GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2021

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
Phones : 41504444, 45341000; *Fax* : 011-24626727
E-mail : info@icsi.edu; *Website* : www.icsi.edu

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

The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2021

ADVANCED COMPANY LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

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

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

Question 1

(a) Draft the resolution for according approval to the appointment of relative of the Managing Director of the company on the place of profit, stating the authority and type of resolution. Assume the details as required.

(b) Gold Limited, an unlisted company, proposes to enter into contract with Radhika for procurement of raw materials of ₹ 5 crore during the financial year. Mohan is Non-Executive Director of the company. Radhika is wife of Kamal, Brother of Mohan. Discuss the provisions of the Companies Act, 2013 and advise Gold Limited.

(c) MNO Limited, an unlisted company, engaged in the manufacturing of water pumps propose to issue redeemable preference shares which will be redeemed at the end of 30 years. Discuss the provisions of the Companies Act and the Rules made thereunder and advise the company.

(d) All the three directors of A Ltd. were also the directors of B Ltd. However, the three directors have been disqualified under Section 164 as B Ltd. has defaulted in filing their financial statements for the previous three years. Shyam, the promoter of A Ltd. wants to have the directors' vacancy filled up so that the Company's operations could go on without hinderance. In the absence of any director available in the Company, can Shyam proceed with the appointment of fresh directors ? Advise. *(5 marks each)*

Answer 1(a)

Authority : Shareholders

Type of Resolution : Ordinary

"Resolved that pursuant to the provisions of Section 188(1)(f) of the Companies Act, 2013 (the Act), read with Companies (Meetings of Board and its Powers) Rules, 2014 and other applicable provisions, if any, of the Act including any statutory modification(s) or re-enactment thereof for the time being in force and as may be enacted from time to time, the consent of the members be and is hereby accorded to the appointment of Mr. Ajay Khanna, son of Mr. Abhay Khanna, Managing Director of the company, for holding the place of profit, as Head (Marketing) w.e.f. 1st May, 2020, at the remuneration of Rs.2,75,000/- per month and on other terms and conditions of appointment detailed in the statement attached to the notice convening this meeting.

Resolved further that the consent of the members be and is hereby accorded to the Board of Director, to decide the change in designation/revisions in the remuneration payable to Mr. Ajay Khanna from time to time in accordance with the company's policy on performance measurement and such other applicable/relevant policies and to perform and execute all such acts, deeds, matters and things, as may be deemed necessary, proper or expedient to give effect to this resolution and for the matters connected herewith or incidental hereto."

OR

Authority: Board

Type of Resolution: Board Resolution

"Resolved that pursuant to the provisions of Section 188(1)(f) of the Companies Act, 2013, read with the Companies (Meetings of Board and its Powers) Rules, 2014 and other applicable provisions, if any, of the Act including any statutory modification[s] or re-enactment thereof for the time being in force and as may be enacted from time to time, the consent of the Board of Directors of the Company be and is hereby accorded for the appointment of Mr. Ajay Khanna, son of Mr. Abhay Khanna , Managing Director of the company, for holding the place of profit, as Head (Marketing) w.e.f. 1st May, 2020, at the monthly remuneration of Rs.1,00,000/- and on other prescribed terms and conditions.

Resolved further that the consent of the Board be and is hereby accorded to decide the change in designation/revisions in the remuneration payable to Mr. Ajay Khanna from time to time in accordance with the company's policy on performance measurement and such other applicable/relevant policies and to perform and execute all such acts, deeds, matters and things, as may be deemed necessary, proper or expedient to give effect to this resolution and for the matters connected herewith or incidental hereto."

Answer 1(b)

Section 2(76) of the Companies Act, 2013 provides that Related Party, with reference to a company, means:

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director or manager is a director and holds along with his relatives, more than two per cent. of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act.

However, nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(a) a holding, subsidiary or an associate company of such company; or

(b) a subsidiary of a holding company to which it is also a subsidiary;

(c) an investing company or the venturer of the company.

Further, Section 2(77) of the Companies Act, 2013 read with Rule 4 of the Companies (Specification of Definitions Details) Rules, 2014 elaborates the definition of Relative.

A person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:-

(i) they are members of a Hindu Undivided Family;

(ii) they are husband and wife; or

(iii) Father - including 'step father'.

(iv) Mother - including 'step mother'.

(v) Son-including 'step son'

(vi) Son' Wife

(vii) Daughter

(viii) Daughter's husband

(ix) Brother - including 'step brother'

(x) Sister - including 'step sister

In view of the above provisions of the Companies Act, 2013 and the Rules made thereunder the provisions of Section 188 of the Companies Act, 2013 will be applicable in case of sale, purchase or supply of any goods or materials when the company is proposing to enter into contract or arrangement with a related party.

However, in the definition of relatives given in Section 2(77) of the Companies Act, 2013 read with relevant Rule does not include Brother's Wife.

Hence, it can be opined that as Radhika, Wife of Kamal, who is Brother of Mohan, Non-Executive Director of Gold Limited, in not included in the definition of the list of relatives, she is not a related party. Therefore, for the contract to be executed by Gold Limited with Radhika, provisions of Section 188 of the Act, will not be applicable.

Answer 1(c)

Section 55 of the Companies Act, 2013 provides that a company limited by shares may, if so authorised by its articles, can issue preference shares which are liable to be redeemed within a period not exceeding twenty years from the date of their issue subject to prescribed conditions.

However, Rule 10 of the Companies (Share Capital and Debentures) Rules, 2014 prescribes that a company engaged in the setting up and dealing with of infrastructural projects may issue preference shares for a period exceeding twenty years but not

exceeding thirty years, subject to the redemption of a minimum ten percent of such preference shares per year from the twenty first year onwards or earlier, on proportionate basis, at the option of the preference shareholders.

In view of the above provisions, MNO Limited which is not engaged in the setting up and dealing with of infrastructural projects, cannot issue redeemable preference shares exceeding twenty years.

Answer 1(d)

According to Section 167(1) of the Companies Act, 2013, the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164 of the Companies Act, 2013.

Further, where the directors incur disqualifications under section 164 sub-section (2), the office of director shall become vacant in all the companies, other than the company which is in default under that sub-section.

Section 167(3) provides that where all the Directors of a company vacate their offices under any of the disqualifications specified in sub-section (1) of section 167, the promoter or, in his absence, the Central Government shall appoint the required number of Directors who shall hold office till the Directors are appointed by the company in general meeting.

Hence, Shyam as Promoter of the Company can proceed with the appointments of fresh directors.

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

Question 2

(a) Specify the matters to be included in the Board's Report of one person company and small company as per the provisions of the Companies Act, 2013 and the Rules made thereunder.

(b) BCD Limited has been incurring losses and has been defaulting in payment of interest and instalments of loans and an amount of ₹30 crore is outstanding and due to consortium of banks. The consortium of banks have mooted a debt restructuring plan in accordance with the guidelines of Reserve Bank of India. The plan requires conversion of outstanding amount into equity shares of the company at the discount of 10% of the face value. The contention of the company is that under the provisions of the Companies Act, 2013, issue of shares at discount is prohibited. Advise the company.

(c) "The Board of Directors can exercise certain powers on behalf of the company by passing resolutions only at its meetings." Discuss.

(d) DYNK Inc., a company incorporated in USA, has established its Branch in Mumbai. Advise the company in regard to filing of the documents etc. under the Companies Act, 2013 and the Rules made thereunder. (4 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(a) XYZ Limited has not filed annual return and financial statements for the year ended 31st March, 2019. The company has defaulted in payment of redemption amount of debentures due in December, 2019 and repayment of matured deposits and interest due thereon and the defaults are still continuing. XYZ Limited is proposing to change its name to ABC Limited. Advise the company.

(b) F Ltd wishes to apply for change of its name under Section 13 of the Act. Comment whether the change of name shall be allowed in each of the following situations :

(i) F Ltd has not filled up the position of woman director, even though it is mandatory.

(ii) F Ltd has defaulted in payment of interest due on debentures.

(iii) F Ltd has not registered three charges created in the last two years.

(iv) F Ltd has defaulted in repayment of loan to National Infrastructure Bank.

(c) Z Ltd wants to pay remuneration to their Managing Director in excess of the limits specified in Schedule V as they do not have adequate profits. The Company has defaulted in payment of dues to banks as well as non-convertible debenture holders. Advise the Company on the approvals required to implement the above remuneration.

(d) ABC Limited is considering to come out with a public issue of equity shares. The company is considering to extend loan to the employees including directors and key managerial personnel upto one year of their salary to enable them to subscribe to the equity shares in the public issue. Advise the company.

(4 marks each)

Answer 2(a)

Section 134 (3A) has empowered the Central Government to prescribe an abridged Board's report for one person company or small company.

Further, rule 8A of the Companies (Accounts) Rules, 2014 prescribes the matters to be included in Board's Report for One Person Company and Small Company.

The Board's Report of one person company and small company shall be prepared based on the standalone financial statement of the company, which shall be in the abridged form and contain the following:

(a) the web address, if any, where the annual return referred to in Sub-section (3) of Section 92 has been placed.

(b) number of meetings of the Board.

(c) directors' Responsibility Statement as referred to in Sub-section (5) of Section 134.

(d) details in respect of fraud reported by auditors under Sub-section (12) of Section 143 other than those which are reportable to the Central Government.

(e) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

(f) the state of affairs of the company.

(g) the financial summary or highlights.

(h) material changes from the date of closure of the financial year in the nature of business and their effect on the financial position of the company.

(i) the details of directors who were appointed or have resigned during the year.

(j) the details of significant material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future.

The Report of the Board shall contain the particulars of contracts or arrangements with related parties referred to in Sub-section (1) of Section 188 in the Form No. AOC-2.

Answer 2(b)

The provisions of Section 53 of the Companies Act, 2013 (the Act) for issue of shares at discount provide as under:

(1) Except as provided in Section 54 (i.e. issue of sweat equity shares), a company shall not issue shares at a discount.

(2) Any share issued by a company at a discount shall be void.

However, a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or Rs.5 lakhs, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of 12% per annum from the date of issue of such shares to the persons to whom such shares have been issued.

In view of the above provisions of the Act, the contention of BCD Limited is not tenable and the equity shares at the discount of 10% of the face value will be required to be issued by the company to the consortium of banks as per the debt restructuring plan.

Answer 2(c)

The provisions related to exercise the certain powers on behalf of the company by passing resolutions passed in meetings of the Board of Directors are provided under Section 179(3) of the Companies Act, 2013 and Rule 8 of the Companies (Meetings of the Board and its Powers) Rules, 2014. The provisions are discussed below.

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

(a) to make calls on shareholders in respect of money unpaid on their shares

(b) to authorise buy-back of securities under Section 68

(c) to issue securities, including debentures, whether in or outside India

(d) to borrow monies

(e) to invest the funds of the company

(f) to grant loans or give guarantee or provide security in respect of loans

(g) to approve financial statement and the Board's report

(h) to diversify the business of the company

(i) to approve amalgamation, merger or reconstruction

(j) to take over a company or acquire a controlling or substantial stake in another company

(k) any other matter which is prescribed.

However, the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in Clauses (d) to (f) on such conditions as it may specify.

Further, as per Rule 8 of the Companies (Meetings of the Board and its Powers) Rules, 2014, in addition to the powers specified in Section 179(3) as discussed above, the following powers shall also be exercised by the Board of Directors only by means of resolutions passed at the meetings of the Board:

(1) to make political contributions

(2) to appoint or remove key managerial personnel

(3) to appoint internal auditors and secretarial auditor

Answer 2(d)

DYNK Inc., a foreign company incorporated in USA and having established its branch office in Mumbai have to do following filings under the relevant provisions of the Companies Act, 2013 and the Rules made thereunder.

Section 380 of the Companies Act, 2013 read with Rule 3 of the Companies (Registration of Foreign Companies) Rules, 2014 provides that -

Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the english language, a certified translation thereof in the english language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary or equivalent (by whatever name called) of the foreign company which shall contain prescribed particulars, for each of the persons included in the list;

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

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

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

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

(h) any other information as may be prescribed.

A foreign company shall, within a period of thirty days of the establishment of its place of business in India, file with the registrar **Form FC-1** with prescribed fees and with the above mentioned documents required to be delivered for registration by a foreign company and the application shall also be supported with an attested copy of approval from the Reserve Bank of India under Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

Where any alteration is made or occurs in the document delivered to the Registrar for registration under sub-section (1) of section 380, the foreign company shall file with the Registrar, a return in **Form FC-2** along with the prescribed fees containing the particulars of the alteration, within a period of thirty days from the date on which the alteration was made or occurred.

The additional filings required to be made under the relevant provisions of the Companies (Registration of Foreign Companies) Rules, 2014 (the Rules) are as under.

1. As per the provisions of Rule 6 of the aforesaid Rules, every foreign company shall file with the Registrar, along with the financial statement, in **Form FC-3** with prescribed fees, a list of all the places of business established by the foreign company in India as on the date of balance sheet.

2. As per the provisions of Rule 7 of the aforesaid Rules, every foreign company shall prepare and file, within a period of sixty days from the last day of its financial year, to the Registrar annual return in **Form FC - 4** along with prescribed fees containing the particulars as they stood on the close of the financial year.

3. As per the provisions of Rule 8 of the aforesaid Rules, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi, along-with the prescribed fees.

4. As per the provisions of Rule 9 of the aforesaid Rules, the provisions made for

certification of any charter, statutes, memorandum and articles or other instrument constituting or defining the constitution of a Foreign company shall be complied by the foreign company.

5. As per the provisions of Rule 10 of the aforesaid Rules, the provisions made for authentication of the translated documents etc. shall be complied by the foreign company.

OR (Alternate question to Q. No. 2)

Answer 2A(a)

Section 13 of the Companies Act, 2013 provides that, save as provided in Section 61, a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. The company has to comply with the relevant provisions of the Companies Act, 2013 and rules made thereunder.

Further, according to Rule 29(1) of the Companies (Incorporation) Rules, 2014, the change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon.

However, the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

Since, XYZ Limited has not filed the annual return and financial statements for the year ended 31st March, 2019 and has defaulted in payment of redemption amount of debentures due in December, 2019 and repayment of matured deposits and interest due thereon and the defaults are continuing, therefore change of name will not be allowed.

So, XYZ Limited is advised to first [a] file the annual return and financial statements for the year ended 31st March, 2019 and [b] make payment of redemption amount of debentures due in December, 2019 and repayment of matured deposits and interest due thereon and thereafter initiate actions for change of name to ABC Limited.

Answer 2A(b)

As per Section 13 of the Companies Act, 2013 read with Rule 29 of the Companies (Incorporation) Rules, 2014, request for change of name by a company shall not be allowed if the company has not filed annual returns or financial statements due for filing with the Registrar or has failed to pay or repay matured deposits or debentures or interest thereon.

However, the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

In the light of the above-

(i) F Ltd. shall be allowed to change the name as the legal provision does not provide for denial of permission in the given circumstances as per the above mentioned provisions.

(ii) F Ltd. shall not be allowed to change the name as there is a default in payment of interest due on debentures which is a prohibition as per the above mentioned provisions.

(iii) F Ltd. shall be allowed to change the name as the legal provision does not provide for denial of permission in the given circumstances as per the above mentioned provisions.

(iv) F Ltd. shall be allowed to change the name as the legal provision does not provide for denial of permission in the given circumstances as per the above mentioned provisions.

Answer 2A(c)

As per Section 197 of the Companies Act, 2013 read with Schedule V of the Companies Act, 2013, payment of remuneration in excess of the limits specified in Schedule V requires the approval of the shareholders by way of a special resolution in case of companies having no profit or inadequate profit.

However, where there is a default in payment of dues to any bank or public financial institution or non-convertible debenture-holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditors, as the case may be, shall be obtained by the Company before obtaining approval in the general meeting.

Therefore, in the instant case, Z Ltd should take prior approval of the concerned banks and the non-convertible debenture-holders before placing the resolution before the shareholders at the general meeting.

Answer 2A(d)

Section 67(2) of the Companies Act, 2013 provides that no public company shall give, whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of or for any shares in the company or in its holding company.

However, nothing mentioned above shall apply to the giving of loans by a company to persons in the employment of the company other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

In view of the above provisions of the Companies Act, 2013 ABC Limited will be advised as under.

(1) The loan can be extended to the employees only and cannot be extended to directors and key managerial personnel to enable them to subscribe to the equity shares in the public issue.

(2) The loan can be extended to the employees for an amount not exceeding their salary or wages for a period of six months only to enable them to subscribe to the equity shares in the public issue.

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

Question 3

(a) Discuss in details 'omnibus approval of related party transactions'. (4 marks)

(b) Draft the resolution for payment of remuneration in addition to the sitting fees to the Non-Executive Directors, stating the authority and type of resolution. The company has appointed a Managing Director and also a Whole-time Director. Assume details as required. (4 marks)

(c) State the relevant provisions of the Companies Act, 2013 and the Rules made thereunder for incorporation of one person company and opine on the following:

(i) ABC Private Limited desire to incorporate a one person company and become members of the company.

(ii) Dipak desire to incorporate 2 [two] one person company and become member of both companies.

(iii) Rakesh, an Indian citizen, who has stayed in India for 102 days during 2019-20, desire to incorporate a one person company.

(iv) Piyush, a minor is proposed to be made member of one person company. (8 marks)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on :

(i) Doctrine of 'constructive notice'

(ii) DPT-3

(iii) DIR-3 KYC

(iv) INC 22 *(4 marks each)*

Answer 3(a)

As per Section 177 of the Companies Act, 2013, the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as prescribed.

Rule 6A of the Companies(Meetings of Board and its Powers) Rules, 2014 prescribes that all related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely –

(1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:-

(a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year

(b) the maximum value per transaction which can be allowed

(c) extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval

(d) review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made

(e) transactions which cannot be subject to the omnibus approval by the Audit Committee.

(2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:-

(a) repetitiveness of the transactions in past or in future

(b) justification for the need of omnibus approval.

(3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.

(4) The omnibus approval shall contain or indicate the following: -

(a) name of the related parties

(b) nature and duration of the transaction

(c) maximum amount of transaction that can be entered into

(d) the indicative base price or current contracted price and the formula for variation in the price, if any; and

(e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding Rs. 1 crore per transaction.

(5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.

(6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.

(7) Any other conditions as the Audit Committee may deem fit.

Answer 3(b)

Authority: Shareholders

Type of Resolution: Special

"**Resolved that** pursuant to the provisions of Section 197 and other applicable provisions, if any, of the Companies Act, 2013 (the Act) as may be amended from time to time, a sum not exceeding 1% (or such higher percentage as may be permitted, from time to time), per annum of the net profits of the company calculated in accordance with the provisions of Section 198 and other applicable provisions of the Act be paid to and distributed amongst the Non-executive Directors of the company in such amounts or

proportions and in such manner and in such respects as may be decided by the Board of Directors (the Board) and such payments shall be made in respect of the profits of the company from the financial year 2019-20 of the company.

Resolved further that the above remuneration shall be in addition to fee payable to the Non-Executive Director(s) for attending the meetings of the Board or the Committees thereof or for any other purpose whatsoever as may be decided by the Board and reimbursement of expenses for participation in the Board and other meetings.

Resolved further that Managing Director or Company Secretary of the company be and are hereby authorized to do all such acts, deeds and things and to sign and execute all such deeds, documents and instruments as may be necessary, expedient and incidental thereto to give effect to this resolution."

Answer 3(c)

The relevant provisions of the Companies Act, 2013 (the Act) and the Companies (Incorporation) Rules, 2014 (the Rules) for incorporation of one person company are discussed as under.

(1) As per Section 2 (62) of the Act 'one person company' means a company which has only one person as a member.

(2) As per Section 3 (1) (c) of the Act a company may be formed for any lawful purpose by one person, where the company to be formed is to be one person company, that is to say a private company.

(3) In Rule 3 of the Companies (Incorporation) Rules, 2014 it is provided as under.

(1) Only a natural person who is an Indian citizen whether resident in India or otherwise

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company.

Explanation - For the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of not less than 120 days during the immediately preceding financial year.

(2) A natural person shall not be member of more than a one person company at any point of time and the said person shall not be a nominee of more than a one person company.

(3) Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in Rule 3 (2) above within a period of 180 days.

(4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.

In view of the above provisions of the Act and the Rules it is stated as under.

(1) ABC Private Limited cannot incorporate a one person company and become member of the company. - Rule 3(1)

(2) Dipak cannot incorporate 2 one person company and become members of both company- Rule 3(2)

(3) Rakesh cannot incorporate a one person company as he has stayed in India for less than 120 days- Rule 3(1) read with explanation

(4) Piyush, cannot be made member of one person company as minor are prohibited from becoming a member of OPC - Rule 3(4).

Answer 3A(i)

Doctrine of 'Constructive Notice'

The company on incorporation is recognized as a separate and distinct legal entity from its members and can after incorporation have in its own name business and hold assets and liabilities.

The company being a legal person is governed by its constitution and framework which lay down its objectives, nature business, powers and how it will function. The set of these documents are called memorandum of association (the memorandum) and articles of association (the articles). The memorandum and articles of every company are required to be registered with the Registrar of Companies (the Registrar) under the Companies Act, 2013 (the Act). After incorporation, all the amendments in the memorandum and articles as approved by the members of the company are also required to registered with the Registrar.

As per Section 399 of the Companies Act, 2013 any person can inspect electronically, make a record or get a copy of any document filed by the company with the Registrar, on payment of the fees prescribed. The documents include the memorandum and articles of any company.

The office of the Registrar is public office and therefore the memorandum and articles and the amendments therein filed with the Registrar are public documents and available of inspection and if desired copies of the same can also be obtained.

It is the duty of every person dealing with the company to inspect the public documents i.e. memorandum and articles and the amendments therein and to make sure that his entering into the dealings with the company are in conformity with the provisions of the memorandum and articles of the company. Even if a person fails to read them, the law assumes that he is aware of the content of and provisions made in the documents. Such implied or presumed notice is called the doctrine of 'constructive notice' of the memorandum and articles of the company. Another effect of his is that a person dealing with the company is taken not only to have read the memorandum and articles but also to have understood them according to their propose meaning also. The person who is dealing with the company is presumed to have understood the objects for which the company is incorporated and of the powers and obligations of the directors etc. of the company.

As per the above doctrine, if a person contracts with the company, which is beyond its objects or powers, then he will not have any right under the contract against the company. Such contract cannot be enforced against the company, even if a person has acted in good faith.

Answer 3A(ii)

DPT-3

e-Form DPT-3 is required to be filed pursuant to Section 73 of the Companies Act, 2013 read with Rule 16 and 16A of the Companies (Acceptance of Deposits) Rules 2014.

- A periodic return by every company other than Government company to which the Companies (Acceptance of Deposit) Rules, 2014 apply, shall on or before the 30th day of June, of every year, file with the Registrar, a return in Form DPT-3 along with prescribed fees and furnish the information contained therein as on the 31st day of March of that year duly audited by the auditor of the company.

  Form DPT-3 is used for filing return of deposit or particulars of transaction not considered as deposit or both by every company other than Government company.

- Additionally, there has also been a requirement of filing a one-time return by every company other than Government company of outstanding receipt of money or loan by a company but not considered as deposits, in terms of clause (c) of sub-rule 1 of rule 2 from the 01st April, 2014 to 31st March 2019, as specified in Form DPT-3 within ninety days from 31st March, 2019 along with the prescribed fees.

Answer 3A(iii)

DIR-3 KYC

Rule 12A of the Companies (Appointment and Qualification of Directors) Rules 2014 provides that every individual who holds a Director's Identification Number (DIN) as on 31st March of a financial year shall submit e-form DIR-3 KYC for the said financial year to the Central Government on or before the 30th September of immediate next financial year. In case of failure to submit the e-form before the stipulated time, the DIN shall be deactivated by the Government and shall be re-activated only after e-form DIR-3 KYC is filed with necessary fee.

Where an individual who has already submitted e-form DIR-3 KYC in relation to any previous financial year, submits web-form DIR-3 KYC-WEB through the web service in relation to any subsequent financial year it shall be deemed to be compliance of the provisions of this rule for the said financial year.

However, in case an individual desires to update his personal mobile number or the e-mail address, as the case may be, he shall update the same by submitting e-form DIR-3 KYC only.

Answer 3A(iv)

INC-22

Section 12 of the Companies Act, 2013 provides that every company shall within 30 days of its incorporation and at all times thereafter have a registered office and provide to the Registrar a verification of the Registered Office of the Company in form INC-22 along with the prescribed fees confirming the details of the Registered Office.

There shall be attached to said Form, any of the following documents, namely:-

(a) the registered document of the title of the premises of the registered office in the name of the company; or

(b) the notarized copy of lease or rent agreement in the name of the company along with a copy of rent paid receipt not older than one month;

(c) the authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the company as its registered office; and

(d) the proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.

Question 4

(a) State the matters not to be dealt with by the Board of Directors in a meeting through video conferencing or other audio-visual means.

(b) Narrate the circumstances in which the Registrar of Companies can remove the name of a company.

(c) Briefly state the provisions of Singapore Companies Act in respect of treasury shares.

(d) Ahuja, Managing Director of PQR Limited is convicted and sentenced to pay fine for violation of the provisions of the Factories Act, 1948. A shareholder has filed a petition seeking directions that Ahuja should vacate his position as the Managing Director. Discuss the provisions of the Companies Act, 2013 and opine if directions as requested in the petition can be passed. (4 marks each)

Answer 4(a)

The provisions for the matters not to be dealt with by the Board of Directors in a meeting through video conferencing or other audio visual means made in Section 173 (2) of the Companies Act, 2013 (the Act) and Rule 4 of the Companies (Meetings of the Board and its Powers) Rules, 2014 (the Rules) are discussed as below.

Section 173(2) provides that-

The participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Rule 4 further stipulates the following matters which shall not be dealt with in any meeting held through video conferencing or other audio visual means such as:

(i) the approval of the annual financial statements;

(ii) the approval of the Board's report;

(iii) the approval of the prospectus;

(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the Board under Sub section [1] of Section 134 of the Act and

(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Provided that where there is quorum presence in a meeting through physical presence of Directors, any other Director may participate conferencing through video or other audio visual means.

Answer 4(b)

Section 248 of the Companies Act, 2013 provides that the Registrar of Companies can start the process of removing the name of a company if it has reasonable cause to believe that -

1. The company has failed to commence its business within one year of its incorporation;
2. The company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under Section 455 of the said Act; or
3. The subscribers to the Memorandum of Association have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred eighty days of its incorporation under Section 10A(1); or
4. The company is not carrying on any business or operations as revealed after the physical verification carried out under Section 12(9) of the said Act.

Answer 4(c)

The provisions in respect of treasury shares made in Section 76H of the Singapore Companies Act are briefly stated as under.

(1) Where ordinary shares or stock are purchased or otherwise acquired by a company in accordance with the provisions of the Act, the company may:

(a) hold the shares or stock (or any one of them) or

(b) deal with any of them, at any time, as provided hereunder.

(2) Where shares are held as treasury shares, a company may at any time:

(a) sell the same (or any of them) for cash;

(b) transfer the shares(or any of them) for the purposes of or pursuant to any share scheme, whether for employees, directors or other persons;

(c) transfer the shares (or any of them) as consideration for the acquisition of shares in or assets of another company or assets of a person;

(d) cancel the shares (or any of them); or

(e) sell, transfer or otherwise use the treasury shares for such other purposes as Minister may order prescribe.

Answer 4(d)

The relevant provisions of the Companies Act, 2013 (the Act) are given as under.

As per Section 167(1)(f) the office of director shall become vacant in case he is convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months.

As per Section 196(3)(d) no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

According to Part I of Schedule V,

No person shall be eligible for appointment as a managing director or whole-time director or manager of a company if he has been sentenced to imprisonment for any period or to a fine exceeding Rs.1,000/- for the conviction of an office under any of 19 Acts mentioned therein.

It need to be noted that in 19 Acts mentioned in Schedule V Part I, the Factories Act, 1948 or other labour legislations are not included.

Opinion

Hence, in view of the provisions of the Companies Act, 2013 and Schedule V discussed as above, it can be said that Ahuja, has not incurred any disqualification as Managing Director when he is convicted and sentenced to pay fine for violation of the provisions of the Factories Act, 1948 and therefore he will not be required to vacate his office. Therefore in the petition filed by the shareholder, no such orders will be passed for his vacating of office as Managing Director.

Question 5

(a) List the businesses that are required to be transacted by means of voting only though postal ballot as provided under the Companies Act, 2013 and the Rules made thereunder.

(b) XYZ Limited has during the financial year 2019-20, made private placement of 15,00,000 equity shares of ₹10 each at a issue price of ₹15 per share as below.

(i) No approval of the shareholders has been obtained for the private placement.

(ii) The subscription amount was deposited in the current account of the company and was utilized before allotment.

(iii) The private placement is made to 230 persons including 10 qualified institutional bidders.

(iv) Out of 70 persons to whom private placement is made 10 persons have paid the subscription amount in cash.

State the provisions of the Companies Act, 2013 and the Rules made thereunder and opine if the company has complied with the provisions in respect of the above. *(8 marks each)*

Answer 5(a)

Rule 22 (16) of the Companies (Management and Administration) Rules, 2014 provides that pursuant to Clause (a) of Sub- section (1) of Section 110 the following items of business shall be transacted only by means of voting through postal ballot:

(a) alteration of the objects clause of the memorandum and in the case of the company in existence immediately before the commencement of the Act, alteration of the main objects of the memorandum;

(b) alteration of articles of association in relation to insertion or removal of provisions which, under Section 2(68) are required to be included in the articles of the company in order to constitute it a private company;

(c) change in place of registered office outside the local limits of any city, town or village as per Section 12 (5);

(d) change in objects for which a company has raised money from public through prospectus and still has any unutilized amount out of the money so raised under Section 13(8),

(e) issue of shares with differential rights as to voting or dividend or otherwise under Sub-clause (ii) of Clause (a) of Section 43;

(f) variation in the rights attached to a class of shares or debentures or other securities as specified under Section 48;

(g) buyback of shares by a company under Section 68(1);

(h) election of a director under Section 151;

(i) sale of the whole or substantially the whole of an undertaking of a company as specified under Sub-clause (a) of Sub-section (1) of Section 180;

(j) giving loans or extending guarantee or providing security in excess of the limit specified under Section 186(3).

However, any aforesaid items of business as mentioned above, required to be transacted by means of postal ballot, may be transacted at a general meeting by a company which is required to provide the facility to members to vote by electronic means under Section 108 in the manner provided in that Section.

Further, one person companies and other companies having members upto 200 are not required to transact any business through postal ballot.

Answer 5(b)

(i) Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes that for the purposes of sub-section (2) and sub-section (3) of section 42 of the Companies Act, 2013, a company shall not make an offer or invitation to subscribe to securities through private placement unless the proposal has been previously approved by the shareholders of the company, by a special resolution for each of the offers or invitations.

However, XYZ Ltd. has made Private Placement during the financial year 2019-20 without taking approval of the Shareholders, hence the company has not complied with Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

(ii) First proviso to Section 42(6) of the Companies Act, 2013 prescribes that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than-

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.

Hence, the company has not complied with the provisions of Section 42 (6) as the subscription amount was deposited in the current account of the company and was utilized before allotment.

(iii) Section 42(1) read with Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes that a private placement shall be made only to a select group of persons who have been identified by the Board, whose number shall not exceed 200 in the aggregate in a financial year [excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of provisions of clause (b) of sub-section (1) of section 62], subject to such conditions as prescribed.

However, the company has not complied with the provisions of Section 42(2) read with Rule 14 as private placement is made to 230 persons (including 10 qualified institutional bidders) which is more than 200 the maximum number prescribed.

(iv) Section 42(4) every identified person willing to subscribe to the private placement issue shall apply in the private placement and application issued to such person along with subscription money paid either by cheque or demand draft or other banking channel and not by cash.

However, in the company XYZ Ltd. out of 70 persons to whom private placement is made 10 persons have paid the subscription amount in cash. Hence, the company has not complied with the provisions of Section 42(4) of the Companies Act, 2013.

Question 6

(a) Anshu is Director of ABC Limited. The Company has failed to redeem debentures on the due date of 30th June, 2018 and the default is still continuing. MNO Limited is considering to appoint Anshu as its Director. Advise MNO Limited.

(b) Discuss the procedure for conversion of private company into one person company.

(c) N Ltd wants to revise the financial statements of the Company voluntarily as they have found out certain errors in the statements due to which they are non-compliant with the provisions of the Act. Advise the Company on the provisions relating to such voluntary revision.

(d) Draft the required paragraph in the Board Report relating to the CSR activities of the Company for which it was mandatory to spend on CSR.

(4 marks each)

Answer 6(a)

Section 164 (2) of the Companies Act, 2013 (the Act) provides that:

No person who is or has been a director of a company which:

(a) has not filed financial statements or annul returns for any continuous period of three financial years; or

(b) has failed to repay the deposit accepted by it or pay interest thereon or to redeem any debentures on due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company failed to do so.

In view of the above provisions, the default by ABC Limited to redeem debentures on due date of 30th June, 2018 is still continuing, therefore MNO Limited cannot appoint Mr. Anshu as its Director.

Answer 6(b)

The procedure for conversion of private company into one person company, laid in Rule 7 of the Companies (Incorporation) Rules, 2014 is discussed below.

(1) A private company other than a company registered under Section 8 of the Act, may convert itself into one person company by passing a special resolution in the general meeting.

(2) Before passing such resolution, the company shall obtain no objection in writing from members and creditors.

(3) The one person company shall file copy of the special resolution with the Registrar of Companies within 30 days from the date of passing such resolution in Form No. MGT. 14.

(4) The company shall file an application in Form No. INC.6, for its conversion into one person company along with fees as provided and by attaching the following documents, namely:

  (i) the directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion;

  (ii) the list of members and list of creditors;

  (iii) the latest audited balance sheet and the profit and loss account; and

  (iv) the copy of no objection letter of secured creditors.

(5) On being satisfied and complied with requirements stated herein the Registrar of Companies shall issue the Certificate.

Answer 6(c)

Section 131(1) of the Companies Act, 2013 provides that if it appears to the directors of a company that the financial statements of the company or the report of the Board do not comply with the provisions of Section 129 or 134, then they can prepare a revised financial statement or a revised report of the Board in respect of any three preceding financial years after obtaining the approval of the Tribunal on an application made by the company and a copy of the order passed by the Tribunal shall be filed with the Registrar.

The Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into account the representations, if any, made by them before passing any order under this section.

Such revised financial statements or report shall not be prepared and filed more than once in a financial year. The detailed reasons for revision of sfuch financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

Answer 6(d)

Draft of the paragraph to be included in Board's Report regarding Corporate Social Responsibility

The Company has adopted a comprehensive CSR Policy outlining programmes, projects and activities that it plans to undertake falling under the purview of Section 135 read with Schedule VII of the Companies Act, 2013 and the Companies (Corporate Social Responsibility Policy) Rules, 2014.

The Company has attracted the provisions of Section 135 by virtue of the financial parameters indicated in the Section and hence had an obligation to spend a sum of Rs. 25 lakh during the financial year under review.

The Board of Directors has constituted a CSR Committee under the Chairmanship of Mr Saxena. The other members of the Committee are Mr Sinha, Professor of Sociology, University of Delhi and Mr Dubey, Professor of Economics, University of Kolkata.

In line with the policy, the Company had spent an amount of Rs. 26 lakh during the financial year under review, towards projects involving public healthcare and education as detailed in Annexure- 1.

***

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART A

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

Question 1

(a) In the course of Secretarial Audit, you discovered that the shareholders of Rajesh Agro Ltd. removed one director X in the Extra-ordinary General meeting held on 27th February, 2018 and the Board of directors of the company also forfeited his one share of ₹1,000 fully paid up and removed his name from the register of members. Whether the forfeiture of the said share is in accordance with law and legally tenable ? (5 marks)

(b) You are a practicing Company Secretary, have been awarded an assignment of Secretarial Audit by NMR Ltd. List out the check points to be taken care with regard to 'Register of Contracts' maintained by the company. (5 marks)

(c) Z, one of the director of Shyam International Ltd. leaked an insider information in the market for personal benefit. Ram, Secretarial auditor of the company, in the course of performance of his duties find out this offence which involved the amount of ₹2.40 crore. As a Secretarial Auditor of the company how would Ram report about this ? Also state the consequences of non-compliance by the Auditor under the Companies Act, 2013. (5 marks)

(d) List out the check points to be observed by Company Secretary while conducting Secretarial Audit with regard to quorum in the meetings of the Board of directors under Secretarial Standard–1. (5 marks)

(e) You are appointed as the Secretarial Auditor of Shakti Foods Ltd., a NSE listed company for conducting Secretarial Audit for the financial year 2018-19. During the audit you found that the satisfaction of charges has not been done. Advise the company as to the filing of form for satisfaction of charge and the fees payable for delayed filing of the said form. (5 marks)

OR (Alternative Question to Q. No. 1)

Question 1A

(i) Jain & Jain Company Ltd., a listed company wants to issue shares under Employees Stock Option under the Companies Act, 2013. For that purpose, the company has to pass a special resolution as required under section 62(1)(b) of the Companies Act, 2013.

Discuss what are the disclosures that are to be made in the Explanatory Statement annexed to the notice for passing special resolution ? (5 marks)

(ii) PQR Ltd. wants to declare interim dividend during the financial year 2019-20. The company incurred losses for the first quarter ended 30th June, 2019 of the current year. Can the company declare interim dividend ? What are the check points you should keep in mind as Secretarial Auditor in respect of declaration of dividend ? (5 marks)

(iii) Comment on the following :

(1) A practicing Company Secretary can act as a Registered Valuer under the provisions of the Companies Act, 2013 and other applicable laws for the time being in force. (3 marks)

(2) Limits prescribed by ICSI for the issue of Secretarial Audit Report. (1 mark)

(3) The Secretarial Auditor is a tenure based appointment. (1 mark)

(iv) The Companies (Restriction of Number of Layers) Rules, 2017 imposes restrictions on number of layers for certain classes of holding companies. Which are the companies exempted from such restrictions ? (5 marks)

(v) Pika Industries Ltd. appointed you as Company Secretary. The company is engaged in the activities covered under FDI. You are requested to list out the prohibited activities/ sector(s) as provided under FDI Policy. Which type of instruments can be issued to a person resident outside India ? (5 marks)

Answer 1(a)

The Companies Act, 2013 does not contain any provision for forfeiture of fully paid up shares. But, the companies normally make the provisions in the Articles of Association along with the procedure for forfeiting the shares only when the shares have already been allotted and not fully paid-up to the full extent of the face value and premium, if any.

Even assuming the directors were authorized to cancel the shares, the said directors of the Company cannot utilize their fiduciary powers over the shares purely for the purpose of cancellation of the shares of the minority shareholders to improve their voting power. They cannot be allowed to exercise such powers which might have been delegated by the company to the Board. There was no authority with the Directors to forfeit the fully paid shares of the removed director X. The whole action is completely illegal, null and void.

Answer 1(b)

The following check points are to be taken care of with regard to Register of Contracts of NMR Limited:

1. Whether the company has maintained one or more registers in Form MBP-4 as prescribed under Rule 16 of the Companies (Meetings of Board and its Powers) Rules, 2014.

2. Whether the company has entered in Form MBP-4 within 30 days the particulars of-

   (a) company or companies or bodies corporate, firms or other association of

individuals, in which any director has any concern or interest, as mentioned under sub-section (1) of section 184 of the Companies Act, 2013.

Provided that the particulars of the company or companies or bodies corporate in which a director himself together with any other director holds two percent or less of the paid-up share capital would not be required to be entered in the register;

(b) contracts or arrangements with a body corporate or firm or other entity as mentioned under sub-section (2) of section 184, in which any director is, directly or indirectly, concerned or interested; and

(c) contracts or arrangements with a related party with respect to transactions to which section 188 applies.

3. Whether the contract or arrangement relates to the following:

(a) for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed five lakh rupees in the aggregate in any year; or

(b) by a banking company for the collection of bills in the ordinary course of its business.

If yes, register is not required to be maintained for the abovementioned contracts or arrangements.

4. The entries in the register shall be made at once, whenever there is a cause to make entry, in chronological order and shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

5. The register(s) is kept at the registered office of the company and is preserved permanently and is in the custody of the company secretary of the company or any other person authorised by the Board for the purpose.

6. The register(s) is signed by all the directors present at the succeeding meeting in which such contract or arrangement was considered.

7. The company shall provide extracts from such register to a member of the company on his request, within seven days from the date on which such request is made upon the payment of such fee as may be specified in the articles of the company but not exceeding ten rupees per page.

Answer 1(c)

No director is allowed to provide any Insider information (Unpublished Price Sensitive information) to any person except authorized persons (as per his functioning in the company or appointed by central government or state government).

Duty to Report Fraud : Section 143(12) read with the Rule 13 of the Companies (Audit and Auditors) Rules, 2014 provides that if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud which involves or is expected to involve individually an amount of rupees one crore or

above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government or to the Audit Committee of the Board.

The auditor shall report the matter to the Central Government as under:

a) the auditor to report the matter to the Board/ Audit Committee, as the case may be, immediately but not later than 2 days of his knowledge of the fraud, seeking their reply or observations within 45 days;

b) on receipt of such reply, the auditor to forward his report and the reply of the Board/Audit Committee along with his comments to the Central Government within 15 days from the date of receipt of such reply or observations;

c) in case the auditor fails to get any reply or observations from the Board/ Audit Committee within 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;

d) the report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same.

e) the report shall be in the form of a statement as specified in Form ADT-4.

Penalty for Incorrect Audit Report : While the Companies Act, 2013 provides a new and significant area of practice for Company Secretaries. It casts immense responsibility on the practicing company secretaries. Company Secretaries must take care while conducting such audits. Any failure or lapse on the part of secretarial auditor may attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980.

Further, Section 448 of Companies Act, 2013 deals with penalty for false statements. The section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement, —

which is false in any material particulars, knowing it to be false; or

which omits any material fact, knowing it to be material, he shall be liable under Section 447.

Section 447 deals with punishment for fraud which provides that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

In view of this, a company secretary in practice will be attracting the penal provisions of Section 448, for any false statement in any material particulars or omission of any material fact in the Secretarial Audit Report. However, a person will be penalised under

section 448 in case he makes a statement, which is false in any material particulars, knowing it to be false, or which omits any material fact knowing it to be material.

It is pertinent to note that Section 448 applies to "any person". In view of this, a company secretary in practice, who is an independent professional, will be attracting the penalty, as prescribed in Section 448 in case his observations in the secretarial audit report turns out to be false or omits any material fact, knowing it to be false or material, along with the other signatories to the Annual Return. Section 204(4) also cast responsibility on the company secretary in practice in case of default of provision of Section 204 and shall be liable to a penalty of two lakh rupees.

Answer 1(d)

Check list on quorum in the meetings of the Board of Directors as per Secretarial Standard-1:

- Whether the requisite quorum was present in each meeting?
- Whether the quorum was present throughout the meeting and no business was transacted when the quorum was not present?
- Where an interested director was present, whether the interested director had disclosed his interest at the Board meeting where the transaction was considered and abstained from participating in the discussions and voting thereon?
- Whether the interested directors were counted for quorum or not and they were present, or were kept off if participating through electronic mode, during discussion and voting on items in which they were interested.
- Whether a director participating in a meeting through electronic mode has been counted for quorum? If so, whether in respect of restricted items under the Act or any other law?
- Whether Stipulated Quorum requirements for Meetings of the Committees were followed? i.e.the Quorum for a Meeting of the Board shall be one-third of the total strength of the Board, or two Directors, whichever is higher. Any fraction for calculating one-third shall be rounded off to the next one.
- Check that the restricted item of business at the Board and audit committee meetings was not approved through electronic mode.
- Check if a Meeting of the Board could not be held for want of Quorum, then, unless otherwise provided in the Articles, the Meeting shall automatically stand adjourned to the same day in the next week, at the same time and place or, if that day is a National Holiday, to the next succeeding day which is not a National Holiday, at the same time and place. If there is no Quorum at the adjourned Meeting also, the Meeting shall stand cancelled.

Answer 1(e)

When any company borrows any secured loan from any banks or financial institution and repays the same then it is termed as "Satisfaction of Charge". On repayment of loan it is mandatory to report Registrar of Companies (ROC) regarding satisfaction of charge in E Form CHG - 4 along with the prescribed fee.

As per Section 83 read with the Companies (Registration of Charges) Rules, 2014- Satisfaction of Charge in E Form CHG - 4 should be filed within 30 days from the date of payment or complete satisfaction of charge. The fee payable in this case is normal applicable fee. Registrar enters a memorandum of satisfaction of charge in full, and shall issue a certificate of registration of satisfaction of charge in Form No.CHG-5.

If the company fails to file E Form CHG - 4 within 30 days, the company may file the Form CHG – 4 up to 300 days from the date of payment or such satisfaction of charge. The fee payable is normal fee + additional fee as prescribed.

If the company fails to file E Form CHG-4 within 300 days the company may file Form CHG -8 beyond 300 days but the company is to pay the normal fee + additional fee + condonation fee for registration of the satisfaction of the charges.

Answer 1A(i)

The Companies Act, 2013 lays down the provisions for the issue of Employees Stock Option under section 62(1)(b) and Rule 12 of the Companies (Share Capital and Debentures) Rules, 2014. The company has to pass the special resolution under section 62(1)(b) for the above said purpose. The company shall make the following disclosures in the explanatory statement annexed to the notice for passing special resolution-

- the total number of stock options to be granted;
- identification of classes of employees entitled to participate in the Employees stock Option;
- the appraisal process for determining the eligibility of employees to Employees Stock Option scheme;
- the requirements of vesting and period of vesting;
- the maximum period within which the options shall be vested;
- the exercise price or the formula for arriving at the same;
- the exercise period and the process of exercise;
- the lock in period;
- the maximum number of options to be granted per employee and in aggregate;
- the method which the company shall use to value its options;
- the conditions under which options vested in employees may lapse;
- the specified time period within which the employee shall exercise the vested options in the event of proposed termination of employment or resignation of employee; and
- a statement to the effect that the company shall comply with the applicable accounting standard.

Answer 1A(ii)

Section 123(3) of the Companies Act, 2013 provides that the Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the

surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.

Therefore, the company can declare interim dividend inspite of losses in the first quarter ended 30th June, 2019 of the current year. However, the interim dividend shall be declared at or below the average dividends declared by the company during immediately preceding three financial years.

Check points in respect of declaration of dividend are as under:

1. The amount of dividend, including interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.
2. The amount of dividend, including interim dividend, was deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.
3. The company has paid dividend within 30 days from the date of declaration.
4. The company has transferred the total amount of dividend which remains unpaid or unclaimed for 30 days from the date of declaration to unpaid dividend account within seven days from the expiry of the said 30 days.
5. The company has prepared a statement containing the names and other details to whom the unpaid dividend is to be paid alongwith the amount of unpaid dividend and place the same on the website of the company and also on any other web-site approved by the Central Government for this purpose, within 90 days after holding of AGM or the date on which it should have been held.
6. In case of inadequate profits or absence of profits, the rate of dividend declared has not exceeded the average at the rates at which dividend was declared by it in the three years immediately preceding that year.
7. The company has not declared and paid any dividend from reserves other than free reserves as defined in Section 2(43) of the Companies Act, 2013.
8. The total amount to be drawn from such accumulated profits shall not exceed one – tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.
9. Ensure that carried over previous losses and depreciation not provided in previous year(s) are set off against profits of the Company of the current year.
10. The dividend is paid by the company by cheque or warrant or by any electronic mode.
11. The company has before declaration of dividend transferred such percentage of profits to reserves as decided.

Answer 1A(iii)

(1) As per section 247 of the Companies Act, 2013 read with the Companies (Registered Valuers and Valuation) Rules, 2017, to become a registered valuer under the Companies Act, 2013:

- The Practicing Company Secretary (PCS) should have three years of experience from the date of registration as a member with the Institute of Company Secretaries of India is eligible to become a registered valuer.
- For this purpose, he should be a registered member of Registered Valuer organization.
- He should be recommended by the Registered Valuer Organization of which he is a member for registration as a valuer.
- He should pass the valuation examination conducted by Insolvency and Bankruptcy Board of India who is the Authority for Registered Valuers, within three years preceding the date of making an application for registration as a member.

(2) The Council of the Institute at its 235th meeting held on February 11, 2016 reviewed the existing limits for the issue of Secretarial Audit Reports and decided as below:

- 10 Secretarial Audits per partner/ PCS, and
- an additional limit of 5 secretarial audits per partner/PCS in case the unit is peer reviewed.

These limits will be applicable for the Secretarial Audit Reports to be issued for the financial year 2016-17 onwards.

(3) There is no provision in the Companies Act, 2013 or the rules and regulations made there under as to the tenure for the appointment of Secretarial Auditor like that of statutory auditor. It may be presumed that the appointment is for the reporting period and shall come to an end on submission of secretarial audit report to the Board.

Answer 1A(iv)

Rule 2(1) the Companies (Restriction on Number of Layers) Rules, 2017 provides that no company other than a company specified in Sub Rule 2, shall have more than two layers of subsidiaries.

Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country:

Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

Rule 2(2) provides that the provisions of this rule shall not apply to the following classes of companies, namely: -

- A banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949;

- A non-banking financial company as defined in clause (f) of Section 45-I of the Reserve Bank of India Act, 1934 which is registered with the Reserve Bank of India and considered as systematically important non-banking financial company by the Reserve Bank of India;
- An insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and the Insurance Regulatory Development Authority Act, 1999;
- A Government company referred to in clause (45) of section 2 of the Companies Act, 2013..

Answer 1A(v)

Prohibited activities/ sector as provided under FDI Policy:

1. Lottery business including Government/ private lottery, online lotteries, etc.
2. Gambling and betting including casinos, etc.
3. Chit funds
4. Nidhi company
5. Trading in TDRS
6. Real estate business or construction of farm houses

   'Real estate business' shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.
7. Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
8. Activities/ sectors not open to private sector investment, e.g., Atomic Energy and Railway Transport (other than Mass Rapid Transport Systems). Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities.

Type of instruments to be issued to person resident outside India

Indian companies can issue equity shares, fully and mandatorily convertible debentures and fully and mandatorily convertible preference shares.

Issue of other types of preference shares such as non-convertible, optionally convertible or partially convertible, has to be in accordance with the guidelines applicable for External Commercial Borrowings (ECBs) issued by RBI.

PART B

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

Question 2

(a) You are a Company Secretary in XYZ Ltd. and also the Corporate Compliance officer of the said company. The Chairman of the company directed you to

prepare a report on the compliance activities under compliance management. What are the activities to be included in the report ? (5 marks)

(b) Industries are required to be located, striking a balance between economic and environmental considerations. What are the factors that must be recognized in such a selected site under the environmental guidelines issued by Ministry of Environment ? (5 marks)

(c) GHI Ltd. wants to acquire RST Ltd., the target company. Prepare a check list to undertake a preliminary study on the target company before taking over. (5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) As a Company Secretary, what are the corporate governance process to be kept in mind with respect to related party transactions under the Securities and Exchange Board of India (Listing Obligation and Disclosure Requirement) Regulations, 2015 ? (5 marks)

(ii) MNR International Ltd. wants to raise funds through issue of Foreign Currency Convertible Bonds (FCCBs) through automatic route. As a Compliance Officer of the company answer the following :

(a) Ceiling for issue of FCCB in any one financial year.

(b) The maturity period of FCCB.

(c) Allowable limit of expenses for the issue of FCCB.

(d) Usage of FCCB proceeds.

(e) Furnishing of report to Reserve Bank of India on completion of the issue. (1×5=5 marks)

(iii) What are Anti-competitive agreements ? What are the various types of Anti-competitive agreements ? (5 marks)

Answer 2(a)

The Corporate Compliance Officer is the custodian of the Corporate Compliance Plan. The Corporate Compliance Officer should report on the compliance activities that include but not limited to-

- To establish and review the centralized compliance program in tune with the business environment strategic decisions of the company and the regulatory amendments;
- To guide and educate the Board on various compliances, regulatory and policy based compliances.
- To devise clear compliance structure;
- Liaison between Board, Functional heads and compliance staff;

- To advise the compliance department regularly and as and when required;
- To devise annual compliance plan;
- To define the role and responsibilities of functional units and disseminate the information;
- To organize training for the Board and the staff on ethics and compliance;
- To establish and strengthen the compliance dashboard;
- Inform the board and the functional departments about changes in the applicable regulatory landscape and its implications;
- To establish processes for effective monitoring and control;
- To present quarterly compliance report before the Board.

Answer 2(b)

To fulfill the requirements of human civilizations starting from essential to luxurious requirement, we need various Industries but off course not on the cost of life and health hazards. Industries are required to be located, striking a balance between economic and environmental considerations.

Economic and social factors are recognized and assessed while setting up an industry. Environmental factors must be taken into consideration in industrial setting up. Proximity of water sources, highway, major settlements, markets for products and raw material resources is desired for economy of production, but all the above listed items must be away for environmental protection. Industries are, therefore, required to be sited, striking a balance between economic and environmental considerations. In such a selected site, the following factors must be recognized

- No forest land shall be converted into non-forest activity for the sustenance of the industry.
- No prime agricultural land shall be converted into industrial site.
- Within the acquired site the industry must locate itself at the lowest location to remain obscured from general sight.
- Land acquired shall be sufficiently large to provide space for appropriate treatment of waste water still left for treatment after maximum possible reuse and recycle. Reclaimed (treated) waste water shall be used to raise green belt and to create water body for aesthetics, recreation and if possible, for aquaculture. The green belt shall be 0.5 kms wide around the battery limit of the industry. For industry having odour problem it shall be one km wide.
- The green belt between two adjoining large scale industries shall be one kilo meter.
- Enough space should be provided for storage of solid wastes so that these could be available for possible reuse.
- Lay out and form of the industry that may come up in the area must conform to the landscape of the area without affecting the scenic features of that place.

- Associated township of the industry must be created at a space having physiographic barrier between the industry and development.
- Each industry is required to maintain three ambient air quality measuring stations within 120 degree angle between stations.

Answer 2(c)

Preliminary Examination of a target company include the following:

The acquirer has to undertake a preliminary study on the target company, before taking for over a company. The following points may be considered-

- information has to be collected on Target Company and to be analyzed on financial and legal angle;
- Register of Members is to be examined to verify the profile of the shareholders;
- title of the target company with respect to immovable properties may be verified;
- financial statements of target company have to be examined;
- examination of Articles and Memorandum of Association of the Company;
- examination of charges created by the company;
- applicability of FEMA provisions if any relating to FDI has to be looked into;
- Deference between intrinsic value and market value
- Import and Export of technology, if any;
- Any specific know how (IPR) – Intellectual Property right.
- business prospects etc.

The above list is not an exhaustive one and it varies depending on size of the nature of the company.

Answer 2A(i)

Related party transactions : Regulation (23) of SEBI (Listing Obligation and Disclosure Requirement) Regulations, 2015, covers the following:

(1) The listed entity shall formulate a policy on materiality of related party transactions and on dealing with related party transactions including clear threshold limits duly approved by the board of directors and such policy shall be reviewed by the board of directors at least once every three years and updated accordingly:

Explanation.- A transaction with a related party shall be considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a financial year, exceeds ten percent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

A transaction involving payments made to a related party with respect to brand usage or royalty shall be considered material if the transaction(s) to be entered

into individually or taken together with previous transactions during a financial year, exceed five percent of the annual consolidated turnover of the listed entity as per the last audited financial statements of the listed entity.

(2) All related party transactions shall require prior approval of the audit committee.

(3) Audit committee may grant omnibus approval for related party transactions proposed to be entered into by the listed entity subject to the following conditions, namely:

(a) the audit committee shall lay down the criteria for granting the omnibus approval in line with the policy on related party transactions of the listed entity and such approval shall be applicable in respect of transactions which are repetitive in nature;

(b) the audit committee shall satisfy itself regarding the need for such omnibus approval and that such approval is in the interest of the listed entity;

(c) the omnibus approval shall specify:

i. the name(s) of the related party, nature of transaction, period of transaction, maximum amount of transactions that shall be entered into,

ii. the indicative base price / current contracted price and the formula for variation in the price if any; and

iii. such other conditions as the audit committee may deem fit:

Provided that where the need for related party transaction cannot be foreseen and aforesaid details are not available, audit committee may grant omnibus approval for such transactions subject to their value not exceeding rupees one crore per transaction.

(d) The audit committee shall review, atleast on a quarterly basis, the details of related party transactions entered into by the listed entity pursuant to each of the omnibus approvals given.

(e) Such omnibus approvals shall be valid for a period not exceeding one year and shall require fresh approvals after the expiry of one year:

(4) All material related party transactions shall require approval of the shareholders through resolution and the related parties shall abstain from voting on such resolutions whether the entity is a related party to the particular transaction or not.

(5) The provisions of sub-regulations (2), (3) and (4) shall not be applicable in the following cases: (a) transactions entered into between two government companies;

(b) transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

Explanation.-For the purpose of clause (a), "government company(ies)" means Government company as defined in sub-section (45) of section 2 of the Companies Act, 2013.

(6) The provisions of this regulation shall be applicable to all prospective transactions.

(7) For the purpose of this regulation, all entities falling under the definition of related parties shall abstain from voting irrespective of whether the entity is a party to the particular transaction or not.

(8) All existing material related party contracts or arrangements entered into prior to the date of notification of these regulations and which may continue beyond such date shall be placed for approval of the shareholders in the first General Meeting subsequent to notification of these regulations.

Answer 2A(ii)

(a) Ceiling for issue of FCCB in any one financial year. - US $500 million.

(b) The maturity period of FCCB – not less than 5 years.

(c) Allowable limit of expenses for the issue of FCCB - The issue related expenses shall not exceed 4% of issue size and in case of private placement, shall not exceed 2% of the issue size.

(d) Usage of FCCB proceeds - The FCCB proceeds shall not be used for investment in stock market, and may be used for such purposes for which ECB proceeds are permitted to be utilized under the ECB Scheme.

(e) Furnishing of report to Reserve Bank of India on completion of the issue – The issuing entity shall, within thirty days from the date of completion of the issue, furnish a report to the concerned Regional Office of the Reserve Bank of India through a designated branch of an Authorized dealer giving the details and documents as under-

- Total amount of FCCB issued;
- Names of investors' resident outside India and number of FCCBs issued to each of them.

Answer 2A(iii)

Anti-competitive Agreements

Anti-competitive agreements are the agreements between enterprises or association of enterprises in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services which cause or likely to cause an appreciable adverse effect on competition within India.

The Anti-competitive agreements are of two types – horizontal agreements and vertical agreements.

Horizontal agreements

- Price fixing section 3(3)(a) of the Competition Act, 2002 - Price fixing occurs when two or more firms agree to trade or fix the prices in order to increase their profits by reducing competition. It is an attempt at forming a collective monopoly.
- Limited the production or supply [section 3(3)(b) of the Competition Act, 2002] –

The object of these agreements or arrangements is to eliminate the competition by limiting the quantity.

- Allocation of market share [section 3(3)(c) of the Competition Act, 2002] - It is the agreement among enterprises that will have exclusive or preferential rights in a designated area for sale, production or provision of services or otherwise.
- Bid rigging (section 3(3(d) of the Competition Act, 2002] – An agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Bid rigging is a particular form of collusive price fixing behaviour by which firms coordinate their bids.

Vertical agreements

- Tie-in-arrangement [section 3(4)(a) of the Competition Act, 2002] – It is an agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods.
- Exclusive supply agreement [section 3(4)(b) of the Competition Act, 2002] - Exclusive supply agreement or exclusive dealings means an arrangement of practice whereby a manufacturer or supplier requires to deal exclusively in his products not in the products of his competitors.
- Exclusive distribution agreement [section 3(4)(c) of the Competition Act, 2002] - Exclusive distribution agreement or exclusive territory includes agreement between enterprises that will have exclusive or preferential rights in a designated area for sales production, performance of services.
- Refusal to deal [section 3(4)(d) of the Competition Act, 2002] – The practice of restricting persons or class of persons to whom the goods are sold or from whom the goods are bought.
- Resale price maintenance [section 3(4)(e) of the Competition Act, 2002] - It is a situation in which the supplier forces the distributor/retail seller to sell the goods to the customer at prices stipulated by the supplier.

Question 3

(a) Pace Power Corporation Ltd. proposed to be amalgamated with Universal Power Ltd., for which a scheme of amalgamation is to be prepared. Detail out the points which should be covered in the Scheme of amalgamation. (8 marks)

(b) What are the possible legal hurdles in carrying out a legal due diligence of the target company and what are the actions to be taken to break the said hurdles in due diligence? (7 marks)

Answer 3(a)

The scheme of amalgamation to be prepared by the company should contain inter-alia the following information:

1. Definitions of transferor and transferee as well as the definition of the undertaking of the transferor company.

2. Authorised, issued and subscribed paid up capital of the transferor and transferee companies.
3. Basis of scheme should be explained briefly on the recommendation of valuation report, covering transfer of assets/liabilities, specified date, reduction or consolidation of capital, application to financial institutions as lead institution for permission, etc.
4. Change of name, object and accounting year.
5. Protection of employment.
6. Dividend position and prospects.
7. Management structure, indicating the number of directors of the transferee company and the transferor company.
8. Applications under Sections 230 and 230 of the Companies Act, 2013 to obtain approval from the Tribunal.
9. Expenses of amalgamation.
10. Conditions of the scheme to become effective and operative and the effective date of amalgamation

Answer 3(b)

Possible hurdles and remedial actions in legal due diligence:

The possible hurdles that may arise in carrying out a legal due diligence of the target company are as under:

- *Non availability of information* – In many occasions, when a person carries out due diligence, the required information may not be available or insufficient to derive a complete picture.
- *Unwillingness of target company's personnel in providing the complete information* - Non co-operation of target company's personnel may also prove to be a major hurdle during due diligence process. Sometimes the available information would be pretended as not available.
- *Providing of incorrect information* - Providing of incorrect information by the target personnel also acts as a major hurdle in the due diligence process.
- *Complex tax policies and hidden liabilities* – Complex tax policies and structures may create a number of hidden tax liabilities which may not be easy to track.
- *Multiple regulations and its applicability* - Owing to the new and emerging legislations, it is difficult to interpret whether a specific legislation is applicable for business and getting legal opinion on the same would prove to be very costly.
- *Process in providing data* – Multiple Layers of review and scrutiny before data is provided for due diligence also hinders and delays the due diligence process.
- *Absence of proper MIS* – Due diligence process would become difficult if there is no proper MIS in the company.

The actions to be taken to break hurdles in due diligence:

- To focus on the follow up questions;
- To ask several people the same questions and utilize appropriate professional skepticism;
- Police persistence may help to overcome this attitude;
- To have independent check with regulatory authorities.

Question 4

(a) The All-India Financial Institution while granting term loans to companies insist on certain formalities to be completed by a company availing such loan. These include furnishing of certificates by the Company Secretaries in practice. What are the certificates and their contents ?

(b) As a practicing Company Secretary briefly describe the procedure for conducting the meeting of creditors of the transferor and transferee companies in a merger.

(c) Define 'SME Exchange'. What are the exemptions available for securities listed at SME Exchange? (5 marks each)

Answer 4(a)

The All-India Financial Institutions while granting term loans to companies insist on certain formalities to be completed by a company availing such loans. In this regards the practicing company secretaries are required to furnish the following certificates-

- Necessary power of a company and its directors to enter into an agreement;
- Borrowing limits of a company under section 180(1) (c) of the Companies Act, 2013;
- Including the details of share capital -authorized, issued, subscribed and paid up and the actual borrowing;
- List of members of a company;
- Copies of resolutions passed at company meeting to be furnished to financial institutions.

Many State Financial/Industrial Investment/Development Corporations have also agreed to accept the certificates issued by the Company Secretaries in Practice, in regard to all/some of the aforesaid matters.

Answer 4(b)

The procedure for conducting the meeting of creditors of the transferor and transferee companies in a merger-

- An application is to be made before the National Company Law Tribunal concerned both by the Transferor Company and the Transferee Company under Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 in Form No. NCLT – I along with a notice of admission in Form No. NCLT - 2, for direction to convene the meeting.

- The affidavit in support of application will be in Form No. NCLT - 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.
- After considering the application in NCLT – 1, the National Company Law Tribunal can given the instructions regarding the holding and concluding of meeting, fixing the time and place of the meeting or meetings, appointing a Chairperson, the procedure to be followed at the meeting, including voting in person or by proxy or by postal ballot or by voting through electronic means, the time which the Chairperson of the meeting is required to report the result of the meeting to the National Company Law Tribunal and such other matters as the National Company Law Tribunal may deem necessary.
- The National Company Law Tribunal may dispense with the calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise and agreement.

Answer 4(c)

'SME Exchange' means a trading platform of a recognized stock exchange having nationwide trading terminals by SEBI to list the specified securities issued and includes a stock exchange granted recognition for this purpose but does not include the Main Board, a stock exchange other SME exchange.

The exemptions available for securities listed at SME Exchange are as under:

- Filing of draft offer document [Regulation 6(1)(2) and (3) of SEBI (ICDR) Regulation, 2009]
- In principal approval from the recognized exchanges (Regulation 7 of SEBI (ICDR) Regulation, 2009)
- Submission of certain documents before opening of an issue (Regulation 8 of SEBI (ICDR) Regulation, 2009)
- Draft offer document to be made to the public (Regulation 9 of SEBI (ICDR) Regulation, 2009)
- Fast Track issues (Regulation 10) Conditions of initial public offer (Regulation 26 of SEBI (ICDR) Regulation, 2009)
- Conditions for further public offer (Regulation 27 of SEBI (ICDR) Regulation, 2009)
- Minimum application value related provisions [Regulation 49(1) of SEBI (ICDR) Regulation, 2009]

Question 5

(a) Write short notes on the following :

(i) Two-way fungibility of GDRs;

(ii) Relevant market under Competition Act, 2002; and

(iii) Elements of ISO 14001 Standard for Environment. (3 marks each)

(b) (i) The funds borrowed from banks/financial institutions must be used by the companyfor the purpose for which they were borrowed. Briefly explain the term 'Diversion and siphoning of funds'. (3 marks)

(ii) For what purposes the following forms are required to be filed under theCompanies Act, 2013 :

(a) FC – 4;

(b) MBP – 3;

(c) PAS – 6. (1×3=3 marks)

Answer 5(a)(i)

Two-way fungibility of Global Depositary Receipts (GDRs)

GDR issued can be converted into underlying assets of the issuing company on the choice of the investors. After converting into underlying assets, investor will receive all benefit of new instruments but lose the benefit of GDR. If investor is not finding the conversion very lucrative or fruitful, can convert it again into GDR and will start enjoying the same benefit of GDR again. This is known as two way fungibility or Reverse Fungibility.

A limited Two-way Fungibility scheme has been put in place by the Government of India for GDRs. Under this scheme a stock broker in India, registered with Securities Exchange and Board of India can purchase shares of an Indian company from the market for conversion into GDRs based on the instructions received from overseas investors. Reissuance of GDRs would be permitted to the extent of GDRs which have been redeemed into underlying shares and sold in Indian market. The scheme thus, provides for purchase and re-conversion of only as many shares into GDRs which are equal to or less than the number of shares emerging on surrender of GDRs which have been actually sold in the market.

Answer 5(a)(ii)

Relevant market under Competition Act, 2002

The term Relevant market is very significant to identify whether an enterprise is in a dominant position or not.

Section 2(r) of the Competition Act, 2002 defines the expression "relevant market' as the market which may be determined by the Commission with reference to the relevant product market' or the relevant geographic market or with reference to both the markets.

The expression 'Relevant geographic market' is defined under section 2(s) of the Competition Act, 2002, as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

The expression 'Relevant product market' is defined under Section 2(t) of the Competition Act, 2002, as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Answer 5(a)(iii)

Elements of ISO 14001 Standard for environment

ISO 14001 contains the core elements of an effective environmental management system. It can be applied to both service and manufacturing sectors. The main elements of the standard are-

- environmental policy;
- planning;
- implementation and operation;
- checking and corrective action;
- management review;
- continuous improvement.

Answer 5(b)(i)

Diversion and Siphoning of funds

The terms "diversion of funds" and "siphoning of funds" should construe to mean the following: -

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

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

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

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

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

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

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

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

The identification of the willful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/

incidents. The default to be categorised as willful must be intentional, deliberate and calculated.

Answer 5(b)(ii)

(a) FC -4 – Annual Return of a foreign company.

(b) MBP – 3 – Register of investments not held in the name of the company.

(c) PAS - 6 – Reconciliation of Share Capital Audit Report (half yearly)

Question 6

(a) Discuss the accounting principles to be used in preparation and disclosure of financial reports under SEBI (LODR) Regulations, 2015 by HDB Bank Ltd., a foreign listed entity, which has listed its Indian Depository Receipts.

(b) Due diligence exercise these days is carried out through creation of Virtual Data Room in the form of internet site where all the confidential/material business information is stored. What are the steps involved in creation of a Virtual Data Room ?

(c) What are the directions placed by the Supreme Court in 'M.C. Mehta Vs. Union of India', AIR 1115, 1988, SCR (2) 530 to the Government to create awareness of environment among people ? (5 marks each)

Answer 6(a)

Accounting principles to be used in preparation and disclosure of financial reports under SEBI (LODR) Regulations, 2015

Schedule IV - Part B of SEBI (LODR) Regulations, 2015 requires the accounting principles that are to be used in preparation and disclosure of financial reports as detailed below-

- The listed entity may prepare and disclose its financial results in accordance with Indian GAAP or International Financial Reporting Standards IFRS or US GAAP.
- In case the listed entity prepares and discloses the financial results as per US GAAP, a reconciliation statement vis-a-vis Indian GAAP and summary of significant differences between the Indian GAAP and US GAAP has to be annexed.
- If financial results are prepared in accordance with IFRS, then listed entity shall annex only the summary of significant differences between the Indian GAAP and IFRS.
- If the listed entity is shifting from IFRS to US GAAP or vice versa then the accounts relating to the previous period shall be properly restated for comparison;
- The Accounting / Reporting Standard followed for any interim results shall be consistent with that of the Annual results.
- The financial results so submitted shall be based on the same set of accounting

policies as those followed in the previous year provided that in case, there are changes in the accounting policies, the results of previous year shall be restated as per the present accounting policies, to make it comparable with current year results.

Answer 6(b)

Steps are involved in the creation of a Virtual Data Room

In general the following steps are involved in the creation of a virtual data room are:

- Demands of the prospective bidders are identified.
- Identify a trust worthy data room service provider if necessary and enter into necessary agreement with them.
- Creation of a web site where all the required documents are stored with internet security, restriction to access the site etc.
- Signing of non disclosure agreement with prospective bidders.
- Service agreement with data room service provider and the prospective bidder.
- Prospective bidders, on signing of non disclosure agreement and the service agreement and the service agreement, are given user id and pass word of the virtual data room so that any number of prospective bidders can have access to it.

Answer 6(c)

In *'M.C.Mehta* vs. *Union of India'* – 1988 SCR (2) 530 the Supreme Court directed that the work of those tanneries be stopped, which were discharging effluents in River Ganga and which did not set up primary effluent treatment plants. The Supreme Court held that the financial capacity of the tanners to set up primary effluent treatment plants was wholly irrelevant. The Supreme Court directed the Government to-

- to impart lessons in natural environment in educational institutions;
- to consult permanent independent centers with professional public spirited experts to provide the necessary scientific and technological information to the court;
- to set up environmental courts on regional basis with a right to appeal before the Supreme Court.
- to form a group of experts in environment to aid and advise the court to facilitate judicial decisions.

***

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer ALL Questions.*

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

PART A

Question 1

(a) The scope of Corporate Restructuring encompasses enhancing economy and improving efficiency. Discuss.

(b) The Competition Commission of India (CCI) has formed a prima facie opinion that a combination is likely to have adverse effect on competition in India. The parties to the combination decide to propose amendment to the proposed combination. Discuss the rights of the parties to carryout modification(s) and the procedure thereof.

(c) As on 1st August 2017, A Ltd had three layers of subsidiaries. Discuss :

(i) Whether A Ltd can continue to have such layers of subsidiaries ?

(ii) Whether any exemption is available to A Ltd ?

(iii) Is there any obligation cast on A Ltd to report to any authority in case it has three layers of subsidiaries ?

(d) The Board of Directors of ANJ Limited is planning to acquire a company to expand its business. What points the Board should consider to get the best possible business acquisition ? *(5 marks each)*

Answer 1(a)

Corporate restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value. Corporate restructuring is an inorganic growth strategy.

Corporate Restructuring is concerned with arranging the business activities of the corporate as a whole so as to achieve certain predetermined objectives at corporate level. Such objectives include the following:

1. Orderly redirection of the firm's activities;
2. Deploying surplus cash from one business to finance profitable growth in another;
3. Exploiting inter-dependence among present or prospective businesses within the corporate portfolio;
4. Risk reduction; and
5. Development of core competencies.

The scope of Corporate Restructuring encompasses enhancing economy (cost reduction) and improving efficiency (profitability). When a company wants to grow or survive in a competitive environment, it needs to restructure itself and focus on its competitive advantage. The survival and growth of companies in this environment depends on their ability to pool all their resources and put them to optimum use. A larger company, resulting from merger of smaller ones, can achieve economies of scale. If the size is bigger, it enjoys a higher corporate status. The status allows it to leverage the same to its own advantage by being able to raise larger funds at lower costs. Reducing the cost of capital translates into profits. Availability of funds allows the enterprise to grow in all levels and thereby become more and more competitive.

Answer 1(b)

Yes, the parties to the combination can propose amendment to the proposed combination.

Where the Competition Commission of India (CCI) is of the opinion that the combination has, or is likely to have an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.

Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such combination then it shall direct the parties to such combination to carry out necessary modifications to the combination.

The parties accepting the proposed modification shall carry out such modification within the period specified by the Commission.

Where the parties to the Combination do not accept the proposed modification such parties may within 30 days of modification proposed by the Commission, submit amendment to the modification proposed by the Commission.

Where the Commission agrees with the amendment submitted by the parties, it shall, by an order approve the combination.

Where the Commission does not accept the amendment, parties shall be allowed a further period of 30 days for accepting the amendment proposed by the Commission.

Where the parties to the combination fail to accept the modification within thirty days, then it shall be deemed that the combination has an appreciable adverse effect on competition and will be dealt with in accordance with the provisions of the Act.

Answer 1(c)

(i) The Companies (Restriction on Number of Layers) Rules, 2017 has been published in the Official Gazette on 20th September 2017. Effective from this date, no company, other a company belonging to a class specified in sub-rule (2), shall have more than two layers of subsidiaries. Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country. Provided further that for computing the number of layers under this Rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries are not taken in to account. Hence, A Ltd can't continue with three layers of subsidiaries unless it can avail exemptions / conditions stipulated above.

(ii) Rule 2(2) prescribes exemptions from applicability of Companies (Restriction on Number of Layers) Rules, 2017 in the following cases:

(a) A banking company as defined in Sec 5(c) of the Banking Regulation Act, 1949;

(b) A non-banking financial company as defined in Section 45-1(f) of RBI Act, 1934 which is registered with RBI and considered as systematically important NBFC by RBI;

(c) An insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and IRDAI Act, 1999;

(d) A Government company referred in 2(45) of Companies Act, 2013.

(iii) If A Ltd has number of layers of subsidiaries in excess of two layers and is not eligible for exemption under Rule 2(2), it shall file with Registrar of Companies a return in Form CRL-1 within 150 days from 20th September 2017.

Answer 1(d)

The following items are essential and should be considered carefully if the company wants to get the best possible business acquisition:

Strategy : The single most important action is to define a clear strategy with realistic objectives.

Profile : Create a profile or an outline of an ideal acquisition target and get some initial indications of how much such an opportunity might cost.

Budget : Prepare a budget for expenses associated with doing a deal.

Plan : Before starting the process, it is important to create a plan that clearly shows how the acquisition will be financed.

Approval : Get necessary internal approvals of essential authorities like board of directors and shareholders.

Team selection : The right project team could serve the maximum results. Hence getting a good team is essential for completing the project successfully. Combining internal assistance along with external support will help in getting best results.

Formalities : Study in detail the legal formalities required before starting the process is necessary.

Tax Liability : Getting complete information about the possible tax consequences beforehand can help in planning and also reduction in tax liability.

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

Question 2

(a) As a Company Secretary, the Board of Directors of XYZ Ltd. seeks your advice on the automatic exemptions from making an open offer, as contained in the applicable SEBI Regulations. List any 8 circumstances under which such general exemption can be availed/claimed.

(b) *The Board of Directors of PQR Limited has proposed a buyback of its shares. The paid up capital of the company as on 31st March 2019 was ₹10 crores. The free reserves of the company on the same date were also ₹10 crores. The Board of Directors in its meeting held on 5th April, 2019 passed a resolution to buy back shares for a value up to 15% of its paid up capital. State the validity of the decision of the Board of Directors based on the provisions of the Companies Act, 2013.*

(c) *A Ltd. is to be amalgamated with B Ltd. Currently there is no common shareholder between A Ltd. and B Ltd. The proposed scheme envisages shareholders holding 85% of the face value of equity shares of A Ltd will become equity shareholders of B Ltd.*

The following reserves appear in the books of A Ltd as at the appointed date of amalgamation.

(i) *Capital Reserves ₹5 Cr*

(ii) *Investment Allowance Reserve ₹3 Cr*

(iii) *Revaluation Reserves ₹6 Cr*

Discuss how the above reserves would be treated while preparing B Ltd's financial statements, in the light of AS-14. ''Accounting for Amalgamations''.

(5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) *KL Ltd. demerged its cement division to create MN Ltd (resulting company) and KL Ltd (demerged company). The scheme of demerger involved debts (receivables) of KL Ltd. taken over by MN Ltd. However, later such debts turned out to be bad debt. Discuss how such bad debts would be treated from taxation perspective, citing case laws.*

(ii) *The approval of Tribunal is required for any scheme of reconstruction. The Tribunal considers minority interest while approving any scheme of reconstruction. Majority approval cannot deprive minority from raising objections. But frivolous objections by Minority shareholders are not entertained. Mention any decided case law (one for each situation) where :*

(a) *The minority shareholder raised objections and prevented the implementation of the scheme of reconstruction.*

(b) *The objections raised by the minority shareholder were rejected and the scheme was approved.*

(iii) *"For the purpose of de minimis exemption under the Competition Act, 2002 the value of assets and turnover of the entire target enterprise would be considered". Comment.* *(5 marks each)*

Answer 2(a)

Regulation 10 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 list out various circumstances under which exemption from the obligation to make an open offer under Regulation 3 and 4. Regulation 3 prescribes open offer thresholds while Regulation 4 prescribes public announcement. The following are some of the circumstances where such exemption can be availed:

i. Acquisition pursuant to inter se transfer of shares amongst qualifying persons such as immediate relatives, promoters.
ii. Acquisition in the ordinary course of business by an underwriter by way of allotment pursuant to an underwriting agreement.
iii. Acquisition in the ordinary course of business by a merchant banker or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue.
iv. Acquisition in the ordinary course of business by a market maker of a stock exchange in respect of shares for which he is the market maker during the course of market making.
v. Acquisition in the ordinary course of business by invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions as a pledge.
vi. Acquisition in the ordinary course of business by a Scheduled Commercial Bank, acting as an escrow agent.
vii. Acquisition pursuant to a scheme made under Section 18 of Sick Industrial Companies (Special Provisions) Act, 1985.
viii. Acquisition pursuant to a resolution plan approved under Section 31 of the Insolvency and Bankruptcy Code, 2016
ix. Acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
x. Acquisition pursuant to the provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009.
xi. Acquisition by way of transmission, succession or inheritance.
xii. Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with RBI guidelines.
xiii. Acquisition of shares in a target company from state level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter.

Answer 2(b)

The provisions of section 68 of the Companies Act, 2013 provide that Board of Directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company and such buy back has to be authorized by the board by means of a resolution passed at the meeting.

Paid up Capital of the Company	Rs. 10 Crore
Free Reserves of the Company	Rs. 10 Crore
10% of the Paid up capital and free reserves	10% of (10+ 10) = Rs. 2 Crore

Hence, according to the provisions of Companies Act, 2013 the board can approve buyback of shares to the extent of Rs. 2 Crore.

15% of the Paid up Capital 15% of 10 Crore =Rs 1.5 Crore.

Thus, Board of Directors is authorized to approve buy back up to Rs. 2 crore. Hence the decision of the Board to purchase shares for a value up to 15% of the paid up share capital is valid.

Answer 2(c)

Under AS-14, an amalgamation would be considered to be an amalgamation in the nature of merger when the following conditions are satisfied:

(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

(ii) Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

In the given case, only 85% of shareholders of the face value of equity shares of A Ltd. will become equity shareholders of B Ltd. Hence, the amalgamation would fall under the category of amalgamation in the nature of purchase.

In the case of purchase method, while preparing the transferee company's financial statements, the identity of the reserves, other than the statutory reserves is not preserved

Hence, only Investment Allowance Reserves (being in the nature of statutory reserve) would retain its identity in the financial statements of B Ltd, in the same form in which they appeared in the financial statements of A Ltd, so long as the identity is required to be statutorily maintained. As regards Capital Reserves and Revaluation Reserves are concerned, their identity will not be preserved.

Answer 2A(i)

The facts of the case are similar to a case decided by Supreme Court in *CIT* vs. *Veerabhadra Rao (T), K. Koteswara Rao & Co (1985) 155 ITR 152 (SC)*. In this case the Supreme Court observed that if a business, along with its assets and liabilities, is transferred by one owner to another, there was no reason as to why the debts so transferred should not be entitled to the same treatment in the hands of the successors.

In this case, it was decided that where due to demerger, the debts of the demerged company have been taken over by the resulting company and later if such debt or part thereof turns out to be bad, such bad debt will be allowed as a deduction to the resulting company. Hence MN Ltd can claim the bad debts as deduction in its books, subject to the following conditions-

i. The amount of such bad debt or part thereof should be written off as irrecoverable in the accounts of MN Ltd for the previous year.

ii. The amount of deduction relating to any such debt or part thereof shall be restricted to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account.

Answer 2A(ii)

a) Proposed Merger of Tainwala Polycontainers Ltd (TPL) with Tainwala Chemicals and Plastics (India) Ltd (TCPL)

Alone minority shareholder of *Tainwala Polycontainers Ltd (TPL), Dinesh V Lakhani*, had apparently forced the company to call off its merger plans with Tainwala Chemicals and Plastics (India) Ltd (TCPL). Lakhani had opposed the proposed merger on several grounds including allegations of willful suppression of material facts and malafide intention of promoters in floating separate companies (TPL and TCPL). A division bench of the Bombay High Court had stayed the proposed TPL-TCPL merger. After almost two years of courtroom battle, the company decided to withdraw the amalgamation petition without citing any reasons.

(b) (i) Merger of Parke Davis India Limited and Pfizer Limited in 2003, Parke Davis India Limited and Pfizer Limited were considering implementation of a Scheme of Merger. The Minority shareholders of Parke-Davis India Ltd objected to the Scheme on the grounds that the approval from the requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed an urgent petition before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme of amalgamation, which was further extended till September 2003. The dissenting shareholders filed a Special Leave Petition with the Supreme Court. The turmoil came to an end when the Supreme Court dismissed the petition filed by the shareholders. Parke- Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

(ii) Merger of TOMCO with HLL

In the case of the merger of Tomco with HLL, the minority shareholders put forward an argument that, as a result of the amalgamation, a large share of the market would be captured by HLL. However, the court turned down the argument and observed that there was nothing unlawful or illegal about it.

Answer 2A(iii)

Every combination must mandatorily be notified to the Competition Commission of India, unless the parties are able to avail any of the exemptions provided under the Competition Act, the Combination Regulations, or notifications issued by MCA.

For the purpose of "de minimis" exemption, transactions where the target enterprise either holds assets of less than Rs 350 Crore in India or generates turnover of less than Rs 1,000 Crore in India are exempt from the mandatory pre-notification requirement.

Following March 2017 notification, in the case of transfer of a portion of an enterprise, division or business, the de minimis exemption is limited to only the value of the assets and turnover of such a portion of enterprise, division or business.

However, prior to the March 2017 notification, the value of the assets and turnover

of the entire target enterprise were to be taken into consideration for applying the de minimis exemption.

Thus subsequent to the 2017 notification, the asset value and turnover provided in the De Minimis exemption apply to the 'enterprise' whose control, shares, voting rights or assets are being acquired; and not to the value of the target assets/division/business being acquired .

Question 3

Comment on the following :

(a) A person holding shares in physical form cannot tender his / her physical shares in the company's buy-back offer. (3 marks)

(b) ATC Limited, a listed company bought back its shares to the extent of 5% of its paid up capital in January, 2018. In May, 2018 the company wants to make a further issue of shares by way of bonus issue. (3 marks)

(c) Additional disclosures required to be made in the first financial statements following amalgamation would vary in the case of amalgamation accounted under (a) pooling of interests method and (b) purchase method. (3 marks)

(d) An increasingly used defense mechanism against hostile takeover is "Shark Repellants". (3 marks)

(e) Amount required to be deposited in Escrow Account would be the same for both conditional and unconditional offer. (3 marks)

Answer 3(a)

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 has been amended on 8th June 2018 wherein a proviso to Regulation 40(1) mandates that except in case of transmission or transposition of securities, requests for effecting transfer of securities shall not be processed unless the securities are held in the dematerialized form with a depository.

Hence the person holding shares in physical form is required to have the physical shares dematerialized so that he can tender the shares in dematerialized form and participate in the buyback.

Answer 3(b)

ATC Ltd. can go ahead with the further issue of shares. As per section 68(8) of the Companies Act, 2013:

When a company completes a buy-back of its shares or other specified securities it shall not make a further issue of the same kind of shares or other securities including allotment of new shares under clause (a) of sub section (1) of section 62 or other specified securities within a period of six months except by way of a bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of Preference shares or debentures into equity shares.

Since the company is making a further issue of shares by way of bonus shares it is exempt from the provisions of section 68(8) and hence authorized to issue bonus shares.

Answer 3(c)

There are certain disclosures that are required to be made in the first financial statements for every type of amalgamations. However, in the case of amalgamation accounted for under the pooling of interests method, the following additional disclosures are required to be made in the first financial statements following the amalgamations:

(i) Description and number of shares issued, together with the percentage of each company's equity shares exchanged to effect the amalgamation.

(ii) The amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof.

In the case of amalgamations accounted for under the purchase method, the following additional disclosures are required to be made in the first financial statements following the amalgamations:

(i) Consideration for the amalgamation and a description of the consideration paid or contingently payable; and

(ii) The amount of any difference between the consideration and the value of net identifiable assets required, and the treatment thereof including the period of amortization of any goodwill arising on amalgamation.

Answer 3(d)

A hostile tender offer made directly to a target company's shareholders, with or without previous overtures to the management, has become an increasingly frequent means of initiating a corporate combination. As a result, there has been considerable interest in devising defense strategies by actual and potential targets.

An increasingly used defense mechanism is anti-takeover amendments to the company's constitution or articles of association, popularly called shark repellants. The anti-takeover amendments have to be voted on and approved by the shareholders. Through this, the practice of the company to change the articles, regulations, bye-laws etc. tries to be less attractive to the corporate bidder.

Anti-takeover amendments generally impose new conditions on the transfer of managerial control of the firm through a merger, tender offer, or by replacement of the Board of Directors. In India every company has the power to alter its articles of association by a special resolution. The altered articles will bind the members just in the same way as did the original articles. But that will not give the altered articles a retrospective effect. The alteration of articles of association is subject to the following restriction:

1. The alteration must not be in contravention of the provisions of the Act, i.e. should not be an attempt to do something that the Act forbids.
2. The power of alteration is subject to the conditions contained in the memorandum of association i.e. alter only the articles of the company as relate to the management of the company but not the very nature and constitution of the company. Also the alteration should not constitute a fraud on the minority.

Answer 3(e)

Whenever an acquirer proposes to make public announcement of an open offer under regulation 17 of Securities and Exchange Board of India (Substantial Acquisition

of Shares and Takeovers) Regulations, 2011, the acquirer is required to open an Escrow Account with a bank. Such escrow account is required to be opened not later than two working days prior to the date of the publication of the detailed public statement of open offer for acquiring shares.

In case the acquirer makes an unconditional open offer, he is required to maintain 25% of consideration in the escrow account for the first Rs. 500 Crores of consideration payable under the open offer. For the balance consideration, acquirer is required to maintain an additional amount equal to 10%.

However, in case the acquirer makes a conditional open offer involving minimum level of acceptance, he is required to maintain in the escrow account the higher of-

(a) 100% of the consideration payable in respect of the minimum level of acceptance; or

(b) 50% of the consideration payable under the open offer.

PART B

Question 4

(a) Allwin Pharma Ltd. is exploring the feasibility of acquiring Bhagwan Biotech Ltd. The latter company is specialized in developing products for major pharmaceutical companies spread over across India. During the first year of the forecast period, product development costs are anticipated to generate negative cash flow of ₹15 lakh. However, during the second to fifth year, it is estimated that positive cash flows of ₹10 lakh, ₹12 lakh, ₹15 lakh and ₹20 lakh respectively would be generated. Considering intense competition in the field, it is anticipated that the cash flows are expected to grow modestly at 5% beyond the fifth year. The discount rate for the first five years is expected at 12%. While it would drop 8% after the fifth year. Compute value of the firm.

(Note : The Present Value Factor at 12% for first year is 0.8929, for second year is 0.7972, for third year is 0.7118, for fourth year is 0.6355, for fifth year is 0.5674)

Note : Present calculations upto 2 decimals. (5 marks)

(b) You are appointed as valuer for valuing unlisted company PQR Ltd.

(i) Which valuation method would normally be followed for valuing unlisted companies ?

(ii) What are the few metrics that you would consider as basis for such valuation?

(iii) If PQR Ltd. is a banking company, what would be the most preferred metrics for valuation ?

(iv) If PQR Ltd. is a steel company, what metrics would ideally be adopted for valuation ? (5 marks)

(c) Promoters of ABC Ltd., a listed company, are planning to delist the company's shares from stock exchanges. The promoters feel the price discovered through reverse book building process is not attractive. What are the options available to the promoters ? (5 marks)

Answer 4(a)

Year	*Cash Flow*	*Discount Rate @12%*	*Present Value (Rs.)*
1	-15	0.8929	13.3935
2	10	0.7972	7.972
3	12	0.7118	8.5416
4	15	0.6355	9.5325
5	20	0.5674	11.348
Total sum of present value			**24.0006**

Terminal Value=(Cash Flow for terminal year +1)/ (r-Stable growth rate)			*(Rs.)*
Cash Flow for terminal year+1	Cash Flow for year 5*(1+g)	20*(1+0.05)	21.00
Terminal Value	21/(0.08-0.05)		700.00
Present value of terminal value	(Terminal Value* 0.5674)		397.18
Firm's value	(24.00+397.20)		421.18

Answer 4(b)

(i) Market comparable method is generally adopted for valuing unlisted entities. This method envisages valuation based on market multiples of comparable companies.

(ii) The following metrics can be adopted as a basis for such relative valuation:

a. Enterprise Value / Sales

b. Enterprise Value / EBIDTA

c. Enterprise Value / EBIT

d. Price to Earnings Ratio

e. Price to Book

f. Enterprise Value / Cash Flow

(iii) For banking companies, book value multiples viz.: price to book metric is widely followed.

(iv) For steel companies, industry specific multiples would be the most appropriate. For instance, price cost per ton capacity of steel can be the appropriate metric adopted for valuation.

Answer 4(c)

Under SEBI (Delisting of Equity Shares) Regulations, 2009, if the price discovered through reverse book building process is not agreeable to the promoter, the only option available to him was to reject the delisting process and withdraw from delisting.

However, the Regulations have been amended on November 14, 2018 through SEBI (Delisting of Equity Shares) (Second Amendment) Regulations, 2018 under which if the price discovered is not acceptable, promoter may make a counter offer to the public shareholders within two working days of the price discovered. However, such counter offer price shall not be less than the book value of the company as certified by the merchant banker.

Hence, the promoter of ABC Ltd can explore the newly available counter offer option to pursue his delisting process.

Question 5

(a) PQR Ltd., a listed company, earned profit before tax of ₹1 crore for the year ended 31st March, 2019, Tax amounts to ₹5 lakh. The company's share capital consists of 30 lakh equity shares of ₹10 each and 2 lakh 8% preference shares of ₹10 each. PQR Ltd's current price to earnings ratio stands at ₹9.64.

Compute PQR Ltd's (i) Earnings Per Share and (ii) Current Market Price

Note : Present calculations upto 2 decimals. *(5 marks)*

(b) Ruchi Industries Ltd. is planning to acquire Jyoti Industries Ltd. through merger. Based on the available information calculate :

(1) Earning per share (EPS) of both the companies

(2) EPS of the merged company

(3) Exchange Ratio for the shareholders of Jyoti Industries Ltd. at the EPS of pre merger level of Ruchi Industries Ltd.

Particulars	*Ruchi Industries Ltd.*	*Jyoti Industries Ltd.*
Number of Equity Shares	*10,00,000*	*6,00,000*
Earnings After Tax	*₹50,00,000*	*18,00,000*
Market Value per share	*₹42*	*₹28*

(5 marks)

(c) DELS Trading Private Limited is a company incorporated under the Companies Act, 1956. The Board of Directors applies to the authorities to register the company as registered valuers organization. Discuss the eligibility of the company to be registered as a registered valuers organization. What are the conditions necessary for an organization to be recognized as a registered valuers organization ?

(5 marks)

Answer 5(a)

Sl. No.	*Particulars*		*Rs.*
(a)	Profit before tax		1,00,00,000
(b)	Tax		5,00,000
(c)	Preference dividend	200000*10* 8%	1,60,000
(d)	Profit available for equity shareholders		93,40,000
(e)	No. of Equity Shares		30,00,000
(f)	Earnings per share(d/e) (Rs)		3.11
(g)	Price to Earnings Ratio (Rs)		9.64
(h)	Market Price (f*g)		30.01

Answer 5(b)

1.

Particulars	*Ruchi Industries Ltd*	*Jyoti Industries Ltd*
No. of Equity Shares	10,00,000	6,00,000
Earnings After Tax	₹ 50,00,000	₹18,00,000
Earnings per Share (EPS)	$\frac{\text{Earning after tax}}{\text{Number of equity shares}}$	$\frac{18,00,000}{6,00,000}$
	$\frac{50,00,000}{10,00,000}$ = ₹5	= ₹3

2. Number of Shares Jyoti

Industries will get in the Merged Company = $\frac{28}{42}$ x 6,00,000 = 4,00,000

Total Number of Equity shares = 10,00,000+ 4,00,000

of the merged company = ₹14,00,000

Total Earnings of the merged company = ₹50,00,000 + ₹18,00,000

= ₹68,00,000

Earning per share (EPS) of the merged company = 68,00,000/14,00,000

= ₹4.86

3. Jyoti Industries Ltd. wants to retain the EPS of mergers at the pre-merger level

EPS of members of Jyoti Industries post merger should be 5

Number of Shares to be issued to	=	$\frac{3}{5}$ x 6,00,000
Members of Jyoti Industries	=	3,60,000
Total Earnings of the merged company	=	₹68,00,000
Total Number of Equity shares of the merged company to maintain the premerger EPS	=	10,00,000+ 3,60,000
	=	13,60,000
EPS after merger	=	₹5

Exchange Ratio if EPS is to be maintained at pre merger level of Ruchi Industries Ltd.

No. of existing Shares	6,00,000
Number of shares which will be issued	3,60,000
Exchange ratio	3,60,000/6,00,000
	3/5

i.e for 5 shares in Jyoti Industries Ltd. member will get: 3 shares of Ruchi Industries Ltd.

Answer 5(c)

DELS Trading Private Limited is not eligible to be registered as registered valuer organization.

(1) An organisation that meets requirements under rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 may be recognized as a registered valuers organisation for valuation of a specific asset class or asset classes if –

I. it has been registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013 with the sole object of dealing with matters relating to regulation of valuers of an asset class or asset classes and has in its bye laws the requirements specified in Annexure-III;

II. it is professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession;

Provided that, subject to sub-rule (3), the following organisations may also be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes, namely:

(a) an organisation registered as a society under the Societies Registration Act, 1860 or any relevant state law, or;

(b) an organisation set up as a trust governed by the Indian Trust Act, 1882.

(2) The organisation referred to in sub-rule (1) shall be recognised if it-

a. conducts educational courses in valuation, in accordance with the syllabus determined by the authority, under rule 5, for individuals who may be its valuers members, and delivered in class room or through distance education modules and which includes practical training;

b. grants membership or certificate of practice to individuals, who possess the qualifications and experience as specified in rule 4, in respect of valuation of asset class for which it is recognised as a registered valuers organisation;

c. conducts training for the individual members before a certificate of practice is issued to them;

d. lays down and enforces a code of conduct for valuers who are its members, which includes all the provisions specified in Annexure-I;

e. provides for continuing education of individuals who are its members;

f. monitors and reviews the functioning, including quality of service, of valuers who are its members; and

g. has a mechanism to address grievances and conduct disciplinary proceedings against valuers who are its members.

(3) A registered valuers organisation, being an entity under proviso to sub-rule (1), shall convert into or register itself as a company under section 8 of the Companies Act, 2013, and include in its bye laws the requirements specified in Annexure-III, within one year from the date of commencement of these rules.

PART C

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

Question 6

(a) Explain workmen's portion in relation to the security of a secured creditor in the winding up process of the company.

The value of security of a secured creditor is ₹1,00,000. The total amount of workmen's due is ₹1,00,000 and the amount due from the company to its secured creditor is ₹3,00,000. What is the workmen's portion of the security ?

(5 marks)

(b) Can a liquidator be replaced, when a company is undergoing liquidation process? If so, mention the grounds or circumstances under which the liquidator can be changed. *(5 marks)*

(c) AG, an insolvency professional is appointed as the Resolution Professional for the insolvency resolution process of XYZ Limited. BG, a partner of AG is a director in XYZ Limited.

Discuss whether AG can continue as the Resolution Professional for the insolvency proceedings ? *(5 marks)*

(d) In the light of Insolvency and Bankruptcy Code, 2016, indicate whether the

following persons are eligible to be a Resolution Applicant for ABC Ltd. which is undergoing Corporate Insolvency Resolution Process, based on an application for insolvency resolution made by PQR Bank Ltd.

(i) A is declared as a wilful defaulter, in terms of guidelines issued by the Reserve Bank of India.

(ii) A has a loan account with PQR Bank Ltd, which has been classified as nonperforming assets 6 months back, in terms of guidelines issued by Reserve Bank of India. A is yet to pay all the overdue amount.

(iii) B who has executed a guarantee to PQR Bank Ltd. towards dues payable by ABC Ltd. and the guarantee has been invoked by PQR Bank Ltd. and remains unpaid.

(iv) B who has executed a guarantee as in (iii) above and the guarantee has been invoked and remains unpaid, but ABC Ltd is a Micro, Small and Medium Enterprise. *(5 marks)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) The Tribunal has appointed a Company Liquidator to submit a report about the company. What are the contents of this report ? A creditor of the company wants to inspect the report submitted by the Company Liquidator and also to take copies thereof. Discuss the power of the creditor in this regard.
(5 marks)

(ii) ABC Construction Ltd. has been involved in construction of residential apartments. Two years ago, the company accepted ₹ 500 Crores from 2000 individuals with a promise to deliver apartments of various sizes in a residential project. Due to various reasons, the company is unable to deliver the apartments to these 2000 individuals as promised within the agreed timeline.

(a) Whether the depositors can invoke any provisions of Insolvency and Bankruptcy Code, 2016 ?

(b) If so, how many of them can initiate application under IBC ?

(c) Can any of the depositors attend Committee of Creditors meetings ?
(5 marks)

(iii) By invoking the provisions of SARFAESI Act, 2002, XYZ Bank took physical possession of property of ABC Co. Ltd., as the latter defaulted in payment of loan given by XYZ Bank. Subsequently ABC Co. Ltd. was brought under Corporate Insolvency Resolution Process and Resolution Professional appointed for ABC Co. Ltd. demanded the property from XYZ Bank. In the light of applicable provisions, briefly discuss whose claim would prevail ? *(5 marks)*

(iv) A debtor is subject to a foreign proceeding and a local proceeding at the same time. Discuss the provisions of UNCITRAL Model Law for the co-ordination of the proceedings in such a situation. *(5 marks)*

Answer 6(a)

As per explanation to section 326 of the Companies Act, 2013 (Clause c) "workmen's portion", in relation to the security of any secured creditor of a company means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors.

The value of the security of a secured creditor of a company	=	Rs. 1,00,000.
The total amount of the workmen's dues	=	Rs. 1,00,000.
The amount of the debts due from the company to its secured creditors	=	Rs. 3,00,000.
Aggregate of the amount of workmen's dues and the amount of debts due to secured creditors	= Rs. (1,00,000 + 3,00,000)	
	=	Rs. 4,00,000.
The workmen's portion of the security	=	1,00,000 * 1,00,000 / 4,00,000
	=	Rs. 25000/-

Answer 6(b)

A company liquidator has wide powers as stipulated in Sec 290 of Companies Act, 2013, including power to sell movable and immovable property, settle claims from creditors, employees etc.

However, such powers are not unquestionable. Under Sec 276, in the following cases, where reasonable cause being shown and for reasons to be recorded in writing, the Tribunal may remove the provisional Liquidator or Company Liquidator:

i. Misconduct
ii. Fraud or misfeasance
iii. Professional incompetence, or failure to exercise due care and diligence in performance of the powers and functions
iv. Inability to act as Provisional Liquidator or Company Liquidator, as the case may be
v. Conflict of interest or lack of independence during the term of his appointment that would justify removal

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

Answer 6(c)

AG cannot continue as a resolution professional if the insolvency professional entity of which he is a director or a partner, or any other partner or director of such insolvency

professional entity represents any other stakeholders in the same corporate insolvency resolution process.

As per Regulation 3 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016-An insolvency professional shall be eligible to be appointed as a resolution professional for the insolvency resolution if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

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

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

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

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

(i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm,

in the last three financial years.

(2) An insolvency professional shall not be eligible to be appointed as a resolution professional if he, or the insolvency professional entity of which he is a partner or director, is under a restraint order of the Board.

(3) An insolvency professional shall not continue as a resolution professional if the insolvency professional entity of which he is a director or a partner, or any other partner or director of such insolvency professional entity represents any other stakeholders in the same corporate insolvency resolution process.

Answer 6(d)

Sec 29 A of Insolvency and Bankruptcy Code, 2016 contains list of persons who are not eligible to be resolution applicant-

(i) In terms of Clause (b) of Sec 29A, a wilful defaulter, as declared by Reserve Bank of India, can't be a resolution applicant.

(ii) In terms of Clause (c) of Sec 29A, if at the time of submission of resolution plan Mr A has an account which has been classified as non performing asset and if he is yet to repay the entire overdue amount of the loan account, he can't be an eligible resolution applicant. This prohibition does not apply to a financial entity who is not a related party of the corporate debtor.

(iii) In terms of Clause (h) of Sec 29A, if Mr B has executed a guarantee in favour of PQR Bank towards dues payable by ABC Ltd, and if Mr B hasn't paid the invoked

guarantee amount, he will not be eligible to be a Resolution Applicant for ABC Ltd.

(iv) Section 240A of the IBC stipulates that Clause (h) of Section 29A shall not apply to the resolution applicant (Mr B) in respect of Corporate Insolvency Resolution Process (CIRP) of ABC Ltd, if ABC Ltd is a Micro, Small and Medium Enterprise. In such a case, Mr B can be a resolution applicant for ABC Ltd.

Answer 6A(i)

According to section 281(1) of the Companies Act, 2013, where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:

(a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;

(b) amount of capital issued, subscribed and paid-up;

(c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realized on account thereof;

(e) guarantees, if any, extended by the company;

(f) list of contributories and dues, if any, payable by them and details of any unpaid call;

(g) details of trademarks and intellectual properties, if any, owned by the company;

(h) details of subsisting contracts, joint ventures and collaborations, if any;

(i) details of holding and subsidiary companies, if any;

(j) details of legal cases filed by or against the company; and

(k) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal. [Section 281(2) of the Companies Act, 2013]

The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximizing the value of the assets of the company. [Section 281(3) of the Companies Act, 2013]

Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts there from on payment of the prescribed fees. [Section 281(5) of the Companies Act, 2013]

Answer 6A(ii)

(a) Section 5(7) of Insolvency and Bankruptcy Code, 2016 (IBC) defines a financial creditor inter-alia as any person to whom financial debt is owed. According to Explanation to Section 5(8)(f), any amount raised from an allottees/depositors under a real estate project shall be deemed to be an amount having the commercial effect of borrowing. Section 7 of IBC provides that a financial creditor either by himself or jointly with other financial creditors may file an application for initiating Corporate Insolvency Resolution Process (CIRP) against a Corporate Debtor before the Adjudicating Authority, when a default has occurred. Hence, the allottees/depositors can invoke the provisions of Insolvency and Bankruptcy Code, 2016 for initiating CIRP against ABC Construction Ltd.

(b) In the given case, an application for initiation of CIRP against ABC Construction Ltd shall be filed jointly by not less than one hundred of such allottees/depositors under the same real estate project or not allottees/depositors less than ten per cent of the total number of such allottees/depositors under the same real estate project, whichever is less. Hence 100 or more allottees/depositors can jointly file an application for CIRP against ABC Construction Ltd.

(c) According to Section 21 (6A) of the Insolvency and Bankruptcy Code, 2016, where a financial debt is owed to a class of creditors, the interim resolution professional shall make an application to the Adjudicating Authority along with the list of all the financial creditors, containing the name of an insolvency professional, other than the interim resolution professional, to act as their authorized representative who shall be appointed by the Adjudicating Authority prior to the first meeting of the committee of creditors.

Hence for this purpose the interim resolution professional would first get the name of the authorized representative selected from the allottees/depositors. The authorized representative shall attend the meetings of Committee of Creditors and vote on behalf of each allottees to the extent of his voting share. Hence, only the authorized representative as appointed through this process can attend the Committee of Creditors meeting to represent the interest of the allottees/depositors.

Answer 6A(iii)

In terms of Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act) once a corporate debtor defaults in repaying the loan amount taken from the bank, the bank can file the application to take over the physical possession of the property of the corporate debtor.

Section 18(f) of Insolvency and Bankruptcy Code, 2016 prescribing duties of Resolution Professional stipulates that the Resolution Professional shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, including assets that may or may not be in possession of the corporate debtor.

Besides Section 238 of Insolvency and Bankruptcy Code, 2016 stipulates that the provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Considering the 'notwithstanding' provision contained in Insolvency and Bankruptcy Code, 2016, the resolution professional will have right over the property of ABC Co Ltd .

NCLAT in *Encore Asset Reconstruction Company Pvt.* vs. *Ms. Charu Sandeep Desai & Ors*, upheld that Section 18 of Insolvency and Bankruptcy Code, 2016 will prevail over Section 13(4) of the SARFAESI Act.

However, as explained in the objectives of Insolvency and Bankruptcy Code, 2016, the secured creditors may relinquish their security interest in the estate and the recoveries that are obtained are paid out through a well-defined waterfall mechanism. Thus by virtue of being a secured creditor, XYZ Bank can file its claim and participate in the resolution process so that its interest is also protected.

Answer 6A(iv)

Article 29 of the of UNCITRAL Model Law gives guidance to the court that deals with cases where the debtor is subject to a foreign proceeding and a local proceeding at the same time. Where a foreign proceeding and a proceeding under the laws of the enacting State relating to insolvency are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under Articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in the State (which has enacted Model Law) is taking place at the time the application for recognition of the foreign proceeding is filed-

  (i) Any relief granted under Article 19 or 21 must be consistent with the proceeding in such State; and

  (ii) If the foreign proceeding is recognized in such State as a foreign main proceeding, Article 20 does not apply;

(b) When the proceeding in such State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding-

  (i) Any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

  (ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in Article 20 shall be modified or terminated, if inconsistent with the proceeding in such State;

(c) In granting, extending or modifying relief granted to a representative of a foreign

non-main proceeding, the court must be satisfied that the relief relates to assets which, according to the law of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

The salient principle embodied in Article 29 is that the commencement of a local proceeding does not prevent or terminate the recognition of a foreign proceeding. This principle is essential for achieving the objectives of the Model Law in that it allows the court in the enacting State in all circumstances to provide relief in favour of the foreign proceeding.

***