GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME
(New Syllabus)

DECEMBER 2021

MODULE 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be updated with the applicable amendments which are as follows:

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

C O N T E N T S

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PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2021

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART I

Question 1

(a) *"The Compliance Chart of any company must contain the complete information on compliance dashboard. which provide a detailed compliance procedure to the compliance executor". As a Company Secretary, list out the various content of the Compliance Chart.*

(b) *'R' was appointed as Managing Director of P mart Limited recently. During the meeting of the Board, he desires that all agenda files should be sent by email encrypted by password. He also desires that to protect the file from hacking, there should be some special name to the file. As a company secretary, kindly highlight any eight best practices for file naming.*

(c) *What are the records to be preserved for a period of 2l years and 5 years under Rule 27 of the Limited Liability Rules, 2009 ?*

(d) *In naming of a document, briefly explain the concept of Descriptive file and Non-Descriptive file.* *(5 marks each)*

Answer 1(a)

Content of Compliance Chart

The Compliance Chart of any company must contain the complete information on compliance dashboard, which provide a detailed compliance procedure to the compliance executor. This information includes:

1. Reference to the key compliance related laws, regulations, industry standards and compliance related policies and standards of the company;
2. Concise statements that capture the relevant internal and external compliance obligations and the risks arising from those obligations;
3. Inherent and managed risk level (critical, high, medium, low) of the identified obligations;
4. The business processes or people to which the compliance obligations are linked or on which they have an impact;
5. Specific compliance risk mitigation activities and compliance risk tracking and monitoring for managing the compliance obligations;

6. To whom and how frequently compliance related results and findings are reported; and
7. Clear ownership of the processes, activities and obligations outlined in the chart.

Such compliance chart must be practical and concise on the role and responsibilities of the management and of the compliance officer who is specifically responsible for existing and newly identified business activities.

Answer 1(b)

The following are best practices for file naming. The File names should:

- Be unique and consistently structured;
- Be persistent and not tied to anything that changes over time or location;
- Limit the character length to no more than 25-35 characters;
- Use leading 0s to facilitate sorting in numerical order if following a numeric scheme "001, 002, 010, 011 … 100, 101, etc." instead of "1, 2, …10, 11 … 100, 101, etc.";
- Contain a file format extension;
- Use a period followed by a file extension (for example, .tif, .jpg, .gif, .pdf, .wav, .mpg);
- Use lowercase letters. However, when a name has more than one word, start each word with an uppercase letter for example, "File_Name_Convention_001.doc";
- Use numbers and/or letters but not characters such as symbols or spaces that could cause complications across operating platforms;
- Use hyphens or underscores instead of spaces;
- Use standard date notation (YYYY-MM-DD or YYYYMMDD);
- Avoid blank spaces anywhere within the character string; and
- Not use an overly complex or lengthy naming scheme that is susceptible to human error during manual input, such as "filenameconventionjoesfinalversioneditedfinal.doc".

The strength of a folder and file naming convention is dependent on the proposed naming structure and the quality and quantity of the data elements chosen to build it. It should be of no surprise that for any business activity there is always an ideal naming structure. However, any structured naming convention that attempts to be all encompassing may result in overkill and unwieldiness.

Answer 1(c)

As per Rule 27 of the Limited Liability Rules, 2009, subject to previous approval order of Registrar, the records in the office of Registrar may be destroyed after the expiry of period specified preservation for 21 years and 5 years are as follows:

1. Records to be preserved for 21 years

All papers, registers, refund orders and correspondence relating to the limited liability partnership liquidation accounts.

2. Records to be preserved for 5 years:

a) Copies of Government orders relating to limited liability partnership;

b) Registered documents of limited liability partnership which have been fully wound up and finally dissolved together with correspondence relating to such limited liability partnership;

c) Papers relating to legal proceedings from the date of disposal of the case and appeal, if any;

d) Copies of statistical returns furnished to Government;

e) All correspondences including correspondences relating to scrutiny of accounts, annual returns, prosecutions, reports to the Central Government and the Tribunal and the correspondences relating to complaints.

In case of prosecution matter, the date is to be recorded from the date of disposal of the case and appeal, if any.

Answer 1(d)

The Descriptive file names are useful for small, well-defined projects with existing identification schemes that link the digital object to the source material. However, inconsistent application of terms or typos will increase to indexing and sorting errors.

Non-descriptive file names are usually system-generated sequential numerical string or the system based, such as a digital ID number, combination of Date and time, name of original file and are often linked to meta data stored elsewhere. Non-descriptive file names are often created for large scale digitization projects and may employ a digital ID number and numerical sequences to indicate batch or parent-child relationships. The advantage of non-descriptive names is that there is less chance of repeated or non-unique file names within a data structure.

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

Question 2

(a) During the Secretarial Audit, a Company Secretary in practice has to check the various compliances of the Law. Explain the following compliance requirement relating to the Private companies under Companies Act, 2013 :

(i) Certification of annual return

(ii) Appointment of auditor

(b) TYRE India Ltd proposed to buy a piece of land on the outskirts of a city to put up their factory. You are appointed as a PCS to prepare a search report for the said property. What are the factors to be considered in the search report ?

(c) Softech Services Private Ltd has failed to file its Annual Return for the financial Year 2018-19. Discuss the consequences of non-filing the Annual Return for the Company.

(d) List out at least five common practices of Diversion of Funds adopted by the companies. (5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Amit Krishna, a Company Secretary and Law Graduate by profession, was appointed as Company Secretary cum Compliance officer for Radha Raman Ltd (a BSE Listed Company). The Company follows the Good Corporate Governance practices and resolution for each and every grievance of the Stakeholder of the Company. Under the SEBI (LODR) Regulations, 2015, what are the provisions there for Grievance Redressal Mechanism & Submission of Compliance Certificate to the Exchange? (5 marks)

(ii) List out the Companies which are required to appoint Internal Auditor under section 138 of the Companies Act 2013 read with Rule l3 of the Companies (Accounts) Rules 2014. (5 marks)

(iii) You are a Company Secretary of a Listed Company, where the prior notice is required to be sent to stock exchange before the Board Meeting. Kindly list out the matters under consideration for the meeting where at least 2 days prior notice of the Board Meeting is to be intimated by the Company to the Stock Exchange. (5 marks)

(iv) Describe the points to be covered in the form MGT-8 and which required to be certifiied. (5 marks)

Answer 2(a)

(i) Certification of Annual Return

As per Section 92 read with Rule 11(2) of Companies (Management and Administration) Rules, 2014, Form MGT-8 is required for certification of Annual Return.

The annual return filed by a listed company or a company having paid up share capital of Rs. 10 Crores or more or turnover of Rs. 50 crores or more shall be certified by a Company Secretary in Practice stating that the annual return discloses the facts correctly and adequately and that the company has complied with all the provisions of the Companies Act, 2013.

(ii) Appointment of Auditor

As per Section 139(1) read with Rule 4(2) of the Companies (Audit and Auditors) Rules, 2014, Auditor shall be appointed for 5 years in the AGM. Before appointment the company shall obtain written consent from the auditor and eligibility certificate. The company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within fifteen (15) days of the meeting in which the auditor is appointed in E-form ADT-1.

In case of Specified IFSC Private Company- the notice of auditor's appointment shall be filed with the Registrar within 30 days of the meeting in which the auditor is appointed.

As per Section 139 (8)(i) of the Companies Act, 2013-In case of any causal vacancy occurred in the office of auditor shall be filled by the Board of Directors

within thirty days, but if such casual vacancy is as a result of the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board and he shall hold the office till the conclusion of the next annual general meeting.

Answer 2(b)

A Property Title Search is the process of retrieving the history of a property right from the original owner of the property to the current owner over a period of time. It provides documents which help determine relevant interests in property of the owner and other individuals, if any.

It is mandatory for a developer to annex a copy of the report in the 'agreement to sell' with the intended purchaser. This document will state if there is any existing mortgage, litigation, condition or claim, which is likely to affect the title of the buyer adversely.

Property Title Search includes:

1. Ownership: Status of ownership- sole or joint and the documents stating the same.
2. Deed Copy: Recent deeds in respect to the property.
3. Legal Description: Description of the property in legal parlance.
4. Chain documents: Previous owner of the property.
5. Possession: Actual Possession of the property.
6. Right of way: Easementary Right - the Right of way given to the owner.
7. Leases: Leases on the property which can affect the property status.
8. Mortgage: Whether the property has been mortgaged or not.
9. Tax Payment: Details of tax payment in relation to the property.
10. Bankruptcy Search: Report of bankruptcy of the owner of the property.
11. Municipal Service Lien: Report of unpaid municipal dues like water, sewer, trash etc.
12. Property Restriction: Restriction on sale of property like sale in case of unsound owner.
13. Plot Map: Official copy of Map of the plot.
14. Property Zoning: Property lying under which zone like Ecological Zone, Flood Zone, Earthquake Zone etc.
15. Civil Court Record: Any order of the Civil Court against the property.

and other things like Spousal Support Lien Search, Child Support Lien search, Power of Attorney, Special Assessment etc.

Answer 2(c)

Consequences of non-filing the annual return

1. *Penalty for default* : If the company has not filed its Annual Return from the date by which it should have been filed with fee and additional fees, every officer who is in default shall be liable to a penalty of ten thousand rupees and in case of

continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees in case of company and fifty thousand rupees in case of officer who is in default. [Section 92(5) of the Companies Act, 2013]

2. *Winding up* : If the Company has defaulted in filing Annual Returns for the immediately preceding five consecutive financial years, the Company may be wound up by the Tribunal. [Section 271(d) of the Companies Act, 2013]

3. *Inactive Status* : If the Company has not filed its Annual Return for last two financial years, it will be termed as "inactive company" [Section 455(1) of the Companies Act, 2013]

4. *Dormant Status* : If the Company has not filed its Annual Return for two financial years consecutively, the Registrar shall issue notice to the Company and enter its name in the Register of Dormant Companies. [Section 455(4) of the Companies Act, 2013]

Answer 2(d)

Common practices of diversion of funds are:

i. Using of short-term working capital funds for long-term commitments not in conformity with the terms of sanction.

ii. Using borrowed funds for creation of assets other than those for which the loan was sanctioned.

iii. Transferring funds to group companies.

iv. Investment in other companies by way of acquiring equities / debt instruments without approval of lenders.

v. Shortage in the usage of funds as compared to the amounts disbursed/ drawn, with the difference not being accounted for.

vi. Over-valuation or absence of requisite collaterals.

Answer 2A(i)

Grievance Redressal Mechanism: Regulation 13(3) of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015

Time Period : The listed entity shall file with the recognised stock exchange(s) on a quarterly basis, within twenty one days from the end of each quarter, a statement giving the number of investor complaints pending at the beginning of the quarter, those received during the quarter, disposed of during the quarter and those remaining unresolved at the end of the quarter.

Events:

The Listed entity shall ensure that adequate steps are taken for expeditious Redressal of investor complaints.

The listed entity shall ensure that it is registered on the SCORES platform or such

other electronic platform or system of the Board as shall be mandated from time to time, in order to handle investor complaints electronically in the manner specified by the Board.

The listed entity shall file with the recognized stock exchange(s) a statement giving:

- The number of investor complaints pending at the beginning of the quarter,
- Those received during the quarter,
- Disposed of during the quarter and
- Those remaining unresolved at the end of the quarter.

The same statement shall be placed before the Board of Directors quarterly

Submission of Compliance Certificate to the Exchange, Regulation 7(3) & (2) of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015

Time Period : Within 30 days of end of the financial year.

Events : Submission of Compliance Certificate to Stock Exchange certifying that all activities in relation to both physical and electronic share transfer facility are maintained either in house or by Registrar to an issue and share transfer agent registered with the Board.

Further the listed entity shall submit a compliance certificate to the exchange , duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent, wherever applicable

Answer 2A(ii)

Section 138 of Companies Act, 2013 read with Rule 13 of the Companies (Accounts) Rules, 2014 provides that the following class of companies are required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate, namely:-

(a) every listed company;

(b) every unlisted public company having-

(i) paid-up share capital of fifty crore rupees or more during the preceding financial year; or

(ii) turnover of two hundred crore rupees or more during the preceding financial year; or

(iii) outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year; or

(iv) outstanding deposits of twenty five crore rupees or more at any point of time during the preceding financial year; and

(c) every private company having-

(i) turnover of two hundred crore rupees or more during the preceding financial year; or

(ii) outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year.

Further, the Central Government may, by rules, prescribe the manner and the intervals in which the internal audit shall be conducted and reported to the Board.

Answer 2A(iii)

According to Regulation 29 of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015: Prior intimating to stock exchange at least 2 working days in advance excluding the date of intimation & date of board meeting is required to be made for the following matters:

- Proposal for Buyback of Securities;
- Proposal for voluntary delisting of listed entity from the Stock Exchange(s)
- Fund raising by following ways of further Public Offer, Rights Issue, American Depository Receipts/Global Depository Receipts/Foreign Currency Convertible Bonds, qualified institutions placement, debt issue, preferential issue or any other method and for determination of issue price:
- Declaration/Recommendation of Dividend, Issue of Convertible Securities including convertible debentures or of debentures carrying a right to subscribe to equity shares or the passing over of dividend.
- Proposal for declaration of Bonus Securities.

Answer 2A(iv)

While certifying the Form No. MGT 8, the practicing company secretary provide certification relating the following points:

A. the Annual Return discloses the facts as at the close of the financial year correctly and adequately; and

B. the Company has complied with the provisions of the Act & Rules made there under during the financial year in respect of:

   1. Its status under the Act;
   2. Maintenance of registers/records & making entries therein within the time prescribed therefore;
   3. Filing of forms and returns as stated in the Annual Return, with the Registrar of Companies, Regional Director, Central Government, the Tribunal, Court or other authorities within / beyond the prescribed time;
   4. Calling/ convening/ holding meetings of Board of directors or its committees if any, and the meetings of the members of the company on due dates as stated in the annual return in respect of which meetings, proper notices were given and the proceedings including the circular resolutions and resolutions passed by postal ballot, if any, have been properly recorded in the Minute Book / registers maintained for the purpose and the same have been signed;

5. Closure of Register of Members / Security holders, as the case may be.
6. Advances/loans to its directors and/or persons or firms or companies referred in section 185 of the Act;
7. Contracts/arrangements with related parties as specified in section 188 of the Act;
8. Issue or allotment or transfer or transmission or buy back of securities/ redemption of preference shares or debentures/ alteration or reduction of share capital/ conversion of shares/ securities and issue of security certificates in all instances;
9. Keeping in abeyance the rights to dividend, rights shares and bonus shares pending registration of transfer in compliance with the provisions of the Act;
10. Declaration/ payment of dividend; transfer of unpaid/ unclaimed dividend/ other amounts as applicable to the IEPF in accordance with section 125 of the Act;
11. Signing of audited financial statement and report of directors is as per section 134 of the Act;
12. Constitution/ appointment/ re-appointments/ retirement/ filling up casual vacancies/ disclosures of the Directors, Key Managerial Personnel and the remuneration paid to them;
13. Appointment/ reappointment/ filling up casual vacancies of auditors as per the provisions of section 139 of the Act;
14. Approvals required to be taken from the Central Government, Tribunal, Regional Director, Registrar, Court or such other authorities under the various provisions of the Act;
15. Acceptance/ renewal/ repayment of deposits;
16. Borrowings from its director, members, public financial institutions, banks and others and creation /modification /satisfaction of charges in that respect, wherever applicable;
17. Loans and investments or guarantees given or providing of securities to other bodies corporate or persons falling under the provisions of section 186 of the Act;
18. Alteration of the provisions of the memorandum and / or articles of association of the company.

PART II

Question 3

(a) "The Secretarial Audit lays the groundwork for the establishment of an ongoing Secretarial and Legal Compliances." Being a practicing Company Secretary what would you do while :

(i) Communicating to the earlier incumbent and

(ii) Submission of Secretarial Audit Report.

(b) Jain Ram & Co., Practicing Company Secretary, during the secretarial audit,

wants to evaluate the function of Internal Audit. Does this come under the function of the Secretarial Auditor ? Prepare a note.

(c) List the major differences between Cyber Audit and Forensic Audit.

(5 marks each)

Answer 3(a)

(i) Communication to earlier Incumbent

Whenever a company secretary in practice is engaged as a secretarial auditor in place of an earlier incumbent, he shall communicate to the earlier incumbent about the proposed engagement in writing to be sent by registered/ speed post or any other mode of delivery, as may be recognised by the Institute of Company Secretaries of India.

The Council of ICSI at its meeting held on 16th March, 2019 has made amendments in Guidelines wherein for Practice Company Secretaries, communication to previous incumbent would be mandatory before accepting the assignment, in terms of Clause (8) of Part I of the First Schedule to the Company Secretaries Act, 1980. The Council has approved the some services in respect of which it shall be mandatory to communicate to the previous incumbent (Company Secretary) before accepting the assignment in terms of terms of clause (8) of part I of the First Schedule to the Company Secretaries Act, 1980, which includes the Issuance of Secretarial Audit Report in terms of Section 204 of the Companies Act, 2013 and Issue of Secretarial Audit Report to material unlisted subsidiaries of Listed entities (whose equity shares are listed) under Regulation 24A of SEBI (LODR) Regulations, 2015.

(ii) Submission of Secretarial Audit Report

After considering the clarifications/replies of the management, the secretarial auditor shall prepare the secretarial audit report in Form No. MR.3 under section 204 of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. The report is addressed to the members but is to be submitted to the Board. The report shall contain the opinion on the statutory compliances examined by the auditor and shall state whether in his opinion the Company is carrying out/not carrying out due compliances of the applicable provisions of the various laws. The report shall be provided with or without qualifications.

Answer 3(b)

During the performance of the Secretarial Audit, the secretarial auditor also needs to report on the adequacy of systems and process in the company. The internal audit function greatly assist the Secretarial auditor in determining the extent to which he can place reliance upon the work of the internal auditor. The Secretarial auditor also needs to report on the adequacy of the systems and processes prevalent in the company. The important aspects to be considered in this context are:

1. **Organisational Status** - Whether internal audit is undertaken by an outside agency or by an internal audit department within the entity itself. The internal

auditor reports to the management, in an ideal situation he reports to the highest level of management and is free of any other operating responsibility. Any constraints or restrictions placed upon his work by management should be carefully evaluated. In particular, the internal auditor should be free to communicate fully with the external auditor.

2. **Scope of Audit Function** - The secretarial auditor should ascertain the nature and depth of coverage of the assignment. He should also ascertain to what extent the management considers, and where appropriate acts upon internal audit recommendations.

3. **Technical Competence** - The secretarial auditor should ascertain that internal audit work is performed by persons having adequate technical training and proficiency.

4. **Due Professional Care** - The secretarial auditor should ascertain whether internal audit work appears to be properly planned, supervised, reviewed and documented. An example of the exercise of due professional care by the internal auditor is the existence of adequate audit manuals, audit programmes and working papers.

5. **Monitoring of internal control** - The internal audit function may be assigned specific responsibility for reviewing controls, monitoring their operation and recommending improvements thereto.

6. **Examination of financial and operating information** - The internal audit function may be assigned to review the means used to identify, measure, classify and report financial and operating information, and to make specific inquiry into individual items, including detailed testing of transactions, balances and procedures.

7. **Review of operating activities** - The internal audit function may be assigned to review the economy, efficiency and effectiveness of operating activities, including non- financial activities of an entity.

8. **Review of compliance with laws and regulations** - The internal audit function may be assigned to review compliance with laws, regulations and other external requirements, and with management policies and directives and other internal requirements.

9. **Risk management** - The internal audit function may assist the organization by identifying and evaluating significant exposures to risk and contributing to the improvement of risk management and control systems.

10. **Governance** - The internal audit function may assess the governance process in its accomplishment of objectives on ethics and values, performance management and accountability, communicating risk and control information to appropriate areas of the organization and effectiveness of communication among those charged with governance, external and internal auditors, and management.

Answer 3(c)

Difference between Cyber Audit and Forensic Audit

S. No.	*Cyber Audit*	*Forensic Audit*
1	In Cyber Audit team of professionals conducts an organizational review to ensure that the correct and most up to date cyber and IT processes and infrastructure are being applied.	Forensic Audit is a dynamic and strategic tool in combating corruption, financial crimes and frauds through investigations and resolving allegations of fraud and embezzlement.
2	A cyber audit also includes a series of tests that guarantee that information security meets all expectations and requirements within an organization.	Forensic is the application of science to crime concerns. Forensic science matters especially criminal matters.
3	In Cyber Audit the Internal auditors and risk management professionals have key roles to play in the Information Management function of the company.	A Forensic Audit is a comprehensive and systematic process involving a series of activities and tasks undertaken for establishing the accuracy and authenticity of the transactions under review.
4	Audit helps enterprises with the challenges of managing cyber threats, by providing an objective evaluation of the controls and making recommendations to improve them as well as assisting the senior management and the board of directors understand and respond to cyber risks.	The term Forensic Audit refers to the specific guidance carried out in order to produce evidence.
5	Internal Audit should support the board's need to understand the effectiveness of cyber security controls.	Forensic Audit task involves an investigation into the financial affairs of the entity and is often associated with investigation into the alleged fraudulent activity.
6	A cyber security assessment drives a risk-based IT internal audit plan. Audit frequency should correspond to the level of risk identified, and applicable regulatory requirements / expectations.	The object of forensic auditing is to relate the findings of audit by examining and gathering legally tenable evidence and producing it to the Court.
7	Cyber Audit frequency should correspond to the level of risk identified, and applicable regulatory requirements/expectations. An assessment of the organization's cyber security should evaluate specific capabilities across multiple domains.	Forensic auditing involves application of audit skills to legally determine whether fraud has actually occurred. The entire process includes planning, gathering evidence, reviewing the evidence and reporting of the same.

Question 4

(a) What do you mean by Audit Sampling ?

(b) Describe the scope of Corporate Governance Audit.

(c) Define the term 'modified opinion and unmodified opinion' as per Auditing Standard 3-on forming an opinion' (CSAS-3) issued by the ICSI.

(d) Define what are designated securities for the purpose of Listed entity and Material unlisted subsidiaries as defined by SEBI in LODR Regulation.

(e) Preapare a checklist on Operational Control under System Audit. (3 marks each)

Answer 4(a)

Audit Sampling

Application of audit procedures to less than 100% of the population of documents/ items relevant for audit such that all sampling units have a chance for selection (for applying audit procedure thereon) so as to provide the auditor a reasonable basis on which conclusion about the entire population can be drawn.

However, the sample design, size & selection of items for testing should meet the following:

a) Purpose of the audit procedure and population characteristics shall be considered for designing an audit sample.

b) Sample size shall be so chosen as to reduce sampling risk to an acceptable low value.

c) Random sampling, whenever practicable, shall be considered so that each sampling unit shall have reasonable chance of selection.

d) For sampling, use of stratification and value-weighted selection will increase audit efficiency.

Answer 4(b)

Scope of Audit of Corporate Governance

The scope of Corporate Governance Audit is wide and mainly focus on following:

1. Financial and Non-Financial Stakeholders.
2. Boards of Directors (Composition, Mix, Independence).
3. Committees of the Boards and terms of References.
4. Control Environment (Accounting, Controls, Internal and External Audit).
5. Risk Management.
6. Transparency and Disclosure of financial information and executive compensation.
7. Strategic plans, programs and guidance on social responsibilities.

In India, the Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 are the governing laws on corporate governance.

Answer 4(c)

Modified Opinion

The Auditor shall express modified opinion when the Auditor concludes that:

a) based on the Audit Evidence obtained, there is non-compliance with the applicable laws in terms of timelines or process; or

b) based on the Audit Evidence obtained, the Records as a whole are not free from Misstatement; or are not maintained in accordance with applicable laws; or

c) he is unable to obtain sufficient and appropriate Audit Evidence to conclude that there is due compliance with the applicable laws in terms of timelines and process; or

d) he is unable to obtain sufficient and appropriate Audit Evidence to conclude that the Records as a whole are free from Misstatement; or are maintained in accordance with applicable laws.

Whenever the Auditor expresses a modified opinion or disclaims an opinion, the text of the opinion shall be either in italics or bold letters.

Unmodified Opinion

The Auditor shall express an unmodified opinion when based on Audit Evidence, the Auditor concludes that:

a. there is due compliance with the applicable laws in terms of timelines and process; and

b. the records as relevant for the audit verified by him as a whole are free from misstatement and maintained in accordance with the applicable laws.

Answer 4(d)

The term "listed entity" means an entity which has listed, on a recognised stock exchange(s), the designated securities issued by it or designated securities issued under schemes managed by it, in accordance with the listing agreement entered into between the entity and the recognised stock exchange(s).

'Designated securities' includes the equity shares, convertible securities, non-convertible debt securities, nonconvertible redeemable preference shares, perpetual debt instrument, perpetual non-cumulative preference shares, Indian depository receipts, securitised debt instruments, security receipts, units issued by mutual funds and any other securities as may be specified by the Board.

Material subsidiary mean a subsidiary, whose income or net worth exceeds ten percent of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year.

Whereas the Regulations provides that 'subsidiary' means a subsidiary as defined under sub-section (87) of section 2 of the Companies Act, 2013 which provides that:

"Subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company –

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Answer 4(e)

Operational Controls under Audit System

A. Monitoring physical assets

1. Whether monitoring of physical assets are done at regular intervals?
2. Any discrepancy in the data collected as well as in the current data of physical assets are addressed immediately or not?

B. Ensure adequate environmental controls:

1. Whether proper facilities of Air-conditioning (dust, temperature & humidity controls), Power Conditioning (Online UPS functioning all the time with backups, proper earthing) are timely reviewed?
2. Whether the cable connections/electronic points are functioning properly or not is reviewed on regular intervals?

Question 5

(a) Differentiate between Fraud Triangle Vs Fraud Risk Vs Fraud Risk assessment.

(b) Prepare a brief note on Right to Access Records and Methodology for Diligence Reporting.

(c) What do you understand by reporting with qualification ? (5 marks each)

Answer 5(a)

A fraud triangle is a tool used in forensic auditing that explains three interrelated elements that assist the commission of fraud- Pressure (motive), opportunity (ability to carry out the fraud) and rationalization (justification of dishonest intentions).

Fraud risk is the vulnerability a company/organisation has to those who are capable of overcoming the three elements in the fraud triangle.

Fraud risk assessment is the identification of fraud risks that exist in the company/ organisation. The planning involves the formulation of techniques and procedures that align with the fraud risk and fraud risk management.

Answer 5(b)

Right to Access Records and Methodology for Diligence Reporting

To enable the practicing company secretary (PCS) to issue the Diligence Report, the Company (borrower) should provide the PCS access at all times to the books, papers, minutes books, forms and returns filed under various statutes, documents and records of the company, whether kept in pursuance of the applicable laws or otherwise and whether

kept at the registered office of the company or elsewhere which he considers essential for the purposes of Diligence Reporting.

The PCS shall be entitled to require from the officers or agents of the company such information and explanations as he or she may think necessary for the purpose of such Reporting. However, depending on the facts and circumstances, he/she may obtain a letter of representation from the company in respect of matters where verification by PCS may not be practicable, for example matters like —

i. disqualification of directors;

ii. show cause notices received;

iii. persons and concerns in which directors are interested, etc.

Answer 5(c)

Reporting with Qualification

1. A qualification, reservation or adverse remarks, if any, should be stated by the auditor at the relevant places in his report in bold type or in italics.

2. If the auditor is unable to express an opinion on any matter, he should mention that he is unable to express an opinion on that matter and the reasons therefor.

3. If the scope of work required to be performed is restricted on account of restrictions imposed by the company or on account of circumstantial limitations (like certain books or papers being in the custody of another person who is not available or a government authority), the report should indicate such limitations.

4. If such limitations are so material that the Auditor is unable to express any opinion, the Auditor should state that in the absence of necessary information and records, he is unable to report on compliance(s) relating to such areas by the company.

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

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

Question 6

(a) What are the circumstances that calls for the Investigation by Serious Fraud Investigation Office (SFIO). (5 marks)

(b) You are appointed as a Secretarial Auditor for audit of Group Companies comprising of 20 plus companies. There are numerous transactions between the group companies and lot of Inter Company Transfer of funds had taken place during audit period besides frequent resignations of Directors and change in shareholders. During the audit you suspect something is wrong. List out at least six transactions that could be suspicious in your opinion to investigate during audit. (5 marks)

(c) "The methodological approach involved in peer review can be described in four stages". Explain the planning process of the peer review. (5 marks)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) You are appointed as a Company Secretary of Aparana Pvt Ltd. You have to conduct the audit for the financial year 2019-20. Draft the guidelines for verification of Board Composition & Board Process as per the CSAS-4 (Auditing Standard on Secretarial Audit).

(ii) ABD Limited (listed Company) has failed to redress investors' grievances relating to the Transfer of the share and indulges in fraudulent and unfair trade practices relating to securities. Write down the penalties which could be faced by the company under SEBI Act, 1992.

(iii) Whether Intellectual Property Due Diligence can be considered as Technical Due Diligence ? Prepare a brief note. (5 marks each)

Answer 6(a)

As per Section 212 (1) of the Companies Act, 2013, Investigation into the affairs of a company is assigned to Serious Fraud Investigation Office (SFIO), where Government is of the opinion that it is necessary to investigate into the affairs of a company –

1. on receipt of a report of the registrar or inspector under section 208 of the Companies Act, 2013;
2. on intimation of a special resolution passed by a company that its affairs are required to be investigated;
3. in the public interest; or
4. on request from any department of the Central Government or a State Government

Answer 6(b)

Suspicion is the positive tendency to doubt the trustworthiness of appearances and therefore to believe that one has detected possibilities of something unreliable, unfavorable.

The following transactions relating to company formation and management may be considered as the suspicious transactions which may or may not be with the group companies, where the detailed audit is need to be performed are:

1. subsidiaries which have no apparent purpose;
2. companies which continuously make substantial losses;
3. complex group structures without cause;
4. uneconomic group structures for tax purposes;
5. frequent changes in shareholders and directors;
6. unexplained transfers of significant sums through several bank accounts;

7. use of bank accounts in several currencies without reason;
8. purchase of companies which have no obvious commercial purpose;
9. sales invoice totals exceeding known value of goods;
10. makes unusually large cash payments in relation to business activities which would normally be paid by cheques, banker's drafts etc; and
11. transferring large sums of money to or from overseas locations with instructions for payment in cash.

Answer 6(c)

The methodological approach involved in peer review can be described in terms of four stages viz., preparation, planning, execution and reporting.

Planning Process of Peer Review

On acceptance of the peer review by the selected reviewer, the Practice Unit (PU) will be notified. The reviewer may also require the Practice Unit (PU) to provide any other information the reviewer considers necessary to facilitate the selection of a sample of attestation services engagements, representative of the practice unit's client portfolio, for review.

- *Sample of Attestation services Engagements*

  (a) From the complete attestation services client list, an initial sample will be selected by the reviewer. Practice units will be notified of the selection in writing about two weeks in advance, requesting the relevant records of the selected attestation services clients to be made available for review.

  (b) At the execution stage, the initial sample may be reduced to a smaller actual sample for review. However, if the reviewer considers that the actual sample does not cover a fair cross-section of the practice unit's attestation services engagements, he may make further selections.

- *Confirmation of visit*

  In consultation with the practice unit, date(s) will be set for the on-site review to be carried out. Flexibility will be permitted to ensure that practice units are not overburdened at especially busy periods. The on-site review date(s) will be arranged by mutual consent such that the review is concluded within sixty days of notification.

Answer 6A(i)

As per ICSI CSAS-4 clause (3):

Board Composition the auditor shall verify:

1. Overall composition of the Board including the minimum and maximum strength of the Board as per provisions of the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, Articles of Association and provisions of other Acts/rules/regulations as may be applicable to the Company.

2. Optimum combination of Executive, Non-executive, Independent, Non-independent, retiring, non-retiring, woman, nominee in the Board as per provisions of the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Articles of Association, agreement with Lenders/Investors and provisions of other Acts/rules/regulations as may be applicable to the company.

3. Eligibility criteria including qualifications of Directors in accordance with the provisions/principles laid down in the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Articles of Association and provisions of other Acts/rules/regulations as may be applicable on the Company.

4. The constitution and composition of Committees of the Board.

As per ICSI CSAS-4 clause (4):

Board Processes

The Auditor shall verify that the decisions of the Board and its Committees are taken and recorded in compliance with applicable laws, rules, regulations, guidelines, standards and defined internal processes, if any. In case of conflict between various provisions the stricter compliance to be verified.

Answer 6A(ii)

Penalty for failure to redress investors' grievances:

Section 15C of the SEBI (Act) 1992: If any listed company or any person who is registered as an intermediary, after having been called upon by the Board in writing, to redress the grievances of investors, fails to redress such grievances within the time specified by the Board, such company or intermediary shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.

Penalty for fraudulent and unfair trade practices:

Section 15HA of the SEBI (Act) 1992: If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

Answer 6A(iii)

Technical due diligence can be classified in to (i) intellectual property due diligence; and (ii) technology due diligence.

Intellectual Property Due Diligence

The company which owns Intellectual Property (IPs) use that IPs to monetize their business. These IPs are something that differentiates their product and service from their competitors. However the concept of valuation of intangible assets related to Intellectual Property like Patents, Copyrights, Design, Trademarks, Brands etc., also getting greater importance as these Intellectual Properties of the business are now often sold and

purchased in the market by itself, like any other tangible asset. Many Indian companies and corporate entities do not give much importance to the portfolio management of their Intellectual Property Rights (IPR). The main objective of intellectual property due diligence is to ascertain the nature and scope of target company's right over the intellectual property, to evaluate the validity of the same and to ensure whether there is no infringement claims.

Few of the items that need to be seen while conducting due diligence is:

1. Schedule of patents and its application.
2. Schedule of copyrights, trademarks and brand names.
3. Pending patents clearance documents.
4. Any pending claims case by or against the company in violation of intellectual property.

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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) The parties intending to file a notice with the Competition Commission prior to filing of the notice to a proposed combination in terms of Regulation 5 of Combinations Regulations are encouraged to approach the Commission for pre-filing consultations. Outline the procedure to be followed along with details to be submitted to the Commission in this respect.

(b) 'Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets'. Explain the statement with reasons for Divestitures. Also state one example.

(c) Mega Motors Ltd., a car manufacturing Company proposes to takeover AXL Automotives, a component manufacturer. As a professional expert, come out with the objects Mega Motors Ltd. may have conceived to attain by this takeover.

(d) Can any acquirer proceed to voluntarily delist the company post acquisition? If your answer is affirmative, state the Rules and Regulations applicable to such action along with main steps involved therein. If not, state the relevant provisions.

(5 marks each)

Answer 1(a)

In accordance with international best practices, the Commission allows for an informal and verbal consultation with the staff of the Commission prior to filing of the notice to a proposed combination in terms the Competition Act, 2002 and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

Such pre-filing consultations help the parties intending to file a notice with the Commission in identifying the information required for filing a complete and correct Form I/II/III as well in identifying additional information that the Commission may require to assess the likely impact of the proposed combination on competition in the relevant markets.

The parties intending to file a notice with the Commission are encouraged to approach the Commission for pre-filing consultations. A request for pre-filing consultation should be made by the parties intending to file a notice at the earliest and at least 10 days before the intended date of filing, to allow time for allocating a case team for the pre-

filing consultation. A copy of draft application comprising of Form I/II/III, as the case may be and supporting documents should be forwarded along with the request for scheduling a pre filing consultation.

A summary of the proposed combination along with the following details should also be submitted:

a. Basic details of the proposed combination including various steps involved in the same;

b. A brief description of the relevant market(s) and sector(s) involved;

c. The likely impact of the proposed combination on competition in those markets and sectors in general terms;

d. Key issues regarding which the parties wish to seek consultation from the Commission;

e. Any other details which according to the parties may be pertinent for a meaningful consultation.

Answer 1(b)

Divestiture means selling or disposal of assets of the company or any of its business undertakings/ divisions, usually for cash (or for a combination of cash and debt) and not against equity shares to achieve a desired objective, such as greater liquidity or reduced debt burden. Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets.

For example : XYZ Ltd. is the parent of a food company, a car company, and a clothing company. If XYZ Ltd. wishes to go out of the car business, it may divest the business by selling it to another company, exchanging it for another asset, or closing down the car company.

Reasons for Divestitures

1. Huge divisional losses
2. Continuous negative cash flows from a particular division
3. Difficulty in integrating the business within the company
4. Unable to meet the competition
5. Better alternatives of investment
6. Lack of technological upgradations due to non-affordability
7. Lack of integration between the divisions
8. Legal pressures

E.g. Nestle is selling its US chocolate business, which includes brands such as BabyRuth, Butterfinger, and Crunch to Ferrero for US$2.8 billion. The deal is part of Nestle's strategy to sell underperforming brands and refocus on healthier products and fast-growing markets.

Answer 1(c)

Mega Motors Limited may have conceived all or any of the following objects of takeover as given below:

i. To effect savings in overheads and other working expenses on the strength of combined resources;

ii. To achieve product development through acquiring firms with compatible products and technological/manufacturing competence, which can be sold to the acquirer's existing marketing areas, dealers and end users;

iii. To diversify through acquiring companies with new product lines as well as new market areas, as one of the entry strategies to reduce some of the risks inherent in stepping out of the acquirer's historical core competence;

iv. To improve productivity and profitability by joint efforts of technical and other personnel of both companies as a consequence of unified control;

v. To create shareholder value and wealth by optimum utilisation of the resources of both companies;

vi. To achieve economies of scale by mass production at economical costs;

vii. To secure substantial facilities as available to a large company compared to smaller companies for raising additional capital, increasing market potential, expanding consumer base, buying raw materials at economical rates and for having own combined and improved research and development activities for continuous improvement of the products, so as to ensure a permanent market share in the industry;

viii. To achieve market development by acquiring one or more companies in new geographical territories or segments, in which the activities of acquirer are absent or do not have a strong presence.

Answer 1(d)

As per regulation 5A(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, any acquirer who is desirous of delisting the company post acquisition due to a variety of reasons, may proceed to voluntarily delist the company under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (Delisting of Equity Shares) Regulations, 2009.

In the event, the acquirer makes a public announcement of an open offer for acquiring shares of a target company in terms of regulations 3, 4 or 5 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, acquirer may delist the company in accordance with the provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009.

However, the acquirer shall have declared upfront his intention to so delist at the time of making the detailed public statement and a subsequent declaration of delisting for the purpose of the offer proposed to be made will not suffice.

The following main steps are involved: -

1. Acquirer to intimate the Board of Directors.

2. Board to consider the proposal for delisting.
3. Public announcement in case delisting offer fails.
4. File draft letter of offer with SEBI.
5. Minimum details in the tentative schedule of activity.
6. Competing Offer.
7. Withdrawal of shares tendered.
8. Option to tender shares in open offer.

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

Question 2

(a) Max Ltd. proposes to takeover Mini Ltd. The Share capital of Max Ltd. and Mini Ltd. comprises of 15,000 and 10,000 equity shares of ₹10 each and 5000 and 4000 10% preference shares of ₹100 each respectively.

The purchase consideration to be discharged is as under:

(1) Equity shareholders of Mini Ltd. will be given 50 equity shares of ₹10 each of Max Ltd. fully paid up in exchange for every 5 shares held in Mini Ltd.

(2) Issue of 10% preference shares of ₹100 each in the ratio of 4 preference shares of Max Ltd. for every 5 preference shares held in Mini Ltd.

In addition to share capital stated above, Max Ltd has 12% debentures of ₹100 each amounting to ₹5,00,000 and Mini Ltd has 13% debentures of 100 each amounting to ₹4,00,000. It was agreed to issue 12% debentures of ₹100 each of Max Ltd. worth ₹5,00,000 to the debenture holders of Mini Ltd.

Compute Purchase consideration and capital after takeover. Also comment upon treatment of debenture holders of Mini Limited during the above takeover.

(b) When does goodwill arise on amalgamation? Comment on its amortization. How will you estimate the useful life of the goodwill? Differentiate goodwill and capital reserve as per AS-14.

(c) In order to assess the nitty-gritty of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Management? (5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) From the following information related to Tanu Ltd, find out :

(a) EBITA

(b) PAT

(c) Super profit

	(₹ in Lakh)
Net tangible assets	*300.00*
Operational Revenue	*560.00*
Employment Cost	
(including onetime payment of ₹20.00 lakh, not likely to occur in future)	*110.00*
Managerial Remunerations (to be increased by ₹10.00 lakh from next year)	*40.00*
Cost of goods sold	*230.00*
Finance charges	*80.00*
Depreciation/Amortization	*30.00*

Tax provision is to be made @ 25%.

Expected rate of return on assets is to be assumed @ 20%. *(5 marks)*

(ii) Briefly explain the provisions regarding accounting treatment in the books of the transferee company on amalgamation where Indian Accounting Standard 103 (Business Combinations of Entities under Common Control) is applicable. *(5 marks)*

(iii) From the details given below, find out the Value of Santosh Ltd. an unlisted company:

No. of shares issued and paid up of ₹10 each	*5,00,000*
Current Dividend 5 per share	*₹ 5 per share*
Annual Dividend growth rate	*10%*

Assume that this growth rate will be maintained in future also. The values for similar listed company are as under:

Share price	*₹ 120 per share*
Current Dividend	*₹ 20 per share*
Annual Dividend Growth rate	*10%*

(5 marks)

Answer 2(a)

Computation of Purchase Consideration:

1.	Equity Shares	10,000* (50/5) * 10	Rs. 10,00,000
2.	10% Preference Shares	4,000* (4/5) * 100	Rs. 3,20,000
		Purchase Consideration	**Rs. 13,20,000**

Computation of Capital of Max Limited after Takeover :

1.	Equity Share Capital	(15,000 shares + 1,00,000 shares) of Rs. 10 each	Rs. 11,50,000
2.	10% Preference Share Capital	(5000 Preference shares + 3200 Preference Shares	Rs. 8,20,000
		Capital of Max Limited after Takeover	Rs. 19,70,000

Treatment of debentures in purchase consideration : Issue of debentures will not form part of purchase consideration as these are issued to debenture holders. Further, Increased number of debentures are issued to debenture holders of Mini Ltd, as there is reduction in rate of interest on debentures.

Answer 2(b)

Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life.

Due to nature of goodwill, it is difficult to estimate its useful life, but estimation is done on a prudent basis. Accordingly, it should be appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified.

The following factors are to be taken into account in estimating the useful life of goodwill:

i. the forcible life of the business or industry;

ii. the effects of product obsolescence, changes in demand and other economic factors;

iii. the service life expectancies of key individuals or groups of employees;

iv. expected actions by competitors or potential competitors; and

v. legal, regulatory or contractual provisions affecting the useful life.

Goodwill Vs. Capital reserve as per AS-14:

Goodwill is the excess of the price paid in a purchase over the fair value of the net identifiable assets acquired.

Capital reserve is the excess of the fair value (agreed value) of the net identifiable assets acquired over the purchase price.

Answer 2(c)

Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to managerial aspect, I would consider the following matters: -

1. Company's HR Policies

2. Assessment of Senior Level Management, resumes of key employees their qualifications and work exposures, previous background, etc.
3. Summary Plan descriptions of qualified and non-qualified retirement plans
4. Business Experience
5. Union Contract, copies of collective bargaining agreements, description of all employees' problems within last five years including the alleged wrongful termination, harassment discrimination, etc.
6. Strike History
7. Labour Relations/ Agreements, grievance procedures, labour disputes currently pending or settled within last five years.
8. Workman's' compensation claim history / unemployment claim history
9. Personnel Schemes, description of benefits of all employees' health and welfare insurance policies
10. Profile of permanent employees
11. Labour dues and settlement history
12. Status of labour law compliances.

Answer 2A(i)

(a) Calculation of EBITA

	(Rs. in lakhs)
Operational Revenue	560.00
Less : Cost of goods sold	230.00
Employment Cost	110.00
Managerial Remuneration	40.00
EBITA	**180.00**

(b) PAT

	(Rs. in lakhs)
EBITA	180.00
Less : Finance charges	80.00
Depreciation / Amortization	30.00
PBT	70.00
Less : Taxes @ 25%	17.50
PAT	**52.50**

(c) Computation of Super Profit

(i) Future Maintainable Profit

	(Rs. in lakhs)
PBT	70.00
Add : Employment Cost one-time payment not likely to occur in future	20.00
Less : Increase in Managerial Remuneration from next year	10.00
	80.00
Less : Taxes @ 25%	20.00
Future Maintainable Profit	**60.00**

(ii) Super Profit

	(Rs. in lakhs)
Expected return on assets (Rs. 300 lakh * 20%)	60.00
Less : Future Maintainable Profit	60.00
Super Profit	**NIL**

Answer 2A(ii)

Accounting treatment in the books of the transferee company on amalgamation where Indian Accounting Standard 103 (Business Combinations of Entities under Common Control) is stated as under:

1. All the assets and liabilities recorded in the books of Transferor Company shall be transferred to and vested in the books of Transferee Company pursuant to the scheme and shall be recorded by Transferee Company at their respective book values as appearing in the books of Transferor Company.
2. The identified of the reserves of Transferor Company shall be preserved and they shall appear in the financial statements of Transferee Company in the same form and manner, in which they appeared in the financial statements of Transferor Company prior to this scheme being effective.
3. The investments in the equity capital of Transferor Company as appearing in the financial statements of Transferee Company shall stand cancelled.
4. Inter-company balances, loans and advances if any, will stand cancelled.
5. In case of any differences in accounting policy between Transferor Company and Transferee Company, the accounting policies followed by Transferee Company will prevail and the difference till the appointed date shall be adjusted in capital reserves of Transferee Company, to ensure that the financial statements of Transferee Company reflect the financial position on the basis of consistent accounting policy.

6. Subject to any corrections and adjustments as may, in the opinion of the Board of Directors of the Transferee Company, be required and except to the extent otherwise by law required, the reserves of the Transferor Company, if any, will be merged with the corresponding reserves of the Transferee Company.

Answer 2A(iii)

Calculation of Value of Santosh Limited:

Step -I (Rate of return of similar Listed Company)

Rate of Return required by shareholders

= {Dividend Current (1+ rate of growth in dividend) / share price} + Rate of growth of dividend

= {20 (1+0.10) / 120] + 0.10

= 0.283 or say 28.3%

Step -II (Unlisted Company -Santosh Limited)

Share Price = {Current Dividend (1 + rate of growth in dividend)} / {Rate of Return required by shareholders - rate of growth in dividend}

= {5 (1+0.1)}/{0.283-0.10}

= Rs. 30.05

Value of Santosh Limited = No. of shares * Price per share

= 500000 * Rs.30.05

= Rs. 1,50,25,000.00

Question 3

(a) What is deemed dividend under Sec 2(22)(e) of the Income Tax Act, 1961 ? Discuss its taxability.

(b) When indirect acquisition is treated as direct acquisition as per SEBI (SAST) Regulations, 2011 ?

(c) Under what circumstances, the Competition Commission may inquire into the appreciable adverse effect caused or likely to be caused on competition in India?

(d) List out the various approaches in practice to find out value of shares of each entity post demerger.

(e) Discuss Split-ups and Split-offs in corporate restructuring. (3 marks each)

Answer 3(a)

Section 2(22)(e) of the Income Tax Act, 1961 defines the term deemed dividend as any payment by a company, not being a company in which public are substantially interested, of any sum by way of advance or loan to the following:

a. To a shareholder, being a person who is the beneficial owner of the shares (not

being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits), holding not less than 10% of the voting rights, or

b. To any concern in which such shareholder is a member or a partner and in which he has a substantial interest, or

c. On behalf, of for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

Exceptions to deemed dividend:

a. any advance or loan made, to a shareholder or to such concern in which the shareholder is interested, by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;

b. any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

c. any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of Section 68 of the Companies Act, 2013;

d. any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).

Finance Act, 2018 has bought the deemed dividend within the ambit of dividend distribution tax under section 115-0, at the rate of 30% in the hands of the closely held companies.

As per the provisions of Section 10(34), dividend income under section 2(24)(e) is 100% exempt in the hands of the shareholders as it is charged to Dividend Distribution Tax under section 115-0 of the Income Tax Act, 1961.

Answer 3(b)

As per Regulation 5(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 indirect acquisition will be treated as direct acquisition when:

a. the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;

b. the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or

c. the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

For the purposes of computing the percentage referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

Answer 3(c)

The Commission under section 20 of the Competition Act, 2002 may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination in the following circumstances:

i. upon its own knowledge or information (suo moto); or

ii. upon receipt of notice under section 6(2) relating to acquisition referred to in section 5(a); or acquiring of control referred to in section 5(b); or merger or amalgamation referred to in section 5(c) of the Act.

It has also been provided that a suo moto enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the Act has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition within the relevant market in India.

Answer 3(d)

In a demerger, a company splits into two different entities. So the valuation of each entity is estimated on a standalone basis and the relative value as a ratio is arrived at. The following are the approaches in practice to find out value of shares of each entity post de-merger:

(i) Asset based approach
  (a) Net asset value
(ii) Income based approach
  (a) Discounted cash flow method
  (b) Earnings capitalisation
  (c) Excess earnings method
  (d) Incremental cash flows method
(iii) Market based approach
  (a) Market price
  (b) Comparable transaction multiple

Answer 3(e)

Splits involve dividing the company into two or more parts with an aim to maximize profitability by removing stagnant units from the mainstream business. Splits can be of two types, Split-ups and Split-offs.

Split-ups : It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation.

Split-offs : It is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter. Some of the shareholders in the parent company are given shares in a division of the parent company which is split off in exchange for their shares in the parent company.

PART II

Question 4

(a) "The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation". Enumerate applicability of the Code as per Insolvency and Bankruptcy Code (Amendment) Act, 2018. What is the existing limit to initiate an insolvency process for corporate debtors ? (5 marks)

(b) PL Enterprise, an Operational Creditor to XYZ Ltd., a corporate debtor is in the process of making an application to NCLT for initiating the insolvency resolution process. Advise PL enterprise about the enclosures to such an application. (5 marks)

(c) From the following details, determine the order of priority payment out of the realization of liquidation estate assets :

(i) Financial debts owed to unsecured creditors;

(ii) Wages and any unpaid dues owed to employees other than workmen for24 months preceding the liquidation commencement date,

(iii) Liquidator's remuneration,

(iv) Debts owed to a secured creditor who has relinquished the security,

(v) Preference shareholders. (5 marks)

(d) "A resolution plan shall provide for the measures, as may be necessary for insolvency resolution of a corporate debtor for maximization of values of its assets." Discuss the measures provided in Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulation, 2016. (5 marks)

Answer 4(a)

Section 2 of the Insolvency and Bankruptcy Code, 2016 as amended vide the

Insolvency and Bankruptcy Code (Amendment) Act, 2018 provides that the provisions of the Code shall apply to–

a. any company incorporated under the Companies Act, 2013 or under any previous company law,

b. any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act,

c. any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,

d. such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,

e. personal guarantors to corporate debtors,

f. partnership firms and proprietorship firms, and

g. individuals, other than persons referred to in clause (e)

in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

To initiate an insolvency process for corporate debtors, the default should be at least INR 1,00,00,000. This limit was increased from INR 1,00,000 to INR 1,00,00,000 vide MCA notification dated 24th March, 2020.

Answer 4(b)

Section 9 (3) of the Insolvency and Bankruptcy Code, 2016 lays down that an application by the operational creditor shall, be accompanied with the following documents:

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available;

(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

Answer 4(c)

As per Sections 53 of the Insolvency and Bankruptcy Code, 2016, the proceeds from the sale of the liquidation assets shall be distributed in the order of priority and within such period as specified thereunder.

Accordingly, in the present question, the Order of priority payment is given as under:

i. Liquidator's remuneration;

ii. Debts owed to a secured creditor who has relinquished the security;

iii. Wages and any unpaid dues owed to employees other than workmen for 24 months preceding the liquidation commencement date;

iv. Financial debts owed to unsecured creditors;

v. Preference shareholders

Answer 4(d)

The Insolvency and Bankruptcy Board of India (IBBI) has made the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) to regulate the Insolvency Resolution Process for Corporate Persons.

Corporate Restructuring process in India under Insolvency and Bankruptcy Code, 2016 may be governed by the provisions of the Regulation 37 of CIRP Regulations; however the Code is silent on the measures of the resolution and restructuring of the corporate debtor. Regulation 37, as substituted vide Notification No. IBBI/2017-18/GN/REGO24, dated 6th February, 2018, 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."

Question 5

(a) Who are disentitled to make an application to initiate corporate insolvency resolution process under IBC, 2016 ?

(b) Discuss the jurisdiction of Debt Recovery Tribunal as per section 179 (2) of the IBC, 2016.

(c) The Tribunal has the powers to remove the provisional liquidator or the Company Liquidator. Mention the grounds where the Tribunal may exercise its powers in this regard.

(d) What do you mean by 'Excluded Debt' ?

(e) Describe the general duties of a debtor under Fresh Start Process.

(3 marks each)

Answer 5(a)

Section 11 of the Insolvency and Bankruptcy Code 2016 disentitles the following persons to make an application to initiate corporate insolvency resolution process:

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

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

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

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

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

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

Answer 5(b)

Section 179(2) of the Insolvency and Bankruptcy Code, 2016 provides that the Debt Recovery Tribunal shall, have jurisdiction to entertain or dispose of –

a. any suit or proceeding by or against the individual debtor;

b. any claim made by or against the individual debtor;

c. any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

Answer 5(c)

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

a. misconduct;

b. fraud or misfeasance;

c. professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;

d. inability to act as provisional liquidator or as the case may be, Company Liquidator;

e. conflict of interest or lack of independence during the term of his appointment that would justify removal.

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

Answer 5(d)

According to Section 79(15) of the Insolvency and Bankruptcy Code, 2016, an "Excluded debt" means –

a. liability to pay fine imposed by a court or tribunal;

b. liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;

c. liability to pay maintenance to any person under any law for the time being in force;

d. liability in relation to a student loan; and

e. any other debt as may be prescribed.

Answer 5(e)

Section 88 the Insolvency and Bankruptcy Code, 2016 lists out the general duties of the debtor. According to section 88, 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.

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

Question 6

(a) An Asset Reconstruction Company is subject to audit and inspection by Reserve Bank of India (RBI). Elucidate the powers of RBI in this regard under SARFAESI Act, 2002.

(b) You, acting as a Resolution Professional received a Resolution Plan. How will you satisfy yourself that the plan is in order for submission to the Committee of Creditors ?

(c) Describe the whole gamut of reliefs that may be granted upon recognition of a foreign proceedings whether main or non-main. (5 marks each)

OR (Alternate question to Q. No. 6)

Question 6A

(i) As a liquidator of a Corporate Debtor, how will you gather information for the purpose of admission & proof of claims and identification of the liquidation estate assets.

(ii) A liquidator is entitled to receive remuneration at 2% on the assets realized, 3% on the amount distributed to Preferential Creditors and 4% on the payment made to Unsecured Creditors. The assets were realized for 18,50,000 against which payments were made as follows

	Amount in ₹
Liquidation Expenses	*18,000*
Secured Creditors	*7,50,000*
Preferential Creditors	*82,000*
The amount due to Unsecured Creditors	*12,00,000*

You are asked to calculate the total remuneration payable to the Liquidator.

(iii) Explain the provisions related to presentation of Annual Status Report by Liquidator during completion of liquidation. (5 marks each)

Answer 6(a)

Section 12 B of the SARFAESI Act, 2002 deals with the powers of Reserve Bank of India to carry out audit and inspection of an Asset Reconstruction Company (ARC), which are given below: -

(1) The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

(2) It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection under sub section (1).

(3) Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order–

(a) remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or

(b) appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company:

Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.

(4) It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

Answer 6(b)

Section 30(2) of the Insolvency and Bankruptcy Code, 2016 provides that the resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than:

(i) the amount to be paid to such creditors in the event of a liquidation of a corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

Whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1: For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2 : For the purposes of this clause, it is hereby declared that on and

from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) Where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) Where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) Where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan.

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) confirms to such other requirements as may be specified by the Board.

Answer 6(c)

Upon recognition of a foreign proceeding, whether main or non-main, where it is necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of Article 20;

b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) Article 20;

c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of Article 20;

d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

f) Extending relief granted under paragraph 1 of Article 19; and

g) Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting State under the laws of that State.

Answer 6A(i)

Section 37(1) of the Insolvency and Bankruptcy Code, 2016 provides that notwithstanding anything contained in any other law for the time being in force, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources:

a) an information utility;

b) credit information systems regulated under any law for the time being in force;

c) any agency of the Central, State or Local Government including any registration authorities;

d) information systems for financial and non-financial liabilities regulated under any law for the time being in force;

e) information systems for securities and assets posted as security interest regulated under any law for the time being in force;

f) any database maintained by the Board; and

g) any other source as may be specified by the Board.

Answer 6A(ii)

Calculation of remuneration payable to Liquidator

Step I : Calculation of amount available for unsecured creditors

	Amount (Rs.)
Assets realised	18,50,000
Less : Liquidation expenses	18,000
Payment to Secured Creditors	7,50,000
Payment to Preferential Creditors	82,000
Amount available for unsecured creditors	10,00,000

Step II : Calculation of Remuneration to Liquidator

	Amount (Rs.)
Remuneration on realisation of assets (2% of Rs. 18,50,000)	37,000
Remuneration on amount distributed to Preferential Creditors (3% of Rs. 82,000)	2,460
Remuneration on payment made to Unsecured Creditors (10,00,000 * 4/104)	38,462
Remuneration payable to Liquidator	77,922

Answer 6A(iii)

As per regulation 37 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017-the Liquidator shall present an Annual Status Report(s) indicating progress in liquidation, including-

i. settlement of list of stakeholders;

ii. details of any assets that remains to be sold and realized;

iii. distribution made to the stakeholders; and

iv. distribution of unsold assets made to the stakeholders;

v. developments in any material litigation, by or against the corporate person; and

vi. filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code.

The Annual Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

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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) *Perun Ltd submitted a scheme of demerger before Hon'ble NCLT, demerging its two divisions as two separate resulting companies. The Company in its application had mentioned that certain proceedings in relation to some other businesses of the Company are pending. Upon clarification sought, it was submitted that an investigation registered out of charge sheet lodged by special investigation team, State Lokayukta Police before Additional City and Sessions Court was pending, wherein the proceedings were stayed by the High Court. Perun Ltd argued that those proceedings have no bearing and cannot be an impediment for approval of the scheme of demerger. However, citing this the Tribunal declined to sanction the scheme of demerger. The Company appealed to NCLAT. Is the contention of the Company tenable ?* *(5 marks)*

(b) *Renkel RTA Services Ltd. is the Registrar to the Issue and Transfer Agent ('RTA') of Alphanso Ltd. Avan, an investor discovered that certain shares of Alphanso Ltd were held by his grandfather and accordingly he applied to the RTA seeking information on transferring the said shares in his name. Avan found some mistakes by RTA, while clearing and sorting out the old documents. He made a complaint in the SCORES Platform against the RTA. Based on the complaint, Securities and Exchange Board of India (SEBI) ordered investigation by its Wholetime Member (WTM). The investigation revealed several such incidents. WTM of SEBI found that the RTA was negligent and did not exercise appropriate due diligence while processing various requests and prima facie found violating Clauses 2, 3 and 16 of the Schedule III of the Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 ('Regulations of 1993'). Accordingly, the WTM issued an ex-parte ad interim order prohibiting the RTA from accepting fresh clients in respect of its activities till further directions. The RTA is aggrieved by the ex-parte ad interim order passed by the WTM of the SEBI has filed an appeal.*

In light of judicial pronouncements, comment whether the action of WTM of SEBI is tenable. *(5 marks)*

(c) *Arghya Industries Ltd. decided to file an appeal before Hon'ble NCLAT due to an Order that has been passed by Hon'ble NCLT on May 6, 2019 without consent of the parties. The Order was received by the Company on May 7, 2019. The employees of the Company went on a strike for a period of 10 days from June 25, 2019 demanding salary hike and other benefits. The operations of the Company*

came to a grinding halt due to the strike and other extraneous reasons. Thereafter, the Company proposed to file an appeal on July 9, 2019 before the Hon'ble NCLAT and the Company prayed for condonation of delay. The Management of the Company was planning to seek professional help on the following queries :

(i) Whether the proposed appeal would be admitted by the NCLAT.

(ii) What is the maximum period allowed by the NCLAT for condonation of delay? As a Practising Company Secretary, advise the Management of the Company. (5 marks)

(d) Omkar Infrastructure Ltd. was engaged in construction and development of infrastructure related projects. Due to the liquidity and other management issues the Company was making losses since last few years. The minority shareholders of the Company filed a class action suit in the Tribunal alleging that the affairs of the Company are being conducted in a manner prejudicial to the interest of the Company. The Tribunal passed an Order restraining the Company from taking action contrary to any resolution passed by the members. The Company failed to comply with Order passed by the Tribunal. Explain in brief, whether the Order passed by the Tribunal is justified and what legal consequences will the Company have to face in case of such non-compliance. (5 marks)

Answer 1(a)

The contention of the company is certainly tenable in view of the fact that the pending investigations/ proceedings (which have already been stayed by the Hon'ble High Court) relates to some other business of the demerged company, i.e., different from the two business divisions of the Company sought to be demerged through the subject petition.

The facts given in the question are similar to case decided by NCLAT in *Mel Windmills Pvt. Ltd.* v. *Mineral Enterprises Limited & Anr.*, wherein in the original proceedings before the Tribunal, the Appellantssought an order for sanctioning the scheme of demerger in terms whereof the wind energy generation business of 'Mineral Enterprises Ltd.' (the Demerged Company) was sought to be separated and given to 'MEL Windmills Pvt. Ltd.' (Resulting Company No.1) whereas the real estate, shares and security investments of'Mineral Enterprises Ltd.' were sought to be given to 'MEL Properties Pvt. Ltd.' (Resulting Company No.2). In that case the Appellants had also disclosed before the Tribunal, the fact about pendency of certain proceedings in relation to the mining business of the Demerged Company which on clarification turned out to be investigations arising out of charge sheet lodged by Special Investigation Team, State Lokayukta Police before Additional City Civil & Sessions Court and even those proceedings were already stayed by Hon'ble High Court.

It was noticed in this judgment that the Tribunal declined to sanction the proposed scheme of demerger, albeit on account of several issues pending finalization, without either considering prayer for dispensation of meeting of creditors and members of the three Appellant or in the alternative directing convening of a meeting of the creditors and members of these companies for considering the proposed scheme of demerger.

The Appellate Tribunal in the above case observed that the mandate of law engrafted under Section 230(1) of the Companies Act, 2013 requiring the Tribunal to order calling of meeting of the creditors/ members of the concerned companies not being complied with and the mandatory provisions being observed in breach, the impugned order cannot be

supported. The Tribunal, at the very threshold stage, was not required to venture into the merits of the proposed scheme of demerger which had to be examined only after obtaining the consent of creditors/members with requisite majority. The NCLAT further observed that the Tribunal failed to adhere to the mandate of law which was mandatory and imperative in nature. This goes to the root of the impugned order which cannot be sustained.

Besides NCLAT also observed that the pending issues could not be construed as an impediment in sanctioning the proposed scheme of demerger, in view of the fact already known to the Tribunal, that the demerger scheme proposed by the Appellants was not with regard to business of Mining which would continue with the Demerged Company and the pending investigation would continue unhindered against the Director of the Demerged Company without having any impact on the proposed scheme of demerger. Second, because pendency of investigation would not stand as a legal impediment in sanctioning the proposed scheme of demerger for any civil action or criminal proceedings in respect of past events/ transactions. In identical circumstances, the Hon'ble Gujarat High Court sanctioned the modified composite scheme of arrangement in terms of its judgment dated 1st March, 2007 rendered in *Core Health Care Limited* v. *Nirma Ltd reported in 2007 SCC Online Guj 235*.

For the foregoing reasons the NCLAT held that the impugned order cannot be supported. The Tribunal seriously erred in dismissing the application on merit when the stage of consideration of the proposed scheme of demerger was yet to arrive and that accordingly the impugned order suffers from serious legal infirmity and the same is set aside.

Based on the above judicial precedent, it can be concluded that the contention of Perun Ltd is tenable.

Answer 1(b)

The facts given in the question are similar to case decided by Securities Appellate Tribunal (SAT) in *Cameo Corporate Services Ltd.* v. *Securities and Exchange Board of India.*

In this case it was observed by Securities Appellate Tribunal that having heard the learned counsel for the parties and having perused the ex parte ad interim order and the confirmatory order we find that except in the case of the complainant where there is a prima facie case of a person impersonating the grandfather of the complainant all other discrepancies either relate to mismatching of photographs or signatures or that the PAN card being fake and not been verified from the Income Tax website / NSDL and accordingly a prima facie case of lack of basic due diligence was made out against the appellant. What is noticeable is that apart from the complainant's case no other investor has come forward to make a complaint relating to the wrongful transfer of the share certificates illegally to a third party.

The discrepancies pointed out by SEBI do not reveal that the appellant made any gain by this wrongful transfer nor there is any finding of a loss being caused to an investor. Thus, exercising the powers under Section 11 and 11 B of the Securities Exchange Board of India Act, 1992 restraining the appellant from accepting fresh clients for a period of three months for failing to exercise due diligence appears to be harsh and unwarranted in the facts and circumstances of the given case.

Thus, *ex-parte* interim order may be made when there is an urgency. As held in *Liberty Oil Mills & Ors.* vs. *Union of India & 18 Ors. [AIR (1984) SC 1271]* decided on May 1, 1984, the urgency must be infused by a host of circumstances, viz. large-scale misuse and attempts to monopolise or corner the market. In the said decision, the Supreme Court further held that the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instil and restore confidence in the capital market.

The aforesaid principle of law is squarely applicable in the instant case. In our opinion, the impugned order is harsh and unwarranted. We are of the opinion that there was no real urgency in passing an ex parte ad interim restraint order which virtually amounts to passing a final order especially when a detailed enquiry has been ordered.

In our opinion, the respondent is empowered to pass an *ex-parte* interim order only in extreme urgent cases and that such power should be exercised sparingly. In the instant case, we do not find that any extreme urgent situation existed which warranted the respondent to pass an ex parte interim order. We are of the opinion that the impugned order is not sustainable in the eyes of law as it has been passed in gross violation of the principles of natural justice as embodied in Article 14 of the Constitution of India. The restraint order is in our opinion unjustified.

In view of the aforesaid, the impugned order insofar as it restrains the appellant from accepting fresh clients is quashed. Other directions issued by the Whole Time Member of SEBI will continue to operate against the appellant. The appeal is partly allowed. In the circumstances of the case, there shall be no orders as to costs.

Based on the above judgement, it can be concluded that the Whole Time Member issued an ex-parte ad interim order prohibiting the RTA from accepting fresh clients, without any urgency. Hence, the action of Whole Time Member may not be tenable.

Answer 1(c)

According to section 421 of the Companies Act, 2013(the Act) any person aggrieved by an order of the National Company Law Tribunal(NCLT) may prefer an appeal to the National Company Law Appellate Tribunal (NCLAT). However, no appeal shall lie to NCLAT from an order made by the NCLT with the consent of parties.

Every appeal section 421 of the Act shall be filed within a period of forty-five days from the date on which a copy of the order of the NCLT is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

Further, NCLAT may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(i) In the given case, the order was passed by NCLT on May 6, 2019 but was received by the company on May 7, 2019. Accordingly, the appeal should have been filed before NCLAT with 45 days from May 7, 2019 i.e., by June 21, 2019. The Company could not file the appeal with the time provided in section 421 of the Act and prayed for condonation of delay. Now, in the given case, the company propose to file the appeal on July 9, 2021. Though the appeal could have been

admitted on the grounds that the Order of NCLT was passed without the consent of the parties but the appeal was not tendered within the prescribed time. Further, the NCLAT may not condone the delay in view of the fact that the strike in the company started on June 25, 2019 i.e., 4 days after the expiry of the 45 days from the date of receiving the NCLT Order. Thus, it may be said that the appellant was not prevented by any sufficient cause from filing the appeal within the prescribed time. Hence, the proposed appeal may not be admitted by NCLAT.

(ii) The maximum period allowed for condonation of delay is 45 days if NCLAT is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

Answer 1(d)

According to section 245(1) of the Companies Act, 2013(the Act), such number of members or depositors or any class of them, as are indicated in section 245(2) of the Act 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 (Tribunal) on behalf of such members or depositors for seeking certain order mentioned therein. The said order that may be sought from Tribunal inter alia includes an order to restrain the company from taking action contrary to any resolution passed by the members.

Hence, it can be concluded that the Order passed by the Tribunal is justified, as it is passed in exercise of the specific authority conferred on the Tribunal u/s 245(1)(f) of the Act.

As per section 245(7) of the Act, any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Further, Section 425 of the Companies Act, 2013, the Tribunal has also been conferred the same jurisdiction, powers and authority in respect of contempt of its Orders as conferred on High Court under the Contempt of Courts Act, 1971.

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

Question 2

(a) Raji, was holding 1,10,000 equity shares in Mahanav Industries Ltd. After Raji's death, her legal heir Raman applied for transmission of the shares in his name while the application for Succession Certificate was pending before the Civil Court. The Company allotted these shares to someone else. Raman contends that it is an act of mismanagement by the Company.

Evaluate in context of a judicial pronouncement. (4 marks)

(b) Zurik Ltd and its Directors were charged with certain offences under Criminal Procedure Code and in the meantime, the Registered Office was shifted from Kochi to Trivandrum. The Form filed for shifting of registered office is still under

process by MCA. Meanwhile, the Authorised Officer of the Court wanted to issue summons.

Explain which is the proper address for service of summons under Criminal Procedure Code. *(4 marks)*

(c) *A Director appointed under Prevention of Money Laundering Act, 2002 authorises his subordinate to carry out the search of certain records. The subordinate caught a Vehicle and since the Vehicle was locked, he calls the mechanic to break the locking system to open it. However, he found nothing inside the car.*

Discuss whether a Director can authorise his subordinate to do such acts, if yes, whether the acts of subordinate are tenable. *(4 marks)*

(d) *At a General Meeting of RigVed Ltd, a resolution was passed as an ordinary resolution, whereas it is required to be passed as a 'special resolution' under the Companies Act, 2013. Ved, an individual shareholder of the Company wants to bring a legal action on the Company, to restrain it on the subject matter of the said resolution. In background of a decided case law, evaluate whether the contention of Ved is tenable.* *(4 marks)*

OR (Alternate question to Q. No. 2)

Question 2A

(i) *"Mere breach of contract cannot give rise to criminal prosecution under section 420 unless fraudulent or dishonest intention is shown, right at the beginning of transaction when the offence is said to have been committed." Explain.* *(4 marks)*

(ii) *'The shareholder's democracy not only can play important role in stimulating the Board of Directors, raising Company's performance but also ensuring that the community at large takes a greater interest in industrial progress.' Comment.* *(4 marks)*

(iii) *Section 442 of the Companies Act, 2013 enables settlement of dispute through 'alternate dispute resolution' – In this context, highlight the differences between mediation and conciliation.* *(4 marks)*

(iv) *'Directors resemble trustees, equity prohibits a trustee from making any profit by his management, directly or indirectly. It is objectionable to use such power simply or solely for the benefit of directors or merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the Company'. Explain with reference to a case law.* *(4 marks)*

Answer 2(a)

The given situation is similar to the case in *Rajkumar Devraj & Anr.* v. *Jai Mahal Hotels Pvt. Ltd. Others (CLB) CA. No. 133 of 2006* in C.P. No. 30 of 2006.

In this case, a shareholder dies and his heirs apply for transmission of shares while their application for succession certificate was pending before the Civil Court. The legal heirs alleged illegal allotment of shares by respondent to themselves, reducing the legal heirs to minority. It was held that the legal heirs are entitled to file a petition alleging oppression and mismanagement.

Yes, Raman will be entitled to file a petition against the illegal allotment of equity shares in accordance with the abovementioned case. The Company cannot allot the shares to someone else as the succession certificate is pending in Civil Court.

Answer 2(b)

As per section 63 of the Code of Criminal Procedure, 1973, service of a summon on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

In case of companies formed and registered under the Companies Act, 2013, section 20 provides the mode of service. As per the said provision, a document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by registered post or by speed post or by courier service, or by leaving it at the registered office or by means of such electronic or other mode as may be prescribed.

Further, as per Rule 35 of the Companies (Incorporation) Rules, 2014, a document may be served on a company or an officer thereof through electronic transmission wherein the term, "electronic transmission" means a communication–

(a) delivered by –

(i) facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the company or the officer has provided from time to time for sending communications to the company or the officer respectively;

(ii) posting of an electronic message board or network that the company or the officer has designated for such communications, and which transmission shall be validly delivered upon the posting; or

(iii) other means of electronic communication, in respect of which the company or the officer has put in place reasonable systems to verify that the sender is the person purporting to send the transmission; and

(b) that creates a record that is capable of retention, retrieval and review, and which may thereafter be rendered into clearly legible tangible form.

In case of *Mukand Kanaiyalal Patel* v. *Swarup Shree Yarn Private Limited [2002] 109 Comp Cas 413 (Bom)*, a director of a company filed an intimation with the Registrar under section 146 of the Act regarding change in the Registered Office of the company and the Bombay High Court held that as the Registrar has not taken on record the change, any service on the changed office does not amount to service as contemplated by law. This gives us the clear impression that service of notice of complaint is a very, very crucial stage, which sets the ball in motion.

In view of the above, the registered office address of Kochi is proper address for service of summon under the Code of Criminal Procedure, 1973.

Answer 2(c)

As per Section 17 of Prevention of Money Laundering Act, 2002, where the Director or any other officer not below the rank of Deputy Director authorized 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 authorize 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 properly, 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

In view of the above-mentioned provision, it can be concluded that the act of the subordinate officer is justified and tenable.

Answer 2(d)

The following are the similar relevant cases for the given situation:

A shareholder can sue if an act requires a special majority but is passed by a simple majority. Simple or rigid formalities are to be observed if the majority wants to give validity to an act which purports to impede the interest of minority. An individual shareholder has the right of action to restrain the company from acting on a special resolution to which the insufficient notice is served *Baillie* v. *Oriental Telephone and Electric Co. Ltd., (1915) 1 Ch. 503 (C. A.)*; refer also *NagappaChettiar* v. *Madras Race Club, 1 M.L.J. 662*.

Individual membership rights cannot be invaded by the majority of shareholders. He is entitled to all the rights and privileges appertaining to his status as a member. An individual shareholder can insist on the strict compliance with the legal rules and statutory provisions. Provisions in the memorandum and the articles are mandatory in nature and cannot be waived by a bare majority of shareholders [*Salmon* v. *Quin and Aztens, (1909)*

A.C. 442]. In *Nagappa Chettiar* v. *Madras Race Club, (1949) 1 M.L.J. 662 at 667*, it was observed by the Court that "An individual shareholder is entitled to enforce his individual rights against the company, such as, his right to vote, the right to have his vote recorded, or his right to stand as a director of a company at an election.

In view of the case laws discussed above, it may be said that contention of Ved is tenable.

Answer 2A(i)

Section 420 of Indian Penal Code, 1860, states that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security, or anything which is singed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

In *Shruti Enterprises* v. *State of Bihar and ors, 2006 CrLJ 1961*, it was held that mere breach of contract cannot give rise to criminal prosecution under section 420 of the Indian Penal Code, 1860, unless fraudulent or dishonest intention is shown right at the beginning of transaction when the offence is said to have been committed. If it is established that the intention of the accused was dishonest at the time of entering into the agreement, then liability will be criminal and the accused will be guilty of offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be fastened on the accused and the only right which complainant acquires is to a decree of damages for breach of contract.

In view of the above, it may be said that "Mere breach of contract cannot give rise to criminal prosecution under section 420 of Indian Penal Code, 1860 unless fraudulent or dishonest intention is shown, right at the beginning of transaction when the offence is said to have been committed".

Answer 2A(ii)

Democracy means the rule of the people, by the people and for the people. In that context, the shareholder's democracy means the rule of shareholders, by the shareholders, and for the shareholders in the corporate enterprise, to which the shareholders belong. Precisely, it is a right to speak, congregate, communicate with co-shareholders and to learn about what is going on in the company.

Under the Companies Act, 2013, the powers have been divided between two segments: one is the Board of Directors and the other is of shareholders. The Directors exercise their powers through meetings of Board of directors and shareholders exercise their powers through Annual General Meetings/Extraordinary General Meetings. Although constitutionally, all the acts relating to the company can be performed in General Meetings, most of the powers in regard thereto are delegated to the Board of Directors by virtue of the constitutional documents of the company viz. the Memorandum of Association and Articles of Association.

It is a widely acclaimed fact that in any corporate enterprise, the shareholders are the owners. But in fact, they are seldom able to exercise any ownership rights except to

sometimes cast votes at General Meetings. The members therefore, are only passive investors rather than active participants in the governance of the corporate process. Still the directors, as per law, are answerable to the shareholders at least for two reasons, one the shareholders are directly concerned with the economic viability of the investee company so to feel sure about the safety of their investment and secondly being the recognised owners of the company to enforce their rights to control the company as and when the company enters into contractual relationship with third persons thereby incurring greater obligations.

Thus, the shareholder's democracy can play an important role in stimulating the Board of directors, raising company performance and ensuring that the community at large takes a greater interest in industrial progress.

Recognising the supreme authority of the shareholders, the Companies Act, 2013 has given authority to them to appoint directors at the Annual General Meetings to direct, control, conduct and manage the business and affairs of the company.

Answer 2A(iii)

Section 442(3) of the Companies Act, 2013 (the Act) provides that the Central Government or the Tribunal (NCLT) or the Appellate Tribunal(NCLAT) before which any proceeding is pending may, suo motu, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the NCLT or the NCLAT, as the case may be, deems fit. Section 442 of the Act enables settlement of disputes through 'Alternate Dispute Resolution'.

Mediation : Mediation is a structured process. The Mediator assists the disputants to reach a negotiable settlement. The Process results in signed agreement which decides the future behaviour of the parties. Further, the decision of the mediator is called "settlement".

It is the process by which the parties to a dispute have closed-door discussions on a contentious issue in the presence of neutral mediator(s). This is a voluntary process and is undertaken only if all the parties are willing to go by it. The mediator, who is specially trained, helps the parties move from their positions, towards assessing where their interests are. Then, he/she helps the parties determine how the matter can be settled, examining various options. Unlike formal adjudicatory processes, the mediation need not be confined to the issues raised in the case, but can go beyond to other matters the parties want resolved. They can also agree to disagree on some issues, while resolving the rest.

Mediation is a time-bound, private and confidential process. The information shared must be kept confidential by all parties, including the mediator. This facilitates a free and frank discussion on matters in dispute. Equally important, the discussions cannot be brought up before the court if the disputes are not resolved through mediation.

In mediation, the mediator does not suggest the manner of settlement to the parties. Any settlement arrived at using either process is voluntary. No settlement can be imposed by the mediator or conciliator.

Conciliation : The term "Conciliation" has been defined under black law dictionary as "The process of adjusting or settling disputes in a friendly manner through extra

judicial mean". Conciliation is the assistance rendered by a conciliator to the parties to a dispute, in an independent and impartial manner, in their attempt to reach an amicable settlement of their dispute. Conciliator brings the disputants to agreement through negotiation. Further, the Conciliator is appointed only after the dispute has arisen. The decision of the Conciliator is called "award".

The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties.

Answer 2A(iv)

It is true that it is objectionable for the directors to use power simply or solely for the benefit of directors or merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. The following case law may be referred to understand and explain:

The case *J.K. Paliwal and Shri B.K. Paliwal* v. *Paliwal Steel Ltd. and Ors., [2008] 141 Comp Cas 624 (CLB)* explain the given statement. In this case, the Principal Bench of the Company Law Board had found that a property of the company had been sold without any authorization by the Board of Directors or shareholders to sell and the provisions of section 293 of erstwhile Companies Act, 1956 have not been complied with and in addition the consideration was also inadequate. Further, it was observed that the transaction was sham and the sale consideration was deposited in the bank and was withdrawn on the same day. On these facts, in the above case, the Company Law Board held that the respondents have breached their fiduciary duties as directors. The Company Law Board held that on the role of Directors, the law is well settled. In some respects, Directors resemble trustees. Equity prohibits a trustee from making any profit by his management, directly or indirectly. It is objectionable to use such power simply or solely for the benefit of directors or merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. Directors are required to act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. The fiduciary capacity within which Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have duty to make foil and honest disclosure to the shareholders regarding all important matters relating to the company.

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

Question 3

(a) In background of decided case laws, comment whether the following instances amount to oppression or mismanagement with brief reasoning :

(i) Filing of unaudited Balance Sheets

(ii) Non holding of the meetings of the Board.

(b) State whether the following offences under the Companies Act, 2013 are compoundable, if yes, also mention the Compounding Authority :

(i) Failure to comply with the provisions relating to transfer and transmission of securities.

(ii) *A Company fails to repay the deposit or part thereof or any interest thereon within the time specified or such further time as may be allowed.*

(iii) *Failure to distribute dividend within thirty days.*

(iv) *Contravention of provisions relating to charges.*

(c) *Amexo International Ltd. is aggrieved by the Order of Deputy Director of Enforcement Directorate (ED), and is evaluating to seek further remedies in this regard. Advise the Company regarding the Appellate jurisdiction under FEMA and also explain in brief the procedure for making such Appeal.*

(d) *'Financial Service Sector is emerging across boundaries.' In this context, explain in brief International Financial Service Centre and its Regulator.*

(4 marks each)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on :

(i) *Disgorgement*

(ii) *Mistake apparent from the record*

(iii) *Importance of Strong Internal Controls*

(iv) *Powers of Inspector under the Factories Act, 1948.* *(4 marks each)*

Answer 3(a)

(i) Filing of Unaudited Balance Sheets

In *Chandra Krishan Gupta* v. *PannalalGirdhari Lal Pvt. Ltd.*, supra, it was held that "Filing of the unaudited balance sheets show misconduct in the managing of the affairs of the company. If this act causes prejudice to the company's interests, it may justify action under Section 398 of the erstwhile Companies Act, 1956 but this by itself cannot be regarded as an ingredient of oppression within the meaning of Sec. 397 of the erstwhile Companies Act, 1956."

In light with the above case, it can be said that filling of unaudited balance sheet may amount to oppression or mismanagement.

(ii) Non-Holding of Meetings of the Board

In *Chandra Krishan Gupta* v. *Pannalal Girdhari Lal Pvt. Ltd.*, supra, 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".

In light with the above case, it can be said that non holding of the Board meeting may not amount to oppression or mismanagement.

Answer 3(b)

(i) Failure to comply with the provisions relating to transfer and transmission of securities

According to section 56(6) of the Companies Act, 2013(the Act), where any default is made in complying with the provisions of sub-sections (1) to (5) relating to transfer and transmission of securities, the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

Since the offence is not punishable with imprisonment only, or with imprisonment and also with fine, and the monetary penalty leviable under Sec 56(6) is less than the limit of Rs. 25 Lakhs, prescribed under Sec 441(1) of the Act, the offence may be compounded by Regional Director.

(ii) A Company fails to repay the deposit or part thereof or any interest thereon within the time specified or such further time as may be allowed

According to section 76A of the Companies Act, 2013, if a company fails to repay the deposit or part thereof or any interest due thereon within the time specified under section 73 or section 76 or rules made thereunder or such further time as may be allowed by the Tribunal,—

(a) the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees or twice the amountof deposit accepted by the company, whichever is lower but which may extend to ten crore rupees;

and

(b) every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees.

Since the offence is punishable with imprisonment and fine, the same is non-compoundable under Sec 441.

(iii) Failure to distribute dividend within thirty days

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

Since the offence is punishable with imprisonment and fine, the same is non-compoundable under Sec 441.

(iv) Contravention of provisions relating to Charges

According to section 86 of the Companies Act, 2013, if any company is in default in complying with any of the provisions of Chapter VI(Registration of Charges etc.), the company shall be liable to a penalty of five lakh rupees and

every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

Since the offence is not punishable with imprisonment only, or with imprisonment and also with fine, and the monetary penalty leviable under Sec 86 is less than the limit of Rs. 25 Lakhs, prescribed under Sec 441(1) of the Act, the offence may be compounded by Regional Director.

Answer 3(c)

The first stage of appeal in the Foreign Exchange Management Act, 1999(the FEMA) is the appeal against the order of the Adjudicating Authorities. It is an appeal before the Special Director (Appeals) under section 17(2) of the FEMA.

The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.

Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals).

Procedure under Sec 17 of the FEMA (read with the Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000)for filling of appeal before Special Director (Appeals):

1. Every appeal under section 17 (1) shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person, provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period,

2. The Appeal shall be filed in Form I, signed by the applicant in triplicate and accompanied by three copies of the order appealed against, together with the fee of Rs. 5,000/-.

3. On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

As per section 19 of the FEMA, any person aggrieved from the order Special Director (Appeals) may prefer an appeal to Appellate tribunal.

Further, under section 35 of FEMA, any person aggrieved from the order or decision of the Appellate Tribunal may file an appeal to the High Court.

Answer 3(d)

Section 18 of the Special Economic Zones Act, 2005 (the Act) provides that the Central Government may approve the setting up of an International Financial Service

Centre (IFSC) in a Special Economic Zone and prescribe the requirements for setting up and operation of such Centre, provided that the Central Government shall approve only one International Financial Services Centre in a Special Economic Zone. Sec 18(2) of the Act provides that the Central Government may, subject to such guidelines as may be framed by the Reserve Bank of India, the Securities Exchange Board of India, the Insurance Regulatory and Development Authority and such other concerned authorities, as it deems fit, prescribe the requirements for setting up and the terms and conditions of the operation of Units in an IFSC for caters to customers outside the jurisdiction of the domestic economy. Such centres deal with flows of finance, financial products and services across borders, London, New York and Singapore can be counted as global financial centres.

Services an International Financial Service Centre can provide:

— Fund-raising services for individuals, corporations and governments.

— Asset management and global portfolio diversification undertaken by pension funds, insurance companies and mutual funds.

— Wealth management.

— Global tax management and cross-border tax liability optimization, which provides a business opportunity for financial intermediaries, accountants and law firms.

— Global and regional corporate treasury management operations that involve fund-raising, liquidity investment and management and asset-liability matching.

— Risk management operations such as insurance and reinsurance.

— Merger and acquisition activities among trans-national corporations.

IFSCs in India

The first International Financial Service Centre (IFSC) in India has been set up at the Gujarat International Finance Tec-City (GIFT City) in Gandhinagar.

International Financial Service Centre Authority (IFSCA)

As the dynamic nature of business in the IFSCs requires a high degree of inter-regulatory coordination within the financial sector, the IFSCA has been established as a unified regulator with a holistic vision in order to promote ease of doing business in IFSC and provide world class regulatory environment. The main objective of the IFSCA is to develop a strong global connect and focus on the needs of the Indian economy as well as to serve as an international financial platform for the entire region and the global economy as a whole.

Answer 3A(i)

Disgorgement

Under the Companies Act, 2013, in case of fraud, undue advantage or benefit, the Central government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such assets, property, or cash. The Central Government may also file and application before the Tribunal for holding directors, key managerial personnel, officers or other person personally liable without any limitation of liability.

Disgorgement is the act of giving up something such as the profits obtained by illegal or unethical acts on demand or by legal compulsion. Court can order wrongdoers to pay back to prevent unjust enrichment. Disgorgement is a civil remedy and not a punishment or punitive civil action. The purpose of such a remedy, as in securities cases, is to deprive the wrongdoer of his or her ill-gotten gains and to deter violations of the law.

Answer 3A(ii)

Mistake apparent from the record

The concept of mistake apparent from the record may be understood from the below mentioned cases.

In *Smt. Baljeet Jolly* v. *CIT [2000] 113 Taxman 38 (Delhi)*, it was held that “Mistake' means to take or understand wrongly or inaccurately; to make an error in interpreting; it is an error; a fault, a misunderstanding, a misconception.

‘Apparent' means visible; capable of being seen; easily seen; obviously; plain. The plain meaning of the word “apparent is that it must be something which appears to be so ex facie and is incapable of argument or debate. The plain reading of the word "apparent' is that it must appears to be so ex facie and it is incapable of argument or debate. It, therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectification.

In *CIT* v. *Maruti Insurance Distribution Services Ltd. [2012] 26 taxmann.com 68/ [2013] 212 Taxman 123 (Mag.) (Delhi)*, it was held that a mistake should exist and must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. ‘Mistake' means to understand wrongly or inaccurately; it is an error, a fault, a misunderstanding, a misconception. “Apparent' implies something that can be seen, or is visible, obvious; plain. A mistake which can be rectified is one which is patent, obvious and whose discovery is not dependent on argument.

The amendment of an order under section 254(2) of the Income Tax Act, 1961 (corresponding to Section 420(2) under the Companies Act, 2013), therefore, does not mean entire obliteration of the order originally passed and its substitution by a new order which is not permissible. Further, where an error is far from self-evident, it ceases to be an 'apparent'error. Undoubtedly, a mistake capable of rectification under section 420(2) of the Companies Act, 2013 is not confined to clerical or arithmetical mistakes, at the same time, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof.

From the above, it is clear that the Tribunal, while exercising the power of rectification under relevant provision can recall its order in its entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is manifest error and it has nothing to do with the doctrine or concept of inherent power of review. Basic philosophy inherent in it is the universal acceptance of human fallibility. An application for review may be necessitated by way of invoking the latin maxim actus curiae neminem gravabit which means an act of the court shall prejudice no man.

The above principles equally apply to other tribunals based on the principle(s) enumerated above.

Answer 3A(iii)

Importance of strong Internal Controls

The importance of strong internal control systems can never be underestimated. In the London Whale story it was established that JP Morgan incurred a loss more because of the risk management systems in the bank were not adequately geared to prevent this from happening. The BFSI (Banks, Financial Services, Insurance) sector entities are required to follow regulatory directions in relation to internal audit and risk management systems since a lot of money changes hands in these entities and there is substantial public stake involved.

Nevertheless, the Companies Act, 2013 also realizes the importance of internal controls. Section 134(5)(e) of the Act requires the directors of a listed company to confirm, in their responsibility statement, that they had laid down internal financial controls to be followed by the company and that such controls are adequate and operating effectively. Section 134(5)(f) further requires them to confirm that they had devised proper systems to ensure compliance with provisions of all applicable laws and that such systems are adequate and operating effectively.

As per the provisions of regulation 17(8) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR regulations), the CEO and CFO are required to furnish a compliance certificate to the board of directors confirming their responsibility to maintain adequate internal controls pertaining to financial reporting and that they have evaluated the effectiveness and disclosed any deficiencies and design and operation of such internal controls to the auditors and the audit committee. The board of directors will therefore, rely on such certificate. If this is fraudulently provided, chances are, the responsibility statement as discussed above will turn out to be incorrect too. Although in many cases, the CEO and CFO will both also hold the positions of directors.

Clearly laid down internal control systems and techniques such as established policies and procedures, maker - checker processes (separate people to generate and authorize transactions), limits on operation, block leaves etc. can all contribute towards reducing the possibilities of fraud and early detection. Since certain internal controls like maker checker and transaction limits can be installed through software systems, this is one of the very few fear or bias free fraud prevention mechanisms.

Answer 3A(iv)

Powers of Inspector under the Factories Act, 1948

According to Section 9 of the Factories Act, 1948, an Inspector may exercise any of the following powers within the local limits for which he is appointed:

- He can enter any place which is used or which, he has reasons to believe, is used as a factory.
- He can make examination of the premises, plant, machinery, article or substance.

- He can Inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry.
- He can require the production of any prescribed register or any other document relating to the factory.
- He can seize, or take copies of any register, record of other document or any portion thereof.
- He can direct the occupier that any premises or any part thereof, or anything lying therein, shall be left undisturbed for so long as is necessary for the purpose of any examination under clause (b) of section 9.
- He can take measurement and photographs and make such recordings as he considers necessary for the purpose of any examination.
- In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is in the circumstances necessary, for carrying out the purposes of this Act) and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination.

Question 4

(a) Paras finds that his name is mis-spelt in his property document, so he makes the correction and keeps the document with himself. A year later, he tries to sell his property and delivers the copy of the document to the proposed buyer. The Advocate of the proposed buyer informs him that the document is a forged document.

Evaluate whether this act of Paras amounts to forgery. (4 marks)

(b) Adjudication Officer under the Companies Act, 2013 has sent notice to the Alaya Ltd alleging that the Company had committed certain offences under the Companies Act. The provisions referring the offences as alleged by Adjudication Officer do not contain any penal provisions. The Management of Alaya Ltd contends that, as no punishment is prescribed under the Act, there is no violation by the Company.

Is the contention of the Company valid ? (4 marks)

(c) Registrar of Companies (ROC) has sent a Notice to a Company alleging default under Section 92(4) and Section 137(2) of the Companies Act, 2013. On receiving the notice, the Company immediately arranges to file the respective Forms/ Returns and communicates within 30 days of the notice that the it has made good the default. However, the ROC proceeded to prosecute the Company for non-compliance under the aforesaid Section.

Is the action of the Registrar justified? If so, what may be the penalty for such non-compliances ? (4 marks)

(d) 'Unlike the Consumer Protection Act, 1986 which permitted a class to initiate a case before a consumer commission in cases of mis-selling, the Consumer Protection Act, 2019 provides for different solution'. Explain whether the new

mechanism provided under the Consumer Protection Act, 2019 will strengthen the class action or will dilute the class action suits. (4 marks)

Answer 4(a)

The making of a false document or false electronic record is defined under section 464 of the Indian Penal Code, 1860. As per the said section a person is said to make a false document or false electronic record –

First. - Who dishonestly or fraudulently -

(a) makes, signs, seals or executes a document or part of a document;

(b) makes or transmits any electronic record or part of any electronic record;

(c) affixes any electronic signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the electronic signature;

With the intention of causing it to be believed that such document or part of document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly. - Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly. - Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.

The Supreme Court in *Ramchandran* v. *State, AIR 2010 SC 1922*, has held that to constitute an offence of forgery document must be made with dishonest or fraudulent intention. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The Supreme Court in *Parminder Kaur* v. *State of UP*, has held that mere alteration of document does not make it a forged document. Alteration must be made for some gain or for some objective.

Similarly, in *Balbir Kaur* v. *State of Punjab, 2011 CrLJ 1546 (P&H)*, the allegation against the accused was that she furnished a certificate to get employment as ETT teacher which was found to be bogus and forged in as much as school was not recognized for period given in certificate. However, the certificate did not anywhere say that school was recognized. It was held that merely indicating teaching experience of the accused, *per-se*, cannot be said to indicate wrong facts. So the direction which was issued for prosecution is liable to be quashed.

In view of the above, the act of Mr. Paras does not amount to Forgery as there is no material alteration in the document and also there is no intention to defraud anyone.

Answer 4(b)

According to section 450 of the Companies Act, 2013, provides for the punishment for non-compliances of those provisions of the Act where no specific Penalty or Punishment is provided.

According to said section, if a company or any officer of a company or any other person contravenes any of the provisions of the Companies Act, 2013 or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in the Companies Act, 2013, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person

Hence, the contention of the company is not valid.

Answer 4(c)

Section 454(3) of the Companies Act, 2013(the Act), provides that the adjudicating officer may, by an order-

(a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of the Act; and

(b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

However, a proviso has been to section 454(3) of the Act inserted vide the Companies (Amendment) Act, 2020 w.e.f. 22.01.2021, which provides as under:

In case the default relates to non-compliance of section 92(4) or section 137(1) or 137(2) and such default has been rectified either prior to, or within thirty days of, the issue of the notice by the adjudicating officer, no penalty shall be imposed in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.

Accordingly, in the given case, the Registrar of Companies, who is the designated Adjudicating Officer for levying penalties under the above mentioned provisions is not empowered to proceed to levy penalty if the requisite Forms prescribed under the said provisions have been filed within 30 days of issue of the Notice.

Answer 4(d)

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 Act, a

complaint relating to violations of consumer rights prejudicial to the interests of consumers as a class is to be forwarded 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.

Question 5

(a) 'Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. To clearly understand the term 'fraud' in reference of penalizing, preventing and regulating this act, one should be well-versed with the elements of fraud'. Comment on this statement by detailing essential elements of Fraud.

(b) 'Risk Management should be tailored to the specific Company, but generally Risk Management system should provide for ways to identification of material risks, implementation of appropriate risk management strategies and transmission of necessary information to the senior executives of the Company for their appropriate Actions'. Explain the actions which a Board and Committee should consider a part of their risk management oversight. (8 marks each)

Answer 5(a)

Under the Indian law a penal offence of fraud, demands for successful prosecution, the twin elements of 'intent to defraud' of the offender i.e.:

- An intent to deceive another; and
- An intent to cause, by that deception, injury to some person.

Now to clearly understand the term 'fraud' in reference of penalizing, preventing and regulating this act, one should clearly understand the elements of fraud.

Few Essential Elements of Fraud are listed as below:

- **False and Wilful representation or Assertion** : To constitute fraud there must be some representation or assertion, which is untrue. In the absence of representation or assertion except in the following two cases, there can be no fraud.

  1. Where silence may itself amount to fraud, and
  2. Where there is active concealment of facts.

  The person making the representation should not believe it to be true, otherwise he/she will not be guilty of fraud. Moreover, to constitute fraud, the false

representation must have been made wilfully or intentionally. For example, X, intending to deceive Y, informs him that his estate is free from encumbrance. Y thereupon buys the estate. The estate is, however, subject to mortgage. The contract is induced by fraud.

- **Perpetrator of Representation** : The false representation or misstatement must have been made by a party to the contract or by anyone with its connivance, or by its agent. If a stranger makes the misstatement to the contract, it cannot result in fraud. For instance, A suggests B to buy C's car, which according to A runs 15 kms per litre. Later on, B finds that the car runs only 8 kms per litre. A was, however, acting neither at the instance of C nor was his agent; he was a stranger. The contract that took place between B and C cannot be stated to be induced by fraud.

- **Intention to deceive** : Intention to deceive the other party is the essence of fraud. In order to commit a fraud, one person asserts or misstates the fact with the intention that it should be acted upon. As a matter of fact, misrepresentation elevates to the level of fraud when it is prefixed by the element of intention to deceive the other party. For example, A, intending to deceive B, falsely represents that 1,000 tons of sugar is produced annually at his factory, although A is fully aware that only 600 tons of sugar can be produced annually. B thereby agrees to buy the factory. A has resorted to fraud to obtain the consent of B.

- **Representation must relate to a fact** : The representation made by the party must relate to a fact, which is material to the formation of the contract. A mere statement of opinion, belief, or commendation cannot be treated as fraud. For instance, A states that the detergent produced at his factory washes whiter than whitest. The statement made by A is merely a commendation of the product and not a fact. But if A describes the ingredients, which the detergent contains, it becomes a statement of fact and if that is found incorrect, it amounts to fraud provided A knows it to be a false statement.

- **Active concealment of facts** : “Active concealment must be distinguished from passive concealment”. Passive concealment implies mere silence as to material facts, which barring a few cases, does not amount to fraud. Whereas, active concealment implies 'when the party takes positive or deliberate steps to prevent information from reaching the other party and this is treated as fraud. For example, A sells a horse to B in an auction despite knowing that the horse is unsound. A says nothing to B about the horse's soundness. This is a case of passive concealment of fact and cannot tantamount to fraud.

- **Promise made without intention of performing it** : If a person while entering into a contract has no intention to perform his/her promise, there is an intent to defraud on his/her part, for the intention to deceive the other party is there from the very beginning. For example, an English merchant appointed an Indian woman as his personal secretary and promised that he would marry her. Later she came to know that he was already married and had made the promise without any intention to perform it. It was held that she could avoid the contract on the ground of fraud. On similar count, a purchase of goods without any intention of paying the price is a fraud and the contract can be avoided on this ground.

- **Representation must have actually deceived the other party** : The representation made with the intention to deceive must actually deceive. The party, induced by fraudulent statement, must have relied on it to accord its consent. Thus, an attempt to deceive does not amount to fraud until the other party is deceived thereby. A case in point is the following example. A had a defective cannon. With a view to conceal the defect, he put a metal plug on it. B without examining it bought it. The cannon burst when used by B. B refused to pay the price and accused A of fraud. It was held that B was bound to pay because he was not actually deceived, as he would have bought the cannon even if the deceptive plug had not been inserted.

- **Any other act fitted to deceive** : The expression any other act fitted to deceive' obviously means any act, which is done with the intention of committing fraud. This category includes all tricks, dissembling, and other unfair ways, which are used by cunning and clever people to cheat others. For example, a husband persuaded his illiterate wife to sign certain documents telling her that by the papers he was going to mortgage her two plots of land to secure his indebtedness. But, in fact, he mortgaged four plots of land belonging to her. This was held as an act done with the intention of deceiving wife.

- **Any such Act or omission that the law specially declares as void** : This category includes the act or omission that the law specially declares to be fraudulent. For example, the Insolvency Act and the Companies Act declare certain kinds of transfers to be fraudulent, Similarly, under the Transfer of Property Act, the transferor of real estate is bound to disclose to the transferee the following details:

- **Material defects** : Material defects, if any, in the property such as, cracks in the wall or in beams, and/or Any defect or dispute as regards transferor's title, such as property is subject to encumbrance, i.e., mortgaged or is subject to some dispute pending in a court of law. An omission to make such disclosure on the part of transferor amounts to fraud.

- **Wrongful Loss and Wrongful Gain is Immaterial** : For the purposes of "Fraud" under the provisions of Sec 447 of the Companies Act, 2013, it is immaterial whether there has been some wrongful loss to one and/or wrong gain to another. The only important thing is intention to deceive and the act or omission actually deceiving the victim. Common corporate frauds for example are, if the CMD's husband benefits from a loan transaction sanctioned by her, it is a fraud. If a CEO takes bribe to approve a contract, that is a fraud.

- On the same principle, Indian Penal Code (IPC) too works, as for IPC to constitute an offence, two elements are required which are *Mens Rea* – Intention to Commit Offence and *Actus Reus* – The Wrongful Act.

In view of the above discussion, it may be said that 'Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. To clearly understand the term 'Fraud' in reference of penalising, preventing and regulating this act, one should be well versed with the elements of Fraud.

Answer 5(b)

The board should seek to promote an effective, on-going risk dialogue with management, design the right relationships between the board and its standing committees as to risk oversight and ensure appropriate resources support risk management systems.

Specific types of actions that the board and appropriate board committees may consider as part of their risk management oversight include the following:

- review with management the company's risk appetite and risk tolerance and assess whether the company's strategy is consistent with the agreed-upon risk appetite and tolerance for the company;
- establish a clear framework for holding the CEO accountable for building and maintaining an effective risk appetite framework and providing the board with regular, periodic reports on the company's residual risk status,
- review with management the categories of risk the company faces, including any risk concentrations and risk interrelationships, as well as the likelihood of occurrence, the potential impact of those risks, mitigating measures and action plans to be employed if a given risk materializes,
- review with management the ways in which risk is measured on an aggregate, company wide basis, the setting of aggregate and individual risk limits (quantitative and qualitative, as appropriate), the policies and procedures in place to hedge against or mitigate risks and the actions to be taken if risk limits are exceeded;
- review with management the assumptions and analysis underpinning the determination of the company's principal risks and whether adequate procedures are in place to ensure that new or materially changed risks are properly and promptly identified, understood and accounted for in the actions of the company;
- review with committees and management the board's expectations as to each group's respective responsibilities for risk oversight and management of specific risks to ensure a shared understanding as to accountabilities and roles;
- review the company's executive compensation structure to ensure it is appropriate in light of the company's articulated risk appetite and risk culture and to ensure it is creating proper incentives in light of the risks the company faces;
- review the risk policies and procedures adopted by management, including procedures for reporting matters to the board and appropriate committees and providing updates, to assess whether they are appropriate and comprehensive;
- review management's implementation of its risk policies and procedures, to assess whether they are being followed and are effective;
- review with management the quality, type and format of risk-related information provided to directors, review the steps taken by management to ensure adequate independence of the risk management function and the processes for resolution and escalation of differences that might arise between risk management and business functions;
- review with management the design of the company's risk management functions, as well as the qualifications and backgrounds of senior risk officers and the

personnel policies applicable to risk management, to assess whether they are appropriate given the company's size and scope of operations; review with management the primary elements comprising the company's risk culture, including establishing "a tone from the top" that reflects the company's core values and the expectation that employees act with integrity and promptly escalate non-compliance in and outside of the organization; accountability mechanisms designed to ensure that employees at all levels understand the company's approach to risk as well as its risk-related goals; an environment that fosters open communication and that encourages a critical attitude towards decision-making, and an incentive system that encourages, rewards and reinforces the company's desired risk management behaviour;

- review with management the means by which the company's risk management strategy is communicated to all appropriate groups within the company so that it is properly integrated into the company's enterprise-wide business strategy;
- review internal systems of formal and informal communication across divisions and control functions to encourage the prompt and coherent flow of risk-related information within and across business units and, as needed, the prompt escalation of information to senior management (and to the board or board committees as appropriate); and
- review reports from management, independent auditors, internal auditors, legal counsel, regulators, stock analysts and outside experts as considered appropriate regarding risks the company faces and the company's risk management function, and consider whether, based on each individual director's experience, knowledge and expertise, the board or committee primarily tasked with carrying out the board's risk oversight function is sufficiently equipped to oversee all facets of the company's risk profile-including specialized areas such as cyber security and determine whether subject-specific risk education is advisable for such directors.

Question 6

(a) A GST Assessing Officer authorised by the Commissioner enters a shop in bazaar and purchases some goods and demands for invoice of the goods he purchased. He checks the invoice, for its correctness and then returns the goods and asks for cancellation of the bill. Whether an officer has power to purchase the goods, just to check issue of tax invoice ? Whether he can demand cancellation of bill and return of amount for such purchases ? (4 marks)

(b) An offence under the Companies Act, 2013 was compounded by the Company and Compounding order was issued by the Compounding Authority specially for offences by the Company and the Directors of the Company as officer in default. The Company has paid the Compounding Fee. However, one of the Director, who is also a party to the Compounding as officer in default feels that compounding fee is high and he would like to go for an Appeal.

Evaluate whether the Director will be allowed to make an appeal. Also indicate the penal provision for non-compliance of compounding orders. (4 marks)

(c) Surasandhya, is a Practising Company Secretary specialising in Corporate and allied laws. One of her clients approached her, seeking inputs on value of penalty/

fine payable for certain offences committed by his Company. He wants to understand the factors which are considered in deciding the quantum of penalty.

Outline the factors considered while deciding the quantum of penalty. *(4 marks)*

(d) Officers from Income Tax Department have seized some assets and money from Gul Ltd.'s premises. After one year of such seizure the assessment was completed by the Income Tax Department and the outstanding tax demands were met out from the sale of assets. Gul Ltd. claims interest from the Income Tax Department for the assets and monies seized, as more than one year has elapsed from seizure.

In background of provisions of Income-tax Act, is the claim of the Company justified ? *(4 marks)*

Answer 6(a)

As per section 67(12) of the Central Goods and Services Tax Act, 2017, the Commissioner or an officer authorized by him may cause purchase of any goods or services or both by any person authorized by him from the business premises of any taxable person, to check the issue of tax invoices or bills of supply by such taxable person, and on return of goods so purchased by such officer, such taxable person or any person in charge of the business premises shall refund the amount so paid towards the goods after cancelling any tax invoice or bill of supply issued earlier.

Accordingly, the GST Officer is empowered to make test purchases to check invoices or bills and bills raised for such test purchases have to be cancelled and the amount paid by the officer have to be returned.

Answer 6(b)

It is necessary to refer to the below cases to understand the applicable law in the given circumstances.

No appeal against order of composition : A person having agreed to the composition of offence is not entitled to challenge the said proceeding by filing an appeal. [*S V Bagi* v. *State of Karnataka (1992) 87 STC 138*].

No penalty or prosecution after compounding : In *P P Varkey* v. *STO (1999) 114 STC 224 (Bom HC DB)*, it was held that once an offence is compounded, penalty or prosecution proceeding cannot be taken for same offence.

No challenge to the compounding order : In *S Viswanathan* v. *State of Kerala (1993) 113 STC 182 (Ker HC DB)*, it was held that once the matter is compounded, neither department nor assessee can challenge the compounding order. Department cannot reopen the matter on the reason that actual suppression was much higher

In view of the above, it can be said that the director will not be allowed to make an appeal.

According to section 441(5) of the Companies Act, 2013.

If any officer or other employee of the company who fails to comply with any order

made by the Tribunal or the Regional Director or any officer authorised by the Central Government under section 441(4) of the Companies Act, 2013, the maximum amount of fine for the offence proposed to be compounded under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

Answer 6(c)

According to Sec 454(3)(a) of the Companies Act, 2013 read with Rule 3(12) of the Companies (Adjudication of Penalties) Rules, 2014, while adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:-

(a) size of the company;

(b) nature of business carried on by the company;

(c) injury to public interest;

(d) nature of the default;

(e) repetition of the default;

(f) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and

(g) the amount of loss caused to an investor or group of investors or creditors as a result of the default:

Provided that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Companies Act, 2013, to which the offence is related to.

Answer 6(d)

Interest on assets ceased

According to Section 132B(4) of the Income-tax Act, 1961(the Act), the Central Government shall pay simple interest at the rate of one-half per cent for every month or part of a month on the amount by which the aggregate amount of money seized under section 132 of the Act or requisitioned under section 132A of the Act, as reduced by the amount of money, if any, released under the first proviso to clause (i) of sub-section (1), and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (i) of sub-section (1), exceeds the aggregate of the amount required to meet the liabilities referred to in clause (i) of sub-section (1) of this section.

Such interest shall run from the date immediately following the expiry of the period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 of the Act or requisition under section 132A of the Act was executed to the date of completion of the assessment under section 153A of the Act or under Chapter XIV-B.

Hence, the claim of the Company is justified.

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