

GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2017

MODULE 3



**THE INSTITUTE OF
Company Secretaries of India**

IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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These answers have been written by competent persons and the Institute hopes 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.

In answers to the questions based on case study, the students may write any other alternative answer with valid reasoning.

The Guideline Answers contain information based on the Laws/Rules relevant for the Session. Students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

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(i)

NOTE : Guideline Answers of the last Sessions may require updation in the light of changes and references given below :

PROFESSIONAL PROGRAMME

UPDATING SLIP

ADVANCED TAX LAWS AND PRACTICE

MODULE – 3 – PAPER 1

<i>Examination Session</i>	<i>Question No.</i>	<i>Updatons required in the answers</i>
All Previous Sessions	—	<p>For December 2017, examination</p> <ul style="list-style-type: none">(i) For Direct taxes, Finance Act, 2016 is applicable.(ii) Applicable Assessment year is 2017-18 (previous year 2016-17).(iii) Wealth Tax Act, 1957 has been abolished w.e.f. 1st April, 2016. The questions from the same will not be asked in examination from December 2015 session onwards.(iv) For Indirect taxes, with the implementation of Goods & Services Tax w.e.f July 1,2017, the students of Professional Programme are hereby notified that the selected topics of Part B of the syllabus for “Advance Tax Laws and Practice” (Module 3 Paper 1) of Professional Programme has been replaced with Goods and Services Tax (GST) for December, 2017 examinations. Students are advise to refer the notification available at the following weblink https://www.icsei.edu/WebModules/Notification_GST_CS_Professional_Programme.pdf for detailed syllabus applicable for December 2017 examination.(v) Students are also required to update themselves on all the relevant Circulars, Clarifications, Notifications, issued by CBDT / CBEC/ Central Government etc. which became effective, on or before six months prior to the date of the respective examination. <p>The questions based on case laws, in conflict with the latest law be treated as of academic interest only.</p>

(ii)

UPDATING SLIP

DRAFTING, APPEARANCES AND PLEADINGS

MODULE – 3 – PAPER 2

<i>Examination Session</i>	<i>Question No.</i>	<i>Updates required in the answers</i>
All Previous Sessions	—	Provisions of Companies Act, 2013. Amended provisions of Arbitration & Conciliation Act, 1996.

(iii)

UPDATING SLIP

BANKING LAW AND PRACTICE

MODULE – 3 – ELECTIVE PAPER 9.1

<i>Examination Session</i>	<i>Question No.</i>	<i>Updates required in the answers</i>
All Previous Sessions	—	All relevant amendment pertaining to Banking Laws and Notification/Circulars issued thereunder upto 6 months prior to the date of examination.

(iv)

UPDATING SLIP

CAPITAL, COMMODITY AND MONEY MARKET

MODULE – 3 – ELECTIVE PAPER 9.2

<i>Examination Session</i>	<i>Question No.</i>	<i>Updates required in the answers</i>
All Previous Sessions	—	<p>In accordance amended Regulations covering Capital Commodity and Money Market.</p> <p>SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015. All answers pertaining to listing of securities and corporate governance to be updated accordingly.</p> <p>SEBI (Prohibition of Insider Trading) Regulations, 2015. All answers pertaining to price sensitive information, insider trading to be updated accordingly. Master Circulars issued by RBI from time to time.</p>

(v)

UPDATING SLIP

INSURANCE LAW AND PRACTICE

MODULE – 3 – ELECTIVE PAPER 9.3

<i>Examination Session</i>	<i>Question No.</i>	<i>Updatons required in the answers</i>
All Previous Sessions	—	All notifications issued by Insurance Regulatory and Development Authority of India (IRDA).

(vi)

UPDATING SLIP

INTELLECTUAL PROPERTY RIGHTS — LAW AND PRACTICE

MODULE – 3 – ELECTIVE PAPER 9.4

<i>Examination Session</i>	<i>Question No.</i>	<i>Updates required in the answers</i>
All Previous Sessions	—	In accordance with revised laws, rules under TRIPs and World Intellectual Property Organization (WIPO) and National Intellectual Property Rights Policy.

(vii)

UPDATING SLIP

INTERNATIONAL BUSINESS - LAWS AND PRACTICES

MODULE – 3 – ELECTIVE PAPER 9.5

<i>Examination Session</i>	<i>Question No.</i>	<i>Updates required in the answers</i>
All Previous Sessions	—	In accordance with revised laws and rules under WTO, IMF, UNCTAD, etc, if any.

PROFESSIONAL PROGRAMME EXAMINATION

JUNE 2017

ADVANCED TAX LAWS AND PRACTICE

Time allowed : 3 hours

Maximum marks : 100

NOTE : 1. Answer ALL Questions.

2. All the references to sections mentioned in Part - A of the Question Paper relate to the Income-tax Act, 1961 and relevant Assessment Year 2017-18, unless stated otherwise.

PART A

Question 1

- (a) Explain the cases of exception under the Income Tax Act, 1961, if any from the general rule "Income earned by a person during a previous year is always taxable in the Assessment Year". (5 marks)
- (b) Compute the amount of tax relief under section 91(1) and of the tax payable by the assessee, an Indian resident, aged 50 years having following incomes during the previous year 2016-17 :
- (i) Business income in India ₹5,50,000.
- (ii) Business income in country A of ₹2,00,000 on which tax was deducted in the foreign country by the Government of ₹50,000.
- (iii) Loss from business in country B of ₹1,00,000.
- (Note : Government of India does not have any Double Tax Avoidance Agreement with either country A or with country B). (5 marks)
- (c) Make an analysis between the purchase and taking on lease of an asset for the purpose of business by the assessee considering the Income Tax provisions and the benefits available. Which option is considered to be better as per tax provisions and other benefits ? (5 marks)

Answer 1(a)

Income earned by a person during the previous year is always taxable in the Assessment Year as per Income tax Act, 1961. However, there is an exception to this general rule and the Income earned during a previous year is taxable in the previous year itself in the following cases:

- Income of non-resident shipping companies [Section 172]
- Income of persons leaving India with no intention of returning back to India [Section 174]
- Association of Persons (AOP) / Body of Individuals (BOI) / Artificial Juridical Person (AJP) formed for a particular purpose likely to be dissolved in the same year of formation [Section 174A]
- Cases of transfer of assets with a view to avoid tax [Section 175]
- Income of a discontinued business [Section 176]

Answer 1(b)**Computation of Relief u/s 91(1) for the Assessment Year 2017-18**

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
Business Income earned in India	5,50,000	
Business Income earned from Country A	2,00,000	
Business loss from Country B	(1,00,000)	
Total Taxable Income		6,50,000
Tax including EC+SHEC		56,650
Average rate of tax in India (56,650 / 6,50,000 * 100) = 8.7154 %		
Foreign tax rate (50,000 / 2,00,000 * 100) = 25%		
Doubly Taxed Income	2,00,000	
Relief under section 91 (on Rs. 2,00,000 @ 8.7154%) i.e. rate 8.7154 % or 25 % whichever is lower		17,431

Tax Liability of the Assessee for the Assessment Year 2017-18

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
Business Income earned in India	5,50,000	
Business Income earned from Country A	2,00,000	
Business loss from Country B	(1,00,000)	
Total Taxable Income		6,50,000
Tax including EC+SHEC		56,650
Relief under section 91(1)		17,431
Net Tax Liability		39,219

Alternative Answer 1(b)**Computation of Relief u/s 91(1) for the Assessment Year 2017-18**

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
Business Income earned in India	5,50,000	
Business Income earned from Country A	2,00,000	
Total Taxable Income		7,50,000
Tax including EC+SHEC		77,250
Average rate of tax in India (77,250 / 7,50,000 * 100) = 10.30 %		
Foreign tax rate (50,000 / 2,00,000 * 100) = 25%		
Doubly Taxed Income	2,00,000	
Relief under section 91 (on Rs. 2,00,000 @ 10.30%) i.e. rate 10.30 % or 25 % whichever is lower		20,600

Note: For calculating the relief u/s 91(1), the business loss of foreign country B has not been considered.

Tax Liability of the Assessee for the Assessment Year 2017-18

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
Business Income earned in India	5,50,000	
Business Income earned from Country A	2,00,000	
Business loss from Country B	(1,00,000)	
Total Taxable Income		6,50,000
Tax including EC+SHEC		56,650
Relief under section 91(1)		20,600
Net Tax Liability		36,050

Answer 1(c)

Analysis between Purchase of an assets and taking the assets on Lease for the purpose of business

- (i) In case of purchase, depreciation is allowed under section 32. On the other hand, depreciation will not be allowed u/s 32 in case of assets taken on lease. This principle has also been upheld by the Hon'ble Supreme Court in case of *ICDS Ltd. V/s CIT* (2013) 350 ITR 527.
- (ii) In case of lease, lease rent paid will be allowed as deduction u/s 37(1) as revenue expenditure. Repairs are also allowable under section 31.
- (iii) In case of purchase, insurance premium, current repairs are allowed as deduction u/s 31 and interest on borrowed funds is deductible u/s 36 as revenue expenditure.
- (iv) Purchase of machinery would create tangible assets which can also be mortgage in case of finance needs whereas in case of assets taken on lease, it is not possible.
- (v) In case of purchase option, residual value at the end of useful life belongs to owner. Capital gains tax liability or savings should also be taken into consideration.

The benefits available as to tax payments are to be worked out separately under both the situations and be analyzed to find out which option is better. However, taking of an assets by investing own funds be always found to be better because of the available benefits under the tax laws and having of the tangible assets in the business.

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

- (a) Explain the provisions contained under the Income Tax Act, 1961 relating to set-off and carry forward of :
 - (i) Speculative Business Losses

- (ii) *Short-term Capital Losses.* (5 marks)
- (b) *How will you decide the residential status of the following companies or firms for the Previous Year 2016-17 under the provisions of Income Tax Act, 1961 ? Give brief reasons for your answer :*
- (i) *XYZ Pharma Ltd., a company registered in India under the Companies Act, 2013.*
- (ii) *PQR Ltd., a company incorporated in Germany, of which the control and management of the affairs of the business is situated wholly in India.*
- (iii) *SVR Ltd., a French company of which the control and management of the affairs of the business is situated wholly outside India in Spain.*
- (iv) *ABC Ltd., a company incorporated in Australia, of which the control and management of the affairs of the business is situated partly outside India and partly in India.*
- (v) *PCR & Co., a partnership firm is doing its business activities in Chennai, India. All the meetings of the partners during the year for decision-making took place in Singapore and Malaysia.* (5 marks)
- (c) *Ravi Glass Ltd., a widely held company is considering for a major expansion of its activities for which an additional investment of ₹ 3 Crores is required. The company has following three options/alternatives for the financing of proposed additional investment of ₹ 3 crores :*
- (i) *By issue of Equity shares and raise the equity share capital only.*
- (ii) *₹ 2 crores from issue of Equity shares and ₹ 1 crore by issue of 15% debentures.*
- (iii) *₹ 1 crore from issue of Equity shares, ₹ 1 crore from issue of 15% debentures and remaining 1 crore by taking a bank loan on interest payable at 15% p.a.*
- The expected rate of return on the new investment has been worked out at 30%. The corporate rate of tax for the time being on the income is 30.9%. Company has proposed to declare the total net profits as dividend.*
- You are required to suggest the company which is the best alternative to be undertaken for the purpose of proposed investment. Assume that no other taxes are being payable/to be charged on the distributed profits.* (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

- (i) *Distinguish and differentiate between :*
- (a) *Tax Planning and Tax Avoidance*
- (b) *Diversion of Income and Application of Income.* (5 marks)
- (ii) *GX Ltd. is a foreign company having business operations in India. The company has made prescribed arrangements for declaration and payment of dividends within India and paid preference share dividend of ₹880 lakh for financial year 2016-17. Is dividend distribution tax payable by the foreign company ? Is there*

any time limit for payment of DDT ? Can GX Ltd. avail deduction in respect of DDT paid ? (5 marks)

(iii) The profit and loss account of XYZ Ltd. for the year ended 31-3-2017 showed a net profit of ₹ 80,00,000 after making of the following adjustments :

- (a) Depreciation ₹ 24 lakh (including depreciation on revaluation of assets of ₹ 4 lakh).
- (b) Provisions for unascertained liabilities ₹ 2 lakh.
- (c) Transfer to General Reserve ₹ 9 lakh.
- (d) Agricultural Income ₹ 15 lakh.
- (e) Amount transferred to profit and loss account from general reserve ₹ 3 lakh. Brought forward business losses and unabsorbed depreciation as per books of accounts were ₹ 15 lakh and ₹ 11 lakh respectively.

Compute book profits and Minimum Alternate Tax (MAT) under section 115JB payable by XYZ Ltd. for A.Y. 2017-18. (5 marks)

Answer 2(a)

The provisions related to set off and carry forward of losses under the Income tax Act, 1961 in the following cases are as follow:

- i. **Speculative Business Losses** : Loss from speculation business is set-off in the same year from available profits and gains of any other speculative business. However, where, for any assessment year, any loss computed in respect of a speculation business has not been wholly set-off against the profits of another speculation business, it shall be carried forward to the following assessment year and shall be set-off against the profits of any speculation business carried on by him and assessable for the assessment year. This loss can be carried forward to a maximum of four consecutive assessment years immediately succeeding the assessment year for which the loss was first computed.
- ii. **Short-term Capital Losses** : Short term Capital loss can be set-off against any other short term capital gains or long terms capital gains only. However, where, for any assessment year, any loss computed in respect of a short-term capital loss has not been wholly set-off against the short term / long term capital gains, it can be carried forward and can be set off against capital gains if any during the next eight consecutive assessment years.

Answer 2(b)

As per the provision of Section 6(3) of the Income tax Act, 1961 for the Financial Year 2016-17, All Indian companies within the meaning of Section 2(26) of the Act are always resident in India regardless of the place of control and management of its affairs. Further, in the case of a foreign company, for the FY 2016-17, the place of control and management of its affairs is the basis on which the company's residential status is determinable.

Accordingly a company shall be said to be resident in India in any previous year, if—

- (i) it is an Indian company; or
- (ii) the control and management of its affairs is wholly situated in India.

- (a) XYZ Pharma Ltd., a company registered in India under the Companies Act, 2013 is an Indian company and therefore is always resident in India.
- (b) PQR Ltd., a company incorporated in Germany, of which the control and management of the affairs of the business is situated wholly in India. As the control and management of the affairs of the business of PQR Ltd. is situated wholly in India and accordingly PQR Ltd. shall be a resident in India.
- (c) SVR Ltd., a French Company, of which the control and management of the affairs of the business is situated wholly in Spain. As the control and management of the affairs of the business of SVR Ltd. is situated wholly in Spain and accordingly SVR Ltd. shall be a non-resident company.
- (d) ABC Ltd., a company incorporated in Australia, of which the control and management of the affairs of the business is situated partly outside India and partly in India. As the control and management of the affairs of the business of ABC Ltd. is situated partly outside India and partly in India and accordingly ABC Ltd. shall be a non-resident company.
- (e) The Partnership firm is non-resident in India, if control and management of its business affairs is wholly situated outside India as per section 6(2) of the Income tax Act, 1961. Accordingly, PCR & Co. shall be non-resident in India.

Answer 2(c)**Computation of Expected Rate of Return on Capital Employed**

<i>Particulars</i>	<i>Amount in Rs.</i>		
	<i>(Proposal I) Issue of Equity Shares</i>	<i>(Proposal II) Issue of 15% Debenture and Equity Shares</i>	<i>(Proposal III) Bank loan 15%, Issue of 15% Debenture and Equity Shares</i>
Equity Share Capital	3,00,00,000	2,00,00,000	1,00,00,000
15% Debenture	-	1,00,00,000	1,00,00,000
Bank Loan @ 15% p.a.	-	-	1,00,00,000
Total Capital Employed	3,00,00,000	3,00,00,000	3,00,00,000
PBIT (Expected Rate of Return @ 30% of total Capital employed)	90,00,000	90,00,000	90,00,000
Less: Interest on Debenture @ 15%	-	(15,00,000)	(15,00,000)
Less: Interest on Bank Loan @ 15%	-	-	(15,00,000)
Profit Before Tax	90,00,000	75,00,000	60,00,000
Less: Tax @ 30.90% on PBT	(27,81,000)	(23,17,500)	(18,54,000)
Net Profit After Tax	62,19,000	51,82,500	41,46,000
Expected Rate of Return to Share Holders	20.73%	25.9125%	41.46%

Conclusion : The Company is paying its entire net profits as dividend and the rate of return on equity is highest in the case of third alternative. Therefore, the company should opt for the third alternative.

Answer 2A(i)(a)

<i>Sr. No.</i>	<i>Tax Planning</i>	<i>Tax Avoidance</i>
1.	Tax planning is an act within the four corners of the tax laws. It is a mean to avail the benefits legally permissible under the Act.	It complies with the legal language of the law but not the spirit of the law.
2.	Tax planning is a permissible legal right which enables the tax payer to maximize his return net of taxes.	It refers to reducing the tax liability by finding out loopholes in the law.
3.	Tax planning has judicial approval.	The concept can be considered heinous to tax evasion. Government brings amendments to curb such practices and to plug the loop holes.
4.	It does not result in levy of penalty and prosecution as it is within the language and spirit of law.	It may result in disregarding the transaction done to avoid tax and may / may not result in penalties and prosecution against the person engaged in it.
5.	An Individual made investment in PPF to claim deduction under section 80C is an example of tax planning.	An assets transferred by one person to another person without consideration / without adequate consideration may be treated an example of Tax Avoidance.

Answer 2A(i)(b)

<i>Sr. No.</i>	<i>Diversion of Income</i>	<i>Application of Income</i>
1.	In case of diversion of income, Income never reaches to the assessee as his own income. By virtue of an obligation, the income is diverted at source before it reaches the assessee.	In case of application of income, Income reaches to the assessee as his own income and is subsequently applied to discharge an obligation.
2.	In case of diversion of income, the obligation is on the source of income.	In case of application of income, the obligation is on the receipt of income i.e. after income reaches to the assessee.
3.	There is an overriding title by virtue of which diversion of income takes place.	There is no over riding title in this case.

<i>Sr. No.</i>	<i>Diversion of Income</i>	<i>Application of Income</i>
4.	In case of diversion of income, the income is not included in the income of the assessee.	In case of application of income, income is included in the income of assessee.

Answer 2A(ii)

As per the provision of Section 2(22A) of the Income tax Act, 1961, in case of a foreign company, which has made prescribed arrangement for declaration and payment of dividends within India, the same will be treated as domestic company. Therefore, in the above case, GX Ltd. the foreign company, will be treated as a domestic company and would be liable to pay dividend distribution tax.

The dividend distribution tax shall be deposited within 14 days of the declaration / distribution or payment of dividends whichever is earlier.

The deduction for the payment of dividend distribution tax shall not be allowed as deduction under the provision of Income tax Act, 1961.

Answer 2A(iii)

**Computation of Book Profits and Minimum Alternation Tax of XYZ Ltd.
Assessment Year 2017-18**

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
Net profits as per Profit & Loss accounts for the year ended 31.03.2017	80,00,000	
<i>Add</i> : Depreciation including depreciation on revaluation on Assets	24,00,000	
Transfer to General Reserve	9,00,000	
Provision for unascertained liability	2,00,000	35,00,000
Total		1,15,00,000
<i>Less</i> : Depreciation excluding revaluation of assets	20,00,000	
Agriculture Income	15,00,000	
Transfer to P&L from general reserve	3,00,000	
Brought forward business loss and depreciation whichever is less	11,00,000	49,00,000
Book Profits u/s 115JB		66,00,000
Computation of Minimum Alternation Tax		
Minimum Alternate tax @ 18.50% of book profits (i.e. 18.50% * 66,00,000)		12,21,000
<i>Add</i> : Education cess and secondary and higher education cess @ 3%		36,630
Tax liability u/s 115JB		12,57,630

PART B**Question 3**

- (a) XYZ Ltd., sold machinery to ABC at a price of ₹5 lacs on 18th August, 2016 which was removed from its factory at Jaipur. The rate of excise duty applicable is 12.36% on the date of removal. ABC refused to take delivery of the machine when it reached destination. Meanwhile XYZ Ltd. increased the price of the same type of machinery to ₹6 lacs with effect from 19th August, 2016. The machinery as refused to by ABC has been sold on 26th August, 2016 to Mr. Lal at the revised price of ₹6 lacs. The excise duty including education cess applicable when the machine was sold to Mr. Lal was 15.45%.

Explain the following with reasons :

- (i) What value is to be taken as assessable value ?
- (ii) What is the rate of excise duty applicable and the amount of duty payable on above transaction ?
- (iii) The Central Excise Officer is demanding the duty on the price of ₹6 lacs at the time of sale to Mr. Lal. Is he right in his approach ?
- (iv) Does cost of production have any bearing on the assessable value ?
(5 marks)
- (b) Rakesh purchased goods from Ramesh for ₹4,50,000 which included amount of VAT charged at the rate of 12.5%. Rakesh after the purchases has made sales of 20% of goods to a trader in his own state and balance 80% of goods to other customer outside the state. Rakesh adds 20% profit on the cost while selling goods within the state and 25% of the cost when the goods are sold outside the state.
- Compute the amount of input VAT credit and its set off to be allowed to Rakesh. Sales outside the state were made against valid C forms and the rate of VAT at the time of sale was 12.5%.
(5 marks)
- (c) Hotel Samode Palace has provided the following information for the month of October, 2016 :

S. No.	Services Provided	(₹)
(i)	Serving of food in a restaurant with air-conditioned facility.	5,00,000
(ii)	Supply of food in convention centre for organizing conferences along with renting thereof.	3,80,000
(iii)	Renting of rooms (Declared Tariff : ₹5,500 per room per day)	3,20,000
(iv)	Catering services provided to a CBSE affiliated Higher Secondary School	1,00,000
(v)	Outdoor catering services provided to a Coaching institute preparing students for engineering examinations	1,80,000
	Total	<u>14,80,000</u>

- (i) All the above amounts are exclusive of service tax.
- (ii) Hotel Samode Palace is not eligible for small service provider's exemption under Notification No. 33/2012 ST dated 20-6-2012 and does not avail CENVAT credit on inputs and capital goods.

You are required to compute the value of taxable service and service tax liability of Hotel Samode Palace for the month of October, 2016. (5 marks)

- (d) "An item of excisability must necessarily pass the test of marketability." Do you agree? How the marketability of excisable goods is being determined? (5 marks)
- (e) What do you understand by the expressions "India" and "Indian Customs Waters" under the Customs Law? Are there any differences between "Indian territorial waters" and "Indian customs waters"? Explain the significance of Indian customs waters under Customs Law. (5 marks)

Answer 3(a)

- (i) The price prevailing at the time of removal of goods from the factory i.e. on 18th August, 2016 Rs. 5 lakhs is the assessable value.
- (ii) The applicable rate of excise duty is @ 12.36% and the excise duty amount payable on assessable value of Rs. 5 lakhs is Rs. 61,800/-
- (iii) The approach adopted by the Central Excise officer is not right as the duty is chargeable on the goods when it is removed from the factory i.e. 18th August, 2016 and not the date when the goods were sold to Mr. Lal i.e. 26th August, 2016.
- (iv) The cost of production has no bearing on the assessable value in the present case. The Central Excise valuation can be below the manufacturing cost if the price is the sole consideration and dealing between seller and buyer are at arm's length, assessable value will be decided on the basis of selling price, even if it is below manufacturing cost. So cost of manufacturing will not change the assessable value.

Answer 3(b)

Computation of Input VAT Credit

Particulars	Amount (INR)	Amount (INR)
Tax paid on goods purchased (Rs. 4,50,000 * 12.5/112.5)		50,000
Sale price of goods within the state being 20% of the goods by adding margin of @ 20% (Rs. 4,00,000 * 20%) + 20% margin	96,000	
Vat payable on sale of goods within the state (Rs. 96,000 * 12.5%)		12,000

Sale price of goods outside the state being 80% of the goods by adding margin of @ 25% (Rs. 4,00,000 * 80%) + 25% margin	4,00,000	
CST payable on sale of goods outside the state (Rs. 4,00,000 * 2%)		8,000
Total VAT and CST payable (Rs. 12,000 + Rs. 8,000)		20,000
Input tax credit to be carried forward (Rs. 50,000 – Rs. 20,000)		30,000

Note: Interstate sale were made against valid C forms. So, 2% has been charged.

Answer 3(c)

Computation of value of taxable services and service tax payable by Hotel Samode Palace for the month of October, 2016

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount (INR) Value</i>	<i>Amount (INR) Taxable Value</i>
i	Serving of food in a restaurant with air-conditioner facility	5,00,000	
	Value of taxable services (@ 40% of 5,00,000)		2,00,000
ii	Supply of food in convention center for organizing conferences along with renting thereof	3,80,000	
	Less : Abatement @ 30%	(1,14,000)	2,66,000
iii	Renting of rooms with declared tariff Rs. 5,500 per room per day	3,20,000	
	Less : Abatement @ 40%	(1,28,000)	1,92,000
iv	Catering services provided to CBSE affiliated Higher Secondary School of Rs. 1,00,000	Exempt	Exempt
v	Outdoor catering services provided to a coaching institute preparing students for engineering examinations	1,80,000	
	Value of taxable services @ 60% of 1,80,000		1,08,000
	Value of Taxable Services		7,66,000
	Service tax payable @ 15% (including swach bharat cess @ .05% & krishi kalian cess @ .05%)		1,14,900

Answer 3(d)

An item of excisability must necessarily pass the test of marketability. Marketability means sale ability or suitability for sale of an item. The test of marketability is also known as vendibility test.

Marketability is the acid test of excisable goods. Any event of manufacture resulting in goods must necessarily pass the test of marketability. It must be remembered that all goods are naturally movable but may not be marketable. Only those excisable goods manufactured can be subject to levy of excise, which are marketable. Since the prime purpose of manufacture is to sell, it is unthinkable of the manufacture of non saleable goods under the excise law. Right from DCM case, the Apex court has been consistently holding that for goods to be excisable, they must be marketable. However, actual sale is not required to impose excise duty.

Since marketability means saleability or suitability for sale, goods fit for sale, use or consumption are marketable goods. Goods without commercial utility or economic value cannot be considered as marketable goods.

The following are the important points regarding determining the Marketability

- (i) Marketability is saleability and not necessarily actual sale.
- (ii) Even actual sale makes the goods marketable as per the amendment in 2008.
- (iii) Marketability is not dependent on nature or description of goods. Even intermediate goods, defective goods, waste/ scrap are marketable if they are saleable in their condition.
- (iv) Even goods of short shelf life are marketable if they are sold during their short life.
- (v) Goods which cannot be identified in the market as goods are not marketable.
- (vi) Even a single buyer is enough to call the goods marketable.
- (vii) Marketability presupposes movability. Goods which are not movable are not marketable for the purpose of excise. To be marketable, goods must be capable of being brought to the market to be bought and sold.
- (viii) Marketability is a question of fact to be decided in each case.
- (ix) Goods specified In Tariff Act do not automatically qualify for marketability. It is to be proved independently that the goods are also marketable.
- (x) When marketability is in dispute, the burden of proof lies on the department.

Excisability from the point of levy shall be necessarily marketable. Marketability refers to goods with a distinctive name, character or use with economic value to be bought and sold.

Answer 3(e)

As per section 2(27) of the Customs Act, 1962, "India" includes the territorial waters of India. Further, "Indian customs waters" means the waters extending into the sea up to

the limit of contiguous zone of India under section 5 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976) and includes any bay, gulf, harbour, creek or tidal river [Section 2(28)].

The concept of territorial waters and Indian customs waters are different for the purpose of Customs law. Territorial waters extend upto twelve nautical miles from the baseline on the coast of India.

Indian customs waters extends upto contiguous zone of India which is twenty four nautical miles from the nearest point of base line. Thus Indian customs waters extend upto twelve nautical miles beyond territorial waters.

The significance of Indian customs waters is that the Customs Officer has powers to arrest a person; to stop and search any vessel; to confiscate a vessel concealing goods; to search any person on board any vessel and; to confiscate goods in the these waters.

Marine police can go only upto 12 nautical miles whereas customs officers have extended mileage upto 24 nautical miles.

Attempt all parts of either Q. No. 4 or Q. No. 4A

Question 4

(a) *What do you mean by the following specific terms used within the meaning of the Customs Act, 1962 :*

- (i) *Appellate tribunal*
- (ii) *Bill of entry*
- (iii) *Bill of export*
- (iv) *Smuggling*
- (v) *Proper officer.*

(5 marks)

(b) *XYZ Ltd. a manufacturer, produced a product "A" by using raw material X on 28-2-2017. Product "A" is movable, marketable and excisable. Product "A" was issued for captive consumption to product "B" on March 2, 2017. Product "B" got manufactured on March 5, 2017 was exempt from levy of excise duty. The value of product "A" used as intermediate product on product "B" is ₹15 lakh and the value of product "B" is ₹25 lakh. The rate of excise duty on product "A" on 28-2-2017, 2-3-2017 and 5-3-2017 was 5%, 6% and 10% respectively.*

Explain the meaning of the word "Captive Consumption" and also ascertain whether any excise duty is payable by the manufacturer and what will be amount of such duty.

(5 marks)

(c) *Rajesh Ltd., providing services in the field of advertisement provides the following information for the quarter ending 31-12-2016 :*

- (i) *Sale of space for advertisement in a national News-paper ₹50 lakh.*
- (ii) *Sale of space for advertisement through hoardings during a cricket match ₹42,00,000.*
- (iii) *Sale of advertisement in a national channel of T.V. ₹18,00,000.*

Service Tax was charged extra in the bills raised wherever applicable. Invoices are issued within 30 days of the completion of the service while payment has been received in Jan. 2017.

Find out the amount of taxable services and of the tax liability for the quarter ending 31-12-2016. (5 marks)

OR (Alternate question to Q. No. 4)

Question 4A

(i) *Mr. Kapoor is a CS and Indian resident. He brought the following items with him while returning to India from USA :*

- (a) *Personal Effects of ₹50,000*
- (b) *Jewellery valued at ₹25,000*
- (c) *One Camera costing ₹50,000*
- (d) *Professional equipment ₹40,000*
- (e) *Laptop worth of ₹30,000*
- (f) *Household goods of ₹30,000.*

Compute the amount of Custom Duty payable by Mr. Kapoor on his baggage, by assuming the Rate of duty @ 36.05%. (5 marks)

(ii) *State with brief reasons whether the following services are taxable under the service tax net in India :*

- (a) *Services provided to the United Nations.*
- (b) *Health care services.*
- (c) *Trading of goods.*
- (d) *Renting of residential dwelling for use as residence*
- (e) *Funeral services. (5 marks)*

(iii) *Anuska Motors Ltd., is the manufacturer of automobile parts for the vehicles. It has installed a gas turbine in the factory premises for generation of electricity which is being used in the production process. Naphtha is used as fuel of turbine and the assessee was availing CENVAT Credit of Excise duty paid on naphtha. The electricity generated was used partly for captive consumption and balance about 40% of the total production of electricity which was surplus was supplied to neighboring units on chargeable basis. Assessee claimed CENVAT credit on the entire input used in generation of electricity while the department disallowed the excise duty paid on inputs used for electricity sold to neighboring units on chargeable basis. Assessee claimed that CENVAT Credit on entire input is available as contained in the definition of input.*

Examine the claim of Anuska Motors Ltd. on the basis of decided case law and state whether the assessee is correct in its arguments. (5 marks)

Answer 4(a)

(i) "Appellate Tribunal" means the Customs, Excise and Service Tax Appellate Tribunal constituted under section 129 of the Customs Act, 1962;

- (ii) "Bill of entry" means a bill of entry referred to in section 46 [Section 2(4)] used for clearance of imported goods;
- (iii) "Bill of export" means a bill of export referred to in section 50 [Section 2(5)] submitted by exporter for export of goods by land route;
- (iv) "Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113; [Section 2(39)];
- (v) "Proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs [Section 2(34)];

Answer 4(b)

As per the Cost Accounting Standard – 4 issued by the Institute of Cost Accountants of India 'CMA' "captive consumption" means consumption of goods manufactured by one division or unit and consumed by another division or unit of the same organization or related undertakings for manufacturing other product or products. Goods for captive consumption are also known as intermediate goods.

Intermediate goods are liable to excise duty only, if they are movable and marketable. In the case of *Moti Laminates (P) Ltd. vs CCE* (1995), it was held by the Apex Court that the articles in crude and elementary form are not dutiable as they are merely in nature of intermediate products but not marketable in that condition. So, far as the valuation of such intermediate goods is concerned, they are valued at 110 % of the cost of production.

As per Rule – 5 of the Central Excise Rules, 2002, the applicable rate of duty on such goods will be the duty prevailing on the date when such goods are removed from the factory or warehouse for captive consumption. The intermediate product shall be liable to excise duty even if the final product is wholly exempt or chargeable to zero rate of duty.

In the instant case product A is movable and marketable and will be liable to excise duty even if final product B is exempt from duty. The rate of duty applicable on intermediate goods as per rule 5 will be the rate applicable on the date when the product A was removed for captive consumption i.e. March 2, 2017 and the excise duty shall be payable on the value of Rs. 15,00,000/- @ 6% = Rs. 90,000/-

Answer 4(c)

Computation of value of taxable services and service tax payable for the quarter ended 31.12.2016

Sr. No.	Particulars	Amount (INR) Value	Amount (INR) Taxable Value
i	Sale of space for advertising in a national news-paper (Exempt)	-	
ii	Sale of space for advertising through hoardings during a cricket match		42,00,000
iii	Sale of advertisement in a national channel of T.V.	18,00,000	

<i>Sr. No. Particulars</i>	<i>Amount (INR) Value</i>	<i>Amount (INR) Taxable Value</i>
Value of Taxable Services		60,00,000
Service tax payable @ 15% (including swach bharat cess @ .05% & krishi kaliaan cess @ .05%)		9,00,000

Answer 4A(i)**Computation of Customs Duty payable by Mr. Kapoor**

<i>Sr. No. Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
a Personal effects (Exempt)	-	
b Jewellery	25,000	
c One Camera	50,000	
d Professional equipment	40,000	
e Laptop (Exempt)	-	
f Household goods	30,000	
Total Value		1,45,000
Less : G.F.A.		(50,000)
Assessable value for duty		95,000
Customs duty (@ 36.05% of Rs. 95,000)		34,248

Note:

- Period of stay abroad by Mr. Kapoor has not been specified in the question. Hence it has been taken as a short trip. Hence no additional allowance was allowed to households, professional equipment and jewellery.
- GFA has been increased to Rs. 50,000 under New Baggage Rules, 2016

Answer 4A(ii)

- Services provided to the United Nations or a specified international organization are exempt from Service Tax net as per Notification No. 25/2012 ST dated 20th June, 2012 (Mega exemption notification Entry No. 1).
- Health care services provided by a clinical establishment, an authorized medical practitioner or paramedics are exempt from Service Tax net as per Notification No. 25/2012 ST dated 20th June, 2012 (Mega exemption notification Entry No. 3)
- Trading of goods is in the nature of sale and not a service and being specified in negative list. Hence, remains outside the service tax net. [Section 66 D (e)]

- (d) Services by way of renting of residential dwelling for use as residence are specified in the negative list. Hence, such services remains outside the service tax net. [Section 66 D (m)]
- (e) Funeral services are specified in negative list. Hence, such services remain outside the service tax net. [Section 66 D (q)]

Answer 4A(iii)

In a similar case of *Maruti Suzuki Ltd. vs. CCE* (2009) the Apex Court had held that electricity generation is an ancillary activity and if it is being used for captive consumption, it also forms part of manufacturing activity.

The Apex Court held that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors etc. for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, the assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their own factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which is sold at a price.

Applying the decision of Apex Court in the case of *Anuska Motors Ltd* which has used Naphtha as input for generation of electricity the CENVAT credit on the inputs shall be allowed to the extent of 60% as to this extent the electricity was used in production as captive consumption but on balance 40% sold to other neighboring units, no CENVAT on input shall be allowed because such generated electricity cannot be said to be used in or in relation to manufacture of final product inside the factory.

Therefore, CENVAT Credit is not available in respect of fuel used for generation of electricity which has been sold outside to other Units.

Question 5

- (a) *Narrate all those books and records, list of which is to be submitted in duplicate while filing return for the first time, required to be maintained by an assessee under the service tax law. (3 marks)*
- (b) *GST law in India is slated to come into existence with effect from 1-7-2017. What are the various central taxes proposed to be subsumed under the GST law? (3 marks)*
- (c) *"The case before the CESTAT can be represented by any one." Do you agree? If not, then state who is allowed to represent the case. Can a Company Secretary represent such case? (3 marks)*
- (d) *ZX (Ayur) Ltd. manufactures herbal toothpastes at its factory located in Mysore. The maximum retail price (MRP) printed on the packet in AP & Tamil Nadu of ₹105, in Karnataka of ₹99, and in other places of ₹111. Abatement rate is 30%.*

Total number of units removed from factory are 10,00,000. Excise duty as per Tariff is 12.5%.

Find out the excise duty payable on the entire quantity removed. (3 marks)

(e) *A manufacturer based in Mumbai is willing to apply the MRP based valuation scheme in respect of the following excisable goods :*

- *Exports*
- *Bulk sale/sale in wholesale pack*
- *Package of less than 10 gram/10 ml*
- *Sale to industrial/institutional consumers*

Advise the manufacturer under the excise law. (3 marks)

Answer 5(a)

As per Rule 5(2) of Service Tax Rules 1994, Every assessee shall furnish to the Superintendent of Central Excise at the time of filing of return for the first time a list in duplicate, of-

(a) all the records prepared or maintained by the assessee for accounting of transactions in regard to:

- providing of any service,
- receipt or procurement of input services and payment for such input services;
- receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;
- other activities, such as manufacture and sale of goods, if any.

(b) all other financial records maintained by him in the normal course of business.

Answer 5(b)

The following are the various Central Taxes proposed to be subsumed under the GST Law:

- Central Excise Duty
- Service Tax
- Additional Excise Duties
- CVD (levied on imports in lieu of Excise duty)
- SAD (levied on imports in lieu of VAT)
- Excise Duty levied under Medicinal and Toiletries Preparations Act,
- Surcharges and Cesses

Answer 5(c)

Under section 35Q of the Central Excise Act 1944, appearance before CESTAT besides the assessee is allowed through an Authorised Representative. Accordingly, a person who has been authorised by the assessee can appear before the CESTAT.

Accordingly, the statement i.e. "The case before the CESTAT can be represented by any one" is not correct.

Section 35Q prescribes that any party to a dispute may otherwise than when required by the Tribunal to attend personally for examination on oath, can appear through an authorised representative who may be:

- (a) his relative or regular employee; or
- (b) Custom House Agent; or
- (c) any legal practitioner who is entitled to practice in any civil court; or
- (d) any person who has acquired such qualifications as the Central Government may prescribe by Rules made in this behalf. The Central Government has prescribed the qualifications under Rule 12 of the Central Excise (Appeals) Rules, 2001.

Yes, a Company Secretary who has obtained a Certificate of Practice under Section 6 of the Company Secretaries Act, 1980 is allowed to represent the case before CESTAT.

Answer 5(d)

As per explanation 2 to section 4A(4) of the Central Excise Act 1944, where more than one MRP is printed on a package, highest of such MRPs shall be taken for valuation. Therefore in the case of ZX (Ayur) Ltd, the MRP for the Toothpaste sold in different states on different rates shall be taken at the highest of all i.e. Rs.111/-.

Hence the assessable value (70% of MRP) i.e. 70% of Rs. 111 = Rs. 77.70

Total units of toothpaste removed from factory = 10,00,000 units

Assessable Value = 10,00,000 * 77.70 = 7,77,00,000

Rate of Excise duty = 12.50%

Excise duty payable (Rs. 7,77,00,000 * 12.50 %) = Rs. 97,12,500

Answer 5(e)

MRP based valuation scheme is not applicable to the manufacturer in respect of the following excisable goods:

- Exports
- Bulk sale/sale in wholesale pack.
- Package of less than 10 gram/ 10 ml.
- Sale to industrial / institutional consumers.

Hence, transaction value method under Section 4 of the Act is to be applicable for all the four items.

Question 6

(a) *Determine the assessable value for computation of Customs Duty from the following information relating to a machine imported from U.S.A. by an Indian Company :*

- (i) *Cost of machine (\$) 25,000*

- (ii) Cost of goods supplied by the importer to the exporter to be used in manufacturing of machine (₹) 2,00,000
- (iii) Design and development charge payable to the exporter (\$) 9,000
- (iv) Installation charges of machine (₹) 1,00,000
- (v) Packing and Insurance charges (\$) 1,000
- (vi) Freight (\$) 1,000
- (vii) Transportation charges of machine from port to the place of installation (₹) 50,000

Note : Exchange rate declared by RBI was ₹61 per dollar while the rate declared by the Board was ₹60 per dollar. (5 marks)

- (b) Briefly discuss, whether the following purchases are eligible for CENVAT credit as capital goods under rule 2(a) of the CCR, 2004 :
- (i) Cool Cab Services Ltd. engaged in providing the passenger transportation service, purchased 10 cabs (not registered in the name of Cool Cab Services Ltd.) for the purpose of providing said service.
 - (ii) Samar Manufacturers, engaged in the manufacture of excisable goods, purchased two special purpose motor vehicles, falling under tariff heading 8705, for use in its factory. (4 marks)
- (c) Lalit Export House exported some goods to Germany. The invoice value of the goods exported of ₹45,00,000 was assessed by the customs appraiser at ₹50,00,000. The shipping bill was presented electronically on 20-3-2017. However, the proper officer passed order permitting clearance and loading of goods for export on 9-4-2017. Compute the export duty payable by Lalit Export House, if the rate of export duty was 9% on 20-3-2017 and 10% on 9-4-2017. (3 marks)
- (d) Examine the validity of the following statements and give brief reasons for your answer :
- (i) Central Government is empowered to make laws in respect of excise duty leviable on liquors (meant for human consumption) containing alcohol.
 - (ii) Taxes on intra-state sale or purchase of goods are covered under entry 92A of Union List of the Constitution. (3 marks)

Answer 6(a)**Computation of Assessable Value**

Particulars	Amount (INR)	Amount (INR)
Cost of Machine (\$ 25,000 * Rs. 60)	15,00,000	
Cost of goods supplied by Importer to the exporter to be used in the manufacturing of machine	2,00,000	
Design and development charge payable to the exporter (\$ 9000 * Rs. 60)	5,40,000	
Packing and Insurance charges (\$ 1000 * Rs. 60)	60,000	

<i>Particulars</i>	<i>Amount (INR)</i>	<i>Amount (INR)</i>
FOB Value		23,00,000
Add : Fright (\$ 1000 * Rs. 60)		60,000
CIF Value		23,60,000
Add : Handling Charges @ 1% of CIF Value (1% * 23,60,000)		23,600
Assessable Value		23,83,600

Note : The exchange rate for the purpose of working of the assessable value shall be the rate declared by the board and not by the RBI. Hence, the value of \$ is taken at Rs. 60 / \$.

Answer 6(b)

- (i) The cabs purchased by Cool Cab Services Ltd, are not eligible for CENVAT Credit as capital goods as such cabs are not registered in the name of the service provider i.e, Cool Cab Services Ltd,
- (ii) The special purpose motor vehicles, falling under tariff heading 8705, are eligible for CENVAT Credit as capital goods. As per the definition of capital goods, motor vehicles other than those falling under tariff headings 8702, 8703, 8704 and 8711 used in the factory of the manufacturer of the final products are eligible capital goods.

Answer 6(c)

Computation of Export duty payable by Lalit Export House

<i>Particulars</i>	<i>Amount (INR)</i>
Assessable value of exported goods to be taken as being determined and assessed by the customs appraiser and not the invoice value	50,00,000
Export duty payable @ 10 % (Note 1)	5,00,000

Note:

1. In case of goods entered for export, the rate of duty shall be the rate in force on the date on which the proper officer makes an order permitting clearance and loading of the goods of exportation and not the date when the shipping bill was filed (Section 16).
2. Education Cess is not payable on export duty.

Answer 6(d)

- (i) *Invalid*: Duties of excise on alcoholic liquors meant for human consumption are covered under entry 5l of State List (List II). Thus, only State Governments are authorized to make laws in respect of such excise duty.
- (ii) *Invalid* : Taxes on intra-state sales or purchase of goods are covered under entry 54 of State List of the Constitution. Entry 92A of Union List of the Constitution covers central sales tax.

DRAFTING, APPEARANCES AND PLEADINGS

Time allowed : 3 hours

Maximum marks : 100

NOTE : Answer ALL Questions.

Question 1

Comment on the following :

- (a) *FIR can be lodged with the Police Station only in case of cognizable offences. What do you understand by non-cognizable offences ?*
- (b) *What are the rights available against refusal of transfer of shares by a company?*
- (c) *Decree has been awarded by the court. Advice on information required for making written application for execution of decree.*
- (d) *'Wakfs are trusts'. Explain ? Advise on applicability of Indian Trust Act on Wakfs. (5 marks each)*

Answer 1(a)

Section 154 of the Criminal Procedure Code, 1973 deals with cognizable offence. It provides that:

- (i) Every information relating to the Commission of a cognizable offence, if given orally to an officer in-charge of a police station, it shall be reduced in writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing, or reduced in writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe.
- (ii) A copy of the information so recorded shall be given forthwith, free of cost to the informant.
- (iii) A person aggrieved by refusal on the part of the Police Officer to record the said information, may send the substance of such information by post to the Superintendent of Police concerned.

The provisions of Section 154 are mandatory and the concerned Police Officer is duty bound to register the case on receiving information disclosing cognizable offence.

Non Cognizable Offence

- A non-cognizable case means, 'a case in which, a police officer has no authority to arrest without warrant.'
- These offences are not much of serious in nature. Example: Assault, Cheating, Forgery, Defamation.
- Section 155 of Cr. P. C. provides that in a non-cognizable offence or case, the police officer cannot receive or record the FIR unless he obtains prior permission from the Magistrate.

Answer 1(b)

Section 58 of the Companies Act, 2013 provides that if a private company limited by shares refuses, whether in pursuance of any power of the company under its articles or otherwise, to register the transfer of, or the transmission by operation of law of the right to, any securities or interest of a member in the company, it shall within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

The securities or other interest of any member in a public company shall be freely transferable. Any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

The transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, was delivered to the company.

Answer 1(c)

Every application for the execution of a decree shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:

- (i) The No. of the suit
- (ii) The names of the parties
- (iii) The date of the decree
- (iv) Whether any appeal has been preferred from the decree
- (v) Whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree
- (vi) Whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results
- (vii) The amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed
- (viii) The amount of costs (if any) awarded
- (ix) The name of the person against whom execution of the decree sought
- (x) The mode in which the assistance of the court is required, whether –
 - a. By the delivery of any property specifically decreed
 - b. By the attachment or by the attainment and sale or by the sale without attachment of any property

- c. By the arrest and detention in prison of any person
- d. By the appointment of a receiver
- e. Otherwise, as the nature of the relief granted may require.

Answer 1(d)

There is a difference between Muslim Wakfs and Trusts. The basic difference is that Wakf properties are dedicated to God and the "Wakif" or dedicator, does not retain any title over the Wakf properties. As far as Trusts are concerned, the properties are not vested in God. Some of the objects of such Trusts are for running charitable organisations such as hospitals, shelter homes, orphanages and charitable dispensaries, which acts, though recognized as pious, do not divest the author of the Trust from the title of the properties in the Trust, unless he relinquishes such title in favour of the Trust or the Trustees. At times, the dividing line between Public Trusts and Wakfs may be thin, but the main factor always is that while Wakf properties vest in God Almighty, the Trust properties do not vest in God and the trustees in terms of Deed of Trust are entitled to deal with the same for the benefit of the Trust and its beneficiaries.

Though wakfs are trusts, the Indian Trusts Act does not apply to wakfs under the Muslim Law. However, it is open to a Muslim to create a secular trust of a public and religious character. Such a trust would be governed by the Indian Trusts Act, 1882.

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

Write notes on the following :

- (a) *Privilege WILL and non-Privilege WILL.*
- (b) *Name and explain various types of Writs allowed by Constitution of India.*
- (c) *Essentials of E-contracts.*
- (d) *Drafting of Articles of Association.* (4 marks each)

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

Write notes on the following :

- (i) *Fidelity Guarantee*
- (ii) *On-line Shopping Agreement between the Service provider and manufacturer.*
- (iii) *Types of Mortgage.*
- (iv) *Probate and letter of administration.* (4 marks each)

Answer 2(a)

Privilege Will – Any soldier being employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or any mariner being at sea, may, if he has completed the age of 18 years, dispose off his property by a will made in a manner provided in Section 66 of the Indian Succession Act, 1925. Such wills are called privilege

wills, such type of will may be made orally or may not always be in writing, if it is in writing, it need not be signed or attested.

Non-Privilege Will – Wills made other than privilege wills are non-privilege wills. Such wills are required to be in writing, signed by the Testator and must be attested by two witnesses. It is governed by Section 63 of the Indian Succession Act, 1925.

Answer 2(b)

As per Articles 32 and 226 of the Constitution of India, writs are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. A brief discussion of each is as follows:

Habeas Corpus - The writ of *habeas corpus* is a remedy available to a person who is confined without legal justification. The words "*Habeas Corpus*" literally mean "to have a body". This is an order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for his detention.

Mandamus - The expression "*mandamus*" means a command. The writ of mandamus is, thus, a command issued to direct any person, corporation, inferior Court or Government authority requiring him to do a particular thing therein specified which pertains to his or their office and is further in the nature of a public duty. This writ is used when the inferior tribunal has declined to exercise jurisdiction. Mandamus can be issued against any public authority.

Prohibitions - The writ of prohibition is issued by the Supreme Court or any High Court to an inferior Court preventing the latter from usurping jurisdiction which is not legally vested in it. It compels courts to act within their jurisdiction when a tribunal acts without or in excess of Jurisdiction or in violation of rules or law. The writ of prohibition is available only against judicial or *quasi-judicial* authorities and is not available against a public officer who is not vested with judicial functions.

Certiorari - The writ of certiorari is available to any person whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of its legal authority. The writ removes the proceedings from such body to the High Court in order to quash a decision that goes beyond the jurisdiction of the deciding authority.

Quo warranto - The writ of quo warranto is prayed for an inquiry into the legality of the claim which a person asserts to an office or franchise and to oust him from such position if he is an usurper.

Answer 2(c)

E-contracts is a kind of contracts formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.

The essentials of e-contracts are:

- (i) An offer or proposal by one party and acceptance of that offer by another party resulting in an agreement consensus-ad- idem.

- (ii) An intention to create legal relations or intent to have legal consequences.
- (iii) The agreement is supported by lawful consideration.
- (iv) The parties to contract are legally capable of contracting.
- (v) Genuine consent between the parties.
- (vi) The object and consideration of the contract is legal and is not opposed to public policy.
- (vii) The terms of the contract are certain.
- (viii) The agreement is capable of being performed i.e., it is not impossible of being performed.

Answer 2(d)

Articles, as a public document of the company, have evidentiary value in matters which involve dealing of the company with its own members or third parties. Any person outsider has constructive notice of the contents of Articles and expected to inspect before entering into any transaction with the company. Articles must be signed by the subscribers of the Memorandum and be registered along with the Memorandum. In case of drafting the articles for a public limited company limited by shares, the draftsman can follow the following alternatives:

- (i) Adopt Table A in full; or
- (ii) Exclude Table A wholly and register own Articles suiting its requirements; or
- (iii) Register own articles and in addition thereto allow Table A to apply so far as it is not modified or excluded by the articles.

Articles shall be divided into paragraphs numbered consecutively. This will help the company to alter the articles conveniently.

Some important points which a draftsman should bear in mind while drafting the Articles are as follows:

1. Share capital, its kinds, rights attached to different kinds of shares or any special privileges attached thereto should be considered and incorporated in Articles.
2. Directors – appointment of directors, their noting rights, resignations, termination etc. should be given due consideration and their rights, powers and privileges should be incorporated in Articles. Proportional representations may also be looked into.
3. In Government Companies, Joint Sector Companies, Joint Ventures with foreign companies, joint venture with Government Companies, the main terms of their partnership in share capital as well as the management of the affairs of the company with power and authority delegation are relevantly discussed in the Articles with scope and limitations thereto to avoid any misinterpretation.
4. As far as possible, regulation given in Table A may be borrowed, even if it is not made applicable; so that Article may conform to the intent and spirit of law.

5. Efforts should be made to make each article self-explanatory and self-interpretative to avoid misleading conclusions. Coherence and sequence of the contents should be maintained at any costs.
6. Any items which are already mentioned in Memorandum and is to be mentioned in Articles, it is better that it is put in words such as "as mentioned in Memorandum of Association" which will skip the requirement of altering Articles when Memorandum is altered.
7. No provision which a company cannot do either as per Memorandum or Companies Act or any other law, should find a place in articles: e.g. expulsion of members. This is opposed to Company Jurisprudence and is ultra vires of the Act.
8. Where the company would require assistance from financial Institutions, provisions is made for appointment of nominee directors, conversion of loans from financial institutions into equity etc.
9. After drafting AoA a proper balancing should be done with Memorandum's contents, as to coverage, inconsistencies with it, contradictions occurred etc. to enable proper modification in time.

It is better to have an Article of an existing company in the same field of activity, either to modify it or at least to know the relevant matters which can be included in the Draft. Before printing it is better be shown to ROC and seek his informal approval.

Answer 2A(i)

A guarantee, guaranteeing by employer against the misconduct of an employee or to answer for the debt or default of another, is called a "fidelity guarantee". A surety's liability for the faithful discharge of another of his duties depends in each case on the exact terms of the guarantee. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised, because the employer of the servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work.

If the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved fact of dishonesty without notice to the guarantor, the surety is discharged. That is a basic principle implicit in the very nature of a fidelity guarantee. The guarantor in such a case guarantees the fidelity and ensures the loss against the risk of infidelity. If the employer wants to continue a dishonest servant after his dishonesty has been proved then he must give the guarantor notice of the fact of infidelity so that the guarantor may get an opportunity to say whether he would continue his guarantee or not for a man whose infidelity has been proved.

Answer 2A(ii)

If XYZ Ltd. wants to offer online shopping services to its customers. XYZ Ltd. would tie-up with manufacturers of books, toys, clothes etc and offer their products for sale through its website. Some of the products could be stocked in XYZ's warehouses while others could be stocked with the manufacturers.

Additionally visitors can post reviews, comments, photos etc. on the XYZ's website.

XYZ Ltd. would need to enter into a contract with all its potential customers “before” they place an order for a product using its services.

The important points in regard to On-line shopping Agreement between the Service Provider and manufacturer are:

1. Customer’s relationship with Service Provider
2. Acceptance of the terms of the contract
3. Copyright
4. Customers duties and obligations
5. License from Service Provider
6. Reviews and comments
7. Risk of loss
8. Pricing
9. Prohibitions
10. Applicable Law
11. Limitation of liability
12. Exclusion of warranties
13. Ending the relationship between Service Provider and the customer

Answer 2A(iii)

The following are different kinds of mortgages :

(a) *Simple Mortgage*

In a simple mortgage, the mortgagor without delivering possession of the mortgaged property binds himself personally to pay the mortgage money and agrees expressly or impliedly that if he fails to pay the debt and interest in terms of the mortgage deed, the property will be sold and the proceeds applied in payment of the mortgaged money.

(b) *Mortgage by Conditional Sale*

In a mortgage by conditional sale, the property is sold subject to the condition that on default in payment of the mortgaged money on a certain date the sale shall become absolute or that on such payment the sale shall become void or on such payment the buyer shall transfer the property to the seller. Possession of the property shall be with the mortgagee.

(c) *Usufructuary Mortgage*

In this mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee who retains the possession until the satisfaction of the debt. The mortgagee will take the usufruct in lieu of the interest or part payment of the

principal or partly in payment of interest or partly in part payment of the principal. The mortgagor is not personally liable to pay the debt and the mortgagee is not entitled during the term of the mortgage to demand his mortgage money.

(d) *English Mortgage*

In an English mortgage, a mortgagor binds himself to repay the mortgaged money on certain date and transfers the mortgaged property absolutely to the mortgagee subject to the proviso that he will re-transfer it to the mortgagor upon payment of the mortgaged money as agreed.

(e) *Mortgage by Deposit of Title Deeds*

Mortgage by deposit of title deeds is called in English law as *equitable mortgage*. It is an oral transaction and no documents like Deed of Mortgage is required to be executed. No written acknowledgement is required for creating this mortgage.

(f) *Anomalous Mortgage*

Anomalous Mortgage is a combination of any of the above forms of mortgage or any mortgage other than those set out above.

Answer 2A(iv)

Probate

Probate is a certificate granted under the seal of Competent Court, certifying the Will as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will.

Letters of Administration

A letter of administration can be obtained from the Court of competent jurisdiction in cases where the testator has failed to appoint an executor under a will or where the executor appointed under a will refuses to act or where he has died before or after proving the Will but before administration of the estate. Letters of Administration are not always necessary in cases of intestacy of Hindus, Mohammedans, Buddhists, Sikhs, Jains, Indian Christians or Parsis. Letter of Administration is always necessary where a person (Governed by the Indian Succession Act, 1925) dies intestate.

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

Question 3

- (a) *Subrogation of Surety to the Rights of creditor on payment.*
- (b) *Assignment of copyrights.*
- (c) *FIR can be lodged with the Police Station whereas a complaint is to be made to the Magistrate.*
- (d) *Gift can be made either orally or through Gift deed. Is there any requirement to get it stamped and registered ?* (4 marks each)

OR (Alternate question to Q. No. 3)

Question 3A

- (i) *Sub-lease is not a surrender of lease.*

- (ii) *An award given by the Arbitrator is not always final and binding upon the parties.*
- (iii) *Deficiency in pleading would not affect case of Plaintiff. State the points to be considered for supporting the above statement.*
- (iv) *Usufructuary mortgage is similar to English Mortgage. Whether this statement is correct ? Justify your answer. (4 marks each)*

Answer 3(a)

When a surety makes a payment to a creditor on behalf of the principal debtor in case of a default, he acquires the rights of a creditor against the principal debtor. He can recover the entire amount that he has paid to the creditor. This is called the right of subrogation.

Section 140 of the Indian Contract Act, 1872 invests a surety with all the rights which the creditor has against the principal debtor, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety has made the payment or performed all that he is liable for.

Answer 3(b)

Section 18 of the Copyright Act deals with the assignment of copyrights. It provides that:

- (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof;

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

- (2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

“No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent.”

Answer 3(c)

Section 154 Criminal Procedure Code, 1973 deals with information in cognizable cases. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Such information is called FIR. A copy of the first information report shall be given forthwith, free of cost, to the informant.

Complaint under section 2(d) of the Criminal Procedure Code means any allegation

made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence, but it does not include a police report.

However, a report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer making the report as a complainant. In general a complaint into an offence can be filed by any person except in cases of offences relating to marriage, defamation and offences mentioned under Sections 195 and 197.

Answer 3(d)

The gift deed should be drafted as a deed of transfer with recitals if necessary. There is no consideration involved in gift as such no mention is required to be made of the same in the gift deed. However, the words "natural love and affection" is generally expressed in all cases of gift to relations, and "consideration of esteem and regard" is expressed when the gift is in favour of same person for whom the donor has regard e.g. when the donee is his religious preceptor. But for a Company these intra-personal characteristic may be necessary. A Company may make gift to honour a person for his outstanding achievements in social life if so authorised under its memorandum and articles.

The value of the property gifted must be set forth in the deed of gift. Stamp Duty is payable on gift deed as on the conveyance as per amount of value of the property as mentioned in the deed or as per market value of such property whichever is greater as per Article 23 of the Indian Stamp Act, 1899. If the value of the property is intentionally omitted or under-valued with a view to defraud the revenue, prosecution may be invited under Section 64 of Indian Stamp Act. Further, penalty provisions under Gift-tax Act may also be attracted.

Gift deed of immovable property is compulsorily registrable as per Section 123 of the Transfer of Property Act and Section 17(i)(a) of the Registration Act, 1908, whatever may be the values.

Answer 3A(i)

A sub-lease is a demise by a lessee for lessor term than he himself has. Every lessee, however short his term may be, make a sub-lease unless he is refrained by the contract of the tenancy from subletting. If the demise is for the whole term or for a period beyond the term, it amounts to assignment. If the lessee divests himself he becomes a stranger to the demised property and he has no right to have possession delivered up to him. It is true that a covenant against subletting will restrain the assignment, but a mere covenant against subletting does not prohibit underletting a part of the premises. As long as the lessee remains in possession he may permit another person to use the demised premises without committing a breach of covenant, namely not to assign, underlet or part with the possession of the demised premises.

Surrender of lease is not a transfer but mere yielding up by the lessee of his interest under the lease to the lessor by mutual agreement. It is in effect merger of the estate of the lessee into the reversion. It is not a transfer or an assignment of any right or estate within the meaning of Section 5 of the Transfer of Property Act, 1882. The person who surrenders is called the surrenderer and the person to whom surrender is made is called

the surrenderee. A Requisition Order by the Government does not amount to any surrender. It may be expressed or implied. Except in a case of some special kinds of lease as required by special Act, no writing or registration is necessary. Surrender may be oral, if accompanied by delivery of possession.

Answer 3A(ii)

Arbitration is a means devised to quick and economical settlement of a dispute between two contracting parties, who also agree as part of the main agreement to refer dispute or difference arising out of or touching upon the terms and conditions of the agreement to a third person to give his judgement, which shall be binding on both the parties. Where the decision of a person is binding on only one of the parties and not on all the parties to the dispute, it cannot be said that the function, which the person giving the decision is exercising, is arbitral in character.

Normally, the decision of the arbitrator is binding upon the parties. However, if the same is not acceptable to either of the parties, then an appeal can be made under section 34 of the Arbitration and Conciliation Act, 1996.

Answer 3A(iii)

In normal circumstances the pleading has to be complete in all respects. However, deficiency in pleading would not affect the case of the plaintiff in the following circumstances:

- (a) Parties are related to each other and know everything in respect of facts and figures of the case.
- (b) No element of surprise has been caused to the other party.
- (c) Parties understood the case and led evidence accordingly.

This was decided in *Kailash Chandra v. Vinod*, AIR 1994 NOC 267 (MP).

Answer 3A(iv)

Usufructuary Mortgage

In this mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee who retains the possession until the satisfaction of the debt. The mortgagee will take the usufruct in lieu of the interest or part payment of the principal or partly in payment of interest or partly in part payment of the principal. The mortgagor is not personally liable to pay the debt and the mortgagee is not entitled during the term of the mortgage to demand his mortgage money.

English Mortgage

In an English mortgage, a mortgagor binds himself to repay the mortgaged money on certain date and transfers the mortgaged property absolutely to the mortgagee subject to the proviso that he will re-transfer it to the mortgagor upon payment of the mortgaged money as agreed.

Hence, Usufructuary mortgage and English mortgage are not similar.

Question 4

- (a) *Draft a petition for prevention of Oppression & Mismanagement u/s 241 of The Companies Act, 2013 with NCLT. Assume facts. (8 marks)*
- (b) *Draft a petition for grant of probate of a will. (8 marks)*

Answer 4(a)

Petition for prevention of Oppression & Mismanagement u/s 241 of The Companies Act, 2013 with NCLT

Before the NCLT, New Delhi

In the matter of XYZ Garments having its Registered office at, Delhi

And

Mr. P s/o. r/o

Mr. Q s/o. r/o

Mr. R s/o. r/o Petitioners

Vs.

Mr. D s/o. r/o

Mrs. D w/o r/o..... Respondents

The petitioners submit as under:

1. That XYZ is a registered company under the provisions of the Companies Act having its Head office a Delhi.
2. That P,Q& R are the shareholders of the company having an aggregate shareholding of 40%, i.e., more than 10% required to file this petition.
3. That Mr. D and Mrs. D have gained interest in a new company and are diverting the orders of XYZ to new company which is detrimental to the interests of XYZ Ltd.
4. XYZ in their Annual General Meeting held on have removed Mr. & Mrs. D from Directorship of the Company after following the process laid by law. Certified copies of minutes and returns filed with the Registrar of Companies are enclosed.
5. That the petitioner feels that the oppressive methods of respondents should be stopped forthwith. The petitioners have already suffered irreparable loss.
6. In view of above this petition is filed to seek appropriate orders restraining Mr. and Mrs. D to act as Director of the company and to prevent them to continue with their oppressive methods.
7. The petition has been made bona fide in interest of justice.
8. Affidavit verifying the petition is annexed.
9. Prescribed filing fee of Rs.is enclosed.

10. It is hereby prayed that :

- a. An order may be issued preventing Mr. and Mrs. D from continuing to their oppressive methods.
- b. Any other order that this Hon'ble Tribunal may think fit & proper in the circumstances of the case.

For & on behalf of petitioner

Place:

Date:

Sd/-

Answer 4(b)

Petition for grant of probate of a will

(Under s. 276 of the Indian Succession Act 1925)

In the Court of the District Judge/District Delegate

at.....

Act 39 of 1925 Case (Or. Misc. Judicial Case) No.of 20.....

A.B. son of C.D.

(State here description and address)

..... Petitioner.

In the matter of grant of a probate of the will of E.F., deceased, under s. 276 of the Indian Succession Act.

The above-named petitioner states as follows:

1. That E.F., since deceased ofP.S. Dist.....died at his residence at.....on.....(date of death) and the writing annexed, in sealed cover, is his last will, duly executed by the deceased on.....
2. That the petitioner was named as the executor in the said will.
3. That the amount of assets which is likely to come to the petitioner's hand is estimated at Rs.....as described in Schedule 'A' below and the amount of debts are shown in Schedule 'B' below.
4. That the said deceased left behind the following relations, besides the petitioner:
 - (i) G..... Son of
(State residence) Brother
 - (ii) H..... widow of
(State residence) Widow of the deceased
 - (iii) M.....Daughter of
(State residence) Daughter

5. That at the time of his death the deceased had his fixed abode at..... (or the deceased had his immovable properties at village – P.S. – Dist.-) within the jurisdiction of this court.
6. That to the best of the petitioner's belief no application has been made to any other court for a probate of the said will.
7. That the petitioner has paid off Estate Duty on the estate of E.F. – deceased.
8. The petitioner, therefore, prays that the court may be pleased to grant to the petitioner probate of the said will of the deceased.

Verification

I, (A.B.), the petitioner in the above petition, declare that statements made in paras 1 to 7 herein above are true to my knowledge and belief and I sign this verification this theday of 20..... at the Bar Library,(place) (see s. 280 of the Indian Succession Act).

A.B.

I, Sri.....one of the witnesses to the last will of E.F. deceased, declare that I was present and saw the said testator affixing his signature in the said will. (See s. 281 of the Indian Succession Act).

Schedule 'A'

(State here assets likely to come to the hand of the executor).

Schedule 'B'

(State here liabilities, debts, if any).

Question 5

- (a) *What are the provisions in the constitution regarding filing of SLP ? (8 marks)*
- (b) *Pravin Arora mortgaged his property in favor of Juhi Chawla in consideration of loan taken by Pravin Arora. Now the loan together with interest has been paid. Prepare a deed of redemption or re-conveyance of mortgaged property in favor of the mortgagor. (8 marks)*

Answer 5(a)

Special Leave Petitions in India (SLP) holds a prime place in the Judiciary of India, and has been provided as a "residual power" in the hands of Supreme Court of India to be exercised only in cases when any substantial question of law is involved, or gross injustice has been done. It provides the aggrieved party a special permission to be heard in Apex court in appeal against any judgment or order of any Court/tribunal in the territory of India.

Article 136 of the Constitution confers upon the Supreme Court power to grant special leave to appeal. The Article lays down:

- “(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.

- (2) Nothing in clause (1) shall apply to any judgement, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces”.

Section 112 of the Code of Civil Procedure, 1908 keeps the powers of the Supreme Court under Article 136 of the Constitution to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India, beyond the scope of the provisions of the Code.

Special Leave Petition (SLP) to the Supreme Court under Article 136

In suitable cases, where some arguable questions, mostly on legal points are involved, the Constitution confers under Article 136 wide discretionary powers on the Supreme Court to entertain appeals even in cases where an appeal is not otherwise provided for. But so far as questions of fact, as distinct from questions of law, is concerned, it is only in rare or exceptional cases that the Supreme Court interferes and that too when finding of the High Court or the lower Court is such that it shocks the conscience of the court.

Answer 5(b)

Deed of Redemption or Re-conveyance of Mortgaged Property by the Mortgagee in favour of the Mortgagor

This deed of redemption is made at _____ on this the _____ day of _____ between

Mr. Pravin Arora, son of Mr. Saket Arora, aged about 50 years, residing at _____, hereinafter referred as MORTGAGOR (which expression shall, unless it is repugnant to the context mean and include his legal representatives and executors.)

And

Ms. Juhi Chawla, Wife of Mr. Jay Mehta, aged about 43 years, residing at Worli, Mumbai, Maharashtra, hereinafter referred to as MORTGAGEE (which expression shall, unless it is repugnant to the context mean and include his legal representatives and executors.)

WHEREAS, the property, more fully described in the schedule I hereto; was mortgaged by the MORTGAGOR to the MORTGAGEE as security for the repayment of a debt amounting to Rs _____ under a deed of mortgage dated _____, registered as document number: in the office of the Sub-Registrar _____.

The MORTGAGEE has received full and final repayment of the loan amount of Rs. _____ Borrowed by the MORTGAGOR _____ under the aforementioned Deed of Mortgage dated _____ vide cheque number/Cash _____ dated _____ drawn on the _____ in favour of the MORTGAGEE.

NOW THIS DEED WITNESSETH THAT in consideration of the payment of Rs. _____ to the Mortgagee by the Mortgagor paid in full of the principal sum and interest due and owing to the mortgagee on the security of the said Indenture of the Mortgage (the receipt whereof the Mortgagee doth hereby admit and acknowledge and of

and from the same doth hereby acquit, release and forever discharge the Mortgagor), the Mortgagee doth hereby retransfer and reconvey to the Mortgagor all that the said mortgage property, more particularly described in the Schedule I hereto, to have and hold the same unto the Mortgagor absolutely and free from encumbrances of any kind whatsoever and discharged from all claims, demands and rights of the Mortgagee under the said mortgage and the Mortgagee hereby covenant with the Mortgagor that he has not done or knowing or willingly suffered or been party or privy to any act, deed or thing whereby or by reason of means whereof the said mortgaged property hereby reconveyed or retransferred or intended so to be or any of them or any part thereof may or shall be impeached, affected or encumbered in title, estate or otherwise howsoever.

AND THE MORTGAGEE HEREBY DECLARES AND CONFIRMS that title deeds he has delivered the title deeds in respect of the mortgaged property and the Deed of Mortgage to the Mortgagor.

SCHEDULE I

Property Details

IN WITNESS WHEREOF, the MORTGAGOR and the MORTGAGEE has hereto set their hands to this deed of redemption on the day, month and year hereinabove written.

WITNESSES:

- | | |
|----|----------------------------|
| 1. | Signature of the Mortgagee |
| 2. | Signature of the Mortgagor |

Question 6

- (a) *You are not happy with the judgement issued by the court. The client has approached the lawyer to file an application for review of the judgement. Draft an application for review of the judgement. (8 marks)*
- (b) *X Co. Ltd. intends to hire the operational staff like Malis, Sweepers, Security Guards, Typists etc. for its office in New Delhi. As a Company Secretary in practice, advise the management of X Co. Ltd. about the benefits of outsourcing the staff rather than direct recruitment. Also draft a specimen of the outsourcing agreement to be entered into with the Service Provider Company. (8 marks)*

Answer 6(a)

Application for review of a judgment

(Under Or. 47, r. 1 of C.P. Code)

A.B.Plaintiff.

Versus

1. C.D.
2. E.F.Defendants

The above-named defendants most respectfully showeth:

1. That the plaintiff instituted a suit against the petitioner-defendants in this court and obtained a judgment and a decree in his favour on.....

2. That no appeal is allowed against the said judgment/decree by law. (Or, no appeal has been preferred against the said decree/judgment).
3. That the defendants are aggrieved with the said judgment/decree and pray for review of the said judgment/decree on the following, amongst others,

Grounds

- (a) Discovery of new and important matter or evidence.
- (b) Discovery of some mistake or error apparent on the face of the record.
- (c) Any other sufficient reason.

It is, therefore, prayed that Your Honour may be pleased to

- (i) set aside the judgment;
- (ii) re-hear the suit and pass judgment accordingly.

Answer 6(b)

Outsourcing is the contracting out of a company's non-core, non-revenue producing activities to specialists. It differs from contracting in that outsourcing is a strategic management tool that involves the restructuring of an organization around what it does best - its core competencies.

Two common types of outsourcing are Information Technology (IT) outsourcing and Business Process Outsourcing(BPO). BPO includes outsourcing related to accounting, human resources, benefits, payroll, and finance functions and activities. Knowledge Process outsourcing (KPO) includes outsourcing related to legal, paralegal, and other highly skilled activities.

The benefits of outsourcing are as under:

1. Direct hiring of the staff becomes a permanent liability. It is very difficult to select right type of persons and it is equally difficult to remove them in case of any trouble.
2. Recruitment and selection is costly and time consuming. Hiring through outsourcing is comparatively very convenient and cost effective.
3. Lot of flexibility is there for hiring through outsourcing where as in direct recruitment, there is hardly any flexibility.
4. Staff hired through Service Provider is more sincere, active and efficient as compared to own staff.

Outsourcing Agreement

This Agreement is made on this day of June, 2017 between ABC Co. Ltd. (hereinafter referred to as the Company), registered under the Companies Act, 1956, having registered office at Orchard Road, Modern Complex, New Delhi and acting through Mr. Mohan, Managing Director of the Company and M/s Lotus Service Providers (hereinafter referred to as Service Provider), a Partnership Firm having its office at S6- Defence Enclave, New Delhi and acting through Mr. Karan, Managing Partner of the Firm.

Whereas the Company is in need of the operational staff like typist, mails, sweepers, security guards, etc. for its registered office at Orchard Road, New Delhi

And

Whereas the Service Provider has approached the Company for hiring and providing of the desired operational staff on outsourcing basis.

Now it is agreed by and between the parties hereto as follows:

I. Obligations of the Service Provider

- (i) That the service provider will hire and depute requisite number of staff like typist, malis, sweepers, security guards, etc. as and when demanded by the Company.
- (ii) That the staff to be hired and deputed should be in the age group of 25-35 years of age and should have a minimum of 2 years experience.
- (iii) That due compliance of labour laws like contribution to PF, ESI, etc. will be the responsibility of the service provider. Proof for the payment of PF and ESI contribution will have to be submitted alongwith the monthly bills to be raised for claiming the wages of the deputed staff.
- (iv) That the staff so deputed should have proper police verification and resident / identity proof.
- (v) That the Service Provider will be liable for the work and conduct of the staff deputed with the company. If case any request is received for change or substitution of any person, the same is attended immediately.

II. Obligations of the Company

- (i) That the Company will pay wages equivalent to the minimum wages as fixed by the Labour Department from time to time.
- (ii) That the Service Provider will be allowed commission of 10% on the total salary/ wages bill for each month based upon the minimum wages fixed by the Labour Department.
- (iii) That the company will make demand for the require staff atleast 10 days in advance to the Service Provider so as to enable it to hire and depute the staff.
- (iv) That the staff deputed by the Service Provider would be eligible for weekly off and other holidays as per the rules of the Company.

III. That in case any dispute arises with respect to the interpretation of any terms and conditions, the matter would be referred for arbitration. Each party will have a right to appoint one of their representatives as the arbitrator. The arbitration proceedings would be as provided under Arbitration and Conciliation Act, 1996.

In witness whereof, both the parties, set their hands, this day of, 2017.

Witness 1

For and on behalf of the Company

Witness 2

For and on behalf of the Service Provider

BANKING LAW AND PRACTICE
(Elective Paper 9.1)

Time allowed : 3 hours

Maximum marks : 100

NOTE: Answer **ALL** Questions.

Question 1

Analysis of financial statements is an important exercise for the purpose of studying the trends and behaviour of different financial parameters from a leader's point of view. Before an analysis is undertaken, the various parameters and items of financial statements are restructured and rearranged in the order of priority set by a credit analyst. This is necessary because enterprises prepare financial statements mainly in order to cater to the needs of the shareholders and the government. Analysis of these statements without any rearrangement may not serve a meaningful purpose for a lending banker.

The process of restructuring of financial statements starts with classification of various items as current, non-current and fixed assets or liabilities. Restructuring also includes the process of filtering out items or entries resulting from those transactions which, though permitted by statutes, may present picture other than reality. Apart from this, the analyst also undertakes various other analysis, like, comparative balance sheet, ratio analysis, cash flow and funds flow, etc., to name a few to arrive at a considered view.

The following example is a live situation requiring your logical conclusion as an analyst. Analyse the situation and respond to the questions indicated there against.

The Balance Sheet of Sri Ganesh & Co. Ltd., for the years 2015 and 2016 are given below :

(Amount in Rupees)

<i>Particulars</i>	<i>31-03-2015</i>	<i>31-03-2016</i>
<i>Liabilities</i>		
<i>Equity Share Capital</i>	<i>6,00,000</i>	<i>12,00,000</i>
<i>10% Preference Share Capital</i>	<i>5,00,000</i>	<i>9,00,000</i>
<i>Profit and Loss Account</i>	<i>6,00,000</i>	<i>8,00,000</i>
<i>Long-term Loans</i>	<i>2,00,000</i>	<i>5,00,000</i>
<i>Creditors</i>	<i>1,00,000</i>	<i>3,00,000</i>
<i>Total</i>	<i>20,00,000</i>	<i>37,00,000</i>

Assets		
<i>Fixed Assets (Gross Block)</i>	15,00,000	28,00,000
<i>Less : Depreciation</i>	5,00,000	8,00,000
<i>Net Block</i>	10,00,000	20,00,000
<i>Investments</i>	4,00,000	5,00,000
<i>Inventories</i>	4,50,000	6,50,000
<i>Accounts Receivables</i>	1,00,000	4,00,000
<i>Cash in hand</i>	50,000	1,50,000
Total	20,00,000	37,00,000

Questions :

- (a) Prepare a Comparative Balance Sheet showing increase or decrease in individual assets and liabilities together with percentage of such increase or decrease between the two years. (20 marks)
- (b) Based on the above comparative analysis, Offer your comments on the following items :
- Fixed Assets;
 - Long-term Loans;
 - Investments and Inventories;
 - Accounts receivables and Cash in hand;
 - Current Assets, Current Liabilities and Profit & Loss Account. (2 marks each)
- (c) Assuming that the current ratio is 1.5, state with reasons in each of the following cases, whether the current ratio will improve or decline or will have no change :
- Payment of a current liability;
 - Purchase of fixed assets;
 - Cash collected from customers;
 - Bill receivable dishonoured;
 - Issue of new shares. (2 marks each)
- (d) Assuming that the Net Profit before tax as on 31st March, 2016, after considering the following stood at ₹ 12,50,000 :
- Depreciation on Fixed Assets : ₹25,000
 - Goodwill Written Off : ₹15,000
 - Loss on Sale of Machinery : ₹12,000

The Current Assets and Current Liabilities of the Company in the beginning and at the end of the year being as follows :

(Amount in Rupees)

Particulars	31st March, 2015	31st March, 2016
Bills Receivable	25,000	15,500
Bills Payable	10,000	12,500
Debtors	30,000	38,800
Stock-in-hand	18,000	14,000
Outstanding Expenses	8,000	7,000

Calculate the Cash Flow from Operating activities under the indirect method of cash flow from operations. (10 marks)

Answer 1(a)

Comparative Balance Sheet as on 31.03.2015 and 31.03.2016

Particulars	31st March 2015	31st March 2016	Absolute increase or decrease in 2016	Percentage of increase or decrease in 2016
Liabilities				
Equity Share Capital	600000	1200000	600000	100%
10% Preference Share Capital	500000	900000	400000	80%
Profit and Loss Account	600000	800000	200000	33.33%
Owner's Funds	1700000	2900000		
Long Term Liabilities:				
Long Term Loan	200000	500000	300000	150%
Current Liabilities				
Creditors	100000	300000	200000	200%
Total	2000000	3700000		
Assets				
Fixed Assets(Gross Block)	1500000	2800000		
Less : Depreciation	500000	800000		
Net Block	1000000	2000000	1000000	100%
Investments	400000	500000	100000	25%
Current Assets:				
Inventories	450000	650000	200000	44.44%
Account Receivables	100000	400000	300000	300%
Cash in Hand	50000	150000	100000	200%
Total	2000000	3700000		

Answer 1(b)

The following comments/conclusions can be drawn from the comparative Balance Sheet analysis based on the financial position of the company between the two years:

- (i) *Fixed Assets* : There has been an increase of Rs.10,00,000 in fixed assets. The increase in fixed assets has been financed through additional equity share capital of Rs. 6,00,000 an additional preference share capital of Rs.4,00,000. Assuming that long-term own capital (equity and preference shares) is used to finance fixed assets. Financing the increase in fixed assets through additional equity share capital and preference share capital; is a sound financial policy.
- (ii) *Long Term Loans* : There has been a substantial increase of Rs.3,00,000 in long term loans. It has to be seen whether the long-term loans have been used productively or not. It appears that such funds are used partly for buying investments. Such a policy may be counter-productive as yield from investments is likely to be lower than interest payable on loan. Moreover some portion of loan is used for financing working capital needs (stock and accounts receivables). Unless working capital requirement is changed permanently, use of long-term fund to finance working capital may not be prudent.
- (iii) *Investments and Inventories* : Investments are treated as long term investments. There has been an increase of Rs.1,00,000 in investments. The increase in investments is appreciable provided yield from investment is good.
There is an increase of 44.44% in inventories. This increase is not very high. That means, much working capital is not locked up in inventories.
- (iv) *Accounts Receivables and Cash on hand* : There is very high increase of 300% in accounts receivables. That means, steps taken for the collection of debts by the company require closer scrutiny.
There has been an increase of 200% in cash. Cash is an idle asset. That means, a huge cash balance is kept idle which is not a healthy trend.
- (v) *Current assets, Current liabilities and Profit & Loss account* : There is an overall increase of Rs.6,00,000 in current assets. There is also an overall increase of Rs.2,00,000 in current liabilities. Whether such a delay in settling dues is affecting reputation or purchase terms require close scrutiny. Generally, suppliers' credit is a costly source of finance. The percentage of increase in current liabilities is at 200%. That means there is a slight decrease in current ratio. But the current ratio of the concern is quite good.
There is an increase of Rs.2,00,000 in Profit & Loss account balance. This suggests that the profitability of the concern is good. (In the absence of Profit & Loss Account, it is assumed that profit margin is good and return on assets is satisfactory)

To conclude, the financial position of the concern seems to be satisfactory.

Answer 1(c)

The current ratio is 1.5:1, the effect of the transactions given in the problem on current ratio will be as follows:

- (i) *Payment of a current liability* : On payment of a current liability out of current

assets, working capital will remain unchanged. However, current ratio will improve and will be more than the current level of 1.5 as there will be decrease in the figure in the denominator and numerator by equal amount.

- (ii) *Purchase of fixed assets* : On purchase of fixed assets in cash, current assets will decrease without any change in current liabilities. This is because when fixed assets are purchased for cash, the current assets will decrease, but the current liabilities will remain the same as before. Thus, the transaction will result in decline of current ratio from the earlier level of 1.5:1.
- (iii) *Cash collected from customers* : Collection of debtors results in the conversion of one current assets, viz., debtors into another current assets, viz., cash. Hence, amount of current assets and current liabilities remain unchanged, the current ratio will, therefore, remain at 1.5:1.
- (iv) *Bills receivable dishonoured* : When a bill receivable is dishonoured, it cannot always be presumed that the customer has become insolvent. Hence, if the customer is solvent, the amount of bills receivable will get reduced and the amount due from debtors will increase. There will be no change in the amount of current liabilities. In short, when bills receivable are dishonoured, there is change only in the composition of current assets and hence when there is a change only in the composition of current assets, the current ratio will not change. Hence, on this assumption current ratio will continue to be 1.5:1.
- However, if it is anticipated that the debt become bad and it is recorded as such, it will result in the reduction of current assets resulting in fall in the current ratio from 1.5:1.
- (v) *Issue of new shares* : If issue of new shares is for cash, it will result in an increase in the current assets. Hence, there will be change in current assets and current ratio will improve due to increase in current assets.

Answer 1(d)**Cash Flow from Operating Activities***(Amount in Rupees)*

Net Profit before Tax		1250000
<i>Add :</i>		
Depreciation on Fixed Assets	25000	
Goodwill written off	15000	
Loss on sale of Machinery	12000	52000
Operating Profit before working Capital Changes:		1302000
<i>Add :</i>		
Decrease in Bills Receivable	9500	
Decrease in stock in hand	4000	
Increase in Bills Payable	2500	16000
		1318000
<i>Less :</i>		
Increase in Debtors	8800	
Decrease in outstanding expenses	1000	9800
Cash Flow from operating Activities		1308200

Question 2

- (a) *Define Marketing Mix. Explain what do you understand by unethical issues concerning Marketing Mix in the context of banking. (5+10=15 marks)*
- (b) *Briefly explain what is SARFAESI Act ? What are the safeguards one should bear in mind while enforcing the security under the SARFAESI Act or Securitization Act to recover the banks' dues ? (5+10=15 marks)*

Answer 2(a)

Marketing mix is the set of marketing tools that a firm uses to pursue its marketing objectives in the target market. There are several marketing mix tools. Popularized a four factor classification of these tools called the “Four Ps” of Marketing mix are place, Product, Price and Promotion. The details of each of them are as under:

1. *Place* : Place is the link between the customer and the producer, through appropriate delivery channels. Convenient locations play a crucial role in increase the sale of the products. As regards banking, the term “Place” represents their delivery channel, i.e. branch network, e-banking channels like ATMs, Internet Banking, Core Banking Solutions, etc. For the convenience of customers ATMs are also available at off site locations. The place acts as an important factor of the marketing mix, and ensures good customer relationship management.
2. *Product* : Product is one of the important components of marketing mix. Product can be in the form of goods or an article or an instrument (in case of financial services), for which the consumer pays a value(price) and expects to get satisfaction/comfort.
3. *Price* : Price is another component of a marketing mix. It is the costs levied/charged to customer for the services provided.
4. *Promotion* : Reaching out to the customers through effective network and attractive communication is the major role of the marketing mix called as “Promotion”. Advertising is the main component of promoting products.

Unethical Practices

1. *Place* : Unethical practices on account of “place” as part of marketing mix arises in the following situations: (a) if a branch of a Bank is relocated to another area without sufficient notice and time; (b) A customer who uses ATMs , Internet Banking Facility, is denied access to him on account of Bank’s failure to provide the services and there by the customer is facing inconvenience, loss of money and time.
2. *Product* : If a bank offers a deposit product offering higher interest and suddenly stops offering such type of deposit products without any prior notice, then from the customers’ point of view this could be viewed as unethical practice. Similarly when new loan products with certain features are launched, such value additions are offered only for the new loan customers but not for existing loan customers, such a practice could be viewed as unethical by the existing customers.
3. *Price* : Price discrimination is labeled as unethical. For example, if a bank,

when there is change in the floating interest rates immediately increase the interest rates for loan accounts for the existing borrowers, and on the contrary, in case of rate cut, the bank does not reduce the interest rate immediately, is considered as unethical. Another example of unethical practice is when an increase in charges, fees, etc. is given immediate effect, whereas a reduction in charges, fees, etc., which would benefit the customers, is not passed on to them immediately.

4. *Promotion* : Examples of unethical practices of promotion can be misleading advertisement to attract the clients; resorting to unsolicited telephone calls, e-mails, etc., which inconvenience the clients.

Answer 2(b)

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), popularly known as Securitisation Act empowers the banks and Financial Institutions to recover their dues in Non- Performing Assets (NPA) accounts classified as Sub-standard, Doubtful or as Loss Asset as per the RBI guidelines.

The Act empowers the Banks and Financial Institutions to issue notice for recovery from the defaulting borrowers and guarantors, calling upon them to discharge the dues in full within 60 days. The special feature of the Act is that the security interest can be enforced without the intervention of the Courts, subject to certain procedure to be followed, like 60 days notice has to be served by the Bank on the borrower with a request to discharge the loan liability. In case the borrower and/or guarantor fails to comply with, the bank and/or Financial Institution can :

- (a) Take the possession or the management of secured assets of the borrower, and also can transfer the same by way of lease, assignment or sale for realizing the secured assets without the intervention of a court/Debt Recovery Tribunal;
- (b) Appoint any person to manage the secured assets which have been taken over by the secured creditor (Bank);
- (c) Also instruct at any time by a notice in writing to a person
 - (i) who holds secured assets of the borrowers;
 - (ii) from whom any money due or becoming due to the borrower;
 - (iii) to pay such money to the secured creditor (Bank).

No civil court has any jurisdiction under this Act. The Indian Limitation Act, 1963 is applicable to this Act.

While taking possession of the assets various precautions are required to be taken and if required the help of the Chief Metropolitan Magistrate (CMM) or District Magistrate (DM) can be taken by the Bank and/or Financial Institution.

It is to be noted that the provision of the Act shall not apply in case of:

- (a) a lien on any goods, money or security;
- (b) a pledge of movables;

- (c) creation of any security interest in any aircraft;
- (d) creation of security interest in any vessel;
- (e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;
- (f) any right of unpaid seller;
- (g) any properties not liable to attachment or sale;
- (h) any security interest for securing payment of any financial asset not exceeding one lakh rupees;
- (i) any security interest created in agricultural land;
- (j) any case in which the amount due is less than twenty five percent of the principal amount and interest thereon.

Question 3

Describe briefly whether garnishee order can attach undrawn or unutilized balance in an overdraft and/or cash credit account. (5 marks)

Answer 3

Third party (e.g., bank, customer, employer etc.) who, while not involved in the court case between a debtor or creditor is required by a Court Order (Garnishee Order) to retain the money(account balance, amount due, wages etc.,) belonging to debtors. The issue whether garnishee order applies to undrawn balance is discussed below.

If the account is overdrawn, the banker owes no money to the customer and hence the Court Order (Garnishee Order) ceases to be effective. A bank is not a garnishee with respect to the unutilized portion of the overdraft or cash credit facility sanctioned to its customer and such utilized portion of cash credit or overdraft facility cannot be said to be an amount due from the bank to its customer. The above decision was given by the *Karnataka High Court in Canara Bank Vs. Regional Provident Fund Commissioner*. In this case the Regional Provident Fund Commissioner wanted to recover the arrears of provident fund contribution from the defaulters' bankers out of the unutilized portion of the cash credit facility. Rejecting this claim, the High Court held that the bank cannot be termed as a Garnishee of such unutilized portion of cash credit, as the banker's position is that of creditor.

The banker, of course, has the right to set off any debt owed by the customer before the amount to which the Garnishee Order applies is determined. But it is essential that debt due from the customer is actual and not merely contingent.

Hence it can be said that garnishee order is not applicable to undrawn/unutilized balance in an overdraft/loan account and the order ceases to be effective.

Question 4

Explain in brief five risks associated with payment systems. (5 marks)

Answer 4

The risks associated with the payment systems can broadly be classified under the following heads, viz.,

- (i) Credit Risk;

- (ii) Liquidity Risk;
- (iii) Operational Risk;
- (iv) Legal risk; and
- (v) Systemic Risk.

The circumstances under which these risks arise are as under:

<i>Risk</i>	<i>Circumstances</i>
1. Credit Risk	Failure by a party to meet the financial obligations
2. Liquidity Risk	A party in the system fails to pay on account of insufficient funds
3. Operational Risk	A risk which can arise on account of human error, system failure, frauds, etc.
4. Legal Risk	Non-compliance of legal or regulatory framework can create a legal risk
5. Systemic Risk	It can have a chain effect into the system due to the default of one of the parties

Question 5

Banks play an important role in facilitating international trade, as they enable the exporter and importer operating at different locations to receive and pay for the goods sold and bought. Describe in brief the instruments issued by banks which apart from facilitating payment towards the trade also facilitate grant of advance and storage facility for the goods to be exported. (5 marks)

Answer 5

1. **A Letter of Credit** with a special clause which allows the beneficiary (exporter) to avail of pre-shipment advance (a type of export finance granted to an exporter, prior to the export of goods) for procuring, manufacturing and export of the goods is called Red Clause Letter of Credit. This special clause used to be printed (highlighted in red colour) , hence it is called "Red Clause" credit. The issuing bank undertakes to repay such advances, even if shipment does not take place. In case of a "Green Clause" credit, the exporter is entitled for an advance for storage (warehouse) facilities of goods. The advance would be granted only when the goods to be shipped have been warehoused, and against an undertaking by the exporter that the transportation documents would be delivered by an agreed date.
2. **Rupee Export Credit (pre-shipment and post-shipment)** : Bank provides both pre and post shipment credit to the Indian exporters through Rupee Denominated Loans as well as foreign currency loans in India. Rupee Export Credit is available generally for a period of 180 days from the date of first disbursement. In deserving cases extension may be permitted within the guidelines of RBI.
3. **Pre-shipment Credit in Foreign Currency (PCFC)** : Bank offers PCFC in the

foreign currency to the exporters enabling them to fund their procurement, manufacturing/processing and packing requirements. PCFC is generally available for a period of 180 days from date of first disbursement. In deserving cases extension may be permitted within the guidelines of RBI.

4. **Export Bill Rediscounting** : Bank provides financing of export by way of discounting of export bills, as a post shipment finance to the exporters at competitive international rate of interest. This facility is available in four currencies i.e. US\$, Pound Sterling, Euro and JPY.
5. **Bank Guarantees** : Bank, on behalf of exporter constituents, issues guarantees in favour of beneficiaries abroad. The guarantees may be Performance and Financial. For Indian exporters, guarantees are issued in compliance to RBI guidelines.

Question 6

Explain what do you understand by the term 'Money Laundering'. (5 marks)

Answer 6

In the Prevention of Money Laundering Act, 2002, money laundering is defined as “any process or activity connected with proceeds of crime including its concealment, possession, acquisition, or use and projecting or claiming it as untainted property. Laundering means acquiring, owning, possessing or transferring any proceeds (of money) of crime or knowingly entering into any transaction related to proceeds of the crime either directly or indirectly or concealing or aiding in the concealment of the proceeds or gains of crime. It is a process for conversion of money obtained illegally to appear to have originated from legitimate sources. Generally, there are three stages through which money laundering takes place.

- (a) The first step is called the *Placement*, whereby the cash is deposited in the domestic banks or is used to buy goods such as precious metals, work of art, etc.
- (b) The second step is called the *Layering*. Once the funds enter into the financial system (banks), the funds are converted by transfers to different destinations. This stage is called as layering. At different locations bank accounts are opened and the funds are transferred as quickly as possible (some time breaking into series of small transactions to escape from the limits set up by banks for cash transactions). The movement of fund sometimes spread across countries.
- (c) The last stage is called the *Integration*. In this stage, the launderer attempts to justify that the money obtained through illegal activities is legitimate. Through different methods attempts are made at this stage like using front offices of the companies, using the tax haven and off shore units, using these funds as security for loans raised, etc.

Money laundering is considered as criminal offence in most of the countries.

CAPITAL, COMMODITY AND MONEY MARKET
(Elective Paper 9.2)

Time allowed : 3 hours

Maximum marks : 100

NOTE: Answer **ALL** Questions.

Question 1

The following is the Balance Sheet as at 31st March 2017 of RKD Company Ltd. :

Items	₹	₹
10,000 equity shares of ₹100 each fully paid up	10,00,000	
25,000 11% cum preference shares of ₹10 each fully paid up	2,50,000	12,50,000
Reserves and surplus		25,00,000
Secured loans		20,00,000
Unsecured loans		12,00,000
Trade creditors		18,00,000
Outstanding expenses		7,50,000
Total liabilities		95,00,000
Fixed assets		55,00,000
Current assets		37,00,000
Advances and deposits		3,00,000
Total assets		95,00,000

The company plans to manufacture a new product in line with its current production, the capital cost of which is estimated to be ₹25,00,000. The company desires to finance a new project to the extent of ₹16 lakhs by issue of equity shares at a premium of ₹100 per share or by issue of 12% debentures and the balance to be raised from internal sources.

Additional information made available to you are :

- (a) Rate of dividends declared in the past 5 years i.e. year ended 31st March 2017, 31st March 2016, 31st March 2015, 31st March 2014, 31st March 2013 were 24%, 24%, 20%, 20% and 18% respectively.
- (b) Normal earning capacity (net of tax) of the business is 10%.
- (c) Turnover in the last three years i.e. 31-03-2017, 31-03-2016 and 31-03-2015 was ₹80 lakh, 60 lakh and 50 lakh respectively.
- (d) Anticipated additional sales from the new project — ₹30 lakh annually.

- (e) Net profit before tax from the existing business which was 10% in the last three years is expected to increase to 12% on account of new product sales.
- (f) Income-Tax rate is 35%.
- (g) The trend of market price of the equity share of company quoted on the Stock Exchange was :

Year	High (₹)	Low (₹)
2016-17	300	190
2015-16	250	180
2014-15	240	180

You are required to examine the following :

- (i) Current EPS and debt equity ratio for the year ended 31-03-2017. (12 marks)
- (ii) Expected EPS and debt equity ratio if ₹16,00,000 financed by issue of 8,000 new equity shares of ₹100 each at premium of ₹100 each. (8 marks)
- (iii) Expected EPS and debt equity ratio if ₹16 lakh financed by issue of 12% debentures at par. (10 marks)

Now Please explain :

- (a) Expected market value of share in above (i) to (iii) situations. (10 marks)
- (b) Which company's proposal is justified ? Do you have any suggestions to offer in this regard. (10 marks)

Answer 1(i)

Current EPS for the year ended 31-03-2017

	Rs.
Sales	80,00,000
Net Profit (Rs. 80,00,000 x 10/100)	8,00,000
Less : Income – Tax @ 35%	2,80,000
Profit After Tax	5,20,000
Less : Preference Dividend (Rs. 2,50,000 x 11/100)	27,500
Profit Available for Equity Shareholders	4,92,500
No. of Equity Shares	10,000
Current EPS = Rs. 4,92,500/10,000 = Rs. 49.25	

Working Notes:

(1) Anticipated Sales

	<i>Rs.</i>
Present Sales	80,00,000
<i>Add</i> : Anticipated Additional Sales	30,00,000
Anticipated Sales	1,10,00,000

(2) No. of equity shares to be issued to raise Rs. 16 lakhs at a share premium of Rs. 100 per share.

Rs. 16,00,000/Rs. 200 = 8,000 equity shares.

(3) Present Book Value of Equity Share

	<i>Rs.</i>
Equity Share Capital	10,00,000
<i>Add</i> : Reserves and Surplus	25,00,000
Total	35,00,000

No. of Equity Shares 10,000

Present Book Value of Share

Rs. 35,00,000/10,000 = Rs. 350

Present Debt-Equity Ratio

(Secured Loans + Unsecured Loan/ [Share Capital (Equity + Preference) + Reserves and Surplus]

= Rs. 32 Lakhs/Rs. 37.50 Lakhs = Rs. 0.85

Answer 1(ii)

Expected EPS, If Rs. 16 lakhs financed by issue of 8000 new equity shares

Anticipated Sales	1,10,00,000
Net Profit (Rs. 1,10,00,000 x 12/100)	13,20,000
<i>Less</i> : Income Tax @ 35%	4,62,000
Profit after Tax	8,58,000
<i>Less</i> : Preference Dividend (Rs. 2,50,000 x 11/100)	27,500
Profit available to Equity Shareholders	8,30,500

Expected Debt-Equity Ratio – If new shares are issued

$$= (\text{Secured Loans} + \text{Unsecured Loans}) / (\text{Share Capital} + \text{Reserves and Surplus})$$

$$= \text{Rs. } 32 \text{ Lakhs} / \text{Rs. } 53.5 \text{ lakhs} = \text{Rs. } 0.59$$

$$\text{No. of equity shares } (10,000 + 8000) = 18,000$$

$$\text{Expected EPS} = \text{Rs. } 8,30,500 / 18,000 = \text{Rs. } 46.14$$

Answer 1(iii)

Expected EPS – If Rs. 16 Lakhs financed by issues of debentures

Anticipated Sales	1,10,00,000
Expected Profit on Turnover	13,20,000
(Rs. 1,10,00,000 x 12/100)	
Less : Debenture Interest	
(Rs. 16,00,000 x 12/100)	1,92,000
Net Profit before Tax	11,28,000
Less : Income Tax @ 35%	3,94,800
Net Profit after Tax	7,33,200
Less: Preference Dividend	27,500
Profit available to Equity Shareholders	7,05,700

No. of Equity Shares – 10,000

$$\text{Expected EPS} = \text{Rs. } 7,05,700 / 10,000 = \text{Rs. } 70.57$$

Expected Debt-Equity Ratio, if Rs. 16 lakhs worth debentures are issued:

$$= (\text{Secured Loans} + \text{Unsecured Loan} + \text{Proposed Debentures}) / (\text{Share Capital} + \text{Reserves and Surplus})$$

$$= \text{Rs. } 20 \text{ Lakhs} + 12 \text{ Lakhs} + 16 \text{ Lakhs} / \text{Rs. } 37.50 \text{ Lakhs} = \text{Rs. } 1.28$$

Answer 1(a)**Calculation of the expected Market Value of the Share**

Average Market Price for the year 2016-2017

$$= [\text{Rs. } 300 + \text{Rs. } 190] / 2 = \text{Rs. } 245$$

Price/Earnings Ratio = Market Price/EPS

$$= \text{Rs. } 245 / \text{Rs. } 49.25 = 4.974 \text{ or say } 5$$

Expected Market Value of the Share if new shares are issued

$$= \text{EPS} \times \text{P/E Ratio}$$

$$= \text{Rs. } 46.14 \times 5 = \text{Rs. } 230.70$$

Expected Market Value of the Share if new debentures are issued

= EPS x P/E Ratio

= Rs. 70.57 x 5 = Rs. 352.85

Answer 1(b)

Analysis of Alternatives

Particulars	Present	Alternative I – Issue of New Shares	Alternative II – Issue of New Debentures
EPS (Rs.)	49.25	46.14	70.57
Expected Market Value (Rs.)	245	230.70	352.85
Debt Equity Ratio	0.85	0.59	1.28

From the analysis of the above, it is observed that, selection of alternative II will maximise the market value of share and its EPS and debt ratio is within the prudential norm 2:1. Hence the alternative II i.e. issue of debentures is suggested.

Question 2

- AVVAIYAR Company limited, an unlisted company has to raise capital at New York. Whether this AVVAIYAR Company limited is allowed to raise capital at New York. If yes, list out the conditions to be fulfilled for raising capital at New York. If No, Please state the reasons for incapacity to raise capital at New York. (10 marks)*
- PAARI VALLAL of India, wants to update the SEBI regulations 2015 with respect to regulations on WEBSITE for listed entities which has listed its specified securities. (10 marks)*
- Describe the structure of Financial Markets of India. What legislative measures have strengthened its financial system ? (10 marks)*

Answer 2(a)

Unlisted companies shall be allowed to raise capital abroad without the requirement of prior or subsequent listing in India initially for a period of two years with effect from 11th October, 2013, subject to the following conditions:

- Unlisted companies shall list abroad only on exchanges in IOSCO/FATF compliant jurisdictions or those with which SEBI has signed bilateral agreements;
- Such Companies shall file a copy of the return which they have submitted to the proposed exchange/ regulators also to SEBI for the purpose of Prevention of Money Laundering Act (PMLA). They shall comply with SEBI's disclosure requirements in addition to that of the primary exchange prior to the listing abroad;
- While raising resources abroad, the listing company shall be fully compliant with the FDI policy in force;

- (d) The capital raised abroad may be utilized for retiring outstanding overseas debt or for bona fide operations abroad including for acquisitions;
- (e) In case the funds raised are not utilized abroad as stipulated at point (d) above, such companies shall remit the money back to India within 15 days from the date of raising of funds and such money shall be parked only in AD Category-1 banks recognized by RBI and may be used domestically;
- (f) The ADRs/GDRs shall be issued subject to sectoral cap, entry route, minimum capitalization norms, pricing norms, etc., as applicable as per FDI regulations notified from time to time;
- (g) The number of underlying equity shares offered for issuance of ADRs/GDRs to be kept with the local custodian shall be determined upfront and ratio of ADRs/GDRs to equity shares shall be decided upfront based on applicable FDI pricing norms of equity shares of unlisted company;
- (h) AVVAIYAR as an unlisted company of India shall comply with the instructions on downstream investment as notified from time to time;
- (i) The criteria of eligibility of an unlisted company raising funds through ADRs/GDRs shall be as prescribed by the Government of India

Answer 2(b)

As per the SEBI (Listing Obligation and Disclosure Requirements), 2015, the listed company has to follow the following requirement as to the disclosure on the website.

- (1) The listed entity shall maintain a functional website containing the basic information about the listed entity.
- (2) The listed entity shall disseminate the following information on its website:
 - (a) Details of its business;
 - (b) Terms and conditions of appointment of independent directors;
 - (c) Composition of various committees of board of directors;
 - (d) Code of conduct of board of directors and senior management personnel;
 - (e) Details of establishment of Vigil Mechanism/ Whistle Blower Policy;
 - (f) Criteria of making payments to non-executive directors, if the same has not been disclosed in annual report;
 - (g) Policy on dealing with related party transactions;
 - (h) Policy for determining material subsidiaries;
 - (i) Details of familiarization programmes imparted to independent directors including the following details:-
 - (i) Number of programmes attended by independent directors (during the year and on a cumulative basis till date),
 - (ii) Number of hours spent by independent directors in such programmes (during the year and on cumulative basis till date), and

- (iii) Other relevant details
 - (j) The email address for grievance redressal and other relevant details;
 - (k) Contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances;
 - (l) Financial information including:
 - (i) Notice of meeting of the board of directors where financial results shall be discussed;
 - (ii) Financial results, on conclusion of the meeting of the board of directors where the financial results were approved;
 - (iii) Complete copy of the annual report including balance sheet, profit and loss account, director's report, corporate governance report etc;
 - (m) Shareholding pattern;
 - (n) Details of agreements entered into with the media companies and/or their associates, etc;
 - (o) Schedule of analyst or institutional investor meet and presentations made by the listed entity to analysts or institutional investors simultaneously with submission to stock exchange;
 - (p) New name and the old name of the listed entity for a continuous period of one year, from the date of the last name change;
 - (q) Items in sub-regulation (1) of regulation 47.
- (3) (a) The listed entity shall ensure that the contents of the website are correct.
 - (b) The listed entity shall update any change in the content of its website within two working days from the date of such change in content.

Answer 2(c)

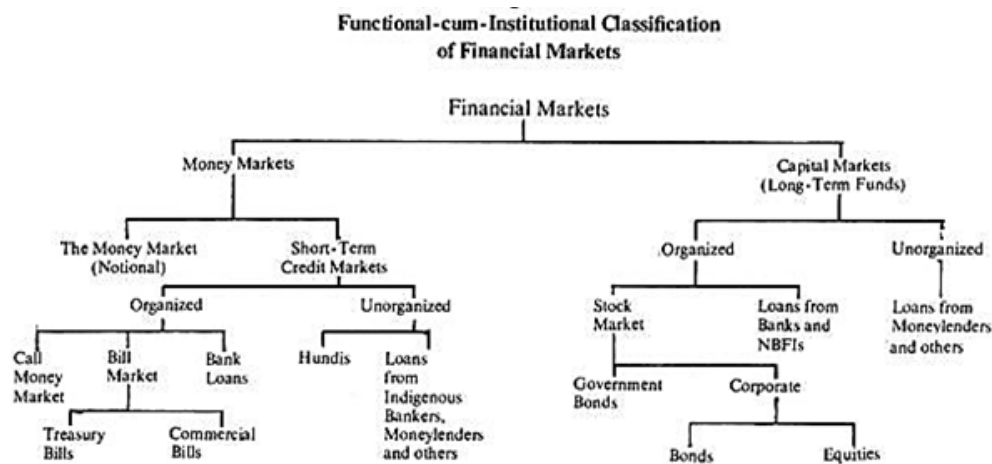
The Financial System of any country comprises within its fold the financial markets and its supporting financial institutions. A well-fortified structure is able to encourage public and institutional support leading to an organized network of supporting financial markets. In India as already presented, there exist a large number of financial institutions which have grown or restructured. A closer look is now taken at the existing markets. The financial markets which exist in India are:

- Treasury Bill Market
- Call Money Market
- Commercial Bill Market
- Market for Financial Guarantees
- Market for Mortgages
- Foreign Exchange Market
- Government (Gilt-Edged) Securities Market and
- Industrial Securities Market.

The structure of financial markets can be studied from different angles, namely, functional, institutional, or sectoral. Accordingly, financial markets, institutions, and instruments can be classified in any one or more of these ways. The functional classification is based on the term of credit, whether the credit supplied is short-term or long-term. Accordingly, markets are called money markets or capital markets.

The institutional classification tells us whether the financial institutions are organized on commercial or cooperative principles and whether they belong to the organized or unorganized sector. The sectoral classification identifies credit arrangements for various sectors of the economy: agriculture, manufacturing industry, trade and others.

Various classifications are not intended to be water-tight or mutually exclusive. Their aim is to give a broad idea of the scope of financial markets, their several dimensions and functions. Combining the first two bases of study, we give a single functional- cum-institutional classification in the following Figure:



Functionally, financial markets are broadly sub-divided under two heads money markets and capital markets. The former are markets in short-term funds; the latter in long-term funds. We have interpreted the term money market more broadly to include within its folds also the notional money market of monetary theory.

This market is co-terminus with the entire economy. The asset it deals in is money; the demanders are the holders of money (the public) and the suppliers are the government, the RBI and banks. Money itself is acquired in the normal process of selling goods, services, and assets in all markets, as money is the common medium of exchange (in all monetised transactions).

There is no special or separate market for money like the ones we have for bills, bonds, or equity shares. In academic discussions of monetary theory and policy whenever the term money market is used, we mean the market for money as explained above. But in business parlance the term money market is almost always used in the sense of short-term credit market.

Structurally, the short-term credit market is divisible under two sectors: organized and unorganized. The organized market comprises the RBI and banks. It is called organized because its parts are systematically coordinated by the RBI.

Non-bank financial institutions such as the LIC, the GIC and subsidiaries, the UTI also operate in this market, but only indirectly through banks and not directly. Quasi-government bodies and large companies may also make their short-term surplus funds available to the market through banks.

Besides commercial banks that dominate the organized money market, there are co-operative banks. They are a part of co-operative credit institutes that have a three-tier structure. At the top there are state co-operative banks (co-operation being a state subject). At the district level there are central co-operative banks. At local level there are primary credit societies and urban co-operative banks. Functional-cum-Institutional Classification of Financial Markets The whole co-operative credit system is linked with the RBI and is dependent on it for funds. The RBI deals directly with only state co-operative banks. For reasons of size, methods of operation and dealings with the RBI and commercial banks, only state and central co-operative banks need be counted into the organized money market; the rest (co-operative credit societies at local level) are only loosely linked with it.

The unorganized market is largely made up of indigenous bankers and moneylenders, professional and non-professional. It is unorganized because the activities of its parts are not systematically coordinated by the RBI or any other authority.

Private moneylenders operate throughout the length and breadth of the country, but without any link among themselves. Indigenous bankers are better organized on local basis, as in Bombay and Ahmedabad. But this kind of organization is also only a loose association.

The main function of the money market is to provide short-term funds to deficit spenders, whether the government or others. It does this mainly by mobilising short-term surpluses of both financial and non-financial units, including state governments, local governments, and quasi-government bodies.

Banks do it by 'selling' deposits of various kinds, participation Certificates and bills discounted. Then, there are treasury bills sold 'on tap' by the RBI. The RBI itself serves as the lender of last resort to the market. Funds have also to be moved between regions and from one place to another according to demand. An efficient and well-developed system does it fast and at low cost.

The capital market deals in medium-term and long-term funds. Like money market, the capital market also is divisible into two sectors organized and unorganized. The organized sector comprises the stock market, the RBI, banks, development banks (such as the Industrial Development Bank of India), LIC, GIC and subsidiaries, and the UTI.

The unorganized sector is mainly made up of indigenous bankers and money-lenders' funds, *nidhis* and similar other financial institutions; investment companies, finance companies and hire purchase companies; and company deposits. The role of the unorganized sector in the capital market is of very limited importance.

Legislative Measures

In 1956, the erstwhile Companies Act was passed to give protection to the investors through improvement in allotment of shares, floatation of new companies and terms and conditions in the capital structure of companies.

The object of the Act was to regulate the working of a corporate organization with a view to channel funds in accordance with the country's planning policy objectives and avoidance of wasteful investment and non-essential investment activities.

Through this Act the government planned to screen all new issues of capital before allowing them to offer for public subscription and to discourage undesirable practices. Another objective of the Act was to regulate foreign capital in the country.

In the same year in 1956, reforms were also made in Stock Exchange trading methods through the Securities Contract (Regulation) Act, 1956. This Act permitted only recognized stock exchanges to function. The Government was empowered to regulate the stock exchanges from time-to-time. A Directorate of Stock Exchanges was set up to enforce the Securities Act.

In the eighties, the financial markets witnessed changes and new developments. The Government became liberal and allowed public sector undertakings to enter the Indian capital market. A legislative development to protect the investors is the setting up of the Securities Exchange Board of India (SEBI) in 1987.

SEBI was established to promote measures for fair and efficient trading in securities and for transparency of companies in which trading of securities is to take place. Every company is required to register with Board and agree to work under the limiting principles and rules laid out by it. The Board has the powers to take action against the erring management in certain cases.

SEBI was formed with the view that the mechanics of buying and selling shares, nominations and transfers required simplification. Further, a large number of new companies required disciplining. They used questionable methods of making their issues successful through the creation of artificial demands, unofficial premiums and fraudulent sales.

After making their issues, a large number of companies disappeared from the market. One more responsibility of the Board was to standardize accounting procedures of brokers and companies. It also had to create awareness programs and educate investors for protecting their interests.

The development in the financial system shows vast changes in the Indian financial system since 1991. The introduction of new innovative financial instruments, development of commercial banks into universal banking and legislative enactments have vastly reorganized the system and have brought confidence in the minds of the investing public and some order in the Indian capital market.

There has been a closer link between the different institutions, fostering growth and progress and at the same time protecting the interests of the investing public.

Financial Sector Legislative Reforms

The Financial Sector Legislative Reforms Commission (FSLRC) is a body set up by the Government of India, Ministry of Finance, on 24 March 2011, to review and rewrite

the legal-institutional architecture of the Indian financial sector. This Commission is chaired by a former Judge of the Supreme Court of India, Justice B. N. Srikrishna and has an eclectic mix of expert members drawn from the fields of finance, economics, public administration, law etc.

The Financial Sector Legislative Reforms Commission (FSLRC) was asked to comprehensively review and redraw the legislations governing India’s financial system. The Commission submitted its report containing an analysis of the current regulatory architecture and a draft Indian Financial Code to replace the bulk of the existing financial laws.

The Draft Indian Financial Code

The Draft Indian Financial Code is a non-sectoral, principles-based law bringing together laws governing different sectors of the financial system. It addresses nine components, which the FSLRC believes any financial legal framework should address:

- Consumer Protection
- Micro-prudential regulation
- Resolution
- Capital controls
- Regulators
- With respect to regulators, the FSLRC stresses the need for both independence and accountability. The draft Code adopts ownership neutrality whereby the regulatory and supervisory treatment of a financial firm is the same whether it is a private or public company. The draft Code seeks to move away from the current sector-wise regulation to a system where the RBI regulates the banking and payments system and a Unified Financial Agency subsumes existing regulators like SEBI, IRDA, PFRDA and FMC, to regulate the rest of the financial markets.

Table provides an outline of the FSLRC’s proposed regulatory architecture.

FSLRC’s Regulatory Architecture

<i>Present</i>	<i>Proposed</i>	<i>Functions</i>
RBI	RBI	Monetary policy; regulation and supervision of banks; regulation and supervision of payments system.
SEBI FMC IRDA PFRDA	United financial agency (UFA)	Regulation and supervision of all non-bank and payments related markets.
Securities Appellate Tribunal (SAT)	FSAT	Hear appeals against RBI, the UFA and FRA.

Deposit Insurance and Credit Guarantee Corporation (DICGC)	Resolution Corporation	Resolution work across the entire financial system.
Financial Stability Development Council (FSDC)	FSDC	Statutory agency for systemic risk and development.
New entities	Debt Management Agency	An independent debt management agency.
	Financial Redressal Agency (FRA)	Consumer complaints.

Source: FSLRC Report; PRS

Further, various new legislative measures are also taken to strengthen the related aspects of financial market in the country. To name few are:

- Central Know Your Customer (KYC) Records Registry
- The Negotiable Instrument (Amendment) Act, 2015
- The Payment and Settlement Systems (Amendment) Act, 2015
- Draft Code on Resolution of Financial Firms, 2016

Question 3

'Pledge' and 'Hypothecation' both word are very common in the grass root business culture and taken as same method/instrument for obtaining a loan from Bank/Financial Institution/NBFC/Micro Finance Institutions :

- *Do you agree completely with this statement ?*
- *If not, what are the basic differences ?*
- *Which instruments is more favourable to the money-lender ?* (5 marks)

Answer 3

I don't agree completely with this statement.

In case of pledge, the lender has unilateral right i.e. without referring the borrower, can appropriate the securities, if the borrower (Pledger) defaults or breaches otherwise.

On the other hand – in case of hypothecation of the securities, the lender needs concurrence of the borrower.

This is the main difference between the two, wherein the purpose is same i.e. borrowing of the funds.

Clearly, the Pledge is more favourable to the lender.

Question 4

What are the steps involved in Post-issue Management ? (5 marks)

Answer 4

Steps involved in post-issue management are:-

- (1) To verify and confirm that the issue is subscribed to the extent of 90% including devolvement from underwriters in case of under subscription.
- (2) To supervise and co-ordinate the allotment procedure of registrar to the issue as per prescribed Stock Exchange guidelines.
- (3) To ensure issue of refund order, allotment letters / certificates within the prescribed time limit after the closure of subscription list.
- (4) To report periodically to SEBI about the progress in the matters related to allotment and refunds.
- (5) To ensure the listing of securities at Stock Exchanges.
- (6) To attend the investors grievances regarding the public issue.

Question 5

*What are the conditions to be fulfilled by the company for issue of depository receipts?
(5 marks)*

Answer 5

Rule 4 lays down the following conditions to be fulfilled by a company for issuance of depository receipts:

- (1) The Board of Directors of the company intending to issue depository receipts shall pass a resolution authorising the company to do so.
- (2) The company shall take prior approval of its shareholders by a special resolution to be passed at a general meeting. Provided that a special resolution passed under section 62 for issue of shares underlying the depository receipts, shall be deemed to be a special resolution for the purpose of section 41 as well.
- (3) The depository receipts shall be issued by an overseas depository bank appointed by the company and the underlying shares shall be kept in the custody of a domestic custodian bank.
- (4) The company shall ensure that all the applicable provisions of the Scheme and the rules or regulations or guidelines issued by the Reserve Bank of India are complied with before and after the issue of depository receipts.
- (5) The company shall appoint a merchant banker or a practising chartered accountant or a practising cost accountant or a practising company secretary to oversee all the compliances relating to issue of depository receipts and the compliance report taken from such merchant banker or practising chartered accountant or practising cost accountant or practising company secretary, as the case may be, shall be placed at the meeting of the Board of Directors of the company or of the committee of the Board of directors authorised by the Board in this regard to be held immediately after closure of all formalities of the issue of depository receipts.

Provided that the committee of the Board of directors referred to above shall have at least one independent director in case the company is required to have independent directors.

Question 6

A highly qualified and diversified male person aged 55 years old holds Independent Directorship in 9 (Nine) public companies and out of them one is delist from the stock exchange. All directorships are not more than 2 years.

The Director has technical background and asked you as a “Company Secretary in Practice” about holding of Independent Directorship and wants your opinion that what is the best course of action to remain clean in the eyes of law ?

The Director has a valid DIN (Director Identification Number). Prepare a short advisory/ opinion to the Independent Director, on his present directorship.

Make assumptions if necessary.

(5 marks)

Answer 6

Dear Sir/ Madam

The following clarifies your position:

Section 165 of the Companies Act, 2013 provides that one director can hold the directorship in the public company not exceeding 10 companies at a time. So your position is legally justified as per the provision.

Your tenure of the office is not more than 2 years, so you need not to face the test of reappointment in near future.

Further, Regulation 25 of SEBI (LODR) Regulation, 2015 provides an obligation for the listed company that a person shall not serve as an independent director in more than 7 listed companies.

After considering the delisting of a company, at present you are an independent director in 8 companies, therefore, you are hereby advised to tender resignation from one company of your choice out of the total 8 companies to avoid undesirable consequences upon the company and yourself.

Yours Faithfully

Sd/-

(Practicing Company Secretary)

INSURANCE LAW AND PRACTICE **(Elective Paper 9.3)**

Time allowed : 3 hours

Maximum marks : 100

NOTE: Answer **ALL** Questions.

Question 1

Shri Prithipal Singh, 48 years of age, on 7th May, 1990, secured for himself a mediclaim policy from X General Insurance Co. Ltd. Necessary formalities were completed by him in this regard after due consultation with and guidance of the insurance company's agent. Shri Singh nominated his wife Smt. Satwant Kaur as the beneficiary under the policy. The policy was for a period of one year and has to run from 7th May, 1990 to 6th May, 1991. The annual premium charged by the company was ₹1,500 which was duly paid in cash by the insured.

In filling the proposal form leading to the issue of the policy Shri Singh, while answering questions 10 and 11 thereof, had clearly stated that he had not suffered from any illness in the past and that he had not undergone any medical procedures.

On 11th September, 1990, Shri Singh fell ill suddenly and was admitted to a local hospital at Ludhiana where he was residing. The Ludhiana hospital, in the course of the treatment, suggested his shift to a specialised hospital and hence on 7th December, 1990, Shri Singh was shifted to the Madras Institute of Nephrology, Chennai also known as Vijaya Health Centre. While under treatment in the Chennai hospital, Shri Singh's condition deteriorated and ultimately he died in the Chennai hospital on 26th December, 1990.

Smt. Sawant Kaur intimated the insurer X General Insurance Co. Ltd., of her husband's death early in January 1991 and followed up the intimation with a claim statement in February 1991 in which she had claimed a reimbursement of medical and hospital charges of ₹5,23,500.

The insurance company made enquiries with the Madras Institute of Nephrology and obtained a certificate from them on 6th May, 1992 stating that the deceased Shri Singh was a known case of chronic renal failure/diabetic nephropathy; that he was on a regular haemo-dialysis for some years and also after admission into their Institute and suffered from severe breathlessness leading to the development of a sudden cardiac arrest leading to death on 26th December, 1990. Their certificate also mentioned that the insured was a confirmed diabetic for the last 16 years of his life. In the circumstances, the insurance company by its letter of 30th August, 1993 repudiated the claim and informed Mrs. Singh so.

Feeling aggrieved, Mrs. Singh approached the Consumer Dispute Redressal Forum with the prayer that the insurance company should be directed to pay her claim fully along with interest on the claim amount at 24% per annum and also compensation for causing her mental agony. Additionally, she claimed that the litigation expenses should be fully granted to her. The insurance company, in defence, stated before the authority that the claim was unsustainable and had been refused by it on the

strength of the report of the treating hospital. The insurer also pointed out that while filling the proposal form, the insured had specifically started against columns 10 and 11 that he had always been in sound health and had not undergone any medical treatment or operation in the 12 months prior to the date of proposal. The medical report issued by the Madras hospital confirmed that the insured was a confirmed diabetic and was suffering from chronic renal failure or diabetic nephropathy. The insurer also relied on certificates obtained from two independent doctors to state that the claim was not payable as material facts relating to the health of the insured had been concealed at the time of taking the policy. They indicated that even though they had not treated the insured personally, they were of the view that the facts established that the claim could not be paid.

After hearing the parties, the District Forum rejected the opinion/view of the independent doctors since they had neither seen nor treated the deceased. The Forum also held that the report of the Chennai hospital was not supported by any circumstantial evidence and was thus not to be relied upon. On this basis, the Forum held in favour of the claimant and against the insurance company and that the claim be paid. The District Forum also concluded that the insurance company was guilty of deficiency of service and that the repudiation of the claim was not based on any full material information. The forum also felt that there was an inordinate delay on the part of the insurance company in dealing with the claim under the policy. The forum directed the insurance company to pay the claim along with interest at 12% per annum from 1st April, 1991, that is, 3 months after the death of the insured, till date of payment. The forum also directed the insurance company to pay Mrs. Singh ₹1,000 as costs of litigation.

Not satisfied with the District Forum's decision, the insurance company filed an appeal before the State commission reiterating the same facts as had been pressed before the District forum. The State commission, on hearing the parties, allowed the appeal of the insurance company and part of its order dated 31st December, 1998 read as under : "Death of the insured occurred within seven months of taking the mediclaim policy and section 45 of the Insurance Act is not even remotely attracted. We are of the considered view that repudiation of the claim was on a consideration of the aforesaid record of the Madras Institute of Nephrology and therefore answer to col. 10 of the proposal form amounted to misrepresentation of and suppression of material facts regarding health made by the policyholder. No case of deficiency in service has been established."

Mrs. Singh filed a revision petition before the National Commission. The National Commission dismissed the revision petition stating that as it was a case of concurrent finding of facts recorded both by the District Forum and the State Commission, there was no reason to interfere and hence dismissed." However, the learned counsel for the respondent submitted that the repudiation of the claim was fully justified because at the time of submission of the proposal form, the proposer had made a false declaration that he was possessing a sound health and had not undergone any treatment in the last 12 years and taking the facts disclosed as correct, the policy was issued.

It was urged that the mediclaim policy was issued solely on the basis of facts disclosed and the representation made by an insured in the proposal form filled in and submitted by him without subjecting the insured to any medical tests. It was

also pointed out that the proposal form contained a declaration to the effect that if after the insurance is effected, it was found that any statements, answers or particulars stated in the proposal form and its questionnaire were found to be incorrect or untrue in any respect, the insurance company shall incur no liability under the policy.

It was thus asserted that the insured having suppressed the fact of his suffering from chronic renal failure/diabetic nephropathy, which fact was within his knowledge, the insurance company was justified in repudiating the claim. There was a clear suppression of material facts in regard to the health of the insured and, therefore, the insurance company was fully justified in repudiating the insurance claim/contract. The National Commission did not find any merit in the revisim petition and dismissed it. No order was made by the Commission as to the costs of litigation.

Based on the facts given above, deal with the following issues :

- (a) Was the insurance company justified in repudiating the claim ? Was there any breach of faith in the case ? (10 marks)*
- (b) Define the principle of utmost good faith and state the pertinent interpretation of IRDAI with regard to material facts. (10 marks)*
- (c) What is the implication of Section 45 of the Insurance Act ? Is a reference to that section relevant to the above case ? (10 marks)*
- (d) Explain the coverage available under a medi-claim policy and state the exclusions under such a policy. (10 marks)*
- (e) Explain the importance of conditions and warranties as applicable to medi-claim insurance with reference to the above case. Was there any breach of such provisions ? (10 marks)*

Answer 1(a)

In the present case, the core question for consideration is whether the fact that at the time of taking out the mediclaim policy, the policy holder was suffering from Chronic Diabetes and Renal failure was a material fact. It is indeed a material fact as, it would have influenced the decision of the company in giving him a policy in the first place. And moreover, this fact was not disclosed by him in his application also.

Therefore, on account of non-disclosure of this fact in the proposal form, the respondent Insurance Company was justified in law in repudiating the claim of the appellant. The National Commission also opined the same thing and held that in the light of the material on record, answer to the question posed has to be in the affirmative.

There was a breach of faith in this case. The principle of "Utmost good faith" has indeed been violated company can refuse to pay for the claim.

Answer 1(b)

The principle of Utmost good faith can be defined as a positive duty voluntarily to disclose, accurately and fully, all facts material to the risk being proposed, whether requested or not. Uberrimae Fidei- 'Fidei' means faith and Uberrimae means utmost. Faith is complete between both the parties of contract. Thus, it needs little emphasis that when an information on a specific aspect is asked for in the proposal form, an assured is under a solemn obligation to make a true and full disclosure of the information on the subject which is within his knowledge.

Therefore, a fundamental principle of insurance law, is that utmost faith must be observed by the contracting parties. Good faith forbids either party from non-disclosure of the facts which the party privately knows.

The assured's duty to disclose can be summarized as under: "...the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured but neither known nor deemed to be known by the insurer. Breach of this duty by the assured entitles the insurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms.

IRDA has made the 15 days free look-in period a 'mandatory regulation'. The company spends heavily to train its agents/advisors so that they are able to guide and give the right product to the customers.

As per the Regulation 2(l)(d) of the Insurance Regulatory and Development Authority (Protection of Policyholders' Interests) Regulations, 2002, which explains the meaning of term "material". The Regulation reads thus: "Proposal Form" means a form to be filled in by the proposer for insurance, for furnishing all material information required by the insurer in respect of a risk, in order to enable the insurer to decide whether to accept or decline, to undertake the risk, and in the event of acceptance of the risk, to determine the rates, terms and conditions of a cover to be granted. The explanation for "Material" for the purpose of these regulations shall mean and include all important, essential and relevant information in the context of underwriting the risk to be covered by the insurer." Thus, the Regulation also defines the word "material" to mean and include all "important, "essential" and "relevant" information in the context of guiding the insurer to decide whether to undertake the risk or not. In a Contract of Insurance, any fact which would influence the mind of a prudent insurer in deciding whether to accept or not to accept the risk is a "material fact". If the proposer has knowledge of such fact, he is obliged to disclose it particularly while answering questions in the proposal form. Needless to emphasize that any inaccurate answer will entitle the insurer to repudiate his liability because there is clear presumption that any information sought for in the proposal form is material for the purpose of entering into a Contract of Insurance.

As per IRDAI matters to be stated in general insurance policy states that "a company has a provision for cancellation of the policy on grounds of mis-representation, fraud, non-disclosure of material facts or non-cooperation of the insured".

Answer 1(c)

As per Section 45 of Insurance Act, "Policy not to be called in question on ground of mis-statement after 2 years" in other words, it means that no policy of life insurance effected before the commencement of the Insurance Act shall, after the expiry of two years from the date of the commencement of the Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policyholder and that the policyholder knew at the time of

making it that the statement was false or that it suppressed facts which it was material to disclose.

In the present case, there is no dispute that Section 45 of the Insurance Act, 1938, which places restrictions on the right of the insurer to call in question a life insurance policy on the ground of mis-statement after a particular period, has no application on facts at hand, in as much as the said provision applies only in a case of life insurance policy. The present case relates to a mediclaim policy, which is entirely different from a life insurance policy. A mediclaim policy is a nonlife insurance policy meant to assure the policy holder in respect of certain expenses pertaining to injury, accidents or hospitalizations.

It is a contract of insurance falling in the category of contract *ubemimae fidei*, means a contract of utmost good faith on the part of the assured.

Therefore, in the present case, section 45 cannot apply and it is not relevant also. Generally an insurer would believe the information given in the application form or proposal form as it is generally called. Based on the information given in the form, the insurance company deems it to be true as the applicant also gives in a declaration at the end of the form. Hence, the insurance company issues a policy based on the facts disclosed in the application form. Moreover, a Mediclaim or any general insurance policy is issued only for one year tenure only and so the insurance company will believe the information furnished by the policyholders. Only when a claim is lodged, the insurance company starts verifying the facts of the case with the information furnished in the proposal form. However, in the case of a life insurance policy, since it is a long term contract, the law gives the insurance company a right to repudiate or cancel the policy if any discrepancy of information is found within a period of two years only.

Therefore, in the present case, the mention of section 45 is irrelevant and does not hold good.

Answer 1(d)

"Health insurance business" can be defined as a contract that provides for sickness benefits and medical expenses on the basis of an indemnity, reimbursement, service or prepaid plan. A Mediclaim Insurance Policy provides for reimbursement of hospitalization/ domiciliary hospitalization expenses arising out of illness/diseases or injury, administered through TPA. The policy provides for Family discount in premium, Cumulative bonus for claim, free renewals, Cost of health check-up once in 4 claim free years of policy renewals @ 1 % of the average Sum Insured, Room, Boarding expenses as provided by the hospital/ nursing home, Nursing expenses, Surgeon, Anesthetist, Medical practitioner, Consultants fees, Anesthesia, Blood, Oxygen, Operation theatre charges, surgical appliances, Medicines and drugs, Diagnostics material, and X-rays. Dialysis, Chemotherapy, Radiotherapy, cost of pacemaker, Artificial limbs, and cost of organs, and similar expenses.

The policy however excludes

- i. Expenses of pre and post hospital treatment
- ii. Expenses incurred for the treatment for any of the following diseases: like Asthma
- iii. Bronchitis / Chronic Nephritis

- iv. Diarrhea / Epilepsy / Hypertension / diabetes
- v. Influenza, cough and cold, pyrexia
- vi. All psychiatric disorders
- vii. Tonsillitis and respiratory infection
- viii. Pre-existing diseases
- ix. First 30/ First year exclusion
- x. Injury / disease caused by war, invasion, act of foreign enemy, war like operations
- xi. Cosmetic surgery or plastic surgery
- xii. Cost of spectacles, hearing aids, contact lens
- xiii. Dental treatment / Intentional self-injury, use of drugs / alcohol / Aids / Vitamins and tonics
- xiv. Pregnancy related treatment
- xv. Naturopathy treatment
- xvi. War related
- xvii. Elective cosmetic surgery
- xviii. Non-accident related dental care
- xix. Eye test, glasses, hearing examination, hearing aid
- xx. Pregnancy and childbirth except complications
- xxi. Work related injury and Experimental surgery.

Answer 1(e)

A warranty in an insurance policy is a promise by the insured party that statements affecting the validity of the contract are true. Most insurance contracts require the insured to make certain warranties.

For example, to obtain a health insurance policy, an insured party may have to warrant that he does not suffer from a terminal disease. If a warranty made by an insured party turns out to be untrue, the insurer may cancel the policy and refuse to cover claims.

However, not all misstatements made by an insured party give the insurer the right to cancel a policy or refuse a claim. Only misrepresentations on conditions and warranties in the contract give an insurer such rights. To qualify as a condition or warranty, the statement must be expressly included in the contract and the provision must clearly show that the parties intended that the rights of the insured and insurer would depend on the truth of the statement.

Sometimes it will exclude claims arising either directly or indirectly from pre-existing conditions. Sometimes it will exclude only claims that are directly connected to the pre-existing condition. There can sometimes be confusion between pre-existing medical conditions and "nondisclosure". For example, where a consumer has failed to disclose a pre-existing condition in response to a question. But these are usually confined to long term policies (for example, income protection or critical illness) - where traditional proposal forms are used and the consumers are given the opportunity to answer detailed questions about their health.

From the above discussions it was clear that there is breach of such provisions indicated in the case because of “non disclosure” of pre existing medical conditions.

Question 2

Mr. Rajiv Shukla residing in Delhi purchased on 9th May, 2016 a Honda Car for ₹8,00,000. The vehicle was registered as DL 2CJ 8745. He, thereafter, applied for a comprehensive insurance policy with Pioneer General Insurance Co. Ltd. and after ascertaining the annual premium, issued a cheque in favour of the insurance company for ₹19,000 as premium for a comprehensive coverage of the vehicle for a period of twelve months commencing from 11th May, 2016. The insurance company accordingly issued Mr. Shukla with a comprehensive motor policy for the period from 11th May, 2016 to 10th May, 2017.

On presentation of the cheque issued by Mr. Shukla by the insurance company, it was dishonoured on 14th May, 2016 on the ground “insufficiency of funds” and an intimation was sent to Mr. Shukla by the insurance company on 16th May, 2016.

Meanwhile, while returning from his office on 15th May, 2016, the vehicle that was driven by Mr. Sukla met with an accident and suffered damages. A third-party walking on the road also sustained injuries and had to be hospitalised. The accident was reported by Mr. Shukla to the police and a FIR was also lodged.

On the basis of the above facts, answer the following questions :

- (i) Does Mr. Rajiv Shukla have a valid claim in respect of damage to his car DL 2CJ 8745 as a result of the above accident ? (10 marks)*
- (ii) Discuss the concept of liability of third party claims. (10 marks)*
- (iii) Does the person walking on the road who sustained injuries and had to be hospitalised, have a right as third party to claim for injury under the policy ? (10 marks)*

Answer 2(i)

Section 64VB of Insurance Act, 1938 prohibits insurance companies accepting a risk on an insurance policy without receiving the consideration (Premium) in advance. The insurer cannot assume any risk earlier than the date on which the premium has been paid in cash or cheque to the insurer.

Here in the present case, payment by cheque by Mr. Shukla is a reciprocal promise to be simultaneously performed. When the insured failed to pay the premium or whether cheque issued by him was returned dishonoured by the Bank, the insurer was not justified in seeking reimbursement of the claim in the absence of any consideration.

In this case Mr Shukla is not liable to take claim from the insurance in respect of damage of his car DL 2CJ 8745 because his cheque get dishonoured.

As per the law if the insured cheque get dishonoured due to insufficient fund in the account than court will not consider this case as it is the negligent of the insured and insured is not liable to claim from insurance company.

But in case if the cheque get dishonoured due to any other reason like signature not

matching or any spelling mistakes on the cheque than in these cases insured is liable to claim from the insurance company.

Answer 2(ii)

Third parties have a right to claim compensation for the loss suffered by them as a result of an accident. The damages suffered by the third parties create liabilities upon the owners of the vehicle as such deal with the liabilities of the owners to the third parties. The presence of an insurance policy in operation is enough to move the claim of payment to the third party.

Liability in respect of damage to property [S.147(2)]

For damage to property of a third party under Motor Vehicle Act, 1939 the limit of liability is Rs 6000 in all, irrespective of the class of the vehicle. Under Motor Vehicle Act, 1988 the position as laid down by section 147 (2) in regard to liability is as under:

- (i) For death or personal injury to a third party, the liability of the insurer is the amount of liability incurred, i.e. for the whole amount of liability.
- (ii) For damage to property of a third party the liability of the insurer is limited to Rs. 6000 as was under the Motor Vehicle Act, 1939.

Answer 2(iii)

It is a rule specified in Motor Vehicle Act, 1988 that no person should use a motor vehicle in a public place, unless there is an Insurance Policy in force in relation to the use of the vehicle. The main object of the provision is that third parties who suffer injuries due to use of the vehicle, may be able to get damages from the owners. The rights of third party to get indemnified can be exercised only against the insurer of the vehicle. The fact that there was a Policy issued in respect of the vehicle involved in the accident is enough for injured third party to maintain a claim against the insurer. The Third Party is not concerned whether the premium was paid or not as long as the policy has been issued.

Where a judgement or an award has been given against a insured person in respect of a third party liability covered under the insurance policy, then, notwithstanding the rights or the insurer to avoid or cancel the insurance policy, the insurer shall be liable to pay to the person entitled to the benefit of decree (third party), as if the insurer were the judgement debtor, together with any amount payable in respect of costs and any sum payable alongwith interest.

Hence the person who sustained injuries while walking on the road can file a claim for injuries with the insurer and be indemnified as per provisions of law.

Question 3

A is an individual and owns extensive properties. He has insured them against comprehensive risks with a general insurer. One property X was insured for a sum of ₹8,00,000 against fire and incidental risks. The property was lost to a fire accident and A made a claim against the insurance company. After getting a report from a surveyor, the insurer rejected the claim stating that there had been some breaches in warranties.

A comes to you for advice as to how to proceed further. What course of action will you suggest to A to enable him to prove the claim against the insurer ? (5 marks)

Answer 3

There are different forums open for an insured to consider his claim. For an insured to proceed with his claim in an outside forum, he has to exhaust internal procedure. He must make an representation to the insured's own grievance settlement mechanism that has been made obligatory for the insurer to establish and when the insured is not satisfied with the progress of the claim refer to forum or the forum must result , he has option to proceed further.

The option open to him are civil courts and the common protection agencies are easiest method that has been prescribed by the IRDAI to conform to the Redressal of Public Grievances Rules, 1998 and approach the Insurance ombudsman. The ombudsman can step in cases where there is a partial or total representation of a claim by the insurer. Hence this procedure will be available to A.

The dimensions of the ombudsman scheme make it very plain to an insured to adopt as an easy facility. The complaint with the ombudsman must be filed within one year from the date of rejection by the insurer or a first seller from the insurance company on the insured's representation. There is a two stage procedure followed by the ombudsman-viz an initial recommendation and then being not found acceptable or final award. Ombudsman's recommendation comes within a month of the date of receipt of the complaint by him and is after hearing both insured and insurer of the recommendation made by the ombudsman were to be acceptable to the parties, they could go ahead and settle the claim with the insurance company with the recommendation not later than 15 days of the receipt from the ombudsman. If the matter does not get settled at most stage the ombudsman shall after hearing the parties will pass an award in writing within three months of the receipt of the complaint and a copy of the award is sent to both the insurer and the insured. The award binds the insurance company but if the insured does not feel satisfied with the ombudsman's decision , he can further go for legal remedies in courts etc.

One limiting factor of the ombudsman process is that the award can not exceeds Rs. 20.00 lacs and the matter should be non-commercial.

It has been seen that the ombudsman path is the cheapest and quickest settlement path for the resolution of the dispute in re dispute claim.

In the present case, the cover granted was non-commercial the subject matter insured was a property. The insurance cover was for Rs. 8.00 lacs.

In the circumstances the advice for A will be file a complaint to the Insurance ombudsman after exhausting the approach to the internal dispute resolution of the insurance company.

Question 4

You are running a business subject to market risks. You want to procure from an insurance company a comprehensive cover. You are informed that agents and brokers are insurance intermediaries who will help you to negotiate a proper cover with an insurer.

As a business person seeking a cover, who will you approach for discussions and guidance in this regard — an agent or a broker ? Give reasons for your answer.

(5 marks)

Answer 4

Insurance intermediaries facilitate the placement and purchase of insurance, and provide services to insurance companies and consumers that complement the insurance placement process.

The insurance market has different categories of intermediaries— agents, brokers etc. Even among the agents, we have a category of corporate agents. All these intermediaries as a professional job role and help in the growth of the insurance market. The types of intermediation that are required depends wholly on the nature of cover required the risks inherent in the business carried on the protection that is offered by an insurer. The professional attachments of the intermediary and the reputation of the insurer among the various things. The insurance companies even in respect of fire loss of projects cover etc. have standard cover which lay down the applicable and these are available off the shelf as one can say.

A commercial policy is normally to be obtained from a General Insurance Company; a product of this type is a short term cover subject to renewal periodically and also governed by commercial principles and practices.

The type of intermediation assistance in such a case will primarily be governed by the risk factors of the business. An agent is normally an employer/representative of an insurance company and frequently market products that have been developed his principal.

Though an agent has, as per IRDAI regulations to possess qualifications and be licensed, his jurisdiction is confined to the policies/products that have been developed by this principal unless the insurance company on being approached by a prospect for a special cover to meet its need shown as inclination, the prospect is not served to his full requirements. Hence in most cases business requiring special provisions or are faced with specific underlying risks will not be effectively serviced by an agent. One thing that has to be noticed in this case is that an agent is paid his commission from this insurer.

On the other hand, a broker is a free professional attached to any insurance company and is enabled to carry as his profession on the strength of a license granted by IRDAI. A broker has to satisfy financial obligations to set up a profession and has to be qualified. He will be subject to the discipline of the IRDAI. As part of his works as broker will study the risk perceptions of business various alternatives that are available to control risk and design a suitable policy for the business which he will then take to an insurer and obtain a cover. Normally a broker will also help a business to negotiate with the insurer the obtainment of a cover and in case of claim pursue the matter with the insurer and collect the claim. A broker gets paid by the insured for his efforts and the scale of remuneration is fixed by IRDAI.

As in this situation for running the business the business person seeking a cover of market risk wants to procure a insurance comprehensive cover for that he should approach for discussion and guidance he should approach to a broker .

As a technical matter, a broker's role may change during an insurance transaction and over the course of an on-going relationship with a client. Many brokers sometimes act as an "agent" of the insurer and other times as a "broker" of the client when assisting a client with insuring its risk exposures through an insurance contract with a traditional carrier.

As a practical matter, regardless of the legal role in which a broker is acting, the manner in which the broker approaches all such placements for his clients is as an intermediary – working on behalf of his clients to facilitate the consummation of insurance contracts with carriers who have the ability and capacity to properly insure his risks. On a balance in case of business where a strait jacketed policy will not be useful, the engagement of a broker will be the most ideal.

Question 5

What are the disclosure requirements that have been prescribed by IRDAI for insurance companies under the corporate governance guidelines ? (5 marks)

Answer 5

The disclosure requirements specified under IRDAI along with Annual Financial Statements for Insurance Company under corporate governance guidelines are under:

- (a) Quantitative and qualitative information on the insurer's financial and operating ratios- namely incurred claim, commission and expenses ratios.
- (b) Actual solvency Margin details vis-à-vis the required margin.
- (c) Insurers engaged in life insurance business shall disclose persistency ratio of policies sold by them.
- (d) Policy lapse ratio for life insurers.
- (e) Financial performance including growth and current financial position of the insurer.
- (f) Description of risk management architecture.
- (g) Details of number of claims initiated, disposed of and pending with details of duration.
- (h) All pecuniary relationships or transactions of the non-executive directors vis-à-vis the insurer.
- (i) Elements of remuneration package(including incentives) of MD & CEO and all other directors and Key Management Persons.
- (j) Payments made to group entities from the Policyholders Funds.
- (k) Any other matters, which have material impact on the insurer's financial position

Where finalization of annual accounts extends beyond 90 days from the end of the Financial Year, the status on disclosure in the financial statements required under this clause may be made within 15 days of adoption of annual accounts by the Board of Directors of the Insurers.

Question 6

Differentiate between risk, peril and hazard.

(5 marks)

Answer 6

Risk is part of every human endeavor. From the moment we get up in the morning, drive or take public transportation to get to school or to work until we get back into our beds (and perhaps even afterwards), we are exposed to risks of different degrees. Risk is the potential of loss (an undesirable outcome, however not necessarily so) resulting from a given action, activity and/or inaction. The notion implies that a choice having an influence on the outcome sometimes exists (or existed). Potential losses themselves may also be called "risks". Any human endeavor carries some risk, but some are much riskier than others.

A peril is an event or circumstance that causes or may potentially cause a loss and give rise to risk. Examples of perils include fire, flooding, hailstorms, tornado, hurricane, auto accident or home accident such as falling.

A hazard is an action, condition, circumstance or situation that makes a peril more likely to occur or a loss more likely to be suffered as the result of a peril. Examples of hazards include dangerous behaviors, such as skydiving or base jumping, that increase the likelihood of injury..

A risk is simply the possibility of a loss, but a peril is a cause of loss. A hazard is a condition that increases the possibility of loss. For instance, fire is a peril because it causes losses, while a fireplace is a hazard because it increases the probability of loss from fire.

Flood is the peril and the proximity of the house to the river is the hazard. The peril is the prime cause; it is what will give rise to the loss. Often it is beyond the control of anyone who may be involved. In this way we can say that storm, fire, theft, motor accident and explosion are all perils. Thus, if a house burns because of a fire, the peril, or cause of loss, is the fire. If a car is totally destroyed in an accident with another motorist, accident (collision) is the peril, or cause of loss. Some common perils that result in the loss or destruction of property include fire, cyclone, storm, landslide.

INTELLECTUAL PROPERTY RIGHTS – LAW AND PRACTICE
(Elective Paper 9.4)

Time allowed : 3 hours

Maximum marks : 100

NOTE: Answer **ALL** Questions.

Question 1

Read the following case on Copyright Law and answer the questions that follows :

The present case is in relation to widely publicized Telugu film entitled ‘Sardar Rubber Singh’. This is a film that stars Mr. Savan Kalyan, an actor of considerable renown in the Telugu film industry known as Tollywood. The movie was scheduled to release on 8th April, 2016. From August 2015 Sardar Rubber Singh was widely advertised. The Plaintiffs themselves admit to having seen posters in January 2016, but waited till March 2016 for the trailer. Sardar Rubber Singh is scheduled for release on 8th April, 2016. The Suit was filed on 24th March, 2016, at the very last minute. Defendant says that Sardar Rubber Singh has been produced with a Rs. 65 Crore budget. It is scheduled for theatrical release in 2000 screens worldwide and over 600 screens in Hindi. Back-to-back distribution and commercial agreements have been executed with several large cinema chains in India, U.S.A. and across the world.

The case was filed on behalf of the plaintiff Aitraaz Khan. The Plaintiff alleged infringement in respect of his film ‘Jabaang’ on two footings. That is copyright infringement and passing off. Two films were produced by the Plaintiffs Aitraaz Khan. The franchise features Mr. Balwan Khan who was shown as a colourful police officer known as ‘Chulbul Pandey’. The first issue is that the Bulbul Pandey character from the Jabangg films has been infringed by the Defendants in their forthcoming film ‘Sardar Rubber Singh’. This is a sequel to the Defendants’ hugely successful ‘Rubber Singh’, a remake authorised under a written and undisputed assignment, of the first ‘Jabangg’ film.

In 2009/2010, the Plaintiff produced and released the first Jabangg film. The film script, story, screenplay and dialogue were written by Anubhav Singh, hired by the Plaintiff Aitraaz Khan on a commission basis for that purposes. The Plaintiffs created the unique character of Bulbul Pandey, portrayed by Mr. Balwan Khan. This character is described as “a corrupt but fearless police officer”. According to the plaintiff there are various features that make this character unique they are :

- (a) Bulbul Pandey (portrayed by Mr. Balwan Khan) plays a corrupt but fearless police officer. He lives with his family and has a troubled relationship with his stepfather and half-brother. He calls himself “Robin Hood” Pandey.*
- (b) Bulbul Pandey has his unique, funny and bizarre way of dealing with rogue elements. The character has developed a unique dance style. The entire character of Bulbul Pandey was that of an endearing, loving and funny police officer, a*

spontaneous and peculiar laugh adds charm to his steps. Bulbul Pandey rides a bike in the movie.

- (c) *Bulbul Pandey wears aviators and has a unique style of tucking the aviators on the back of his collar in the Film.*
- (d) *Bulbul Pandey has a well-built body type, neat close-cut hairdo and handlebar pencil-thin moustache. Though a police officer, he wears a uniform with the top buttons open.*
- (e) *Bulbul Pandey is a very light hearted police officer who dances with the other police officials at the police station. Even his fighting style has comic elements.”*

The Jabangg film was extremely successful. This uniquely etched character of Culbul Pandey and it is suggested that this is no ordinary, generic or ‘stock’ police hero.

Some two years later on 21st January, 2011, the Plaintiff entered into an agreement with Rameshwara Arts, a proprietary concern of the Savan Kalyan, for the remake rights of the first Jabangg film.

As per the agreement the Assignee obtained absolute rights for remaking the film in Telugu language only. The Assignee will be having absolute rights to exploit the remade version of the film in Telugu Language only all over the world in all dimensions commercially and non-commercially.

As per the agreement the term “Remake Rights” shall mean and included the rights to make a Film based on the Film and/or Script but not limited to the following :

- (a) *The right to remake the Film in Telugu Language and for the Territory based on and using the story line, script, scenes, screenplay, dialogues, characters, picturisation, designs, dramatic work, artistic works and names of the characters, passages, title of the Film or any part thereof etc. of the Film in any manners as Assignee may deem fit the Film or the story line of the Film in any manner Assignee so chooses.*
- (b) *The exclusive right in the intellectual Property of the New Film including but not limited to the Copyright and all other ancillary rights and exclusive rights in the New Film and its underlying works.*
- (c) *Any and all other rights that are incidental to and are necessary for appropriate utilization of the above mentioned rights i.e. (i) and (ii) of this clause.*

As per the agreement the term “Script” means and includes jointly and severally the story, each script outline treatment, draft, re-write and polish and screenplay of the Film in Hindi with dialogues.

Plaintiffs’ case is that the Rubber Singh character portrayed br Mr. Savan Kalyan is nothing but an avatar of the Bulbul Pandey character portrayed by Mr. Balwant Khan.

If Rubber Singh brough into existence a wholly different persona, then surely its creators and owners have the right to futher use that character and persona, no matter what any document said. Other than the name, there is no difference, and anyone seeing Rubber Singh on-screen, played by Mr. Savan Kalyan, will believe that he is seeing Bulbul Pandey albeit albeit with a different visage.

Defendant’s contention is that the name was different. The portrayal was different.

The stylization was different. The locales were different. So too were his mannerisms, qualities and, most of all, his core value system, his moral compass : where Bulbal Pandey is fearless but corrupt, Rubber Singh is fearless and honest. This was an adaptation developed distinctively. The script or story line underlying Rubber Singh, is said to have been developed by Mr. Savan Kalyan himself, has an independent copyright. Further they informed that the agreement of 21st January, 2011 relates not to a licence but to an assignment, a very different thing.

The Rubber Singh character for the first Telugu film, though a derivative character, was one that was unique to that particular film. This is reflected by the fact that there is an assignment in perpetuity and with exclusivity. Copyright vested with the Defendants within the meaning of Section 14(a) and (d) respectively of a literary work and a cinematographic film. The rights in the Rubber Singh character are wholly distinct from the rights in the Bulbul Pandey character. The rights in the Rubber Singh character vest in and only in the Defendants.

Defendants claim was not only that the producers had copyright in the cinematography film but that they also owned the rights in the script, and that it was the entirety of all of this material that was assigned.

There is also an argument in passing off that any person watching the Rubber Singh film is bound to recognise in the Rubber Singh's character as portrayed by Defendant Mr. Savan Kalyan, the Bulbul Pandey character portrayed by Mr. Balwant Khan. It is one thing to say that the character first portrayed by Mr. Balwant Khan is now being portrayed as an adaptation by Mr. Savan Kalyan. It is quite another thing to say that the two characters are exact and that anyone seeing Mr. Savan Kalyan's performance would think and only think of Mr. Balwan Khan's portrayal of a particular and character and none other. Again of this conflation of the two personas, and of the Rubber Singh character having no persona of his own, there is no evidence.

The Court is of the opinion that both Bulbul Pandey and Rubber Singh wear their uniforms in a casual manner are hardly unique. The Rubber Singh character features a police officer who is both fearless and honest. The Bulbul Pandey in the Jabang franchise is just as fearless, on the footing that we all want our heroes to be fearless, but he is at the same time corrupt, a nod to reality but hardly an aspiration. The setting of the two films is different, the Jabang films are set in North India while the Rubber Singh films are in the Andhra/Telangana region. There are many other points of distinction too.

Basing on the argument advanced and reasons explained in the present case the Bombay High Court is unable to find for the Plaintiffs on either a prima facie or balance of convenience, as a result the court decline ad-interim reliefs.

Questions :

- (a) Examine the concept of cinematographic film and mention the right provided to performer under the Copyright legislation. (10 marks)*
- (b) 'Computer programmes per se not patentable.' Discuss the patentability of computer programmes in India and other jurisdictions. Specify under which law they are protected. (10 marks)*
- (c) Explain the term infringement of copyright and highlight any six statutory exceptions there in. (10 marks)*

- (d) *Discuss the terms Assignment and licenses, explain the procedure and conditions to be followed while entering in to an assignment. (10 marks)*
- (e) *Critically analyse all the provisions and grounds established by the defendant to put his case for infringement of copyright ? In whose favour the High Court awarded the judgement. (10 marks)*

Answer 1(a)

According to Sec. 2 (f) of Copyright Act, 1957 – ‘Cinematograph Film’ means any work of visual recording and includes a sound recording accompanying such visual recording and ‘Cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films. Thus, the term cinematographic film includes a video film which has been recorded in a VCR. [*Entertaining Enterprises and Others v. State of Tamil Nadu and Others*, AIR 1984 Mad 278]

The Bombay High Court in *Fortune Films International v. Dev Anand and Others* AIR 1979 Bom 17, held that in view of the definition of "artistic work", "dramatic work" and "cinematograph film", it would appear that the Copyright Act, 1957, does not recognize the performance of an actor as 'work' which is protected by the Copyright Act.

To overcome the lacuna in the law as pointed out in the aforementioned judgement of the Bombay High Court in relation to the protection of actors, the Act was amended in the year 1994 and a new concept of performer’s rights was introduced into the law.

Performer’s Right

Section 38 (as substituted in the year 1994) provides that where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance. The performer's right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made.

Exclusive Right of Performer

As per section 38A without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of the Copyright Act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:-

- (a) To make a sound recording or a visual recording of the performance, including-
 - (i) reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
 - (ii) issuance of copies of it to the public not being copies already in circulation;
 - (iii) communication of it to the public;
 - (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording;
 - (v) to broadcast or communicate the performance to the public except where the performance is already broadcast.

It may be also be noted that once a performer has, by a written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film. However, the performer shall be entitled for royalties in case of making of the performances for commercial use.

Moral Right of the Performer

Section 38B of the Act provides that the performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right:

- (a) To claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and
- (b) To restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

It may be noted that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

Answer 1(b)

Modern society relies heavily on computer technology for multiple reasons. Without software technology, computer hardware cannot be operated and therefore the software and hardware work in tandem in today's information society. Therefore, considering the heavy reliance placed by different businesses on the use of software for its different business purposes the intellectual property protection granted to software becomes not just important but also very crucial to the software industry as well as other industries.

A Software patent is generally defined as a patent that protects some programming technique. The Foundation for a Free Information Infrastructure (FFII) has defined a software patent as being a "patent on any performance of a computer realized by means of a computer program." The intellectual property law protection with respect to computer software has been highly debated both at the national as well as international level.

The following are the important issues concerning software patents:

1. Whether software patents should be allowed, and if so, where the boundary between patentable and non-patentable software should lie;
2. Whether the inventive step and non-obviousness requirement is applied too loosely to software; and
3. Whether patents covering software discourage, rather than encourage, innovation.

Most countries place limitations on the grant of patent on inventions involving software as the ultimate product. Also, there is no settled definition of a software patent laid down under the law. As for instance, U.S. patent law excludes "abstract ideas", and this has been used to refuse grant of patent to products involving some software. In Europe, "computer programs as such" are excluded from the phenomenon of patent.

The Patent laws in several countries favour the grant of patent protection for software innovations. Such countries include USA, Australia and Singapore, to name a few. However, many other countries, which include India and European nations, have more stringent laws concerning grant of patent protection to software innovations.

Most of the jurisprudence relating to software patents emanates from United States, which is considered as the cradle of software patents. In the landmark decision of the US Supreme Court in *Diamond v. Thehr*, (1981), the court ordered the Patent office to grant a patent on an invention even though a computer software was utilized in it.

Indian Patent legislation offers patent protection to products and processes (if they satisfy the requirements of patentability) except the non-patentable subject matter laid down in sections 3 and 4 of the Patents Act, 1970. As per in section 3(k), it is clearly indicated that 'a mathematical or business method or a computer program per se or algorithms' are non-patentable inventions.

One may also refer to the recently released Manual of Patent Office Practice and Procedure (2011) which clarifies ambiguities in respect of patentability. Even the manual does not provide for patentability of computer software in combination with hardware. The text in the Manual is reproduced below.

- f. If the claimed subject matter in a patent application is only a computer programme, it is considered as a computer programme per se and hence not patentable. Claims directed at computer programme products are computer programmes per se stored in a computer readable medium and as such are not allowable. Even if the claims, inter alia, contain a subject matter which is not a computer programme, it is examined whether such subject matter is sufficiently disclosed in the specification and forms an essential part of the invention.*

In India, Computer Software is protected by the Copyright Law as applicable to literary and artistic works. Computer software on the other hand is protected by copyright as applicable to literary and artistic works. A computer program is therefore dealt with as a literary work and the law and practice in relation to literary works will apply to computer programs. Section 2(o) of the Copyright Act, 1957 lays down that the term 'literary work' includes computer programmes.

Answer 1(c)

Copyright law confers upon the owner of the work a bundle of rights in respect of reproduction of the work and the other acts which enables the owner to get financial benefits by exercising such rights. If any of these rights relating to the work is carried out by a person other than the owner without the license of the owner or a competent authority under the act, it constitutes infringement of copyright in the work. Since copyright is granted for a limited period, there will be no infringement if the reproductions of the work or other acts concerned are carried out after the term of the copyright has expired. The exclusive rights conferred on the owner depends on the nature of the work in which copyright subsists. Accordingly the type of acts which will constitute infringement will also depend on the nature of work.

Any person who without authorisation or assent of the copyright owner, exercises the rights in respect of the work which is the subject matter of copyright, or does anything which is the sole right of the copyright owner, commits infringement of the copyright

(*Kartar Singh Gianiv. Ladha Singh & Others, AIR 1934 Lah 777*). Thus, if the reproduction of the work is carried out after the expiry of the copyright term the said act will not amount to infringement of copyright.

Section 51 of the Copyright Act contemplates situations where copyright in a work shall be deemed to be infringed. As per the section copyright in a work shall be deemed to be infringed: (a) when any person, without a license granted by the owner of the copyright or the Registrar of Copyrights or in contravention of the conditions of a license so granted or of any condition imposed by a competent authority does:

- (1) Anything for which the exclusive right is conferred upon the owner of the copyright, or
- (2) Permits for profit any place to be used for the communication of the work to public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright, or
- (3) When any person: (i) makes for sale or hire or sells or lets for hire, or by way of trade display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade, exhibits in public, or (iv) imports into India, any infringing copies of the work.

However, import of one copy of any work is allowed for private and domestic use of the importer.

Section 51 clarifies that the reproduction of literary, dramatic, musical or artistic work in the form of cinematograph film shall be deemed to be an 'infringing copy'.

The principle of conditional grants to proprietary rights in any intellectual property is to promote public interest. This is universally recognized and incorporated in intellectual property system. Protection and enforcement of intellectual property rights must:

1. Be conducive to social and economic welfare;
2. Safeguard an individual's fundamental rights; and
3. Promote commerce, competition and innovation.

In Copyright Laws exceptions and limitations are provisions which in public interest permit the use of copyrighted works without prior authorization or a license from its owner.

Generally, exceptions and limitations to copyright are subject to a three-step test set out in the Berne Convention for the Protection of Literary and Artistic Works. Briefly stated, the Berne Convention provides that an exception or limitation to copyright is permissible only if:

1. It covers special cases
2. It does not conflict with the normal exploitation of the work; and
3. It does not unreasonably prejudice the legitimate interests of the author.

Statutory Exception

Section 52 (1) Copyright Act contains around 33 categories of exceptions wherein

the act committed shall not amount to an infringement of copyright. The objective behind laying down these exception is to promote public good and thus enable the reproduction of the work for certain public purposes, and for encouragement of private study, research and promotion of education.

The list of acts which do not constitute an infringement of copyright are:

- (i) A fair dealing with any literary, dramatic, musical or artistic work, not being a computer programme, for the purposes of-
 - (a) Private or personal use, including research;
 - (b) Criticism or review, whether of that work or of any other work;
 - (c) Reporting of current events and current affairs, including the reporting of a lecture delivered in public;

The explanation appended therewith further clarifies that storing of any work in any electronic medium including the incidental storage of any computer programme, which is not itself an infringing copy for the said purposes, shall not constitute infringement of copyright.

- (ii) The reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;
- (iii) The reproduction or publication of a literary, dramatic, musical or artistic work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;
- (iv) The reproduction of any literary, dramatic or musical or artistic work in a certified copy made or supplied in accordance with any law for the time being in force;
- (v) The reading or recitation in public of reasonable extracts from a published literary or dramatic work;
- (vi) The publication in a collection, mainly composed of non-copyright matter, bona fide intended for instructional use, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works, not themselves published for use in which copyright subsists. Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.
- (vii) The reproduction of a literary, dramatic, musical or artistic work-
 - by a teacher or a pupil in the course of instruction; or
 - as part of the questions to be answered in an examination; or
 - in answers to such questions;
- (viii) The performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recordings if the audience is limited to

such staff and students, the parents and guardians of the students and persons connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording.

- (ix) The performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;
- (x) The reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;
- (xi) The storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work;
- (xii) The making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India;

Answer 1(d)

The owner of the copyright can transfer his rights to any other person by way of either assignment of the copyright or by issuing licenses. The owner of the copyright in an existing work or the prospective owner of a copyright in a future work may assign to any person the copyright as per section 18 and 19.

Sections 17 and 18 of the Copyright Act, 1957 lay down provisions as to in whom the copyright vests. Section 17 mentions that if a work is done by an author for a consideration for a publisher, the copyright in it would normally vest in the publisher subject to any contract to the contrary.

Section 18 states that the owner of the copyright in an existing work or the prospective owner of in a future work may assign the copyright to any person, either wholly or partially and either generally or subject to limitations and either for the whole of the copyright or any part thereto.

Modes of Assignment

Section 19 of the Act provides that an assignment of copyright should be in writing signed by the owner of the copyright or by his duly authorised agent. Mere acceptance of remuneration or delivery of manuscript does not constitute an assignment of copyright. Oral assignment is invalid and it is impermissible in law (*K.A. Venugopala Setty v. Dr. Suryakantha U. Kamath* AIR 1992 Kar 1).

This section requires that the assignment should be in writing signed by the assignor or by his duly authorized agent. The assignment of copyright should specify the assigned work, rights including and the duration, territorial extent of assignment and the amount of royalty or any other consideration payable to the author or his legal heirs.

In case assignee does not exercise his rights within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have

lapsed after the expiry of said period, unless otherwise specified in the assignment. The assignment of copyright in any work contrary to the terms and conditions of the rights already assigned to a copyright society in which the author of the work is a member is void.

The Assignment of copyright in any work to make a cinematograph film does not affect the right of the author of the work to claim an equal share of royalties and consideration payable in case of utilization of the work in any form other than for the communication to the public of the work, along with the cinematograph film in a cinema hall.

Amendment of 2012 to Section 19

Three clauses have been added with respect to assignment to Section 19 which basically says that royalty has to be paid to the authors whose work has been exploited in a cinematographic film other than by way of exhibition of the film in a cinema hall. This simply means that the authors are entitled to the subsequent royalties which may arise in the course of further exploitation of the film which includes their work. For example, they will also be entitled to royalty for satellite right, home video, internet right etc. This again strengthens the position of the authors of the work as the actual owners of anything apart from their work in the cinematographic film. The second clause that has been added is for sound recording and is the same as above. What the authors can do is register their work with a copyright society and thereafter license it to whoever they like.

Licenses

A license is different from an assignment as the licensee gets certain rights subject to the conditions specified in the license agreement but the ownership of those rights vests solely in the owner of the copyright. On the other hand, in case of an assignment, the assignee becomes the owner of the interest assigned to him. The original owner of the copyright transfers all his/her rights to the assignee and retains none.

A license can be voluntary or compulsory.

Voluntary Licensing

Section 30 of the Indian Copyright Act defines what is meant by voluntary licensing. According to Section 30 the owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by license in writing signed by him or by his duly authorized agent.

Therefore, the copyright owner of any existing work or the prospective owner of any future work can grant any interest in the right by way of a license. However, it has to be borne in mind that in case of a future work, the license will come into force only when the work comes into existence.

Compulsory Licensing

Compulsory license is the term generally applied to a statutory license to do an act covered by an exclusive right without the prior authority of the right owner. Compulsory licensing allows for the use of protected (in this case, copyrighted material) without the prior permission of the owner of the right.

Answer 1(e)

In the present problem the defendant put forward the following grounds before the High Court to buttress his case that there is no infringement of copyright:

1. The Plaintiff themselves admitted that they saw the posters of the movie in January, 2016 itself but waited till March 2016 for the trailer. Sardar Rubber Singh was scheduled for release on 8th April, 2016 and the suit was filed on 24th March, 2016 at the very last minute. This shows that the plaintiff's intention was to try to cause loss and damage to the defendant.
2. Plaintiff and Defendant had entered into an agreement whereby the assignee obtained an absolute right to remake the film in Telugu language only. Further, under the agreement the Assignee was conferred an absolute right to exploit the remade version of the film in Telugu language only all over the world in all dimensions commercially as well as non-commercially.
3. Defendant's was contended that the name of the movies is different, the Portrayal is different, the stylization is different, the locales were different and so were his mannerism, qualities and, most of all, his core value system, his moral compass; whereas Bulbul Pandey is fearless and corrupt, Rubber Singh is though fearless but honest. This was an adaptation developed distinctively. The script or the storyline underlying the character of Rubber Singh is said to have been developed by Mr. Savan Kalyan himself, and thus he has an independent copyright over the same. Further, they informed that the agreement of 21st January 2011 relates not to a licence but to an assignment which is a very different thing from a mere licence.
4. Copyright vested with the Defendants within the meaning of Section 14(a) and (d) respectively of a literary work and a cinematographic film. The rights in the Rubber Singh character are wholly distinct from the rights in the Bulbul Pandey character. The rights in the Rubber Singh character vest in and only in the defendants.
5. Further, the defendants claim that the producers had copyright in the cinematograph film but they also owned the rights in the script, and that it was the entirety of all of this material that was assigned.
6. The setting of the two films is different and while the Jabang films are set in North India the Rubber Singh films are in the Andhra/Telangana region and that there are many other points of distinction too.

Taking into account the provisions of the Copyright Act especially with reference to section 14 (a) to (d) and section 17 of the Act, in the present case, the Bombay High Court held that it is unable to find any reason in favour of the Plaintiffs on either a prima facie case or on the test of balance of convenience.

As the result, the court refused to grant any ad-interim relief to the plaintiff. Hence the suit was dismissed and the judgement was passed in favour of the defendant.

Question 2

Read the following case and answer the questions given at the end :

One Shri Rama Krishna Bahadur the appellant in the present case, trading as M/s

Om Perfumery, Makerganj, Mahatma Gandhi Road, Bhubaneshwar made an application to the Registrar of Trade Marks to register a trade mark by Digitally signed by name "RAMAYAN" with the device of crown in Class 3 in respect on incense sticks (agarbattis, dhoops) and perfumeries etc.

One Shri Laxman Singh the respondent herein, was a dealer for the sale of the products of the appellant and was also trading as M/s Badshah Industries, Shitkohra, Purohit Colony, Bhubaneshwar. The respondent herein filed a Notice of opposition to oppose the registration of aforesaid trade mark under Sections 9, 11(a), 11(b), 11(e), 12(1), 12(3) and 18(1) of the Trademarks Act, 1999 claiming that the impugned mark, being the name of a religious book, cannot become the subject matter of monopoly for an individual.

The appellant was in the business of manufacturing, trading and marketing of incense sticks since 1981 and the respondent was a dealer of the appellant. The goods under the trade mark "RAMAYAN" have been advertised by him through various means including the publication of cautionary notices in newspapers, extensive use, wide advertisement and the excellent quality of the products. The trademark "RAMAYAN" and the carton in which the products are sold has become distinctive in such a manner that use of the same or similar trademark or carton by any other person will cause confusion and deception in the trade and amongst the public. The sale was done through a network of dealers and distributors. The respondent was one of the dealers of the appellant. After the termination of dealership, the respondent started selling incense sticks under the trademark "RAMAYAN" written in the same style and manner.

The Assistant Registrar of Trade Marks, after holding that the impugned trade mark consists of device of crown and the word "RAMAYAN" is capable of distinguishing the goods and is not included in the list of marks not registrable under the Act, by order dated 31st March, 2004, dismissed the application filed by the respondent.

Taking in to account the trade mark, being the name of a religious book, cannot be a sufficient ground for refusal of registration under Section 9(2) of the Act and is not based on evidence on record that the feelings of any section of the Hindus having been hurt by its use in relation to incense sticks. Further it was submitted that the Assistant Registrar of Trade Marks rightly held that the impugned trade mark consists of device of crown and the word is capable of distinguishing the goods of the appellant and the trade mark is not included in the list of marks not registrable under the Act. It was further claimed that it has already been proved before the Court of Assistant Registrar that the appellant was using the trade mark since 1981 and hence, is the prior user in comparison to the respondent.

Being aggrieved by the other passed by the Assistant Registrar, the respondent preferred an appeal before the Intellectual Property Appellate Board. On January 10th, 2005 the Board, set aside the other passed by the Assistant Registrar of Trade Marks (31-03-2004).

Aggrieved by the other passed by the IPAB (10-01-2005), the appellant has filed this appeal by way of special leave before the Supreme Court of India. Appellant contended that it was unfortunate the Board, misconstrued the observations of the Standing Committee in the Eighth Report on the Trade Marks Bill, 1993. It was also contended that the Board erred in law while setting aside the judgement of the Assistant Registrar

of Trade Marks while holding adversely about its distinctiveness, the mark causing deception and not having been used in an honest manner.

The respondent contended that the impugned mark, being name of a religious book, cannot become the subject matter of monopoly for an individual. He further contended that the mark "RAMAYAN" is not a distinctive mark and is devoid of any distinctive character. The mark is capable of distinguishing the goods of one person from those of another. It was also contended that the mark "RAMAYAN" is not registrable since it is name of a famous and well known religious book. It was also claimed that more than 20 traders in Patna and many more are using the trade mark and thus it has become public juris. It was further submitted that the impugned mark is identical with the respondent's mark "BADSHAH RAMAYAN" which is pending registration and the impugned registration will cause harassment to other traders and purchasing public would be bound to be confused and deceived. He further added that his application for the registration of the same trade mark claiming user since 5th November, 1986 is pending for registration.

The court observed that the word "RAMAYAN" represents the title of a book written by Maharishi Valmiki and is considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book "RAMAYAN", for getting it registered as a trade mark for any commodity could not be permissible under the Act. If any other word is added as suffix or prefix to the word "RAMAYAN" and the alphabets or design or length of the words are same as of the word "RAMAYAN" then the word "RAMAYAN" may lose its significance as a religious book and it may be considered for registration as a trade mark. However, in the present case, the court finds that the appellant had applied for registration of the word "RAMAYAN" as a trade mark. It also finds that in the photographs, after adding "OM's" to the word "RAMAYAN", at the top and in between "OM's and RAMAYAN", the sentence, "Three Top Class Aromatic Fragrance", is also written. Thus, it is not a case that the appellant is seeking the registration of the word "OM's RAMAYAN" as a trade mark. Further, from the photographs, it also find that the photographs of Lord Rama, Sita and Lakshman are also shown in the label which is a clear indication that the appellant is taking advantage of the Gods and Goddesses which is otherwise not permitted.

There are many holy and religious books like Quran, Bible, Guru Granth Sahib, Ramayan etc., to name a few. The answer to the question as to whether any person can claim the name of a holy or religious book as a trade mark for his goods or services marketed by him is clear 'NO'.

In relation to the artistic work said to have been created, there is not doubt that both the marks are identical in design, colour, scheme and the reproduction of photographs is in such a manner that an ordinary buyer would reasonably come to a mistaken conclusion that the article covered by one brand can be the article covered by the other. Both the parties have claimed to be manufacturing units engaged in certain goods.

The respondent claimed that though he had been in the business since 1980, he had developed and published the artistic work in 1986 and has also been using the mark as a trademark and claiming use since 1986 whereas the appellant herein claimed use of the trademark since 1987. However, by filing an application to the concerned authority, the appellant has claimed the use since 1981. Further, in various pleadings in the Title Suits filed by the respondent herein, the appellant herein has admitted

the use and publication of the artistic mark of the respondent before the date of claim of the first use by the appellant, that is, 1987. From these facts, it is clear that the respondent herein was using the artistic mark earlier in point of time to that of the appellant herein.

In view of the foregoing discussion, the Supreme Court of India do not find any irregularity in the order passed by the Intellectual Property Appellate Board consequently, the appeal fails and is accordingly dismissed.

Questions :

- (a) *Analyse the judgement of the Supreme Court. Find out the reasons and provisions of law applied by the court in giving such judgement. (5 marks)*
- (b) *Do you agree with the order passed by the Assistant Registrar of Trademarks Registry ? Explain the concept of domain names mentioned under trademarks law. (5 marks)*
- (c) *Examine the requisites for registration, duration and renewal of trademark as per trademark legislation. (10 marks)*
- (d) *Discuss in brief various kinds of mark and mention the provisions in relation to registered user under the Trademarks Act, 1999. (10 marks)*

Answer 2(a)

In the present case, the Supreme Court of India while taking into account the following facts upheld the judgement of the IPAB:

1. The court observed that the word "RAMAYAN" represents the title of a holy book written by Maharishi Valmiki and is considered to be a religious book of the Hindus in our country. Thus, using exclusive name of the book "RAMAYAN", for getting it registered as a trade mark for any commodity could not be permitted under the Act. If any other word is added as suffix or prefix to the word "RAMAYAN" and the alphabets or design or length of the words are same as of the word "RAMAYAN" then the word "RAMAYAN" may lose its significance as a religious book and it may be considered for registration as a trade mark.
2. In the present case, the court finds that the appellant had applied for registration of "RAMAYAN" as a trade mark for his business. It also finds that in the photographs, after adding "OM's" to the word "RAMAYAN", at the top and in between "OM's and RAMAYAN", the sentence, "Three Top Class Aromatic Fragrance", is also written. Thus, it is not a case that the appellant is seeking the registration of the word "OM's RAMAYAN" as a trade mark.

Further, from the photographs, it also found that the photographs of Lord Rama, Sita and Lakshman are also shown in the label which is a clear indication that the appellant is taking advantage of the Gods and Goddesses which is otherwise not permitted.

3. There are many other holy and religious books like Quran, Bible, Guru Granth Sahib, Ramayan etc., to name a few. According to the Court, no person can claim the name of a holy or a religious book as a trade mark for his goods or services.

4. In relation to the creation of artistic work, there is no doubt that both the marks are identical in design, colour, scheme and the reproduction of photographs is in such a manner that an ordinary buyer would reasonably come to a mistaken conclusion that the article covered by one brand is the article covered by the other. Both the parties have claimed to be the manufacturing units in respect of certain goods.
5. The impugned mark, being the name of a religious book, cannot become the subject matter of monopoly for an individual.
6. Further, the respondent claimed that though he had been in the business since 1980, he had developed and published the artistic work in 1986 and has also been using the mark as a trademark and claiming use since 1986 whereas the appellant herein claimed use of the trademark since 1987. However, by filing an application to the concerned authority, the appellant has claimed the use since 1981.

Section 9 and 11 of the Trade Marks Act, 1999 prohibits the registration of certain marks as trade mark. In case of a mark which hurts the religious sentiments of any class or section of the citizens of India has been laid down as an absolute ground for refusal of registration of a trade mark under section 9(2)(b) of the Act. It comes under the absolute grounds for refusal of registration of a trade mark. Section 11 deals with the relative grounds and section 12 states regarding honest concurrent use or other special circumstances. These two sections also deal with certain exceptions to the main rule. The only question before the SC was whether the “registration of the word Ramayan as a trade mark, being the name of a Holy Book of Hindus, is prohibited under Section 9(2) of the Trade Marks Act, 1999”

Answering this question the court emphatically held “The answer to the question as to whether any person can claim the name of a holy or religious book as a trademark for his goods or services marketed by him is clearly NO”. Also the court very specifically adds that if there was a prefix or a suffix to the word Ramayan which was of the same “length of the word Ramayan then Ramayan may lose its significance as a religious book and it may be considered for registration as a trademark”.

Answer 2(b)

No, the order passed by the Assistant Registrar is not proper. The impugned trade mark consists of device of crown and the word “RAMAYAN” is capable of misleading, causing confusion and deception in the minds of the public.

Concept of Domain Names

Domain names are the human-friendly forms of Internet addresses. A domain name is a unique name that identifies a website. For example, the domain name of the Tech Terms Computer Dictionary is "techterms.com." Each website has a domain name that serves as an address, which is used to access the website. Whenever we visit a website, the domain name appears in the address bar of the web browser. Some domain names are preceded by "www" (which is not part of the domain name), while others omit the "www" prefix. All domain names have a domain suffix, such as, .com, .net, or .org. The domain suffix helps identify the type of website the domain name represents. For example, ".com" domain names are typically used by commercial website, while ".org" websites are often used by non-profit organizations. Some domain names end with a country

code, such as ".dk" (Denmark) or ".se" (Sweden), which helps identify the location and audience of the website.

When we access a website, the domain name is actually translated to an IP address, which defines the server where the website is located. This translation is performed dynamically by a server called the Domain Name Server (DNS).

Domain names are formed by the rules and procedures of the Domain Name System (DNS). Technically, any name registered in the DNS is a domain name.

It is common-place for traders to have their electronic mail address and use the same in respect of their goods /services as trade names. In other words, the domain name is being used as a trade name or trade mark, and the Registrar will, subject to the usual criteria of the Act, permit domain names to be registered as trademarks, if otherwise registerable.

Elements of the domain name such as ".com" or ".co.in" are considered to be totally non-distinctive, much in the same way as "Ltd" and "Plc". As a general rule, one should consider whether the remainder of the mark is descriptive or non-distinctive; if so, there is likely to be an objection under Section 9(1) (a) of the Act.

The rights to take rigorous and drastic actions against any infringement cases connected with the registered and protected domain name within the Indian jurisdictions, are essentially covered by these rights granted to the registrant of domain name by any regional Trademarks Office of India. In this connection, the opinion and judgment of the law courts of India, essentially including the Apex Court, are expressed explicitly during the handling of many domain-name related law cases, particularly the cases of *Satyam Infoway Ltd. Vs Sifynet Solutions Pvt. Ltd.* and the *Tata Sons Ltd. vs Manukosuri and Others*.

Answer 2(c)

Within three months of the publication of the trade mark in the Trade Marks Journal, should the trade mark not be opposed by a third party, it will proceed for registration and the Trade Marks Registry will accordingly issue a registration certificate.

Requisites of Registration

The registration of a trade mark confers upon the owner the exclusive right to the use of the registered trade mark and indicate so by using the symbol (R) in relation to the goods or services in respect of which the mark is registered and seek the relief of infringement in appropriate courts in the country. The exclusive right is however subject to any conditions entered on the register such as limitation of area of use etc. Also, where two or more persons have registered identical or nearly similar mark due to special circumstances such exclusive right does not operate against each other.

The register of trade mark currently maintained in electronic form contains inter alia the trade mark the class and goods/ services in respect of which it is registered including particulars affecting the scope of registration of rights conferred or disclaimers, if any; the address of the proprietors; particulars of trade or other description of the proprietor; the convention application date (if applicable); where a trade mark has been registered with the consent of proprietor of an earlier mark or earlier rights, that fact.

The Trade Marks Act, 1999 does not expressly list any requisites for registration of a Trade Mark. The requirements for registration and the definition of trade mark have

converged. Instead of detailing requisites for registration, grounds for refusal are listed in Section 9(1), (2) and (3) & Section 11 which conversely are requisites for registration.

Most of the substantive law laid down by the Trade & Merchandise Marks Act, 1958 remains valid and would hold the field in respect of administering the provisions of Trade Marks Act, 1999.

From previous operation of trade mark law, four categories of trade marks were made out i.e., names, signatures, words and other distinctive marks. Most of the principles relating thereto would hold good under the new dispensation too.

Now any mark which is a trade mark may be registered for any goods or services if it is not hit by any of the two categories of grounds for refusal or other specific prohibitions. The first requisite is that it should be a trade mark within the meaning of Trade Marks Act, 1999 which concept itself imports many conditions as has been mentioned earlier in the legal concept of trade mark. There emerge many conditions from the definition of trade mark in Section 2(1)(zb). The identification and distinguishing functions performed by the trade mark must be fulfilled by the mark sought to be registered as a trade mark under the Act.

The next pre-requisite—distinctive character emerges from the presence of words “capable of distinguishing goods of one person from those of others” in the definition of trade mark in Section 2(1)(zb). A mark shall be trade mark only if, in addition to fulfilling other conditions in the definition of trade mark, it also satisfies the requirement of being a distinctive character. That distinctive character may be inherent or an acquired one.

Purpose the Trademark System serves

- It identifies the actual physical origin of goods and services. The brand itself is the seal of authenticity.
- It guarantees the identity of the origin of goods and services.
- It stimulates further purchase.
- It serves as a badge of loyalty and affiliation.
- It may enable consumer to make a life style or fashion statement.

Capable of Distinguishing the Goods or Services

A mark which has a direct reference to the character or quality of the goods/services is considered as inherently not capable of distinguishing. If the reference to the character or quality is only indirect or suggestive, the mark may be considered as possessing sufficient degree of inherent capacity to distinguish.

Thus, the legal requirements to register a trade mark under the Act are:

- The mark should be capable of being represented graphically.
- It should be capable of distinguishing the goods or services of one undertaking from those of others.

Duration and Renewal of Trademark

Trade mark protection in India is perpetual subject to renewal of the registration after every 10 years. The application for renewal can be filed six months before the expiry of the validity period of the trade mark.

Section 25 of the Act allows registration of a trade mark for a period of 10 years. In keeping with the generally accepted international practice and to reduce the work-load of the Trade Marks Office, section 25 allows renewal of registration for successive periods of 10 years, from the date of the original registration or the last renewal. With a view to facilitate renewal of registration, section 25(3) provides for a grace period of six months for payment of renewal fee after expiry of registration, subject to the payment of the prescribed surcharge. Sub-section (4) provides for restoration of the trade mark to the register and renew of the registration on payment of renewal fees.

Unlike patents, copyright or industrial designs, trade mark rights can last indefinitely if the owner continues to use the mark and seek its renewal. However, if a registered trade mark is not renewed, it is liable to be removed from the register.

An application for restoration of the expired trademark can be filed to the Registrar within one year from the expiration of the last registration of the trademark under Section 25(4) of the Trademark Act, 1999 accompanied by the prescribed fee. The Registrar shall while considering the request for restoration of the expired trademark look at the interest of other affected persons.

Upon the restoration of the expired trademark, a notice must be sent by the Registrar to proprietor regarding such restoration and the same must be advertised in the official Journal. After the advertisement is made in the Trademark Journal regarding the restoration of the expired trademark, the Registrar invites for objection against restoration. If no such objection is made then the trademark is restored in the register for the next 10 years. In case of any objection, the Registrar conducts hearing and after hearing both the parties it passes a decision on whether to restore the trademark or not.

If somebody else applies for registration of the expired trademark, then the proprietor has to file an objection against the third party who has applied for registration of the expired trademark.

Restoration of an expired trademark protects the proprietor from duplicity and enables to maintain the exclusivity of the brand. If the expired trademark is not restored then the brand opens up in the market and can be exploited by anyone. Thus, in order to protect the rights of the proprietor that are attached with the trademark, it is necessary to restore the trademark. Thus, it can be said that the Trademark Act, 1999 and Trademark Rules of 2002 (further amended in 2013) provides the liberty to the proprietor of the trademark that even if the trademark has expired he can file an application for restoration of the expired trademark at any point of time only if the Registrar has not issued a notice to the proprietor in FORM 03.

Should the rights holder of a trade mark come across a trade mark that is deceptively similar to their mark and which has been published in the Trade Marks Journal, they can oppose to the grant of the impugned mark within three months of the publication of the journal.

A trader acquires a right of property in a distinctive mark merely by using it upon or in connection with his goods irrespective of the length of such user and the extent of his trade. Priority in adoption and use of a trade mark is superior to priority in registration [*Consolidated Foods Corporation v. Brandon & Co. Pvt. Ltd.*, AIR 1965 Bom 35].

In *Ramdev Food Products (P) Ltd. v. Arvind Bhai Rambai Patel*, 2006 (8) SCC 726, the Apex Court held that the registration of trade marks is envisaged to remove any confusion in the minds of the consumers. If, thus, goods are sold which are produced from two sources, the same may lead to confusion in the mind of the consumers. In a given situation, it may also amount to fraud on the public. A proprietor of a registered trademark indisputably has a statutory right thereto. In the event of such use by any person other than the person in whose favour the trade mark is registered, he will have a statutory remedy in terms of section 21 of the Trade & Merchandise Marks Act, 1958. Ordinarily, therefore, two people are not entitled to the same trade mark, unless there exists an express licence in that behalf.

Further the Supreme Court in Commissioner of *Income-tax v. Finlay Mills Ltd.*, AIR 1951 SC 464, held that the expenditure incurred on registration of trade mark is capital expenditure thus allowable to deduction under the Income-tax Act.

Answer 2(d)

Kinds of Trademark

Trademarks can be divided into the following categories:

Service Mark is the same as a trade mark except that it identifies and distinguishes the source of a service rather than a product. Normally, a mark for goods appears on the product or on its packaging, while a service mark appears in advertising for the services. It includes service oriented establishments, such as, banking, communication, education, finance, insurance, boarding, lodging, construction, repairs etc.

Certification Trade Mark means a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of its origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registrable as such under Chapter IX in respect of those goods or services in the name, as proprietor of the certification trade mark, of that person (Section 2(1)(e) of the Act). Example are AGMARK, HALLMARK, ISI Mark et al.

Collective Mark is a trade mark which distinguishes the goods or services of members of an association of persons not being a partnership within the meaning of the Indian Partnership Act, 1932 which is the proprietor of the mark from those of others. It is provided for the benefit of members of an association of persons (but not partnership) and such inclusion of 'collective mark' is intended to benefit the traditional Indian family trademarks [Section 2(1)(g)].

Well-Known Trademark as per Section 2(1)(zg) of the Trade Marks Act, 1999 refers to a trade mark which in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or

receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services. A mark, which has been designated as a well-known mark, is accorded stronger protection. The Act casts an obligation on the Registrar to protect a well-known mark against an identical or similar trade mark.

Unconventional Trademarks: Unconventional trademarks are those trademarks which get recognition for their inherently distinctive feature. Unconventional trademarks include the following categories:

Colour Trademark: If a particular colour has become a distinctive feature indicating the goods of a particular trader it can be registered as a trademark. For example, Red Wine.

Sound Marks: Signs which are perceived by hearing and which is distinguishable by their distinctive and exclusive sound can be registered as sound marks. For example, Musical notes.

Shape Marks: When the shape of goods, packaging have some distinctive feature it can be registered. For example, Ornamental Lamps.

Smell Marks: When the smell is distinctive and cannot be mistaken for an associated product it can be registered as a smell mark. For example, Perfumes.

On the whole, a trademark is an important means to protect the goodwill and reputation of a Business. While filing a trademark, the applicant can choose any aforementioned types of trademarks based on the nature of mark.

Provisions Related to Registered User under Trade Marks Act, 1999

Provisions relating to registered users are discussed in sections 48 to 54 of the Act.

Section 50 empowers the Registrar to vary or cancel registration as registered user on the ground that the registered user has used the trade mark otherwise than in accordance with the agreement or in such a way as to cause or likely to cause confusion, or deception or that the proprietor/registered user misrepresented or has failed to disclose any material facts for such registration or that the stipulation in the agreement regarding the quality of goods is not enforced or that the circumstances have changed since the date of registration, in such a way that at the date of such application for cancellation they would not have justified registration of the registered user, etc.

However, Registrar has been put under an obligation to give reasonable opportunity of hearing before passing orders for cancellation of registration.

Section 51 empowers the Registrar, at any time during the continuance of the registration of the registered user, by a notice in writing, to require the registered proprietor to confirm to him within one month, whether the agreement on the basis of which registered user was registered is still in force, and if such confirmation is not received within a period of one month, the Registrar shall remove the entry thereof from the Register in the prescribed manner. The Act also recognises the right of registered user to take proceedings against infringement.

Section 54 provides that the registered user will not have a right of assignment or transmission. However, it is clarified that where an individual registered user enters into partnership or remains in a reconstituted firm, the use of the mark by the firm would not amount to assignment or transmission.

Question 3

'There are two kinds of opposition in grant of patent.' Discuss the provisions of Pre grant opposition and procedure followed in such situation as per the Patent legislation. (5 marks)

Answer 3

There are two types of opposition to the grant of a patent as per Patent Amendment Act, 2005. They are:

- Pre-Grant Opposition
- Post-Grant Opposition.

Pre-Grant Opposition

Section 25 of the Act deals with opposition to the grant of a patent and provides that where an application for a patent has been published but a patent has not been granted, any person may, in writing, represent by way of opposition to the Controller against the grant of patent on the following grounds and the Controller on request of such person shall hear him and dispose of the representation in the prescribed manner and specified time.

The grounds of the Pre-Grant opposition are as follows :

- (a) That the applicant for the patent or the person under or through whom he claims, wrongfully obtained the invention or any part thereof from him or from a person under or through whom he claims;
- (b) That the invention so far as claimed in any claim of the complete specification has been published before the priority date of the claim -
 - (i) In any specification filed in pursuance of an application for a patent made in India on or after the 1st day of January, 1912; or
 - (ii) In India or elsewhere, in any other document:
Provided that the ground specified in sub-clause (ii) shall not be available where such publication does not constitute an anticipation of the invention by virtue of sub-section (2) or sub-section (3) of section 29;
- (c) That the invention so far as claimed in any claim of the complete specification is claimed in a claim of a complete specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in India, being a claim of which the priority date is earlier than that of the applicant's claim;
- (d) That the invention so far as claimed in any claim of the complete specification was publicly known or publicly used in India before the priority date of that claim.

Explanation— For the purposes of this clause, an invention relating to a process for which a patent is claimed shall be deemed to have been publicly known or publicly used in India before the priority date of the claim if a product made by that process had already been imported into India before that date except where such importation has been for the purpose of reasonable trial or experiment only;

- (e) That the invention so far as claimed in any claim of the complete specification is obvious and clearly does not involve any inventive step, having regard to the matter published as mentioned in clause (b) or having regard to what was used in India before the priority date of the applicant's claim;
- (f) That the subject of any claim of the complete specification is not an invention within the meaning of this Act, or is not patentable under this Act;
- (g) That the complete specification does not sufficiently and clearly describe the invention or the method by which it is to be performed;
- (h) That the applicant has failed to disclose to the Controller the information required by section 8 or has furnished the information which in any material particular was false to his knowledge;
- (i) That in the case of convention application, the application was not made within twelve months from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title;
- (j) That the complete specification does not disclose or wrongly mentions the source of geographical origin of biological material used for the invention;
- (k) That the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

The grounds for both pre and post-grant opposition are identical and there is nothing to preclude a pre-grant opponent from subsequently filing a post-grant opposition. However, despite the similarities, there are also several procedural differences between the two types of opposition.

The primary difference between pre-grant and post-grant opposition is that though pre-grant proceedings may be initiated by "any person", but only a "person interested" can institute a post-grant opposition. The Indian Patents Act defines a "person interested" as including a person engaged in, or in promoting, research in the same field as that to which the invention relates.

Moreover, the Indian Patents Act does not explicitly allow the opponent to be heard in a pre-grant opposition. The opponent has to make a request for hearing and the rules do not detail how a hearing is to be conducted. The opponent's right to be heard solely depends upon the discretion of the Controller, who decides the same based upon the merit of the opposition. Additionally, the rules are also not clear whether the opponent will be heard in the presence of the applicant.

Opposition Proceedings

Rule 55 dealing with opposition by representation against the grant of patent requires

the representation for opposition under section 25(1) to be filed at the appropriate office within a period not exceeding three months from the date of publication of the application under section 11A of the Act, or before the grant of patent, whichever is later and includes a statement and evidence, if any, in support of the representation and a request for hearing if so desired.

The Controller has been empowered to consider such representation only when a request for examination of the application has been filed.

On consideration of the representation if the Controller is of the opinion that application for patent shall be refused or the complete specification requires amendment, he shall give a notice to the applicant to that effect.

On receiving the notice the applicant shall, if he so desires, file his statement and evidence, if any in support of his application within one month from the date of the notice.

On consideration of the statement and evidence filed by the applicant, the Controller may either refuse to grant a patent on the application or require the complete specification to be amended to his satisfaction before the patent is granted.

After considering the representation and submission made during the hearing if so requested, the Controller shall proceed further simultaneously either rejecting the representation and granting the patent or accepting the representation and refusing the grant of patent on that application, ordinarily within one month from the completion of above proceedings.

In the case of *Novartis Ag v. Natco Pharma Ltd.* on 25 January, 2006, an application for patent was filed in India on 17th July, 1998 by Novartis AG, Switzerland, claiming Switzerland priority date of 18th July, 1997. Upon publication, the grant of patent was opposed by Natco Pharma Ltd., India on 26th May, 2005.

The grounds for opposition were:

- Anticipation by prior publication
- Lack of inventive step
- Non-patentability under section 3(d)
- Wrongfully claiming the priority

The title compound was already known in a US patent (filed in 1993). The US patent claimed a pharmaceutically acceptable salt of the base compound. Another Document, "Nature Medicine" (5th May, 1996) also described the title compound. Also, the claimed salt inherently existed in the most stable form of the salt. Hence, the claims of the application for the product and process in respect of the title compound stood anticipated by prior publications. Additionally, based on section 3(d) the product claim amounted to a mere discovery of the new form of the known substance. Further, the application had claimed Swiss priority, but Switzerland was not a convention country on the date of filing in Switzerland. Hence, no priority of Swiss application could be claimed in respect of the Indian application. In view of the above findings and arguments the Controller ruled that the above patent application cannot proceed for grant of patent.

Question 4

*Explain the criminal remedies in case of infringement, piracy or falsification of GI under the Geographical Indications of Goods (Registration and Protection) Act, 1999?
(5 marks)*

Answer 4

A registered geographical indication is infringed by a person who, not being an authorised user thereof uses such geographical indication by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods. Hence the infringement of registered G.I. occurs if a person:

1. Uses the G.I. on the goods or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the public; or
2. Uses the G.I. in a manner that constitutes an act of unfair competition; or
3. Uses another G.I. to the goods in a manner, which falsely represents to the public that the goods originate in the territory, region or locality in respect of which such registered G.I. relates.

Chapter VIII of the Geographical Indication of Goods (Registration and Protection) Act, 1999 lays down provisions regarding certain offences, Penalties and the Procedure to be followed thereof

The legislature has taken a strong view of the cases of infringement, piracy, falsification, misrepresentation and has made them as penal offences under the Act. The chapter apart from listing penalties for the above-mentioned offences also details the penalty and procedure to be followed in prosecution of such offences.

The following are the acts deemed as offences:

In the context of offences, what constitutes the meaning of “applying geographical indication has been dealt with in section 37 and the expression geographical indication has been defined in Section 2 (1) (e).

Section 38 list two kinds of offences namely:-

- (a) Falsifying a GI and
- (b) Falsely applying a GI.
 - The penalty for falsification of GIs and the circumstances in which a person applies false GI are enumerated in section 39.
 - Selling goods to which false GI is applied as outlined in section 40.
 - Enhanced Penalty for subsequent convictions for the offences of falsifying, falsification of GIs or selling goods with false GIs.
 - Falsely representing a GI as registered as listed in section 42. Misrepresenting the GI as registered, which has not been actually registered is made an offence.

- Improperly describing a place of business as connected with the GIs Registry as listed in section 43.
- Falsification of entries in the Register as listed in Section 44.
- No offence in certain cases as provided under Section 45.
- Exemption of certain persons employed in ordinary course of business as provided under section 46.
- Procedure where invalidity of registration is pleaded by the accused as provided in section 18.

Offences by Companies

As per section 49 when an offence is committed by a Company, the Company as well as person responsible in the company for conducting the business of the Company shall be liable and punished accordingly.

Cognizance of the Offence

Under section 50(2) it has been clearly stated that no court inferior to that of a Metropolitan Magistrate or judicial Magistrate of first class shall try an offence under this Act.

Question 5

Define 'design' and analyse non-registrable designs with examples. (5 marks)

Answer 5

Design as per Section 2(d) of the Designs Act, 2000 means only the features of shape, configuration, pattern or ornament or composition of lines or colours or combination thereof applied to any article whether two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.

Exceptions:

Design does not include any mode or principle or construction or anything which is in substance a mere mechanical device, and does not include any trade mark, as define in clause (v) of sub-section of section 2 of the Trade and Merchandise Marks Act, 1958, property mark or artistic works as defined under section 2(c) of the Copyright Act, 1957.

As per section 4 of Design Act, 2000, Design is not registrable in India, if it -

- is not new or original;
- has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use in any other way prior to the filing date or priority date of the application;
- is not significantly distinguishable from known designs or combination of known designs;
- Comprises or contains scandalous or obscene matter.

An illustrative list of non-registrable designs is as under:

- i. Book jackets, calendars, certificates, forms and documents.
- ii. Dress making patterns, greeting cards, leaflets, maps and plan cards.
- iii. Post cards, stamps and medals.
- iv. Labels, tokens, cards and cartoons.
- v. Any principle or mode of construction of an article.
- vi. Mere workshop alterations of components of an assembly.
- vii. Mere change in size of article.
- viii. Flags, emblems of signs of any country.
- ix. Layout designs of integrated circuits.

Question 6

'Unfair competition is going on in relation to intellectual property.' Discuss the safeguards and multilateral agreements in this regard. (5 marks)

Answer 6

Multilateral Agreements

A number of multilateral agreements in the field of intellectual property deal with unfair competition in intellectual property transactions. The laws dealing with restrictive trade practices in India are contained under the Patents Act and the Competition Act.

The Paris Convention for Protection of Industrial Property provides for efficient protection against unfair competition. Article 17 of the Berne Convention for the Protection of Literary and Artistic Works makes clear that the Convention does not prohibit the application of national administrative control this formulation may apply to competition laws. The Paris Convention allows the grant of compulsory licences to prevent abuses resulting from the exercise of the exclusive rights conferred by patents.

From the objective point of view, which provides intellectual property rights in order to prevent the conclusion of contract negotiations in the abuse of their exclusive right. For the restrictions of intellectual property rights, TRIPs agreement to be enough interest, TRIPs Agreement expressly provides for Article 8 the principle of prohibiting the abuse of intellectual property rights, Article 30 of the exceptions to patentability, Article 31 of the compulsory license system are the embodiment of intellectual property restrictions.

WTO agreement on Trade Related Aspects of Intellectual Property Rights expressly recognises the role of competition policy in ensuring that IPRs promote economic growth and innovation. Article 40.2 of the TRIPs agreement provides that: "Nothing in this Agreement shall prevent members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market".

It allows member countries "to adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices in the light of the relevant laws and regulations".

The repression of anti-competitive practices associated with IPRs is therefore assigned to national competition laws and policies.

Safeguards against Unfair Competition under Multilateral Agreements

As a general rule, any act or practice carried out in the course of industrial or commercial activities contrary to honest practices constitutes an act of unfair competition; the decisive criterion being “contrary to honest practices. A number of multilateral agreements in the field of intellectual property deal with unfair competition in intellectual property transactions.

In this context, the need for international cooperation has also been emphasized under TRIPs agreement. In particular, consultations among member countries are envisaged, inter alia, through the supply of publicly available non-confidential information. In this regard, Article 8 stipulates that appropriate measures consistent with the provisions of the Agreement may be needed to prevent the abuse of IPRs or practices which unreasonably restrain trade or adversely affect the transfer of technology.

Article 40 affirms the right of member countries to specify in their legislations licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having adverse effects on competition in the relevant market and to adopt, consistently with other provisions of the Agreement, appropriate measures to prevent or control such practices.

For example, exclusive grant back conditions, conditions preventing challenges to validity, and coercive package licensing.

Article 31 of TRIPs agreement lays down conditions limiting the use of patents without authorization of the IPR holder, including both uses by Governments or by third parties i.e. through compulsory licenses. The TRIPs Agreement also contains a number of provisions relating to the use of IPRs. First there are general considerations in paragraph 1 of the Preamble that are accompanied by Article 8(2), allowing Members to take appropriate measures in order to prevent abusive practices. Second, there are some very precise provisions concerning competition law. They allow fair use and the possibility of compulsory licensing or the granting of dependent patents, i.e. the granting of a right by public authorities, and against the will of a patent owner, in order to make use of a patent to the extent necessary to develop a new product.

Compulsory licensing provisions can be included in both intellectual property and competition laws. Article 31(k) of the TRIPS Agreement, explicitly provides for the granting of such licences in the case of patents. Grounds for granting compulsory licences under competition law have included in the US the use of patents as a basis for price-fixing or entry-restricting cartels, the conclusion of market-concentrating mergers in which patents played an important role, and practices that extend the scope of patent restrictions beyond the bounds of the patented subject matter. Compulsory licences may also be issued when cross-licensing unduly limits competition, particularly in cases that involve substitute technologies, i.e. technologies that actually or potentially compete with each other, independently of their intrinsic characteristics.

However, certain exceptions from these conditions are made if the unauthorized use is permitted in order to remedy a practice determined to be anti-competitive after judicial or administrative process.

INTERNATIONAL BUSINESS LAWS AND PRACTICES (Elective Paper 9.5)

Time allowed : 3 hours

Maximum marks : 100

NOTE: Answer **ALL** Questions.

Question 1

Case study :

Impact of Brexit on Indian Economy

Britain's exit from the European Union (EU) is known in common parlance as Brexit, has come about as a shocker not only for global business markets but also the political leaders across the world, throwing a huge amount of uncertainty as to which way the world economic winds would blow ?

Britain, the second largest economy in Europe after Germany, is the second country after Greenland to quit the bloc. London, Scotland and Northern Ireland voted strongly to stay in the EU but Brexit held strong in the north of England, the Midlands region, Wales and most English countries.

Since 1973, the Europe continent has seen 54 instances of citizens deciding policy via referendum.

There are three interesting insight on the political and constitutional side of Brexit. First, that the issue of immigration is a crucial one for people even today and there can be irrationality choices about this despite the fact that it may fly in the face of economic logic. As a matter of fact, what strikes as an "unkindest cut" for the Brexit camp is the fact that countries which are formally not part of the EU but enjoy access to the single market as members of the European Economic Area-like Iceland, Liechtenstein, Norway and even Switzerland, being a member of the European Free Trade Association. Several EU leaders have put their foot down and stated unequivocally that if the UK wishes to have access to its single market, then it has to permit the free movement of EU citizens within its borders and their right to be engaged in employment. In other words, "free market" implies "free movement of persons".

Second, a pro sentiment in some parts is not shared in some other parts. For example, Scotland and London have voted to stay in the EU but were balanced by other parts where people saw immigration as a significance threat. Finally, on the political front, the exist of Britain still has some ambiguity. It is long process and is as yet not legally binding.

Economic Catastrophe for Britain

The economic catastrophe for Britain will occur in 10 categories like (i) The loss of trade preferences, (ii) the loss of community funding, (iii) the loss of jobs, (iv) the loss of manufacturing capacity, (v) the loss of scale economics, (vi) the loss of institutional scope, (vii) the loss of market access (viii) the loss of solidarity in

political economy, (ix) the loss of international credibility, and (x) classification downgrading it from a major important global player to a humble local country player. The political components of this catastrophe would involve the engendering of complete rethinking of the need for union among the different components of the nation that is the UK today.

Further, more disadvantage would be the UK's size. Its population is 64 million, while the EU's post-Brexit population would be about 440 million. The UK may face a shortage of skilled professionals, if free movement of EU professionals is curtailed. The expert expect more restrictions on immigration in the UK post Brexit. The move might lead to brain drain from the UK. If the UK-EU divorce proceedings become protracted and acrimonious, growth and markets will suffer. And an ugly divorce may also lead Scotland and Northern Ireland to leave the UK. In that scenario, Catalonia may also push for independence from Spain. And without the UK, Denmark and Sweden, which aren't planning to join the euro zone, may fear that they will become second-class members of the EU, thus leading them to consider leaving as well. Japan's priority in negotiating deals with Europe rather than individual European states.

EU Position in World Trade

The EU is in prime position when it comes to global grade. The EU is an attractive market to do business with :

- 500 million customers looking for quality goods.
- The most open market to developing countries in the world. Excluding fuels, the EU imports more from developing countries than the USA, Canada, Japan and China put together.
- The average applied tariff for goods imported into EU is very low. More than 70 per cent of imports enter the EU at zero or reduced tariffs.
- The world's largest exporter of manufactured goods and services, and is itself the biggest export market for around 80 countries.
- Together, the European Union's 28 members account for 16 per cent of world imports and exports.
- Its ranks first in both inbound and outbound international investments.

The EU referendum result means the UK will regain control over its trade and investment agreement once the EU deal is signed. A number of Commonwealth nations have expressed interest in trade talks such as India, Australia and New Zealand. Australia and NZ have offered trade negotiators to help the UK. India as a leading country of commonwealth could grab this opportunity.

India and EU

Experts from abroad believe that Indian business and exports could benefit from Brexit in the long run in terms of better market access. Britain ranked 12th in world in terms of India's bilateral trade among individual countries. It is among just seven in 25 top countries with whom India enjoy a trade surplus. The bilateral trade between India-EU constitutes a quarter of India's total trade. EU is an important trading partner for India, accounting for 16 per cent of Indian exports and 11 per cent of

imports in 2014-15 (April-June). In the year 2015-16, India's bilateral trade with Britain was worth \$14.02 billion, out of which \$8.83 billion was in exports and \$5.19 billion was in imports.

Brexit Impact on Indian Economy

India is positioned fairly well at present vis-à-vis its peers. The macro-economic fundamentals have improved and the strong orientation displayed towards reforms over the past two years has given us an edge. Further, India is also one of the few major economies still growing by 7.5 to 8 per cent, amidst a global slowdown. Following analysis narrates the impact of post-Brexit in India's trade :

- (i) *Gross Domestic Product* : Most of the factors like favorable conditions on the domestic front, the performance of agricultural sector due to good monsoons, increase in domestic demand due to seventh Pay Commission decision etc., indicate that India is holding on to its growth path even in the post Brexit Scenario.
- (ii) *Auto Component Sector* : India is a major supplier of auto components to the EU region, The region accounts for about 36 per cent of India's total auto component export, while the share of UK is about 5 per cent. The anticipated slowdown in the UK and EU region will have a dampening effect on the sector by losing nearby 10 per cent of their value.
- (iii) *Information Technology* : India is one of the largest exporters of IT-enabled services and the sector has significant exposure to the European market especially the UK. The UK itself accounts for about 17 per cent of the total IT exports whereas other European countries is at about 11 per cent. Thus the IT companies are expected to face the heat in light of the Brexit.
- (iv) *Diamond and Jewellery* : Diamond and jewellery business is currency-sensitive. The Britain's exit is likely to affect India's gems and jewellery exports and rough diamond imports badly due to depreciation in the Pound (GBP) against global major currencies including the Indian rupee.
- (v) *Pharmaceutical Sector* : The EU accounts for 10-13 per cent and UK accounts for 3-4 per cent of India's total pharmacy exports. These companies do not really expect a big hit following the Brexit and have indicated a limited impact of Pound depreciation.
- (vi) *Garment Industry* : Readymade garment is one of the key export items to the UK from India. It account for about 20 per cent of the India's total exports to the UK. This sector is expected to feel the pinch on account of moderation in demand.
- (vii) *Seafood Industry* : The Britain's move is expected to bring a fresh lease of hope among the India seafood exporters who see this opportunity to boost their exports.
- (viii) *Financial Services* : There is currently bond issuances planned of range USD 100 to 150 million in USD and INR. Brexit it making it very hard for UK and other markets like Singapore, Paris and Frankfurt as green bond investors are mainly in EU.
- (ix) *Higher Education* : The Britain's move is expected to open up significant business and economic opportunities for Indian education sector. Presently UK

is obliged to offer around 50 per cent of its seats in higher education for EU countries. In post-Brexit scenario, India will have more opportunity for these seats as the cost will come down due to INR and Pound parity.

- (x) *Immigration : The UK is less dependent on intra-EU immigration into the UK, it could become more open to high-skilled immigration from the non-EU countries including India. Also, now the UK would be under no obligation to adopt restrictive EU data localization norms, which it does not subscribe to in their entirety.*

Government's Initiatives

The impact of Brexit on the Indian economy had been hotly debated. For the Indian firms, the unanswered questions are many. How will an 'independent' UK deal with employment restrictions for foreigners and barriers for companies to access the European Continent ? How soon will they be able to recalibrate their operations to align with the new Euro zone order ? The Government will now have to steer a new trade equation between India and the UK, as also India and Europe. There are about 800 Indian companies operating in the UK, which employ about 110,000 people. These firms are operating across multiple sectors. The issue for most of them is the centrality of London, as a financial centre, and its importance to Indian companies as a gateway to the rest of Europe.

India has underlined the need for a judicious mix of fiscal, monetary and structural policies by major economies to deal with the heightened uncertainty on account of Brexit. Besides, programmes such as Make in India, Start-up India and Skill India are focused on encouraging innovation, entrepreneurship and job creation.

But the question still lingers : is it going to be smooth and easy for the world markets from here on ? or is this just the calm before the storm. However, the anticipation is that Britain's exit is a huge event and will continue to haunt the global economy in the coming months. Thus "It is a big, once-in-a-life kind of event. Its consequences will last longer than one can think".

Referring the above, answer the following :

- (a) *Do you agree with the view that "regional trade blocks promote trade within the blocks and defend its members against global competition." Justify your answer by explaining different categories of regional trading blocks existing in the world. (10 marks)*
- (b) *Is there any difference in responsibilities between the EU's Council of Ministers and the European Commission ? Narrate. (10 marks)*
- (c) *Why pre-Brexit EU is an attractive market to do business in the world ? Explain the economic catastrophe for Britain in post-Brexit scenario. (5+5 marks)*
- (d) *"The impact of Brexit on the Indian economy is balanced one." Justify the statement by analyzing Brexit impact on various sectors of Indian economy. (10 marks)*
- (e) *Why Britain exist from EU ? How do you justify that "the government of India is keeping bird's-eye-view on each movement of Britain". (5+5 marks)*

Answer 1(a)

Yes, a regional trading bloc is a group of countries within a geographical region that protect themselves from imports from non-members. A trade bloc is basically a free-trade zone, or near-free-trade zone, formed by one or more countries eliminating tariff and non-tariff barriers among two or more countries. Trading blocs are a form of economic integration, and increasingly shape the pattern of world trade.

Following are various categories of trading blocs:

1. *Preferential Trade Area* : Preferential Trade Areas (PTAs) exist when countries within a geographical region agree to reduce or eliminate tariff barriers on selected goods imported from other members of the area.
2. *Free trade area* : Free Trade Areas (FTAs) are created when two or more countries in a region agree to reduce or eliminate barriers to trade on all goods coming from other members. This is the most basic form of economic cooperation. Member countries remove all barriers to trade among themselves but are free to independently determine trade policies with non-member nations.
3. *Customs union* : Custom Union provides for economic cooperation as in a free-trade zone. Barriers to trade are removed between member countries. The primary difference from the free trade area is that members agree to treat trade with non-member countries in a similar manner. A customs union involves the removal of tariff barriers between members, plus the acceptance of a common (unified) external tariff against non-members.
4. *Common market* : A 'common market' is the first significant step towards full economic integration, and occurs when member countries trade freely in all economic resources – not just tangible goods. This means that all barriers to trade in goods, services, capital, and labour are removed. In addition, as well as removing tariffs, non-tariff barriers are also reduced and eliminated. This type allows for the creation of economically integrated markets between member countries. Trade barriers are removed, as are any restrictions on the movement of labour and capital between member countries.
5. *Economic and Monetary union* : This type is created when countries enter into an economic agreement to remove all barriers to trade and adopt common economic and monetary policies. An example is the European Union (EU). Monetary union is a type of trade bloc which is composed of an economic union (common market and customs union) with a monetary union. Monetary union is established through a currency-related trade pact. An intermediate step between pure monetary union and a complete economic integration is the fiscal union.
6. *Political union* : In order to be successful the more advanced integration steps are typically accompanied by unification of economic policies (tax, social welfare benefits, etc.), reductions in the rest of the trade barriers, introduction of supranational bodies, and gradual moves towards the final stage, a "political union". Political union is the final stage in economic integration with more formal political links between the countries.

Answer 1(b)

Yes, there is difference between the two.

The European Union (EU) has four main institutions namely through which it functions, the Council of Ministers, the European Commission, the European Parliament and the European Court of Justice. The Council of Ministers is the EU's main decision-making body. It is the embodiment of the Member States, whose representatives brings together regularly at ministerial level.

The Council of Ministers has following major responsibilities:

1. It is the Union's legislative body; for a wide range of EU issues, it exercises that legislative power in coordination with the European Parliament;
2. It coordinates the broad economic policies of the Member States;
3. It concludes, on behalf of the EU, international agreements with one or more States or international organisations;
4. It shares budgetary authority with Parliament;
5. It takes the decisions necessary for framing and implementing the common foreign and security policy, on the basis of general guidelines established by the European Council;
6. It coordinates the activities of Member States and adopts measures in the field of police and judicial cooperation in criminal matters.

The EU's Administrative & Executive body is headed by twenty Commissioners who are charged with furthering the goals of the Union and implementing EU policy and legislation.

The Commission is the driving force in the Union's institutional system:

1. It has the right to initiate draft legislation and therefore presents legislative proposals to Parliament and the Council;
2. As the Union's executive body, it is responsible for implementing the European legislation (directives, regulations, and decisions), budget and programmes adopted by Parliament and the Council;
3. It acts as guardian of the Treaties and, together with the Court of Justice, ensures that Community law is properly applied;
4. It represents the Union on the international stage and negotiates international agreements, chiefly in the field of trade and cooperation.

Answer 1(c)

The pre-Brexit EU is in prime position when it comes to global trade. The EU is an attractive market to do business with:

- 500 million customers looking for quality goods
- The most open market to developing countries in the world. Excluding fuels, the

EU imports more from developing countries than the USA, Canada, Japan and China put together

- The average applied tariff for goods imported into the EU is very low. More than 70 percent of imports enter the EU at zero or reduced tariffs
- The world's largest exporter of manufactured goods and services, and is itself the biggest export market for around 80 countries
- Together, the European Union's 28 members account for 16 percent of world imports and exports
- Its rank first in both inbound and outbound international investments.
- It is financial center for and gateway to Europe due to its location and logistics competitiveness. Ease in doing business in English language connect it easily for prospective investors, business people, professionals and entrepreneurs.

Economic catastrophe for Britain in post-Brexit scenario

The economic catastrophe for Britain will occur in 10 categories like- (i) The loss of trade preferences, (ii) the loss of community funding, (iii) the loss of jobs, (iv) the loss of manufacturing capacity, (v) the loss of scale economics, (vi) the loss of institutional scope, (vii) the loss of market access, (viii) the loss of solidarity in political economy, (ix) the loss of international credibility, and (x) classification downgrading it from a major important global player to a humble local country player. The political components of this catastrophe would involve the engendering of complete rethinking of the need for union among the different components of the nation that is the UK today.

Answer 1(d)

India is positioned fairly well at present vis-a-vis its peers. The macro-economic fundamentals of Indian economy have improved and the strong orientation displayed towards reforms over the past two years has given India an edge. Further, India is also one of the few major economies still growing by 7.5 to 8 per cent, amidst a global slowdown. Following analysis narrates the impact of post-Brexit in India's trade:

- (i) *Gross Domestic Product* - Most of the factors like favourable conditions on the domestic front, the performance of agricultural sector due to good monsoons, increase in domestic demand due to seventh Pay Commission decision etc., indicate that India is holding on to its growth path even in the post Brexit scenario.
- (ii) *Auto Component Sector*- India is a major supplier of auto components to the EU region. The region accounts for about 36 per cent of India's total auto component export, while the share of UK is about 5 per cent. The anticipated slowdown in the UK and EU region will have a dampening effect on the sector by losing nearby 10 per cent of their value.
- (iii) *Information Technology* - India is one of the largest exporters of IT-enabled services and the sector has significant exposure to the European market especially the UK. The UK itself accounts for about 17 per cent of the total IT exports where as other European countries are at about 11 per cent. Thus the IT companies are expected to face the heat in light of the Brexit.

- (iv) *Diamond and Jewellery* - Diamond and jewellery business is currency-sensitive. The Britain's exit is likely to affect India's gems and jewellery exports and rough diamond imports badly due to depreciation in the Pound (GBP) against global major currencies including the Indian rupee.
- (v) *Pharmaceutical Sector* - The EU accounts for 10-13 per cent and UK accounts for 3-4 per cent of India's total pharmacy exports. These companies do not really expect a big hit following the Brexit and have indicated a limited impact of Pound depreciation.
- (vi) *Garment Industry*- Readymade garment is one of the key export items to the UK from India. It account for about 20 per cent of India's total exports to the UK. This sector is expected to feel the pinch on account of moderation in demand.
- (vii) *Seafood Industry* -The Britain's move is expected to bring a fresh lease of hope among the Indian seafood exporters who see this opportunity to boost their exports.
- (viii) *Financial Services* -There is currently bond issuance planned of range USD 100 to 150 million in USD and INR. Brexit is making it very hard for UK and other markets like Singapore, Paris and Frankfurt as green bond investors are mainly in EU.
- (ix) *Higher Education* -The Britain's move is expected to open up significant business and economic opportunities for Indian education sector.
- (x) *Immigration* - The UK is less dependent on intra-EU immigration into the UK; it could become more open to high-skilled immigration from other non-EU countries including India. Also, now the UK would be under no obligation to adopt restrictive EU data localization norms, which it does not subscribe to in their entirety.

Post-Brexit is having favourable impact to few sectors and has adverse impact to few sectors. Thus overall it can be said that the effect of post-Brexit would be moderate on Indian economy.

Answer 1(e)

There are three interesting insights on the political and constitutional side of Brexit. First, that the issue of immigration is a crucial one for people even today and there can be irrationality choices about this despite the fact that it may fly in the face of economic logic. As a matter of fact, what strikes as an "unkindest cut" for the Brexit camp is the fact that countries which are formally not part of the EU but enjoy access to the single market as members of the European Economic Area-like Iceland, Liechtenstein, Norway and even Switzerland, being the member of the European Free Trade Association. Several EU leaders have put their foot down and stated unequivocally that if the UK wishes to have access to its single market, then it has to permit the free movement of EU citizens within its borders and their right to be engaged in employment. In other words, "free market" implies "free movement of persons".

Second, a pro sentiment in some parts is not shared in some other parts. For example, Scotland and London have voted to stay in the EU but were balanced by other parts where people saw immigration as a significant threat. Finally, on the political front, the exit of Britain still has some ambiguity. It is long process and is as yet not legally binding.

The government will now have to steer a new trade equation between India and the UK, as also India and Europe. There are about 800 Indian Companies operating in the UK, which employ about 110,000 people. These firms are operating across multiple sectors. The issue for most of them is the centrality of London, as a financial centre, and its importance to Indian companies as a gateway to the rest of Europe.

India has underlined the need for a judicious mix of fiscal, monetary and structural policies by major economies to deal with the heightened uncertainty on account of Brexit. Besides, programmes such as Make in India, Start-up India and Skill India are focused on encouraging innovation, entrepreneurship and job creation. Government of India is keeping a bird's eye-view so as to leverage these national initiatives with areas of strengths from counterparts either from Europe or from India and additionally government is also exploring the options to Free Trade Agreement with both EU and UK if it really exits the EU. Government of India has demanded a 'data secure country' from both UK and EU and it will open plethora of opportunities from Indian IT & IT enabled sector.

Question 2

- (a) *MBW, a leading Germany based automobile company decided to make India a hub for the company's 100cc (smallest) motorcycle to be manufactured in collaboration with The TWS Group, a leading Indian motorcycle manufacturer to be exported to the company's home market as well as to other European countries. Describe the favourable effect of such MNC collaboration on Indian economy. (5 marks)*
- (b) *Discuss the provisional measures and price undertakings that can be levied under antidumping in order to protect domestic industry from injury caused by dumped import. (5 marks)*
- (c) *"Logistics management involves the integration and coordination of various marketing activities so that end markets are served in most effective manner." Discuss the statement. (5 marks)*
- (d) *A Hyderabad based company desires to float a new company for production and sales of cell phones and its accessories. Explain how PEST analysis would be helpful to the promoters before taking the decision to launch such a venture? (5 marks)*
- (e) *"To keep pace with industrial development, it has become necessary to create a better and more conducive atmosphere for increased inflow of foreign investment and capital in the country." Explain the statement in the context of industrial policy in developing countries like India. (5 marks)*
- (f) *Anand is to send a shipment from Vizag to Kuala Lumpur, what are the pre-shipment documents that Anand needs to generate authenticate and submit to concerned authorities. What should he do after goods have been shipped? (5 marks)*

Answer 2(a)

MBW, a German based MNC has decided to make India a hub for the company's 100cc (smallest) motor cycle with collaboration with TWS Group, one of the India's

leading motor cycle manufacturers. This perhaps is for the first time that the mother company will have a bike under 100cc, and the decision to sell the brand across major global markets display plans of positioning it as a large selling volume product.

MBW have had some favourable impact on the Indian economy. MBW's collaboration has following favourable impacts.

- Increase the investment level of our country and thereby the income and employment
- Act as a vehicle for the transfer of technology which will help TWS group and other manufacturers acting a 'original equipment supplier' (OES)
- Enable India to increase their exports and decrease their import requirements
- Make commendable contribution to research and developments due to the MNCs experience.
- Increase competition and break domestic monopolies
- Contribute towards the national exchequer by way of duties and taxes
- Consumers get the choices as per their expectations.
- Boost up the economic growth of India

Answer 2(b)

Article 7 of the WTO Antidumping Agreement provides rules relating to the imposition of provisional measures. These include the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation. Provisional measures may take the form of a provisional duty or, preferably, a security by cash deposit or bond equal to the amount of the preliminarily determined margin of dumping. The Agreement also contains time limits for the imposition of provisional measures— generally four months, with a possible extension to six months at the request of exporters. If a Member, in its administration of anti-dumping duties, imposes duties lower than the margin of dumping when these are sufficient to remove injury, the period of provisional measures is generally six months, with a possible extension to nine months at the request of exporters.

Article 8 of the WTO Antidumping Agreement contains rules on the offering and acceptance of price undertakings, in lieu of the imposition of anti-dumping duties. It establishes the principle that undertakings between any exporter and the importing Member, to revise prices, or cease exports at dumped prices, may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Answer 2(c)

Logistics Management involves the integration and coordination of various marketing activities so that end markets are served in the most effective manner. Both the marketing

as well as logistics keep on playing an important role in creating satisfied customers in international markets as marketing function is aimed at 'creation of demand' through product, price and promotion mixes and logistics function is more operationally aimed at 'creating value for customer satisfaction'. Logistics thus is aimed at getting the right product to the right place at the right time whereby the typical interface between marketing and logistics has been delivering on enhanced customer services. Firms whether engaged in domestic or international business leverage logistics management with marketing function for creating the time, place and form utilities and advertise and promote themselves as firms with logistical superiority.

Specific areas of integration and coordination between marketing and logistics activities can be summarized as under:

- To reduce costs of physical distribution through optimum number and location of warehouses, more efficient materials handling, better order processing, etc.
- To gain competitive advantage by means of quick and reliable delivery and error free order processing.
- To improve customer service by minimizing time and efforts in physical distribution.
- To increase sales by ensuring availability of products
- To develop effective communication system so as to respond quickly to inquiries and complaints of customers.

Answer 2(d)

PEST analysis is an analysis of the political, economic, social and technological factors in the external environment of an organisation, which can affect its activities and performance. PEST analysis (Political, Economic, Social and Technological analysis) describes a framework of macro-environmental factors used in the environmental scanning component of international business management. It is a part of the external environmental analysis, and gives an overview of the different macro environmental factors that the company has to take into consideration. It is a useful strategic tool for understanding market growth or decline, business position, potential and direction for operations.

1. *Political factors* are basically to what degree the government intervenes in the economy. Specifically, political factors include areas such as tax policy, labour law, environmental law, trade restrictions, tariffs, and political stability. Political factors may also include goods and services which the government wants to provide or be provided (merit goods) and those that the government does not want to be provided (demerit goods or merit bads). Furthermore, governments have great influence on the health, education, and infrastructure of a nation.
2. *Economic factors* include economic growth, interest rates, exchange rates and the inflation rate. These factors have major impacts on how businesses operate and make decisions. For example, interest rates affect a firm's cost of capital and therefore to what extent a business grows and expands. Exchange rates affect the costs of exporting goods and the supply and price of imported goods in an economy.
3. *Social factors* include the cultural aspects and include health consciousness,

population growth rate, age distribution, career attitudes and emphasis on safety. Trends in social factors affect the demand for a company's products and how that company operates. For example, an aging population may imply a smaller and less-willing workforce (thus increasing the cost of labor). Furthermore, companies may change various management strategies to adapt to these social trends (such as recruiting older workers).

4. *Technological factors* include technological aspects such as R&D activity, automation, technology incentives and the rate of technological change. They can determine barriers to entry, minimum efficient production level and influence outsourcing decisions. Furthermore, technological shifts can affect costs, quality, and lead to innovation.

Answer 2(e)

Industrialization is a major objective of developing countries as a means to the attainment of higher levels of economic well-being of the people. Advancement of science and technology provides the stimulus to achieve faster industrial growth.

After four and half decades of strongly inward oriented policies, India began opening up of its economy to foreign trade and investment with the announcement of New Industrial Policy in July 1991. The New Industrial Policy sought to prepare Indian industry for meeting the challenges of globalization. The reforms aim at generating a market orientation for the hitherto highly regulated domestic economy by deregulating the domestic economy to provide Indian industry with greater flexibility to respond to competitive pressures by reducing costs and improving quality.

The New Industrial Policy has injected a substantial measure of competitive environment and market thrust to industry. Many areas earlier reserved for the public sector are now open to private sector participation. The restrictions on the expansion of large industrial houses have been removed. Licensing requirements for industries have been abolished except for a few strategic and defence industries.

The policy reforms towards Foreign Direct Investment (FDI) began with a radically new approach to FDI in the very first year of the implementation of New Industrial Policy. The new regime permits FDI in virtually every sector of the economy. Foreign equity proposals need not be accompanied by technology transfer as required earlier. Royalty payments have been considerably liberalised, no restrictions on the use of foreign brand name/ trademarks for internal sale.

In view of the major changes introduced in the Indian economy and the liberalization of Industrial and trade policies consistent with the fast changing international economic and trade relations, it has become necessary to create a better and more conducive atmosphere for increased inflow of foreign investment and capital in the country to accelerate industrial growth and promotion of trade, with greater emphasis on export.

Answer 2(f)

Prior to the actual shipment of goods/cargo, Anand needs to have valid documents generated, authenticated and submitted to the concerned authorities. These are as under:

- (a) Customs Invoice

- (b) Packing List
- (c) GP Form (original and duplicate)
- (d) AR4 Form (original and duplicate)
- (e) Copy of Export order
- (f) Letter of Credit
- (g) Shipping Bill (entire set)
- (h) Export Licence(for notified items)
- (i) Certificate of Origin
- (j) Certificate of Inspection
- (k) GATT Declaration
- (l) Any Other Documents (as required in L/C or by Customs)

The post-shipment documents comprise the certified copies of some of the main pre-shipment documents and certain additional documents to be generated and compiled by the Anand so that the proof of shipments can be properly presented to the negotiating bank for collecting the payments through L/C or for presentation to the foreign buyer in Malaysia for collection of payment through the nominated bank. The standard pre-shipment documents include:

- (a) Custom attested invoice
- (b) Custom attested packing list
- (c) Copy of Export Order / Copy of LC
- (d) Commercial Invoice
- (e) Consular Invoice (If Specified)
- (f) Bill of Lading / Air Way Bill
- (g) Certificate of Origin
- (h) Certificate of Inspection (If Specified)
- (i) Bill of Exchange (Draft)
- (j) GP Form (Duplicate)

Question 3

An Indian consumer appliances company has developed a multi-functioning 'Torch Light' at a cheaper price and having a good market share due to its technology. A survey conducted by the company shows that torch is having a great demand in south-east-Asia. As ahead of the international business division of the company, by critically examining various options available to expand its operations overseas, suggest the most suitable one for this firm. (5 marks)

Answer 3

Licensing would be the most suitable method for this consumer appliances company.

International licensing is an agreement between the licensor and the licensee over a period of time for the use of brand name, marketing knowhow, copyright, work method, and trade mark by paying a license fee. The licensor has minimum involvement in day to day functions. Therefore, the returns are also comparatively low. The domestic company can choose any international location and enjoy the advantages without incurring any obligations and responsibilities of ownership, managerial, investment etc.

Licensing gives the following advantages:

- Good way to start in foreign operations and open the door to low risk manufacturing relationships
- It brings new technology and know-how in the licensees' country.
- Linkage of parent and receiving partner interests means both get most out of marketing effort
- Capital not tied up in foreign operation and Options to buy into partner exist or provision to take royalties in stock.

Question 4

Now-a-days the 'National treatment' principle is considered more important than the 'Most Favored Nation' principle. Discuss why ? (5 marks)

Answer 4

In Most-favoured-nation (MFN) principle, "treating other people equally". Under the WTO agreements, countries cannot normally discriminate between their trading partners. When a country grants someone a special favour (such as a lower customs duty rate for one of their products), it has to do the same for all other WTO members. This principle is known as most-favoured-nation (MFN) treatment. It is very important and the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods.

However, in national treatment principle, "treating foreigners and locals equally". The principle of national treatment states that imported and locally-produced goods should be treated equally, at least after the foreign goods has entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. The reason behind this argument is that, in general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners whether rich or poor, weak or strong. Each member treats all the other members equally as "most-favoured" trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same "best" treatment to all the other WTO members so that they all remain "most-favoured". This ultimately becomes national treatment.

Question 5

"Asian Development Bank (ADB) supported projects and programs have had significant development impacts and worked towards improving the lives of the ultimate beneficiaries of the India." Narrate with examples. (5 marks)

Answer 5

ADB-supported projects and programs have had significant development impacts and worked toward improving the lives of the ultimate beneficiaries in following ways:

- The Madhya Pradesh State Roads II (2007–2011) project facilitated construction and rehabilitation of approximately 1,800 kilometres (km) of state roads, thereby improving access to business opportunities and social services, particularly benefiting small business owners and farmers
- The supported initiatives in the energy sector are helping India scale-up access to electricity through projects like the Assam Power Sector Enhancement Investment Project (2009– 2014). The financing facility will strengthen the transmission and distribution system and is expected to benefit around 1 million households, businesses, hospitals, and schools through increased access to power.
- Chhattisgarh Irrigation Development Project (2005–2013) is supporting a participatory irrigation management approach to rehabilitate and upgrade irrigation infrastructure to improve water resource management, helping increase productivity of irrigated agriculture and enhancing livelihoods in the state. More than 150,000 farmers would be benefited from this.
- The Kolkata Environmental Improvement Project (2000–2012) has improved overall living and environmental conditions for nearly 1.4 million inhabitants through the construction of 331 km of sewage and drainage networks. Recent projects and programs include an innovative partial credit guarantee facility that will support credit enhancements of infrastructure project bonds to enable cash-rich pension funds and insurers to invest in such bonds (India Infrastructure Finance Company Limited– Credit Enhancement of Project Bonds); and assistance to West Bengal for stabilizing its fiscal situation and encouraging reforms of administrative processes to promote efficient public spending and improvements in revenue collection (West Bengal Development Finance Program).

Question 6

Considering Ricardo's Comparative Advantage theory, explain why is trade always possible between two countries, even when one is absolutely inefficient compared to the other ? (5 marks)

Answer 6

The theory of comparative advantage suggests that a country should export goods in the country in which its relative cost advantage, and not the absolute cost advantage, is greatest in comparison to other countries. According to Smith, if one country has an absolute advantage over the other country in one line of production and the other country has an absolute advantage over the first country in a second line of production; both countries can gain by trading. But what if one country is more productive than another country in all lines of production? Ricardo claimed that if country I can produce all goods with less labour cost than country II then also it will benefit the countries to trade so long as long as country II is not equally less productive in all lines of production. A country

has a comparative advantage in producing a good if the opportunity cost for producing the good is lower at home than in the other country.

We should now further clarify the meaning of the term 'comparative advantage'. In order to speak about comparative advantage there must be at least two countries and two goods. We compare the opportunity costs of production of each good in both countries. As long as the two countries' opportunity costs for one good differ, one country has a comparative advantage in the production of one of the two goods, while the other country has a comparative advantage to the production of the other good. As long as this is the case, both countries will gain from trade, regardless of the fact that one of the countries might have an absolute disadvantage in both lines of production.

The comparative advantage proposition states that a less developed country that lacks an absolute advantage in any goods can still engage in mutually beneficial trade, and that an advanced country whose domestic industries are more efficient than those in any other country can still benefit from trade even as some of its industries face intense import competition.
