office.

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

Question 6.

(a) Corporate Insolvency Resolution Process (CIRP) against XYZ Ltd. was initiated on application by its Financial Creditors on September 21, 2019 but the process was not completed within the time limit prescribed in terms of Section 12(1) of the Insolvency and Bankruptcy Code, 2016. Before completion of CIRP timeline, the Committee of Creditors in its meeting held on January 31, 2020, passed resolution with 60 percent voting share in favour of a proposal seeking extension for a period of 60 days. Whether Resolution Professional can file application seeking extension of CIRP on the basis of voting results so obtained? Give reasons with the help of legal provisions.

(5 marks)

(b) An insolvency professional shall be eligible to be appointed as a liquidator for Voluntary Liquidation process if he and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person. What are the circumstances under which an insolvency professional will be considered an independent person for the purpose of appointment as liquidator for the process of Voluntary Liquidation?

(5 marks)

(c) Under the Insolvency and Bankruptcy Code, 2016, a public announcement of the initiation of the corporate insolvency resolution process for the corporate debtor is required. What information is required to be given in the public announcement?

(5 marks)

OR (Alternate question to Q. No. 6)

Question 6a.

(i) What are the duties of Resolution Professional during the Pre-Packaged Insolvency Resolution Process?

(ii)Explain the effects of recognition of foreign main proceedings under the UNCITRAL Model Law on Cross Border Insolvency.

(iii) Discuss about the acquisition of Bhushan Steel Ltd. by Tata Steel Ltd.

(5 marks each)

Answer 6(a)

Section 12(1) of the Insolvency and Bankruptcy Code provides that subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.
Section 12(2) states that the resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 1 [sixty-six] per cent. of the voting shares.
Section 12(3) stipulate that on receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot

be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:
Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.
Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

In view of the above legal provisions, there is a resolution by Committee of Creditors with 60% voting shares which is less than minimum 66% voting share as required and hence the Resolution Professional can not fie application for extension.

Answer 6(b)

An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person.

A person shall be considered independent of the corporate debtor, if he:

A person shall be considered independent of the corporate person, if he-

(a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner-

(i) of a firm of auditors or secretarial auditors or cost auditors of the corporate person; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, at any time in the last three years.

Answer 6(c)

According to Section 15 of the Insolvency and Bankruptcy Code, the public announcement of the corporate insolvency resolution process shall contain the following information, namely: –

(a) name and address of the corporate debtor under the corporate insolvency resolution process;

(b) name of the authority with which the corporate debtor is incorporated or registered; (c) the last date for submission of claims, as may be specified;

(d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims;

(e) penalties for false or misleading claims; and

(f) the date on which the corporate insolvency resolution process shall close, which shall be the one hundred and eightieth day from the date of the admission of the application under sections 7, 9 or section 10, as the case may be.

Answer 6A(i)

According to the Section 54F of the Insolvency and Bankruptcy Code, the resolution professional shall perform the following duties, namely: —

(a) confirm the list of claims submitted by the corporate debtor under section 54G, in such manner as may be specified;

(b) inform creditors regarding their claims as confirmed under clause (a), in such manner as may be specified;

(c) maintain an updated list of claims, in such manner as may be specified;

(d) monitor management of the affairs of the corporate debtor;

(e) inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this Chapter and the rules and regulations made thereunder;

(f) constitute the committee of creditors and convene and attend all its meetings;

(g) prepare the information memorandum on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information, in such form and manner as may be specified;

(h) file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any; and

(i) such other duties as may be specified.

Answer 6A(ii)

Article 20 of the UNCITRAL Model Law provides that once foreign proceeding is recognized which is a foreign main proceeding, the following are the effects:

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

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

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

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

Answer 6A(iii)

The acquisition of Bhushan Steel Ltd (BSL) for Rs. 35,200 crore by Bamnipal Steel Ltd (BNL), a subsidiary of Tata Steel Ltd. in May 2018, has been the first major case of acquisition of a major stressed asset under the Insolvency and Bankruptcy Code.

BNL completed the acquisition of controlling stake of 72.65 per cent in BSL in accordance with the approved resolution plan under the Corporate Insolvency Resolution Process (CIRP) of the IBC. Tata Steel has paid Rs.35,200 crore in cash to acquire Bhushan Steel. It would pay another Rs.1,200 crore over next 12 months to operational creditors.

The promoters of BSL approached the National Company Law Appellate Tribunal (NCLAT) over issue of ineligibility of Tata Steel to acquire BSL. L&T, an operational creditor also approached the Hon'ble NCLAT over issue of unfair distribution of settlement amount for its claim under the provisions of IBC, 2016.

NCLAT upheld the acquisition of Bhushan Steel, rejecting allegations of its ineligibility by the promoters of the company. The NCLAT also rejected the claims of L&T, an operational creditor of Bhushan Steel Ltd, opposing Tata Steel's resolution plan seeking a higher priority in debt settlement.

The NCLAT said that Tata Steel UK, a foreign subsidiary of Tata Steel, which was fined by an English Court in February 2018 under UK act, had a provision of 'imprisonment for a term not exceeding twelve months, or a fine, or both'. While, the provision in section 29A(d) of the Code, which deals with eligibility, stipulates "has been convicted for any offence punishable with imprisonment for two years or more", cannot be equated with Section 33(1)(a) of the U.K Act, said NCLAT. Section 29A of the IBC mandates that a person convicted for any offence punishable with imprisonment for two years or more is ineligible for submitting a resolution plan.

Over the claims of L&T, which had supplied goods and machineries over Rs.900 crore, NCLAT said that Tata Steel's resolution plan was fair towards operational creditors of Bhushan Steel which has a total demand of Rs.1,422 crore. The NCLAT observed that the company has allotted Rs.1,200 crore for them and L&T plea for a higher priority could not be accepted.

Moreover, it also declined the plea of the promoter's family, contending Tata Steel's Resolution Plan' was illegal as it purports to transfer shares of the 'preference shareholders' of Bhushan Steel without their consent for a fixed consideration of Rs.100 as against Rs.2,269 crore.

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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) Federal Zinc Ltd., is a listed entity. It accepted deposits from public. The amount of deposits as on 31st March, 2022 stood at ` 15 crore by 1500 depositors. Some of the deposits amounting to ` 5 crore belonging to 125 depositors matured in the month of June 2022. However, the company did not pay the amount to the depositors due to liquidity issues. The company issued letters to all such depositors requesting them to wait for some time and also assured them to pay the overdue interest on the matured amount. However, even after lapse of the 6 months from the due date, the company did not repay the due amount to the depositors. What recourse is available to the depositors? Refer to relevant provisions of the law.

(5 marks)

(b) XYZ Ltd. proposed to enter into a transaction with PQR Private Ltd. for the purchase of 40,000 sq. ft. of residential space. This proposal was treated as related party transaction and was required to be approved by the shareholders of the company. Accordingly, a special resolution was approved by XYZ Ltd. In terms of section 188 of the Companies Act, 2013, the related parties abstained from voting on this special resolution. Thereafter, an Extra-Ordinary General Meeting was convened for rescinding the resolution in which the related parties also voted. One of the shareholders made complaint to SEBI in this regard. SEBI took up the matter on the complaint made to it and issued notice alleging violation of Regulation 23 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

The Adjudicating Officer proceeded to penalise XYZ Ltd. with a cumulative sum of ₹ 35 lakh for the alleged violation of the said Regulation 23. Critically analyse and explain: (i) Was there any violation in the above matter? (ii) Was the action of SEBI justified? Give reasons in support of your answer and refer to decided case law, if any.

(3+2=5 marks)

(c) An authorized officer under Foreign Exchange Management Act, 1999 had reason to believe that Amar held foreign exchange and immovable property outside India in contravention of certain provisions of the Act. The authorized officer seized the movable and immovable properties of Amar located in India based on this belief. Amar raised objections on the action initiated by the authorized officer on the ground that the action of the officer was violative of individual rights and was also without any basis. Quoting relevant provisions, explain whether the action of the authorized officer is tenable under the said Act.

(5 marks)

(d) A Company failed to pay fine levied for certain non-compliances. The prescribed authority issued non-bailable warrant of arrest as well as a distress warrant against the Managing Director for non-payment of the fine. The Managing Director contended that warrant cannot be issued against him as the liability is only of the company to pay. Citing relevant case law, briefly describe whether legal dues of a company can be realised from the Managing Director of the company and whether issuance of non-bailable warrant or distress warrant against the Managing Director is permissible?

(5 marks)

Answer 1(a)

There are 2 remedies available with the depositor under Companies Act, 2013 (the Act) i.e. Action against the company in NCLT individually and Class action suit by depositors.

Action against the company in NCLT individually

According to section 73(3) of the Act, every deposit accepted by a company under section 77(2) shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that sub-section.

Further, as per section 73(4) of the Act, where a company fails to repay the deposit or part thereof or any interest thereon under section 73(3), the depositor concerned may apply to the National Company Law Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as NCLT may deem fit.

Accordingly, unless the action of the company is in line with the Agreement under section 73(2), the Depositors may apply to the NCLT under section 73(4) for appropriate orders.

Class action suit by depositors

According to section 245(1) of the Act, such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in section 245(2) may, 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 National Company Law Tribunal on behalf of the members or depositors for seeking the remedies.

According to section 245(3)(ii) of the Act, the requisite number of depositors provided in section 245(1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

Rule 84 of the NCLT Rules, 2016 provides the provisions relating to Right to apply under section 245. Rule 84(4) states:

The requisite number of depositor or depositors to file an application under section 245(1) shall be:

(i) (a) at least five per cent. of the total number of depositors of the company; or

(b) one hundred depositors of the company,

whichever is less; or;

(ii) depositor or depositors to whom the company owes five per cent. of total deposits of the company.

In the given situation, the total number of depositors are 1500 and 5% comes to 75. Thus, in terms of Rule 84(4) of NCLT Rules, 2016, the requisite number of depositors to file an application is –

(i) 75 depositors

(ii) 100 depositors

whichever is less

Further, the total deposits are Rs. 15 (fifteen) Crore and the company owes deposits of Rs. 5(five) Crore (33.33%) from these depositors.

Therefore, the depositors can take Action against the company in NCLT individually under section 73 of the Act and Class action suit under section 245 of the Act.

Answer 1(b)

The given facts are similar to the case of *SEBI v. R.T Agro (P.) Ltd. (2022) 137-456 (SC) dated 25th April, 2022*. In the instant case, a company 'R. T. Exports Limited' proposed to enter into a transaction with 'Neelkanth Realtors Private Limited' for the purchase of 40,000 sq. ft. of residential space. This proposal

was treated as a related party transaction and was required to be approved by the shareholders of the Company.

Accordingly, a special resolution was approved by R.T. Exports Limited. In terms of Section 188 of the Companies Act, 2013, the related parties abstained from voting on this special resolution. Thereafter, an Extra-Ordinary General Meeting was convened for rescinding the resolution in which, the related parties also voted.

However, the appellant-SEBI took up the matter on a complaint and issued notice alleging violation of Regulation 23 of the SEBI (Listing Obligations and disclosure Requirements) Regulations, 2015. The Adjudicating Officer, ultimately, proceeded to penalise the present respondents with a cumulative sum of Rs. 35 lakhs for the alleged violation of the said Regulation 23.

The Securities Appellate Tribunal dismissed the order passed by the Adjudicating Officer and allowed the appeal holding that the bar of voting as per Section 188 of the Companies Act, 2013 on related parties operated only at the time of entering into a contract or arrangement, i.e., when the resolution was passed; and therein the said related parties indeed abstained from voting. The Appellate Tribunal found no fault in the said parties voting in the recalling/rescinding of the said resolution.

Supreme Court Held

On further appeal, the Apex Court held that the SEBI was not justified in taking a 'hyper- technical, stance imposing a penalty on the company for the related party voting on a resolution rescinding an earlier special resolution authorising entering into a contract with him, where the related party had abstained from the vote on the earlier special resolution in his favour and no ill-intent on part of the company was established.

The Court held that the view taken by SAT in the given facts and circumstances of the case is to be upheld as it appeared to be a plausible view of the matter since no ill-intent on the part of the respondents (company) was established. It was held that the SAT had rightly disapproved of the hyper-technical stance of SEBL. SEBI's present appeal failed and therefore be dismissed.

Conclusion

(i) In view of the above, it can be said that the proposal of purchase of 40,000 sq. ft. of residential space was treated as a related party transaction and it was approved by the shareholders of the Company in the special resolutions and hence there is no violation on the part of XYZ Limited.

(ii) Accordingly, the action of SEBI in penalising XYZ Limited with a fine of Rs. 35 Lakh is not justified.

Alternate Answer 1(b)

The given facts are similar to the case of *SEBI v. R.T Agro (P.) Ltd. (2022) 137-456 (SC) dated 25th April, 2022*. In the instant case, a company 'R. T. Exports Limited' proposed to enter into a transaction with 'Neelkanth Realtors Private Limited' for the purchase of 40,000 sq. ft. of residential space. This proposal was treated as a related party transaction and was required to be approved by the shareholders of the Company.

Accordingly, a special resolution was approved by R.T. Exports Limited. In terms of Section 188 of the Companies Act, 2013, the related parties abstained from voting on this special resolution. Thereafter, an Extra-Ordinary General Meeting was convened for rescinding the resolution in which, the related parties also voted.

However, the appellant-SEBI took up the matter on a complaint and issued notice alleging violation of Regulation 23 of the SEBI (Listing Obligations and disclosure Requirements) Regulations, 2015. The Adjudicating Officer, ultimately, proceeded to penalise the present respondents with a cumulative sum of Rs. 35 lakhs for the alleged violation of the said Regulation 23.

The Securities Appellate Tribunal dismissed the order passed by the Adjudicating Officer and allowed the appeal holding that the bar of voting as per Section 188 of the Companies Act, 2013 on related parties operated only at the time of entering into a contract or arrangement, i.e., when the resolution was passed; and therein the said related parties indeed abstained from voting. The Appellate Tribunal found no fault in the said parties voting in the recalling/rescinding of the said resolution.

Supreme Court Held

On further appeal, the Apex Court held that the SEBI was not justified in taking a 'hyper- technical, stance imposing a penalty on the company for the related party voting on a resolution rescinding an earlier special resolution authorising entering into a contract with him, where the related party had abstained from the vote on the earlier special resolution in his favour and no ill-intent on part of the company was established.

The Court held that the view taken by SAT in the given facts and circumstances of the case is to be upheld as it appeared to be a plausible view of the matter since no ill-intent on the part of the respondents (company) was established. It was held that the SAT had rightly disapproved of the hyper-technical stance of SEBL. SEBI's present appeal failed and therefore be dismissed.

However, Securities Exchange Board of India has amended the regulation 23 vide SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021, w.e.f. 1.4.2022. According to amended regulation 23(4) of SEBI (Listing Obligations and Disclosure Requirements), 2015, all material related party transactions and subsequent material modifications as defined by the audit committee under sub-regulation (2) shall require prior approval of the shareholders through resolution and no related party shall vote to approve such resolutions whether the entity is a related party to the particular transaction or not.

Conclusion

(i) In view of the amendment, it can be said that the proposal of purchase of 40,000 sq. ft. of residential space was treated as a related party transaction and it was approved by the shareholders of the Company in the special resolutions. However, further resolution for rescinding the earlier resolution being in the nature of “subsequent material modification” in terms of amended regulation 23(4) also require the approval of shareholders and no related party shall vote to approve such resolutions whether the entity is a related party to the particular transaction or not.

(ii) Accordingly, the action of SEBI in penalising XYZ Limited with a fine of Rs. 35 Lakh is justified.

Answer 1(c)

Section 37A of the Foreign Exchange Management Act, 1999 (the Act) provides the provisions relating to Special provisions relating to assets held outside India in contravention of section 4 of the Act. Section 37A States:

(1) Upon receipt of any information or otherwise, if the Authorised Officer prescribed by the Central Government has reason to believe that any foreign exchange, foreign security, or any immovable property, situated outside India, is suspected to have been held in contravention of section 4, he may after recording the reasons in writing, by an order, seize value equivalent, situated within India, of such foreign exchange, foreign security or immovable property.

Provided that no such seizure shall be made in case where the aggregate value of such foreign exchange, foreign security or any immovable property, situated outside India, is less than the value as may be prescribed.

(2) The order of seizure along with relevant material shall be placed before the Competent Authority, appointed by the Central Government, who shall be an officer not below the rank of Joint Secretary to the Government of India by the Authorised Officer within a period of thirty days from the date of such seizure.

(3) The Competent Authority shall dispose of the petition within a period of one hundred eighty days from the date of seizure by either confirming or by setting aside such order, after giving an opportunity of being heard to the representatives of the Directorate of Enforcement and the aggrieved person.

Explanation.—While computing the period of one hundred eighty days, the period of stay granted by court shall be excluded and a further period of at least thirty days shall be granted from the date of communication of vacation of such stay order.

(4) The order of the Competent Authority confirming seizure of equivalent asset shall continue till the disposal of adjudication proceedings and thereafter, the Adjudicating Authority shall pass appropriate

directions in the adjudication order with regard to further action as regards the seizure made under sub-section (1):

Provided that if, at any stage of the proceedings under the Act, the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the Competent Authority or the Adjudicating Authority, as the case may be, on receipt of an application in this regard from the aggrieved person, and after affording an opportunity of being heard to the aggrieved person and representatives of the Directorate of Enforcement, shall pass an appropriate order as it deems fit, including setting aside of the seizure made under sub-section (1).

(5) Any person aggrieved by any order passed by the Competent Authority may prefer an appeal to the Appellate Tribunal.

(6) Nothing contained in section 15 which is relating to Power to compound contravention shall apply to this section.

In view of the above, it can be said that action of the authorized officer is tenable under Foreign Exchange Management Act, 1999.

Answer 1(d)

As per section 421 of the Criminal Procedure Code, 1973, where an offender has been sentenced to pay a fine, the Court has the authority to issue a warrant for the levy of the amount by attachment and of any movable properly belonging the offender and further can issue a warrant to the Collector of the District authorizing him to realize the amount as arrears of land revenue or movable or immovable property or both of the defaulter.

The Orissa High Court in *Hrushikesh Panda v. State of Orissa and Ors. [1997] 89 Comp Cas 613 (Ori)*, setting aside a non-bailable warrant of arrest as well as a distress warrant issued against the petitioner in order to realise a fine levied on the company of which he was the Managing Director, held that the fine has been imposed on the company and it is the liability of the company to pay the same. The High Court further held that the liability of the company is distinct from the liability of its managing director. Once it is concluded that the company has its own liability, the realization of fine has to be made from the company. The mode for realisation is provided under section 421 of CrPC.

The High Court further held that legal dues of a company could be realized only by attaching the assets of the company and not by putting the managing director or any of the directors in prison. It is to be kept in mind that the company is the offender or the defaulter. The issuances of a non-bailable warrant or distress warrant against the managing director or director to realize the same is not permissible.

In view of the above, it can be said that issuance of non-bailable warrant or distress warrant against the Managing Director in the given situation, is not appropriate.

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

Question 2.

(a) Jay Capitals Ltd. is a non-banking finance company (NBFC), incorporated under the Companies Act, 2013 and has got the license to operate as NBFC from the Reserve Bank of India (RBI). Prachi, who belongs to the promoter group, was the Managing Director of the said NBFC. On account of certain irregularities, the Reserve Bank of India debarred Prachi from occupying any position in the NBFC. But every agenda papers placed before the Board of Directors were being first perused by Prachi unauthorisedly and the Board thereafter, approved or dis-approved the agenda, on her verbal instructions. In the light of the above facts, what is the status of Prachi in the NBFC? Can she be held liable for her acts? Give reasons in support of your answer.

(4 marks)

(b) A, an aggrieved person by an order of the Appellate Tribunal under the Prevention of Money Laundering Act, 2002 intends to prefer an appeal before the city civil court of Madurai as he is a resident of Madurai. Can he do so? If not, what is the alternative course of action for him?

(4 marks)

(c) *During the course of proceedings before the National Company Law Tribunal (NCLT), it was observed that the Memorandum of Association and Articles of Association (MoA and AoA) are inconsistent with the provisions of the Companies Act, 2013. The NCLT advised the company to alter the relevant clauses of MoA and AoA to comply with the provisions of the Companies Act, 2013. In the light of the above facts, explain whether there is any difference between the 'Alteration made by the company itself' and the 'Alteration advised by the NCLT' referring to the relevant provision of the Companies Act, 2013.*

(4 marks)

(d) *Discuss: (i) Whether non-holding of the meetings of the Board of Directors would amount to oppression of minority shareholders? (ii) Whether non-declaration of dividend can be termed as an oppressive conduct?*

(2+2=4 marks)

OR (Alternate question to Q. No. 2)

Question 2A.

(i) *Comfort Hosiery Ltd. is a listed entity engaged in the business of manufacturing and selling of innerwear for all the age group of people. The company has paid-up equity capital of Rs. 25 crore. In the year 2016, the company issued 10% Redeemable Preference Shares to the tune of Rs. 5 crore. The dividend at the rate of 10% was payable on the preference shares, but due to insufficiency of profits, the company did not pay dividends for the Financial Years 2018-19, 2019-20 and 2020-21. For the Financial Year ended on 31st March, 2022, the General Meeting of the shareholders was called on 5th August, 2022. The notices for the General Meeting was issued to equity shareholders as well as to the preference shareholders. During the course of the meeting, the preference shareholders averred that they were also entitled to vote on every resolution placed before the shareholders. The Chairman of the Meeting informed the shareholders that only the equity shareholders can vote on every resolution placed in the meeting and the preference shareholders are not entitled to vote. Is the Chairman's contention correct? Refer to relevant provisions of the Company Act, 2013.*

(4 marks)

(ii) *In order to promote private sector in defense, the Govt. of India have granted license to manufacture automatic light weight machine guns to Unique Guns Ltd. (UGL). UGL is a non-government public sector company and a listed entity. The company has entered into an agreement with the Govt. of India to manufacture and supply the machine guns for an initial period of 5 years, subject to the condition that the company shall not supply the machine guns to any unauthorized persons and the number of items manufactured, month wise, shall be furnished to the Govt. of India. Harish, one of the employees, who is also a shareholder of the company (purchased shares in open market) came to know that company is secretly supplying the machine guns to some unscrupulous persons, who are supplying the machine guns to the terrorists which is against the public interest. Can Harish make a complaint to the National Company Law Tribunal (NCLT)? Can Govt. of India make a complaint to the NCLT if such malpractices come to its notice?*

(4 marks)

(iii) *Vara was appointed as Company Secretary and Compliance Officer in Aaradhya Textiles Ltd. (ATL). As per the terms of offer, she was provided with a rent free furnished accommodation of 3BHK flat in Borivali (East), Mumbai for her use exclusively, with a condition to surrender the flat to the company within a month after the cessation of service.*

Since Vara was unmarried, she kept her friend Anushka, as paying guest in the company provided flat for which Vara charged ₹ 15,000 per month from Anushka. The company came to know that Vara has kept her friend as paying guest and is also charging rent, which was not meant for subletting. The company issued a show cause notice to Vara, which she did not reply and also remained absent from the company. The company terminated her service and served a legal notice to hand over the possession of the flat. However, Vara did not vacete the flat and alleged wrongful dismissal from service. In light of the above facts, whether the company can move an application before the National Company Law

Tribunal against Vara for wrongful withholding of a property of the company? Also refer to relevant provisions of the Companies Act, 2013.

(4 marks)

(iv) *Ekta Textiles Ltd. issued a prospectus for its initial public offer (IPO). The prospectus contained some misleading information which may mislead the investors in subscribing to the issue. Some of the investors came to know about this information after they had subscribed and were allotted the shares. What recourse is available to the affected persons, who subscribed in the IPO on the basis of such information and were allotted the shares?*

(4 marks)

Answer 2(a)

According to section 2(60)(v) of the Companies Act, 2013(the Act), "officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means the following officers of a company, namely:

Any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity.

In the given situation, although Prachi is not occupying any position in Jay Capitals Ltd. a non-banking finance company on papers, but the Board of the company was accustomed to act as per the verbal instructions of Prachi. Hence, the status of Prachi can be of "Officer in default" in terms of section 2(60) of the Act and she can be held liable for her acts.

Answer 2(b)

According to section 41 of Prevention of Money-Laundering Act, 2002(PMLA), no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Hence, A cannot file any appeal to City Civil Court of Madurai.

According to section 42 of PMLA, any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law or fact arising out of such order.

However, the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Hence, A aggrieved by the order of Appellate Tribunal under PMLA, can file an appeal to the High Court of Madras (Madurai Bench) within sixty days from the date of communication of the order of the Appellate Tribunal.

Answer 2(c)

Alteration made by Company itself

The alteration in the Memorandum of Understanding (MOA) and Articles of Association (AOA) are governed by section 13 and section 14 of the Companies Act, 2013(the Act) respectively, under which the company itself, after following the due process in the Act, may alter the provisions.

Alteration advised by the National Company Law Tribunal (NCLT)

According to section 242(5) of the Companies Act, 2013(the Act), where an order of NCLT under section 245 (1) makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in

the order, to make, without the leave of NCLT, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

Further, according to section 242(6) of the Act, subject to the provisions of section 242(1), the alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

Thus, as per the above provisions, the NCLT has the power to get the alteration in MOA and AOA and it will have same effect as if they have been duly made by the company.

Answer 2(d)

(i) Non-Holding of Meetings of the Board

In the case of *Chandra Krishan Gupta v. Pannalal Girdhari Lal Pvt. Ltd.*, it was held that "The non-holding of the meetings of the Board would not amount to oppression of minority shareholders. The rights of the petitioner as a director might have been affected but his rights as a minority shareholder have not been affected thereby".

Therefore in view of the above, it can be said in the given situation that non-holding of the meetings of the Board of Directors would not amount to oppression of minority shareholders.

(ii) Non-Declaration of Dividend

In *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".

Therefore in view of the above, it can be said that non-declaration of dividend cannot be termed to be an oppressive conduct.

Answer 2A (i)

According to section 47(2) of the Companies Act, 2013(the Act), every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital and his voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company.

Further, the 2nd proviso to section 47(2) of the Act states that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

Since in the given situation, the preference shareholders have not been paid dividend for 3 Financial Years, they are entitled to vote on all the resolutions placed before the company.

Hence, the contention of the chairman is not correct.

Answer 2A (ii)

According to section 241(1)(a) of the Companies Act, 2013(the Act), any member of a company who complains that 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 may apply to the National Company Law Tribunal(NCLT), provided such member has a right to apply under section 244, for an order under Chapter XVI.

According to section 244(1) of the Act, the following members of a company shall have the right to apply under section 241, namely:

(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;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members:

However, the NCLT may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b) so as to enable the members to apply under section 241.

Hence, if Harish is holding not less than one-tenth of the issued share capital of the company or if he takes waiver from NCLT of the requirements provided under section 244(1)(a) of the Act, he can make a complaint before NCLT otherwise, he cannot make the complaint to NCLT.

Further, according to section 241(2) of the Act, the Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to NCLT for an order under Chapter XVI.

Therefore, Govt. of Indian can make a complaint to NCLT if malpractices comes to its knowledge.

Answer 2A (iii)

According to section 452(1) of the Companies Act, 2013(the Act), If any officer or employee of a company-

(a) wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Further, according to section 452(2) of the Act, the Court trying an offence under section 452(1) of the Act may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to two years.

Provided that the imprisonment of such officer or employee, as the case may be, shall not be ordered for wrongful possession or withholding of a dwelling unit, if the court is satisfied that the company has not paid to that officer or employee, as the case may be, any amount relating to-

(a) provident fund, pension fund, gratuity fund or any other fund for the welfare of its officers or employees, maintained by the company;

(b) compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement.

In the given situation, Vara was provided a furnished flat for her personal and exclusive use, but the property was sub-let, which amounts to its use for a purpose other than that for which it was given and Vara was making profit by sub-letting it. Thus, the company can move an application before National Company Law Tribunal against Vara for wrongful withholding of a property of the Company.

Answer 2A (iv)

According to section 37 of the Companies Act, 2013 (the Act), a suit may be filed or any other action may be taken under section 34 or section 35 or section 36 by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Criminal Liability for Mis-statements in Prospectus

According to section 34 of the Act, where a prospectus, issued, circulated or distributed under Chapter III, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorizes the issue of such prospectus shall be liable under section 447.

Civil Liability for Mis-statements in Prospectus

According to section 35, where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who—

(a) is a director of the company at the time of the issue of the prospectus;

(b) has authorised himself to be named and is named in the prospectus as a director of the company, or has agreed to become such director, either immediately or after an interval of time;

(c) is a promoter of the company;

(d) has authorised the issue of the prospectus; and

(e) is an expert referred to in sub-section (5) of section 26,

shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

Punishment for Fraudulently Inducing Persons to Invest Money

According to section 36, any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into,—

(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities; or

(b) any agreement, the purpose or the pretended purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities; or

(c) any agreement for, or with a view to, obtaining credit facilities from any bank or financial institution,

shall be liable for action under section 447.

The affected persons can take action according to above mentioned provisions.

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

Question 3.

(a) Discuss the liability of executive and non-executive directors for fraud committed by the Managing Director of the company which came to their notice during a Board Meeting.

(4 marks)

(b) Sunidhi, ACS, was appointed as Asst. Vice President (Board Secretariat). Just after joining, she came to know that the Central Government has appointed an inspector to carry out detailed investigation into the alleged fraud in the company. In order to carry out the smooth operations of inspection, what preparation would you suggest to Sunidhi ?

(4 marks)

(c) Richa was appointed as a senior level officer in a company. Before joining the company, she did not do any due diligence. The company was under investigation by the Serious Fraud Investigation Office (SFIO). One day, the SFIO official arrested some of the directors and employees of the company for the offences covered under 447 of the Companies Act, 2013 and Richa was one of them. She applied for bail through her Advocate. The Advocate made the bail application before the district court. Examine whether Richa will get bail? Refer to relevant provisions of the law.

(4 marks)

(d) What are the penalties/punishments for the following?

(i) Penalty for insider trading under Section 15G of SEBI Act, 1992.

(ii) Penalty for contravention under the Securities Contracts (Regulation) Act, 1956 where no separate penalty has been provided.

(iii) Punishment for repeated default under Companies Act, 2013.

(iv) Penalty for contravention of any provisions of Foreign Exchange Management Act, 1999.

(4 marks)

OR (Alternate question to Q. No. 3)

Question 3A.

Write notes on the following:

(i) Meaning of Interlocutory Application under NCLAT Rules, 2016.

(4 marks)

(ii) Practicing Company Secretary, who is in practice since 2010 with LL.B. degree intends to be empanelled as 'Mediator or Conciliator' under Companies (Mediation and Conciliation) Rules 2016. Can he be empanelled? If not, why?

(4 marks)

(iii) Crisis of Organizational Misdeeds.

(4 marks)

(iv) Punishment/penalty for :

- *Cheating by personation*
- *Improper use of "Limited" or "Private Limited"*
- *Deceitfully personating as an owner of shares or interest in a company.*
- *Tampering with the minutes of the proceedings of meeting.*

(4 marks)

Answer 3(a)

Executive directors can usually be caught in the net of suspicion of fraud, since they are hands on involved in the day to day operations of the company and are aware of where there are loopholes in the systems prevalent within the company. However, the non-executive directors or the independent directors cannot escape responsibility simply by virtue of their position.

Section 2(60) of the Companies Act, 2013 (the Act) implicates 'every director' in respect of a contravention of the provisions of the Act (including Section 447 - Fraud as discussed above) who consented to the fraud or is aware of the contravention can become covered within the term 'officer who is in default'.

The method of awareness is also provided for - this must be either by participating in board proceedings without objecting to the same or even by virtue of receipt of proceedings of the board. 'Proceedings of the board' can normally be understood to mean the minutes, but can it also include board papers? What if an independent director receives board papers relating to details of the annual financial statements? Often board papers can be so bulky that they comprise of an entire lever arch file. Can the director be expected to reasonably read everything and will this prove his 'awareness' of the fraud? These are some questions to be pondered.

Resignation may seem to be the immediate recourse to a non-executive director, but that does not absolve someone from liability, since the proviso to Section 168(2) of the Companies Act, 2013 clearly

provides that the director who has resigned shall be liable even after his resignation, for the offences which occurred during his tenure.

Here's where the attendance registers, board papers and minutes which you thought were mundane, suddenly become relevant. Attendance at the board meeting promptly brings a director within the 'awareness' purview discussed above. A recording of who attended the meeting, where they did not participate in the discussion and voting and where they dissented is very relevant to affixing liability.

The board papers need to be concise and clear. Board papers circulated over a period of time, if efficiently compiled, might be instrumental in throwing up a red flag for a director, and might result in an independent either recording his dissent or in extreme cases, resignation.

Secretarial Standard 1: Secretarial Standard on Meetings of the Board of Directors requires that the draft minutes need to be circulated to all the members of the board of directors, not only those who attended the meeting. Thus the proceedings of the Board can be available even to those who did not attend the meeting and they can therefore be considered to be aware of a contravention. It certainly makes sense to have your minutes fairly detailed and also for the directors who receive the draft, to read it thoroughly.

Answer 3(b)

Before an inspector commences investigation into the affairs of a company, it is advisable for the Secretary to prepare a report touching upon various aspects of the activities of his company particularly those transactions in respect of which fraud or misfeasance or mismanagement is alleged. This exercise will enable the secretary to handle the investigation into the affairs of his company with courage and confidence.

The aspects which should be considered by the company secretary include:

1. Basic information about the company – Name of the company; date of incorporation; location of the registered office, branches, factories and other offices; status of the company – public or private; objects of the company – capital structure; voting rights attached to the shares; shareholding pattern of the company.

2. Business activities – Nature of existing business, licensed and installed capacities, expansion programme and sources of finance, whether the company belongs to a particular group; if so the names of other companies falling within the same group.

3. Debentures, bank finance and deposits.

4. Foreign collaboration agreements.

5. Management—Brief history of past management set up; existing management set up; composition of Board of Directors; whether the terms and conditions of the appointment of managerial personnel are being adhered to; details regarding appointment of directors and their relatives to an office or place of profit.

6. Whether all the statutory registers including minute's books are being maintained up-to-date?

7. Whether the internal checks and internal control system is being properly followed?

8. Working results and financial position – General assessment of working of the company, evaluation of the level of performance and efficiency of the management, a review of the profits of the company, performance data, financial position of the company in the context of its working results for the last three years.

9. Compliance by the company and its officers with the provisions of the Companies Act, 1956/2013.

10. Compliance with the provisions of other Acts applicable to the company.

11. Whether the loans taken and loans advanced to Directors, the firms in which they are partners or companies in which they are Directors are in accordance with the provisions of the Act.

12. The investments made by the company.

13. Sole selling agency agreement.

14. Instance of mismanagement and other irregularities.

15. Acquisition/disposal of substantial assets.

16. A scrutiny of abnormal/heavy expenditure items.

17. Complaints, if any, against the company and its management and steps taken to redress them.

18. Brief particulars of the litigations against the company and the reasons thereof.

19. Management's relations with the employees and labour.

20. Shareholders—Instance of oppression of minority shareholders, allegations of non-receipt of dividend, notices of meetings, accounts, share certificates, etc.; illegal forfeiture of shares, etc. and steps taken to redress Investors, complaints.

21. Auditors—Name and address of Statutory auditors, Secretarial Auditor and Cost Auditor, compliance as per the provisions of Companies Act, 2013.

The above are the suggestions that can be helpful for Sunidhi for carrying out the smooth operations of inspection.

Answer 3(c)

According to section 212(6) of the Companies Act, 2013(the Act), notwithstanding anything contained in the Code of Criminal Procedure, 1973, offence covered under section 447 of the Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given an 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:

Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

In view of the above provision, it can be said that bail may be granted to Richa after complying the above provision on the direction of special court.

Answer 3(d)

S. No.	**Offence**	**Penalty**
(i)	**Penalty for insider trading under section 15G of SEBI Act, 1992**	If any insider who,— (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; or (ii) communicates any unpublished price-sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or

		(iii) counsels, or procures for any other person to deal in any securities of any body corporate on the basis of unpublished price-sensitive information, Shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.
(ii)	**Penalty for contravention under the Securities Contracts (Regulation) Act, 1956 where no separate penalty has been provided**	Whoever fails to comply with any provision of this Securities Contracts (Regulation) Act, 1956, the rules or articles or bye- laws or the regulations of the recognised stock exchange or directions issued by the Securities and Exchange Board of India for which no separate penalty has been provided Shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.
(iii)	**Punishments for repeated default under Companies Act, 2013**	If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.
(iv)	**Penalty for contravention of any provisions of Foreign Exchange Management Act, 1999**	According to section 13(1) of Foreign Exchange Management Act, 1999 (FEMA), If any person contravenes any provision of Foreign Exchange Management Act, 1999, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

Answer 3A (i)

According to rule 2(f) of National Company Law Appellate Tribunal Rules, 2016 (NCLAT Rule, 2016) "interlocutory application" means an application in any appeal already instituted in the Nation Company Law Appellate Tribunal(NCLAT), but not being a proceeding for execution of the order or direction of NCLAT.

Further, according to rule 31, every interlocutory application for stay, direction, condonation of delay, exemption from production of copy of order appealed against or extension of time prayed for in pending matters shall be in Form NCLAT-2 and the requirements prescribed in that behalf shall be complied with by the applicant, besides filing a affidavit supporting the application.

Answer 3A (ii)

According to rule 4(f) of Companies (Mediation and Conciliation) Rules, 2016, a person shall not be qualified for being empanelled as mediator or conciliator unless he is a qualified legal practitioner for not less than ten years.

According to rule 4(g) of Companies (Mediation and Conciliation) Rules, 2016, a person shall not be qualified for being empanelled as mediator or conciliator unless he is or has been a professional for at least fifteen years of continuous practice as Chartered Accountant or Cost Accountant or Company Secretary.

In the given situation, the Practicing Company Secretary (PCS) is not fulfilling the requirement of rule 4(g) for empanelment as mediator or conciliation as for a PCS the requirement is at least fifteen years of continuous practice. Also, a LLB Degree holder is not authorized to practice law unless registered as an Advocate with the appropriate Bar Council, and therefore, the PCS is also not eligible under rule 4(f) of Companies (Mediation and Conciliation) Rules, 2016. Accordingly, he cannot be empanelled as 'Mediator or Conciliator".

Answer 3A (iii)

Crisis of Organisational Misdeeds

Crises of organizational misdeeds arise when management takes certain decisions knowing the harmful consequences of the same towards the stakeholders and external parties. In such cases, superiors ignore the after effects of strategies and implement the same for quick results. Crisis of organizational misdeeds can be further classified into following three types:

(i) Crisis of Skewed Management Values: Crisis of Skewed Management Values arises when management supports short term growth and ignores broader issues. For example, a company asks the employees to work for long extended hours without proper rest being available.

(ii) Crisis of Deception: Organizations face crisis of deception when management purposely tampers data and information. Management makes fake promises and wrong commitments to the customers. Communicating wrong information about the organization and products lead to crisis of deception. For example, misleading advertisements.

(iii) Crisis of Management Misconduct: Organizations face crisis of management misconduct when management indulges in deliberate acts of illegality like accepting bribes, passing on confidential information and so on. For example, corruption in management.

Answer 3A (iv)

Offence	**Punishment/Penalty**
Cheating by personation	According to section 419 of Indian Penal Code, 1860, whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Improper use of “Limited” or “Private Limited	According to section 453 of the Companies Act, 2013, if any person or persons trade or carry on business under any name or title, of which the word “Limited” or the words “Private Limited” or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated with limited liability, or unless duly incorporated as a private company with limited liability, as the case may be, punishable with fine which shall not be less than five hundred rupees but may extend to two thousand rupees for every day for which that name or title has been used.
Deceitfully personating as an owner of shares or interest in a company	According to section 57 of the Companies Act, 2013, if any person deceitfully personates as an owner of any security or interest in a company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or attempts to obtain any such security or interest or any such share warrant or coupon, or receives or attempts to receive any money due to any such owner, he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.
Tampering with the minutes of the proceedings of meeting	According to section 118(12) of the Companies Act, 2013, If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Question 4.

(a) *Shyam Electronics Ltd. is engaged in the business of manufacturing and distributing of colour TVs. Anil joined the company as Vice President (Accounts and Taxation). He observed that the company was taking benefit of Input Tax Credit (ITC) by creating some dummy firms in the names of promoter directors. There is no supply of raw materials, but the invoices are raised by these firms, payments are made and the company is availing of the ITC in its GST Returns and claiming big amount of refund. He made a complaint to the Tribunal under section 213(b)(i) of the Companies Act, 2013, alleging that the business of the company was being conducted in a fraudulent and unlawful manner and sought investigation to be made.*

The Tribunal after satisfying with the application made by Anil, ordered that the affairs of the company ought to be investigated by an inspector appointed by the Central Government. During the course of the investigation, the Chief Executive Officer of the company terminated Anil on the ground of in-subordination and damaging the image of the company.

Comment on the action of the company in terminating Anil during the course of the investigation.

Comment on the action of the company in terminating Anil during the course of the investigation.

(4 marks)

(b) *In the contemporary world of competitive business, there is a saying that 'no riskno business'. Moreover, Environmental, Social and Governance (ESG) Risks represent a specific subject of general risks that a company must manage. How should a company handle such risks?*

(4 marks)

(c) *A Corporate Insolvency Resolution Proceedings (CIRP) was initiated by the financial creditors and the National Company Law Tribunal (NCLT) passed the order of acceptance of proposal of the Resolution Applicant. After taking over the control and management of the Corporate Debtor, the Resolution Applicant observed an apparent mistake in the order. The proposal of the Resolution Applicant was to provide payment of ₹4,79,06,549 to all the Operational Creditors, whereas in the order it was wrongly written as ` 4,97,06,549. The Resolution Applicant seeks your professional advice to get the inadvertent mistake rectified. Discuss the relevant provisions of the law and suggest the procedure for its rectification.*

(4 marks)

(d) *In a tender floated by ABC Bank for the supply and installation of new signages/ replacement of existing signages for branches/offices/ATMs of ABC Bank located at specified metro centres of various circles of ABC Bank across India, it appeared that certain bidders of the tender were coordinating and fixing the prices of their services as well as allocating the market amongst themselves to distort fair bidding process. Citing relevant case, examine whether the acts of the tenderers are violative of any provisions of the law.*

(4 marks)

Answer 4(a)

Section 218 of the Companies Act, 2013 provides the provisions relating to Protection of Employees during Investigation. It states:

(1) Notwithstanding anything contained in any other law for the time being in force, if—

(a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or

(b) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

(i) to discharge or suspend any employee; or

(ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or

(iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the National Company Law Tribunal(NCLT) of the action proposed against the employee and if the NCLT has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

Since the company has not obtained the approval of NCLT in accordance with the above section, therefore, the action of the company in terminating Anil during the course of investigation in not valid.

Answer 4(b)

ESG risks represent a specific subset of general risks that a company must manage where relevant, 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.

For example, A company is required to follow various laws like Minimum Wages Act, 1948, Industrial Disputes Act, 1947, Water (Prevention & Control of Pollution) Act, 1974 etc. These laws are Environment and Social Legislations. The non-compliance of these laws may have direct impact on the image of company. Non-compliance of these laws will have dual effect i.e. Punishments and degrading of image of the company, besides the larger long term impact of non-achievement of the larger welfare based objectives of those legislations.

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.

In certain cases, the board may wish to consider receiving regular briefing on relevant ESG matters and the company's approach to handling them. Creating more focused board committees or sub-committees, such as a "corporate responsibility and sustainability" committee that is specifically tasked with oversight of specified ESG matters or updating existing committee charters and board-level corporate governance guidelines to address the board's approach to such topics may also be considered. Of course, the board should ensure that any committee tasked with ESG risk oversight properly coordinates with any other committees tasked with other types of risk oversight (i.e., the audit committee) so that the board as a whole is satisfied.

Answer 4(c)

According to section 420(2) of the Companies Act, 2013 (the Act), the National Company Law Tribunal (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, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties. However, no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

Procedure for rectification

According to rule 154(1) of the NCLT Rules, 2016, any clerical or arithmetical mistakes in any order of the NCLT or error therein arising from any accidental slip or omission may at any time, be corrected by NCLT on its own motion or on application of any party by way of rectification,

Further according to rule 154(2) of the NCLT Rules, 2016, an application under Rule 154(1) may be made in Form No NCLT. 9 within two years from the date of the final order for rectification of the final order not being an interlocutory order.

General power to amend

NCLT may, within a period of thirty days from the date of completion of pleadings, and on such terms as to costs or otherwise, as it may think fit, amend any defect or error in any proceeding before it and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

In view of the above, the resolution applicant can apply under Rule 154(1) of NCLT Rules, 2016 in Form No NCLT. 9 within two years from the date of the final order.

Answer 4(d)

The situation given is similar to the facts of the case *Re: Alleged Anti-Competitive Conduct by various bidders in supply and installation of signages at specified locations of State Bank of India across India [CCI] suo motu case no. 02 of 2020 [decided on 03/02/2022],* wherein it was alleged that bid-rigging and cartelisation was done in the tender floated by SBI Infra Management Solutions Pvt. Ltd. ('SBIIMS') for the supply and installation of new signages/replacement of existing signages for branches/offices/ATMs of SBI located at specified metro centers of various circles of SBI across India. From the facts on record, it appeared that certain bidders in the Impugned Tender were coordinating and fixing the prices of their services as well as allocating the market amongst themselves, with the object of distorting fair bidding process.

Upon investigation being carried out, the Competition Commission of India (CCI) after taking into account different factors to assess whether an agreement has any appreciable adverse effect on competition (AAEC) in the market, observed that the definition of an 'agreement' as given in Section 2(b) of the Act, requires, *inter alia*, any arrangement or understanding or action in concert, whether or not formal or in writing or intended to be enforceable by legal proceedings. The definition, being inclusive and not exhaustive, is a wide one. Such understanding may be tacit, and the definition under Section 2(b) of the Act covers even those situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert, and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of the term 'agreement', the Commission has to assess the evidence on the basis of preponderance of probabilities. Further, since the prohibition on participating in anti-competitive agreements and bid rigging and the penalties which the infringers may incur are well-known, it is normal for such practices and agreements to take place in a clandestine fashion, for meetings to be held in secret and for associated documentation to be reduced to a minimum. The Commission further observed that, in respect of cases concerning cartels which are hidden or secret, there is little or no documentary evidence, and evidence may be quite fragmentary. The evidence may also be wholly circumstantial. It is therefore, often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of co-incidences and indicia which taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

Based on a holistic assessment of the evidence presented before it, the Commission concluded that the opposite Parties had collectively had entered into an agreement resulting in geographical market allocation as well as bid-rigging in the Impugned Tender.

Decision: Cartelisation upheld. Penalty imposed.

Reason: The Competition Commission notes that cartelisation, including bid-rigging is a pernicious form of competition law contravention. Any party willing to advance justification for such conduct has to give proper reasoning with clear and cogent evidence for the same. Vague assertions would not help such parties evade the responsibility cast upon them under the provisions of Section 3 of the Competition Act, 2002(the Act).

It has been contended by the OPs that their conduct has not resulted in the any AAEC. In this regard, it is noted that the collusion to fix prices by rigging the bids in the Impugned Tender would have had an adverse impact on the competitive price discovery process. Reliance placed on the internal note dated 06.06.2018 of SBIIMS is of no consequence to assert the absence of any AAEC. The assertion by some of the OPs that SBIIMS has not suffered any loss due to the alleged conduct is also misplaced as the same is not a criteria for determining AAEC. Any manipulation in the competitive price discovery process, in this case e-reverse auction system, would affect the final price to be paid by the tendering authority.

The Commission also notes that rebuttal of the presumption of AAEC can be made by the parties taking recourse to all or any of the factors provided under Section 19(3) of the Act.

In the present matter, none of the parties has been able to demonstrate as to how their impugned conduct resulted in any

(i) accrual of benefits to consumers;

(ii) improvement in production or distribution of goods or provision of services; or

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

In view of the above decided case, it can be said that the acts of the tenderers are violative of provisions of Competition Act, 2002.

Question 5.

(a) Anurag was appointed as Independent Director in a listed entity, which is in the list of top 1000 listed entities by market capitalization as on 31st March, 2022. Regulation 25(10) of SEBI (LODR) Regulations, 2015 provides that with effect from 1st January, 2022, the top 1000 listed entities by market capitalization calculated as on March 31 of the preceding financial year, shall undertake Directors and Officers insurance (D&O Policy) for all their independent directors of such quantum and for such risks as may be determined by its Board of Directors. The company is planning to purchase D&O Policy for all its directors and key managerial personnel. Discuss:

(i)The coverage of the D&O Policy.

(ii) Key points Anurag, as a director, should ensure in the D&O Policy.

(b) The Consumer Protection Act, 2019 has taken away the power to initiate class actions from individuals and vested them into the hands of the regulator. Do you agree with this statement? Comment.

(c) An investor proposes to make a complaint about certain groups of individuals who engage in the trading of securities by adopting manipulative practices. The investor does not know to which authority he can make the complaint and under which provisions of the law. Prepare a detailed note for the investor explaining under which law the complaint be made, to which authority and under what circumstances can the complaint be made and type of actions that may be taken by the authority.

(d) Write a note on the Exit Checks and Clawbacks.

(4 marks each)

Answer 5(a)

The coverage of the D&O Policy

Directors and Officers Liability Insurance (D&O) is an insurance coverage intended to protect individuals from personal losses if they are sued as a result of serving as a director or an officer of a business or other type of organization. It can also cover the legal fees and other costs the organization may incur as a result of such a suit. The D&O cover applies to former, present, and future members of the board of directors or any employee performing a managerial role.

D&O covers the directors and officers of a company, or the organization(s) itself, against the losses or for reimbursement of defense costs if a legal action is brought against them. Such coverage can also extend to criminal and regulatory investigations/trials defense costs. Civil and criminal actions are often brought against directors and officers simultaneously. D&O has become closely associated with broader management liability insurance and usually, the D&O policy covers the following:

• Management Liability

• Management indemnification

• Non-Profit Outside Directorship Liability

• Estates and legal representatives of incapacitated or deceased insured individuals covered

• Spousal Liability extension

• Cover for the creation or acquisition of new Subsidiary companies (effective from the date of acquisition or creation)

Further, the D&O policy also offers the following coverages:

• It covers any loss or damage that the company may incur because of actions mistakenly taken in the individual capacity as directors and officers under the Memorandum and Articles of Association.

• It includes loss or damage arising from claims made against directors and officers for any wrongful act done in their official capacity.

• It covers legal expenditure incurred with the written consent of the insurance companies arising out of the prosecution of any director or officer at any investigation, enquiry or other proceedings by the authority empowered to do so.

• It covers expenses incurred by the company's shareholders in pursuance of a claim against a director/ officer for which the insurance company is legally obliged to pay, as per the Court's direction.

• It provides indemnity to the legal heirs or legal representatives of the director/officer if the director or officer becomes insolvent.

Key Points Anurag, as a director, should ensure in the D&O Policy

1. How Much Insurance Do We Have How And Much Do One Need?: 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.

2. Who Shares the Insurance Policies?: 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 (often referred to as "Side A" or "Side A DIC" coverage) 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.

3. When is Coverage Triggered?: 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 (SEC) investigations and summons, at what point coverage is triggered.

4. What is Covered Under the D&O Policy?: As noted above, in addition to defence costs and the costs of settlements/ judgments 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.

5. Who are Insurers?: One has to look at 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 conversation 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.

6. How Do Other Insurers Impact Coverage?: 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.

7. What is not Covered?: 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.

8. How to Protect in a Crisis? : 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.

9. What is Side A Insurance and Why is it Needed?: 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.

10. What is Independent Director Insurance?: 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.

Answer 5(b)

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 either the Disctrict Collector or to the CCPA. 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.

In view of the above, it can be said that the Consumer Protection Act, 2019 has taken away the power to initiate class actions from individuals and vested them into the hands of the regulators.

Answer 5(c)

Complaint can be made to Securities and Exchange Board of India (SEBI) under Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (the regulations) in case of Manipulative, Fraudulent or Unfair Trade Practices in securities markets.

A compliant may be filed with the SEBI for violation of the prohibitions provided under regulation 3 of the regulations, which provides that no person shall, directly or indirectly:

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.

Types of actions that may be taken by the authority

According to regulation 11(1) of the regulations, SEBI may, without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) of section 11 and section 11B of the Securities and Exchange Board of India Act, 1992 by an order, for reasons to be recorded in writing, in the interests of investors and securities market, issue or take any of the following actions or directions, either pending investigation or enquiry or on completion of such investigation or enquiry, namely:

(a) suspend the trading of the security found to be or prima facie found to be involved in fraudulent and unfair trade practice in a recognized stock exchange;

(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

(c) suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;

(d) impound and retain the proceeds or securities in respect of any transaction which is in violation or prima facie in violation of these regulations;

(e) direct and intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of a fraudulent and unfair transaction;

(f) require the person concerned to call upon any of its officers, other employees or representatives to refrain from dealing in securities in any particular manner;

(g) prohibit the person concerned from disposing of any of the securities acquired in contravention of these regulations;

(h) direct the person concerned to dispose of any such securities acquired in contravention of these regulations, in such manner as the Board may deem fit, for restoring the status *quo ante.*

Answer 5(d)

Exit Checks and Clawbacks

Exit checks and interviews, particularly when employees are performing and are remunerated well, can raise red flags about possible involvement in fraud. Somewhere there are likely to be some answers which do not add up. The organisation can then investigate.

Clawback provisions in employment agreements, which enable the company to recover incentive and additional compensation paid to executives are an effective deterrent tool, since executive compensation tends to be largely performance linked. Clawback provisions would provide for recovery of such compensation (usually other than the base salary) in case of fraudulent misrepresentation or misstatements.

Question 6.

(a) Nikki joined a retail store run by Jain Daily Needs Ltd. as Manager. After some time she manipulated *the accounts of the branch and thus made illegal money amounting to Rs. 15 lakh. The fraud was unearthed during the regular inspection of accounts and stock check. The Area Manager complained to the Corporate Office of the company and Nikki was put under suspension by the competent authority. What penal action can be taken against Nikki under the provisions of the Companies Act, 2013? What would be your answer, if the fraud amount is Rs. 5 lakh only?*

(4 marks)

(b) Nothing in the Code of Civil Procedure, 1908 shall be deemed to limit or otherwise affect the inherent power of the Civil Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Discuss the inherent powers of the Court and refer to decided case law, if any.

(4 marks)

(c)Siddhant is a Practicing Company Secretary and Insolvency Professional. He provides to his clients various consultancy services. In order to secure his office establishment, he purchased a general liability insurance policy from an insurance company. By going through the policy terms and conditions, he realized that it will not cover his professional liability. Which policy should Siddhant take in order to mitigate his professional liability?

(4 marks)

(d)Kamal is a farmer. He grows vegetables and fruits on his farm. However, he secretly does trading in opium and unauthorisedly sells it to some unscrupulous persons. The keeping and selling of opium and poppy straw is a punishable offence under the Narcotic Drugs and Psychotropic Substances Act, 1985. From this illegal trading, he made money and purchased a big house in the village. Some villagers were keeping an eye over the activities of Kamal and when Kamal was storing the opium substances in his house, they informed the matter to the appropriate authority. The authority searched the premises, seized the opium substances and registered a case under the Prevention of Money Laundering Act, 2002 (PMLA). In light of the above facts, who is authorized under the PMLA to make search and seize the goods? Also refer to the relevant provisions of the PMLA.

(4 marks)

Answer 6(a)

Where the amount involved is at least Rs. 10 Lakhs

According to section 447 of the Companies Act, 2013 (the Act), 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:

However, proviso 1 of section 447 of the Act provides that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Since the fraud amount exceeds Rs. 10 Lakh in the given situation, Nikki can 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 i.e. Rs. 45 Lakh.

Where the amount is less than Rs. 10 Lakhs

Proviso 2 of section 447 of the Act provides that 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.

Since the fraud amount is Rs. 5 Lakh in other situation and does not exceed Rs. 10 Lakh, Nikki can 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(b)

Section 151 of the Civil Procedure Code, 1908 says, nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Though it does not confer any specific power to the Courts, it is one of the most used sections of the Code in litigation. Any situation that is not covered under the Code can be brought under this Section. The scope of Section 151 CPC has been explained by the Supreme Court in the case *K.K. Velusamy v. N. Palanisamy (2011) 11 SCC 275* as follows:

(a) Section 151 CPC is not a substantive provision which creates or confers any power or jurisdiction on Courts. It merely recognises the discretionary power inherent in every Court as a necessary corollary for rendering justice in accordance with law, to do what is “right” and undo what is “wrong”, that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the Court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the Court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the Court being complementary to the powers specifically conferred, a Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the Court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the Court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a Court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of Court.

Answer 6(c)

Siddhant may take Professional Indemnity Insurance in order to mitigate his professional liability. Professional Indemnity Insurance is a type of business insurance, typically for organizations that provide consultation or any professional services to its clients. Professional indemnity insurance covers claims made by the businesses in case their clients have sued them for making them endure any significant financial loss due to their advices and services.

It is a type of liability insurance that works to protect businesses and individuals who provide consultation and services with the compensation for full and hefty costs arising from the loss that they have caused to their client. The coverage provided by the insurance company focuses on the alleged failure of the service delivery by the company, which has led to the financial loss due to errors and omissions in the service or consultation. The insurance company handles the confidential data of its clients and their intellectual property to analyze before it provides consultation and required services. Keeping in mind the confidentiality of such information, it becomes very important for a business to take up professional indemnity insurance or professional liability insurance.

This insurance policy is based on the claims that are made. It means that the professional indemnity insurance policy will only cover the claims that are made during the tenure of the policy. So, make sure you get your renewals done on time. Also, any financial loss due to a false advice, the negligence, or the faulty analyses will only be covered if those mistakes were made during the tenure of the insurance policy. Claims made before or after the period of the policy will not be covered.

Answer 6(d)

Section 17 of Prevention of Money-Laundering Act, 2002(PMLA) provides the provisions relating to Search and seizure. It also provides authorities which are authorised under PMLA to make search and seize of goods. It states:

(1) Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person-

(i) has committed any act which constitutes money-laundering, or

(ii) is in possession of any proceeds of crime involved in money-laundering, or

(iii) is in possession of any records relating to money-laundering, or

(iv) is in possession of any property related to crime

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or property, if required or make or cause to be made extracts or copies therefrom;

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

(1A) Where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.

(2) The authority, who has been authorised under sub-section (1) shall, immediately after search and seizure or upon issuance of a freezing order, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

(3) Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence:

Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

(4) The authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of thirty days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.

Accordingly, the search and seize can be made by the persons authorised under section 17 of PMLA.