GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2019

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2019

ADVANCED COMPANY LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

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

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

Question 1

(a) The Board of Directors of ABC Ltd. has agreed in principle to grant loan of ` 6 crores to XYZ Ltd. :

ABC Ltd. has provided the following information :

Authorised Share Capital	*₹ 15 crores*
Paid up Share Capital	*₹ 10 crores*
Free Reserves	*₹ 4 crores*
Securities Premium Account	*₹ 1 crore*

ABC Ltd. has already given loan of ₹ 3 crores to another company namely PQR Ltd. and has made investment of ₹ 2 crores in the shares of other companies.

What advice would you give to the Board of Directors of ABC Ltd. about the proposed loan to XYZ Ltd. in the light of provisions of the Companies Act, 2013 and the rules made thereunder ? *(5 marks)*

(b) What is "Entrenchment" ? State the provisions of Companies Act, 2013 and the rules made thereunder with regard to "Entrenchment". *(5 marks)*

(c) Draft a resolution for creation of security on the properties of the company in favour of the lenders, stating the authority, type of resolution and relevant provisions of the Companies Act, 2013. *(5 marks)*

(d) Draft a resolution for reappointment of an independent director of a listed company for the second term of five years, stating the authority, type of resolution and relevant provisions of the Companies Act, 2013. *(5 marks)*

Answer 1(a)

Section 186 (2) of the Companies Act, 2013 provides that, no company shall directly or indirectly:

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, securities of any body corporate,

exceeding 60% of its paid up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Section 186(3) of the Companies Act, 2013 provides that where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under section 186(2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

In view of the above provisions, it is to determine that whether special resolution is required to be passed in the general meeting, before granting loan of ₹6 crores to XYZ Ltd.

A per section 186(2) of the Companies Act, 2013, the limits for the loan and investment will be the amount whichever is more of the following

(1) 60% of paid up share capital, free reserves and securities premium account = ₹9 crores

(2) 100% of free reserves and securities premium account = ₹5 crores

Hence, the limit will be ₹9 crores as for loans and investments made and to be made being more of the following:

Since the company has already given loans of ₹3 crores and has made investment of ₹2 crores in the shares of other companies and further agreed to grant loan, of ₹6 crores to XYZ Ltd. will exceed limit of ₹9 crores, hence prior approval by special resolution in the general meeting will be required to be passed by ABC Ltd in terms of Section 186(3).

Further, in terms of Section 117(3)(a) of the Companies Act, 2013, the Special Resolution so passed by ABC Ltd shall also be required to be filed with the MCA in E form MGT-14 within 30 days of the passing of the said Special Resolution.

Answer 1(b)

The word 'entrenchment' is not defined under the Companies Act, 2013, but provisions for the same are contained in Section 5 of the Companies Act 2013 and Rule 10 of the Companies (Incorporation) Rules, 2014.

As per the Oxford Dictionary 'entrenchment' means 'to apply additional legal safeguards'. In legal sense it means addition of provisions which makes certain provisions or regulations more difficult/ stringent or cumbersome by way of additional procedure or checks and safeguards.

The articles of association of the company provides for regulations for management and affairs of the company. It is a public document and shareholders are presumed to have notice of the regulations of the articles of the company.

The entrenched clauses in the articles, shall not be in violation of or in contradiction with express provisions of the Act and the memorandum of association of the company and in terms of Section 6 of the Act, the said entrenched clauses shall be void and unenforceable if they are against the provisions of Act and memorandum.

The provisions of Section 5 of the Companies Act, 2013 and Rule 10 of the Companies (Incorporation) Rules (the Rules) can be discussed as under.

(1) Section 5(3) of the Companies Act, 2013, the articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution are met or complied with.

(2) Section 5(4) of the Companies Act, 2013, the above provisions of entrenchment shall only be made either on formation of a company or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

(3) Section 5(5) of the Companies Act 2013, where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of Companies (the Registrar) of such provisions in such form and in such manner as may be prescribed.

(4) Rules 10 of the Companies (Incorporation) Rules, 2014, where the articles contain the provisions for entrenchment, the company shall give notice to the Registrar of such provisions in Form INC No. 32 (SPICe) as the case may be along-with the fees as prescribed at the time of incorporation of the company or in the case of the existing companies, the same shall be filed in Form No. MGT 14, within 30 days from the date of entrenchment of the articles, along with the fees as prescribed.

Answer 1(c)

Authority : Shareholders

Type of resolution : Special Resolution

"Resolved that pursuant to the provisions of Section 180(l)(a) and other applicable provisions, if any, of the Companies Act, 2013, as amended from time to time and the Articles of Association of the company, consent of the shareholders be and is hereby accorded to the Board of Directors for creation of /security in any form or manner on the movable or immovable properties of the company whether tangible, intangible or otherwise both present and future of the whole or substantially the whole of the undertaking(s) of the Company in such form and manner as the Board of Directors may deem fit, in favour of such lenders from time to time, together with interest or further interest thereon, compound interest in the event of default, accumulated interest, liquidated damages, all other charges, expenses and costs payable by the company in respect of such borrowings, made by the Board in accordance with the authorizations given to it by the company, from time to time.

"Resolved further that for the purpose of giving effect to this Resolution, the Board of Directors be and are hereby authorised, subject to the applicable provisions of the Act and the Articles of Association of the Company, to negotiate and settle the terms and conditions of the securities, finalize and execute all agreements, deeds and documents as may be necessary, desirable or expedient, settle any question, doubt or difficulties that may arise in this regard, do all such acts, deeds, things or matters, as they may in their absolute discretion deem proper, necessary or desirable and to delegate all or any

of these powers to any Committee of Directors or to the Managing Director or Whole-time Director or any officer of the company. "

Answer 1(d)

Authority : Shareholders

Type of Resolution : Special Resolution

"Resolved that pursuant to the provisions of Section 149, Section 150 and Section 152 read with Schedule IV and other applicable provisions, if any, of the Companies Act, 2013 (the Act), as amended from time to time and the Companies (Appointment and Qualifications of Directors) Rules, 2014, (the Rules) including any statutory modification(s) or re-enactments thereof for the time being in force, read with the applicable provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (the Listing Regulations), the Articles of Association of the company and the recommendation of the Nomination and Remuneration Committee of the Board and the Board of Directors, Mr._____ (DIN:00000000), who was appointed as an Independent Director and who holds the office of Independent Director upto the conclusion of this annual general meeting and who has submitted a declaration that he meets the criteria for independence as provided in Section149(6) the Act and applicable Rules of the Listing Regulations and in respect of whom the company has received a notice in writing from a member proposing his candidature for the office of the director pursuant to Section 160 of the Act and being eligible and willing, be and is hereby reappointed as an Independent Director of the company not liable to retire by rotation and to hold office for a second term of five consecutive years on the Board of Directors of the company w.e.f._____ to hold office up to _____..

"Resolved further that the Board of Directors of the company be and is hereby authorised to do all acts, deeds and things including filings and take steps as may deemed necessary, proper or expedient to give effect to this Resolution and matters incidental thereto."

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

Question 2

(a) Write a short note on 'AGILE'. *(4 marks)*

(b) As per the last audited financial statements the borrowings of MNL Ltd. from Banks is ₹90 crores. Advise the company on the provisions of the Companies Act, 2013 and the rules made thereunder regarding the vigil mechanism. *(4 marks)*

(c) Royal Ltd., an unlisted company is having issued and paid up share capital of 40,00,000 equity shares of ₹10 each. In the annual general meeting Mr. Karan holding 3,40,000 equity shares has appointed Mr. Mayur as his proxy. Also Mrs. Mona holding 85,000 equity shares has appointed Ms. Radha as her proxy. In the annual general meeting, both Mr. Mayur and Ms. Radha demand poll on a resolution. What Advice would you give to the Chairman of the meeting ? *(4 marks)*

(d) Ajit is a Director of PQR Ltd. The Board of Directors of the company is considering a proposal for the purchase of its office premises for which is owned by Ajit by issuing fully paid equity shares as consideration. What advice would you give

to the Board of Directors keeping in view the provisions of the Companies Act , 2013 in respect of such transactions ? (4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Mukund, Director of PLK Ltd. desires to resign as Director of the company. Advise Mukund on the provisions of the Companies Act, 2013 for resignation of a Director and actions to be taken by the Director and the company. (4 marks)

(ii) Explain whether the following transactions will be considered as 'deposits' under the relevant provisions of the Companies Act, 2013 and the Rules made thereunder:

(1) Prashant is Promoter and Managing Director of XYZ Ltd. an unlisted company. Prashant and his wife Meera have extended total unsecured loan of ₹80 lakhs to the company in pursuance of the stipulation by Bank for the loans extended.

(2) ABC Ltd. has received advance of ₹20 lakhs on 1st April, 2018 from Great Ltd. for supply of goods. The amount is outstanding till date but is subject matter of legal proceedings in the Court. (4 marks)

(iii) Liberty Ltd. is public company with 229 members as under :

	No. of members
Directors and their relatives	*12*
Employees	*24*
Ex-Employees [shares were allotted when they were Employees]	*28*
Others	*165*
Total	*229*

The Board of Directors have resolved to convert the company into a private company.What actions will be required to be taken by the Board of Director for reduction in the number of members as required under the Companies Act, 20l3 and the rules made thereunder. (4 marks)

(iv) Briefly state the forms, registers and return prescribed under the Companies [Significant Beneficial Owners] Rules, 2018. (4 marks)

Answer 2(a)

The AGILE stand for "Application for Goods and Services tax identification number, employee state Insurance corporation registration plus Employee provident fund organization registration".

The Ministry of Corporate Affairs has vide Notification G.S.R.275(E) dated 29th March, 2019, inserted Rule 38A in the Companies (Incorporation) Rules, 2014 and introduced E-form No.INC 35 (AGILE).

Now the application for incorporation of a company under Rule 38 in E-form No. INC-

32 (SPICE) shall be accompanied by E-form INC 35 (AGILE) containing an application for registration of the following numbers, namely:

(1) Goods and Services Tax Identification Number (GSTIN) with effect from 31st March, 2019.

(2) Employees State Insurance Corporation Registration (ESIC) with effect from 15th April, 2019.

(3) Employees Provident Fund Organisation Registration (EPFO) with effect from 8th April, 2019.

Though, it is optional to apply for GSTIN/ Establishment code as issued by EPFO/ Employer Code as issued by ESIC at the time of incorporating company, filing of INC-35 form along with SPICE form is mandatory.

As per the FAQs on E-form No. INC 35 (AGILE) on MCA21, the director who has signed the E-form No.32 (SPICE) should sign' the E-form No. INC 35(AGILE).Thus, both SPICE Form and AGILE Form shall be signed by the same director.

Answer 2(b)

Section 177 (9) of the Companies Act, 2013 read with Rule 7 of the Companies (Meetings of the Board and its Powers) Rules, 2014 provides that every listed company and the following class or classes of companies shall establish a vigil mechanism for directors and employees to report their genuine concern or grievances:

i) the companies which accept deposits from the public;

ii) the companies which have borrowed money from the banks and public financial institutions in excess of ₹50 crores.

Further, the companies which are required to constitute an audit committee shall oversee the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should rescue themselves and others on the audit committee would deal with the matter on hand.

In case of other companies, the board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.

The vigil mechanism shall provide for adequate safeguards against victimisation of the directors and the employees who avail of the vigil mechanism and also provide for direct access to the chairperson of the audit committee or the director nominated to play the role of the audit committee as the case may be, in exceptional cases.

As the borrowings of MNL Ltd. are of ₹90 cores, more than the limit prescribed in Rule 7 of the Rules as above, the company shall establish a vigil mechanism for directors and employees to report their genuine concern or grievances and comply with the provisions in regard thereto stated as above.

Answer 2(c)

As per Section 105 of the Companies Act, 2013, any member of a company is

entitled to attend and vote at a meeting of the company and shall also be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf. The proxy shall not be entitled to speak at the meeting and shall not be entitled to vote except on a poll.

Further, Section 109 of the Companies Act, 2013 provides that before or on the declaration of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting on his own motion and shall be ordered to be taken by him on a demand made in that behalf:

(a) in the case a company having a share capital, by the members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power or holding shares on which an aggregate sum of not less than five lakh rupees or such higher amount as may be prescribed has been paid-up and

(b) in the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than one-tenth of the total voting power.

The demand for a poll may be withdrawn at any time by the persons who made the demand.

A poll demanded for adjournment of the meeting or appointment of Chairman of the meeting shall be taken forthwith.

A poll demanded on any question other than adjournment of the meeting or appointment of Chairman shall be taken at such time, not being later than forty-eight hours from the time when the demand was made, as the Chairman of the meeting may direct.

Where a poll is to be taken, the Chairman of the meeting shall appoint such number of persons, as he deems necessary, to scrutinise the poll process and votes given on the poll and to report thereon to him as provided in Rule 21 of the Companies (Management and Administration) Rules, 2014.

The Chairman of the meeting shall have power to regulate the manner in which the poll shall be taken.

The result of the poll shall be deemed to be the decision of the meeting on the resolution on which the poll was taken.

In view of the above provisions the Chairman will be advised as below:

(a) Mr. Mayur and Ms. Radha being proxy shall not be entitled to speak or vote on show of hands but they can demand poll.

(b) Since the demand for poll made by Mr. Mayur and Ms. Radha as proxies, is complying with the requirements as above, the Chairman will have to arrange for taking poll as demanded by Mr. Mayur and Ms. Radha within 48 hours as provided.

Answer 2(d)

The provisions for restrictions on non-cash transactions involving directors are contained in Section 192 of the Companies Act, 2013, which are discussed as under:

(1) No company shall enter into an arrangement by which:

(a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or

(b) the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

(2) The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

(3) Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless:

(a) the restitution of any money or other consideration which is the subject matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or

(b) Any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

In the present case, PQR Ltd intends to enter into an arrangement with its Director Ajit, involving acquisition of Office premises against a consideration other than cash payable by way of issuance of the company's equity shares to Ajit. Accordingly, the Board of Directors of PQR Ltd. is advised to convene the general meeting of the members for prior approval for the transaction and also follow the above provisions of Section 192 of the Companies Act, 2013, for entering the proposed transaction with Ajit, Director of the company.

Since, the company is issuing shares to the Ajit, the Company is also required to in compliance with Section 62(1)(c) of the Companies Act, 2013.

Answer 2A(i)

Section 168 of the Companies Act, 2013 read with Rule 15 and Rule 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that:

1. The director may resign from his office by giving notice in writing to the company.

2. The Board of Directors of the company shall on receipt of the notice of resignation from the director take note of the same.

3. The resignation shall be effective from the date on which the notice is received by the company or the date specified by the director in the notice whichever is later.

4. The Board shall place the fact of resignation by the director in the Directors' Report laid immediately following annual general meeting of the company.

5. The director who has resigned shall be liable even after his resignation for the offenses which occurred during his tenure.

Rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the company shall within 30 days of from the date of receipt of the notice of resignation from a director intimate the Registrar in Form No. DIR 12 and post the information on its website, if any.

Rule 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 that where a director resigns from his office, he may within a period of 30 days the date of his resignation, forward to the Registrar a copy of his resignation along with reasons of the resignation in Form No. DIR 11, along-with the fees as prescribed.

Mr. Mukund will resign from his office by giving notice with reasons of resignation in writing to the company and may file within 30 days of his resignation, Form No. DIR 11 with Registrar.

Also, the Board of the PLK Ltd. shall file Form No. DIR 12 within 30 days of the date of receipt of notice of resignation from Mr. Mukund.

Answer 2A(ii)

As per Section 2 (31) of the Companies Act 2013 "deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India."

Further, in Rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014 deposit is defined to include any receipt of money by way of deposit or loan or in any other form by a company except various categories of receipts specified therein.

(1) Rule (2)(1)(c)(xiii) Companies (Acceptance of Deposits) Rules, 2014 provided that Deposit shall not include any amount brought in by promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to fulfilment of the following conditions namely:

   (a) the loan is brought in pursuance of the stipulation imposed by the lending institutions or banks on the promoter to contribute such finance

   (b) the loan is provided by the promoters themselves or by their relatives or by both and

   (c) the exemption under this sub-clause shall be available only till the loans of financial institutions or banks are repaid and not thereafter.

   In view of the above provisions, the unsecured loan of ₹80 lakhs extended to the company by Prashant and his wife Meera shall not be considered deposits, till the time the loans extended by the Bank are repaid but not thereafter.

(2) In Rule (2)(1)(c)(xii)(a) Companies (Acceptance of Deposits) Rules, 2014 provided that Deposit shall not include any amount received in the course of, or for the purposes of, the business of the company as an advance for the supply of goods or provision of services accounted for in any manner whatsoever provided that such advance is appropriated against supply of goods or provision of services within a period of three hundred and sixty five days from the date of acceptance of such advance, provided further that in case of any advance which is subject matter of any legal proceedings before any court of law, the said time limit of three hundred and sixty five days shall not apply.

In view of the above provisions, the advance of ₹ 20 lakhs received by ABC Ltd shall not be considered as deposit, even-though the amount is not appropriated within a period of three hundred and sixty five days, but as the same is subject matter of legal proceedings in the Court.

Answer 2A(iii)

As per the provisions of Section 2(68) of the Companies Act,2013 , a private company means a company, having a minimum paid up share capital as maybe prescribed and which by its articles:

(a) restricts the right to transfer of its shares

(b) except in case of one person company, limits the number of its members to two hundred, provided that:

  (i) where two or more persons hold one or more shares in a company jointly, they shall be treated as a single person

  (ii) persons who are in the employment of the company and persons who having been in the employment of the company , were members of the company while in the employment and have continued to be members after the employment ceased, shall not be included in the number of members

(c) prohibits any invitation to the public to subscribe for any securities of the company.

In view of the above provisions, for conversion of Liberty Ltd. into a private company, no actions for reduction of number of members will be required to be taken as 24 employees and 28 ex-employees will be excluded for consideration of the limit of 200 members. After excluding employees and ex-employees, there will be 177 members as per the above provisions, which is well within the limits of 200 members as provided under Section 2(68) of the Companies Act 2013.

Answer 2A(iv)

The Companies (Significant Beneficial Owners) Rules, 2018 are notified by Ministry of Corporate Affairs vide Notification No. GSR 561(E) dated 13 June, 2018 and further substantially amended, vide Notification No. GSR 100(E) dated 8 February, 2019, the forms, registers, returns etc. prescribed under the Rules as amended from time to time are briefly stated as below.

(1) Form No. BEN-I

Declaration by the beneficial owner who hold or acquires significant ownership

in the shares to be filed with the company under section 90(1) of the Companies Act read with Rule 3 of the Companies (Significant Beneficial Owners) Rules, 2018.

Form No. BEN-1 to the reporting company within ninety days from such commencement of the rule or within thirty days of acquiring such significant beneficial ownership or any change therein.

(2) Form No. BEN-2

Return to be filed with the Registrar of Companies within a period of thirty days by the company in respect of the declaration received under Section 90(4) of the Companies Act, 2013 read with Rule 4 of the Companies (Significant Beneficial Owners) Rules, 2018.

(3) Form No. BEN-3

Register of beneficial owners holding significant beneficial interest to be maintained by the company

[Pursuant to section 90(2) of the Companies Act, 2013 and rule 5 of the Companies (Significant Beneficial Owners) Rules, 2018.

(4) Form No. BEN-4

Notice to be issued by the company to any person for declaration of the significant beneficial interest in the shares of the company.

Pursuant to section 90(5) of the Companies Act, 2013 and read with Rule 6 of the Companies (Significant Beneficial Owners) Rules, 2018.

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

Question 3

(a) The Board of Directors of PQR Ltd. incorporated on 23rd January, 2019, having paid up equity share capital of ` 10 crores divided into 1,00,00,000 equity shares of ₹10 each, have resolved to issue 20,00,000 equity shares of ₹10 each at the face value, as sweat equity shares to Makarand, Director for providing technical know-how.

Advise the Board of Directors on various steps to be taken with respect to the proposed transaction. (4 marks)

(b) Deep Ltd. declared dividend but failed to make payment to shareholders. Advise the company about the consequences for such a default. Please also list out the circumstances under which a company is not deemed to have committed an offence with regard to non-payment of dividend. (4 marks)

(c) FGH Ltd. incorporated in 2015 and its financial year is ending 31st March. The company had held its annual general meeting on 10th July, 2018. Thereafter the company has not held its annual general meeting till end of November, 2019. Manoj, a shareholder approaches you for guidance. Briefly discuss the provisions of the Companies Act, 2013 and the rules made thereunder and advise Manoj about his rights in these circumstances. (4 marks)

(d) Dipen is Director in nine public limited companies, one dormant public limited company and ten private limited companies. Dipen is invited by JKL Ltd. to join as Director. Discuss the relevant provisions of the Companies Act, 2013 and advise Dipen. (4 marks)

OR (Alternate question to Q. No. 3)

Question 3A

(i) Dinesh, Chartered Accountants is statutory auditors of PQR Ltd. MNP Ltd., a subsidiary company of PQR Ltd. propose to give assignment of actuarial services to Ramesh, Chartered Accountant, son of Dinesh. Advise MNP Ltd. about the legality of the above proposal. (4 marks)

(ii) You are approached by the Board of Directors of KLM Ltd. for advise on the procedure for variation of members' rights under the Companies Act, 2013 and the rules made thereunder. Advise the Board of Directors. (4 marks)

(iii) The Board of Directors of Williams Ltd. have resolved as under :

(i) Appoint Mohan as Alternate Director of Rakesh, Director. Mohan is already appointed as Alternate Director to Prakash, Director.

(ii) Appoint Mitesh, a Director of the company as Alternate Director of Manoj, Director.

State the provisions of the Companies Act, 2013 and comment on the legality of the above decisions of the Board of Directors. (4 marks)

(iv) Draft a resolution confirming the remuneration of cost auditors stating the authority, type of resolution and relevant provisions of the Companies Act, 2013. (4 marks)

Answer 3(a)

The following provisions of the Companies Act, 2013 and Companies (Share Capital and Debentures) Rules, 2014 provide for issue of sweat equity shares by a company.

(1) As per Section 2(88) of the Companies Act, 2013, "sweat equity shares" means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

(2) As per Section 54 (1) of the Companies Act,2013, notwithstanding anything contained in Section 53 (prohibition on issue of shares at discount), a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:

(a) the issue is authorised by a special resolution passed by the company

(b) the resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued

(c) where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board of India in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed.

(3) As per Section 54(2) of the Companies Act, 2013, the rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall rank pari passu with other equity shareholders.

(4) As per Rule 8 of the Companies (Share Capital and Debentures) Rules, 2014:

(i) the company shall not issue the sweat equity shares for more than 15% of the of the existing paid up equity share capital in a year or shares of the issue value of ₹5 crores whichever is higher, provided that issue of sweat equity shares shall not exceed 25% of the paid up equity capital of the company at any time.

(ii) the special resolution authorizing the issue of sweat equity shares shall be valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.

(iii) the sweat equity shares issued to directors or employees shall be locked in/non-transferable for a period of three years from the date of allotment and the fact that the share certificates are under lock-in and the period of expiry of lock in shall be stamped in bold or mentioned in any other prominent manner on the share certificate.

(iv) the sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation.

(v) the valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued, shall be carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with justification for such valuation

In view of the above referred provisions of the Companies Act, 2013 and the Companies (Share Capital and Debentures) Rules, 2014, after passing the special resolution of the members in the general meeting and ensuring other compliances referred above, 20,00,000 equity shares of ₹10 each at the face value i.e. at the paid-up value of ₹2 crores can be issued, by the Board of Directors of PQR Ltd., as sweat equity shares to Mr. Makarand, Director for providing technical know-how.

Answer 3(b)

The provisions for punishment for failure to distribute dividends provided in Section 127 of the Companies Act, 2013 are discussed as below:

(1) As provided in Section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to

any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen per cent. per annum during the period for which such default continues.

(2) As provided in Section 127 of the Companies Act, 2013 no offence under this section shall be deemed to have been committed:

(a) where the dividend could not be paid by reason of the operation of any law

(b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him

(c) where there is a dispute regarding the right to receive the dividend;

(d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder or

(e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

Answer 3(c)

The provisions of Section 96 and Section 97 the Companies Act, 2013 and Rule 74 of the National Company Law Tribunal Rules, 2016 providing for holding of the annual general meeting and application to the National Company Law Tribunal (the Tribunal) are discussed as under:

(1) As per Section 96 (1) of the Companies Act, 2013, every company other than a one person company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notice calling it and not more than fifteen months shall elapse between the date of one annual general meeting of the company and that of the next.

(2) It is provided in Section 96 (1) of the Companies Act, 2013 that in case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company and in any other case within a period of six months from the date of closing of the financial year.

(3) It is also provided in Third Proviso to Section 96(1) of the Companies Act, 2013 that the Registrar of Companies may, for any special reason, extend the time within which the annual general meeting, other than the first annual general meeting, by a period not exceeding three months.

(4) As provided in Section 97 of the Companies Act, 2013,

(a) if any default is made in holding an annual general meeting of a company under Section 96 of the Companies Act, 2013, the National Company Law Tribunal (the Tribunal) may, notwithstanding anything contained in the Act or

the articles of association of the company, on the application of any member of the company, call or direct the calling of an annual general meeting of the company and give such ancillary or consequential directions as the Tribunal think expedient

(b) the direction may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(c) a general meeting held in pursuance of the directions of the Tribunal as aforesaid, shall , subject to any directions of the Tribunal, be deemed to be an annual general meeting of the company under the Act.

(3) As provided in Rule 74 of the National Company Law Tribunal Rules, 2016

(a) an application under Section 97 Companies Act,2013 for calling or obtaining a direction to call the annual general meeting of the company shall be made by any member of the company in Form No. NCLT 1 and shall be accompanied by the documents specified in Annexure-B i.e.

(i) affidavit verifying the petition

(ii) bank draft evidencing payment of application fees and

(iii) any other relevant documents

(b) a copy of the application shall be served on the Registrar of Companies on or before the date of hearing.

It is not stated in the question and therefore it is presumed that FGH Ltd. has not obtained any extension of time from Registrar of Companies for holding the annual general meeting under 3rd proviso to Section 96(1) of Companies Act, 2013. As the company has not convened annual general meeting in 2019 within six months of the close of the financial year i.e. by 30th September, 2019 and more than fifteen months' time has elapsed from the date of the last annual general meeting convened on 10th July, 2018. Mr. Manoj may choose to file application before the Bench of Tribunal as above in Form No. NCLT-1 for seeking directions for calling the annual general meeting and other appropriate directions under section 97.

Answer 3(d)

The following provisions are contained in Section 165 of the Companies Act, 2013 for number of directorships a person can hold in companies.

(1) As per Section 165 (1) of the Companies Act, 2013, after commencement of the Act, no person shall hold office of a director, including any alternate directorship in more than twenty companies at the same time, Provided that maximum number of public companies in which a person can be appointed shall not exceed ten.

(2) As per the explanations provided in Section 165(1) of the Companies Act, 2013:

(i) for reckoning the limit of public limited companies in which a person can be appointed as director, the directorship in private companies that are either holding or subsidiary company of a public company shall be included.

(ii) for reckoning the limit of directorships in twenty companies , the directorship in a dormant company shall not be included.

In view of the above provisions of Section 165(1) of the Companies Act, 2013 for calculating the directorships held by Mr. Dipen, the directorship held in 1 dormant public limited company shall be excluded.

Therefore Mr. Dipen can accept the invitation of JKL Ltd. for directorship and after appointment in JKL Ltd., the directorships held by Mr. Dipen will be within the overall prescribed limit of 20 companies (including not more than 10 Public companies) as indicated under:

1. 10 public limited companies
2. 1 dormant public limited company (excluded from the limit as above)
3. 10 private companies

Answer 3A(i)

As per the provisions of Section 144 of the Companies Act, 2013:

(1) An auditor appointed under the Act shall provide to the company only such other services as are approved by the board of directors or the audit committee, as the case may be, but which shall not include any of the following services whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company

(a) accounting and book keeping services

(b) internal audit

(c) design and implementation' of any financial information system

(d) actuarial services

(e) investment advisory services

(f) investment banking services

(g) rendering of outsourced financial services

(h) management services

(i) other kind of services as may be prescribed

In the explanations to Section 144 of the Companies Act, 2013, it is provided that the term' directly or indirectly' shall include rendering of the services by the auditor:

(a) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other such entity, whatsoever, in which such individual has significant influence or control or whose name, trade name or brand is used by such individual

(b) in case of the auditor being a firm, either by itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity,

whatsoever, in which the firm or any partner of the firm has significant influence or control or whose name, trade name or brand is used by the firm or any of its partners.

In view of the above provisions, giving of assignment of actuarial services to Mr. Ramesh, son of Mr. Dinesh by MNP Ltd. will be violation of the provisions of Section 144 of the Companies Act, 2013 as:

(i) the actuarial services cannot be provided by an auditor; and

(ii) providing of the said services by Mr. Ramesh to MNP Ltd. will mean providing services indirectly by Mr. Dinesh to the subsidiary company of PQR Ltd. of which he is auditor.

Answer 3A(ii)

(1) As per Section 48(1) of the Companies Act, 2013, where the share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied; (i) with the consent in writing of the holders of not less than three-fourth of the issued shares of that class or (ii) by passing special resolution at the separate meeting of the holders of the issued shares of that class:

   (a) if provision with respect to such variation is made in the memorandum or articles of the company; or

   (b) in absence of such provision in the memorandum or articles if such variation is not by the terms of issue of the shares of that class.

(2) As provided in Section 48(1) of the Companies Act, 2013, if variation by one class of shareholder affects the rights of any other class of shareholders, the consent of three-fourth of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

(3) As per Section 48(2) of the Companies Act, 2013, if the holders of not less than 10% of the issued shares of a class did not consent to such variation or vote in favour of the variation may apply to the National Company Law Tribunal (the Tribunal) to have the variation cancelled and where such application is made, variation shall not have effect unless and until confirmed by the Tribunal.

(4) As provided in Section 48(2) of the Companies Act, 2013, an application under this section shall be made within 21 days after the date on which the consent was given or the resolution was passed as the case may be and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(5) As provided in Section 48(3) of the Companies Act, 2013, the decision of the Tribunal on any application filed as above shall be binding on the shareholders.

(6) As provided in Section 48(4) of the Companies Act, 2013, the company shall file with the Registrar of Companies, the copy of the order of the Tribunal within 30 days of the date of the order.

(7) As provided in Section 48(5) of the Companies Act, 2013, where any default is made in complying with the provisions of this section, the company shall be

punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

(8) The application before the Tribunal shall be filed under Rule 68A of the National Company Law Tribunal Rules, 2016 in Form No. NCLT-1 and the applicants shall comply with the provisions made and the requirements specified.

Answer 3A(iii)

The provisions contained in Section 161 (2) of the Companies Act, 2013 for appointment of alternate director are discussed as under:

(1) the Board of a company may, if so authorised by its articles or by a resolution passed by the company in the general meeting, appoint a person, not being a person holding any alternate directorship for any other person in the company, or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

(2) no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of the Act.

(3) an alternate director shall not hold office for a period longer than permissible to the directors in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India

(4) if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring director in the default of another appointment shall apply to the original director and not to the alternate director.

In view of the above it can be stated that the above decisions of the Board of Directors are not in conformity with the provisions of Section 161(2) of the Companies Act, 2013 as:

(i) Mr. Mohan is already appointed as Alternate Director to Mr. Prakash, Director and therefore Mr. Mohan cannot be appointed as Alternate Director of Mr. Rakesh, another Director in the same company.

(ii) Mr. Mitesh, is Director of the company and therefore cannot be appointed as Alternate Director of Mr. Manoj another Director in the same company.

Answer 3A(iv)

Authority : Shareholders

Type of Resolution: Ordinary Resolution

"Resolved that pursuant to the provisions of Section 148 (3) and other applicable provisions, if any, of the Companies Act,2013 and the Companies(Audit and Auditors) Rules, 2014 (including any statutory modification(s) or re-enactment(s) thereof for the

time being in force), the remuneration of ₹2,50,000/-plus applicable taxes and out of pocket expenses, as recommended by the Audit Committee and approved by the Board of Directors of the company, payable to M/s ABC & Associates, Cost Accountants (Firm RegistrationNo.000202) as Cost Auditors to conduct the audit of the relevant cost records of the company for the financial year 2019-20 ending 31st March,2020 be and is hereby ratified and confirmed.

Resolved further that the Mr. X Director of the Company be and is hereby authorised to do all acts, deeds and things including filings as may be required and to take steps as may deemed necessary, proper or expedient to give effect to this Resolution and matters incidental thereto"

Question 4

(a) Ms. Monica is a director elected by small shareholders of PLQ Ltd. She has approached you for advice on the following :

(i) Whether a director elected by small shareholders is eligible to be appointed as independent director ?

(ii) What is the tenure of a director elected by small shareholders ?

(iii) Can a director elected by small shareholders be associated with the company after completion of the tenure of his/her office ?

(iv) Can a director elected by small shareholders be appointed in similar capacity in three or more companies ?

What advice would you give her ? (4 marks)

(b) Ratanlal, a member of Rajratna Ltd. has given notice to the company for inspection of the contract of service with Manohar, Managing Director. Advise the company. (4 marks)

(c) Draft a resolution for keeping and maintaining the registers of members and debentureholders with index and other statutory registers at the place other than the registered office of the company, stating the authority, type of resolution and the relevant provisions of the Companies Act, 2013. (4 marks)

(d) State the provisions of the UK Companies Act, 2006 for keeping of Register of Secretaries. (4 marks)

Answer 4(a)

The provisions in respect of appointment of director elected by small shareholders (the small shareholder' director) are contained in Section 151 of the Companies Act, 2013 and Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 .In view of the provisions of Section 151 of the Act and Rule 7 of the Rules, Ms. Monika will be advised as under:

(i) As provided in Rule 7(4) of the Companies (Appointment and Qualification of Directors) Rules, 2014, the small shareholder' director shall be considered as an independent director subject to his being eligible under Section149 (6) of the Companies Act 2013, and his giving a declaration of his independence of his independence as per Section 149 (7) of the Companies Act, 2013.

Thus the small shareholder' director can be considered as independent director only if he is eligible under Section 149 (6) of the Companies Act, 2013 and gives his declaration under Section149 (7) Companies Act, 2013.

(ii) As provided in Rule 7(5) of the Companies (Appointment and Qualification of Directors) Rules, 2014, the appointment of small shareholders' director shall be subject to the provisions of Section 152 of the Act except that:

(i) such director shall not be liable to retire by rotation

(ii) such director's tenure as small shareholders' director shall not exceed a period of 3 consecutive years and

(iii) on the expiry of the tenure, such director shall not be eligible for re-appointment.

Thus the tenure of the small shareholders' director shall not be more than 3consecutive years and cannot be reappointed.

(iii) As per Rule 7 (9) of the Companies (Appointment and Qualification of Directors) Rules, 2014, a small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed or be associated with such company in any other capacity, directly or indirectly.

Thus, after ceasing as the small shareholders' director he cannot, be appointed or be associated with such company in any other capacity, directly or indirectly for 3 years.

(iv) As per Rule 7 (8) of the Companies (Appointment and Qualification of Directors) Rules, 2014, no person shall hold the position of small shareholders' director in more than two companies at a time. It is also provided that the second company in which he has been appointed shall not be in a business which is competing or is in conflict with the business of the first company.

Thus, a person cannot be small shareholders' director in 3 companies.

Ms. Monica will be advised accordingly on queries as above.

Answer 4(b)

The provisions regarding keeping of the copies of the contract of employment with managing director or whole-time director and inspection thereof by members as contained in Section 190 of the Companies Act, 2013 are stated as below.

As per Section 190 (1) of the Companies Act, 2013, every company shall keep at its registered office:

a) where a contract of service with the managing director or whole-time director in writing a copy of the contract or

b) where such contract is not in writing, a written memorandum setting out its terms.

As per Section 190 (2) of the Companies Act, 2013, the copies of the contract or the

memorandum kept under sub-clause (1) shall be open for inspection by any member of the company without payment of fees.

As per Section 190 (3) of the Companies Act, 2013, if any default is made in complying with the provisions of sub-section (1) or sub-section (2), the company shall be liable to a penalty of twenty-five thousand rupees and every office of the company who is in default shall be liable to a penalty of five thousand rupees for each default.

As per Section 190(4) of the Companies Act, 2013, the provisions of this section shall not apply to a private company.

In view of the above provisions, Mr. Ratanlal , a member of Rajratna Ltd. has right to inspect the copies of the contract of service or memorandum setting out terms of employment of Mr. Manohar Managing Director. If Mr. Ratanlal is not allowed inspection, the company and every officer will be liable to penalty as prescribed in Section 190 (3) of the Companies Act, 2013. The company management will be advised to allow Mr. Ratanlal inspection of the copy of contract of service of Mr. Manhar, Managing Director.

Answer 4(c)

Authority: Shareholders

Type of Resolution: Special Resolution

"Resolved that pursuant to Section 94 and other applicable provisions, if any, of the Companies Act,2013 as amended from time to time and Companies (Management and Administration) Rules, 2014 (including any statutory modification or amendment thereto or re-enactment thereof for the time being in force), the consent of the shareholders of the company be and is hereby accorded to keep and maintain the register of members, the register of debenture-holders, the index of members/debenture-holders, other statutory registers and the copies of all annual returns and copies of certificates and documents required to be annexed thereto at the company's corporate office at A-304, MK Complex, Anand vihar, New Delhi, w.e.f. – (PIN Code), being a place in India in which more than one-tenth of the total number of members entered in the register of members reside w.e.f. 1st December,2019, instead of the registered office of the company.

Resolved further that the Board of Directors be and are hereby authorised to do all acts, deeds and things including filings and take steps as may deemed necessary, proper or expedient to give effect to this Resolution and matters incidental thereto."

Answer 4(d)

The following provisions are contained in Section 275 and Section 276 of the UK Companies Act, 2006 in respect of register of secretaries.

(A) As per Section 275 (Duty to keep register of secretaries)

(1) A company must keep a register of its secretaries.

(2) The register must contain the required particulars of the person who is or persons who are, the secretary or joint secretaries of the company.

(3) The register must be kept available for inspection:

- at the company's registered office, or

- at a place specified in the regulations

(4) The company must give notice to the registrar-

- of the place at which the register is kept available for inspection and
- of any change in that place,

unless it has at all times been kept at the company's registered office.

(5) The register must be open to the inspection.

- of any member of the company without charge and
- of any other person on payment of such fee as may be prescribed.

(B) As per Section 276(Duty to notify registrar of changes)

(1) A company must, within the period of 14 days from:

- a person becoming or ceasing to be its secretary or one of its joint secretaries, or
- the occurrence of any change in the particulars contained in its register of secretaries, give notice to the registrar of the change and of the date on which it occurred.

(2) The Notice of a person having become secretary or one of the joint secretaries, of the company must be accompanied by a consent of that person to act in the relevant capacity.

(3) If default is made in complying with this section, an offence is committed by every officer of the company who is in default.

For this purpose a shadow director is treated as an officer of the company.

(4) A person guilty of an offence under this Section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and for continued contravention, a daily default fine not exceeding one-tenth of level 5on the standard scale.

Question 5

(a) The Board of Directors of X Ltd.—an unlisted company—having turnover of ₹ 250 as per the last audited financial statements approach for your advice for constitution, composition and functions and powers of the Nomination and Remuneration Committee. Advise X Ltd. *(8 marks)*

(b) The Board of Directors of ABC Ltd. approaches you for advice on the voluntary revision of financial statements or board reports of the company as per the Companies Act, 2013. Advise the Board of Directors. *(8 marks)*

Answer 5(a)

The provisions of Section 178 of the Companies Act, 2013 and Rule 6 of Companies (Meetings of Board and its Powers) Rules, 2014 providing for the constitution, composition,

functions and powers of the Nomination and Remuneration Committee are discussed below:

As per Section 178 (1) of the Companies Act, 2013, the Board of Directors of every listed public company and such other classes of companies as may be prescribed shall constitute of the Nomination and Remuneration Committee (the Committee),consisting of three or more non-executive directors out of which not less than one half shall be independent directors. Further the chairperson of the company (whether executive or non-executive) may be appointed as member of Committee but shall not chair the committee.

As per Section 178 (2) of the Companies Act, 2013, the Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with criteria laid down and recommend to the Board for their appointment and removal and shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Committee or by an independent external agency and review its implementation and compliance.

As per Section 178 (3) of the Companies Act, 2013, the Committee shall formulate the criteria for determining qualifications, positive attributes ad independence of a director and recommend to the Board a policy relating to the remuneration for the directors, key managerial personnel and other employees.

As per Section 178 (4) of the Companies Act, 2013, the Committee shall ensure the following while formulating the above policy.

- the level and composition of the remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully.
- relationship of remuneration to performance is clear and meets appropriate performance bench-marks .
- remuneration to directors, key managerial personnel and senior management involves a balance between fixed incentive pay reflecting short and long term performance objectives appropriate to the working of the company and its goals.

The policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along-with the web address of the policy, if any, shall be disclosed in the Board of Directors' Report.

As per Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014, every listed public company and a company covered under Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an Audit Committee and the a 'Nomination and Remuneration Committee of the Board.

According to Rule 4 (1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, following classes of companies are provided therefore they shall constitute the Committee.

- all public companies with a paid - up capital of ₹10 crores or more or
- all public companies having turnover of ₹100 crores or more or

- all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding ₹50 Crores or more.

In the above Rule 4 (1) of the Companies (Appointment and Qualification of Directors) Rules the following provisions and explanations are provided, the paid up share capital or turnover or outstanding loans, or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

Where a company ceases to fulfil any of the three conditions laid down above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

As per Rule 4(2) of the Companies (Appointment and Qualification of Directors) Rules, the following classes of unlisted public companies shall not be covered under Rule 4(1):

- a joint venture;
- a wholly owned subsidiary;
- a dormant company defined under Section 455 of the Act.

Considering that the Turnover of X Ltd as per its last audited financial Statement is ₹250 only i.e. below the prescribed threshold/ limits discussed above, the Board of Directors of X Ltd. is not required to constitute Nomination & Remuneration Committee.

Alternate Answer with Assumption of Turnover of ₹250 crore.

The Board of Directors of X Ltd. will be advised to follow the above provisions of the Companies Act, 2013 and Rule 6 of Companies (Meetings of Board and its Powers) Rules, 2014 for constitution, composition and functions and powers of the Nomination and Remuneration Committee.

Answer 5(b)

The provisions as contained in Section 131 of the Companies Act, 2013 and Rule 77 of the National Company Law Tribunal Rules, 2016 for voluntary revision of financial statements or board reports of the company, are discussed below:

As provided in Section 131(1) of the Companies Act, 2013, if it appears to the directors of the company that -

a) the financial statements of the company or

b) the report of the Board

do not comply with the provisions of Section 129 (financial statements) or Section 134 (financial statements, Board's report etc.)of the Companies Act, 2013, they may prepare revised financial statements or a revised report in respect of any of three preceding financial years after obtaining the approval of National Company Law Tribunal (the Tribunal) on an application made by the company in such form and in such manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar.

The Tribunal shall, before passing any order, give notice to the Central Government and the income-tax authorities and shall take into consideration, the representations made if any, by the government or the authorities.

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

As provided in Section 131(2) of the Companies Act, 2013, where the copies of the previous financial statement or report has been sent out to the members or delivered to the Registrar or laid before the general meeting of the company, the revision must be confined to:

a) the correction in respect of which the previous financial statement or report do not comply with the provisions of Section 129 or Section 134;and

b) the making of any consequential alteration.

As provided in Section 131(3) of the Companies Act, 2013, the Central Government may make rules as to the application of the provisions of the Act in relation to revised financial statement or a revised Director's report and such rules may in particular:

- make different provisions according to which the prevision financial statements or the reports are replaced or are supplemented by a document indicating the corrections to be made;
- make provisions with respect to the functions of the company's auditor in relation to the revised Financial statements or report;
- require the directors to take such steps as may be prescribed.

As provided in Rule 77 of the National Company Law Tribunal Rules, 2016

(1) where it appears to the directors of a company that the financial statements of the company or the report of the Board do not comply with the provisions of Section 129 (Financial Statements) or Section 134 (Financial Statements, Board report etc.), the application to the National Company Law Tribunal (the Tribunal) shall be made by the company in Form No. NCLT-I within 14 days of the resolution passed by the Board along-with prescribed fees.

(2) In case the majority of the directors of the company or the auditor of the company has changed immediately before the decision was taken to apply under Section 131, the company shall disclose such facts in the application.

(3) the application filed in Form NCLT 1 to the Tribunal, shall set forth the following particulars:

a. the financial year or period to which such accounts relates.

b. the names and contact details of the managing director, chief financial officer, directors, company secretary and officers of the company responsible for making and maintaining such books of accounts and financial statement.

c. where such books of accounts are audited, the name and contact details of the auditor or any other former auditor who audited such accounts.

d. copy of the board resolution passed by the board of directors.

e. grounds seeking revision of financial statement of Board's Report.

(4) The company shall at least 14 days before the date of hearing advertise the application as per Rule 35 of the National Company Law Tribunal Rules, 2016.

(5) The Tribunal shall issue notice and hear the auditor of the original financial statement, if present auditor is different and after considering the application and hearing the auditor and any other person as the Tribunal may deem fit, may pass appropriate orders in the matter.

(6) A certified copy of the order of the Tribunal shall be filed with the Registrar of Companies within 30 days of the receipt of the certified copy.

(7) A general meeting may be called on receipt of the order of the Tribunal and notice of such general meeting along with reasons for change in financial statements may be published in newspaper in english and vernacular language.

(8) In the general meeting, the revised financial statements, statement of directors and the statement of auditors may be put up for consideration before a decision is taken on adoption of the revised financial statements.

(9) On approval of the general meeting, the revised financial statements, statement of auditors or revised report of the Board as the case may be, shall be filed with the Registrar within days of the general meeting approval.

The Board of Directors of ABC Ltd will be advised accordingly

Question 6

(a) Manoj was appointed as Managing Director of Silver Ltd. for 5 years. He resigns from his office after completing 2 years with Silver Ltd., for joining as Managing Director of another company and demands compensation from the company. The Board of Directors of Silver Ltd. approach you for advise as a Practicing Company Secretary. Briefly discuss the relevant provisions of the Companies Act, 2013 and advise. (4 marks)

(b) (i) Star Ltd. has 3425 members. Advise the Board of Directors of the company on the quorum of its Annual General Meeting.

(ii) ABC Ltd. was registered under the companies Act, 2013 in May, 2018. Can the company contribute to a recognized political party. Advise. (4 marks)

(c) State the matter along with relevant sections(s) of the Companies Act, 2013 for which the following E-Forms are required to be filed :

(1) E-Form No. INC 18

(2) E-Form No. CHG 6

(3) E-Form No. CRA 4

(4) E-Form No. FC 4 (4 marks)

(d) BCD Ltd. has paid up share capital of 40,00,000 equity shares of ₹10 each. Kalyan holding 40,000 equity shares has given notice to the company for inspection of the books of accounts of the company. Advise the company.
(4 marks)

Answer 6(a)

The provisions of Section 202 of the Companies Act, 2013 provide for payment of compensation for loss of office to managing director or whole-time director or manager. The provisions are discussed below.

(1) As per Section 202(1) of the Companies Act, 2013, a company can make payment of compensation for loss of office to managing director or whole-time director or manager but not to any other director, by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement.

(2) As per Section 202(2) of the Companies Act, 2013, no payment of compensation for loss of office can be made in the following cases.

- where a director resigns from his office as a result of the reconstitution of the company or of its amalgamation with other body corporate or bodies corporate and is appointed as managing or whole time director or manager or other officer in the reconstituted company or of the body corporate resulting from the amalgamation;
- where a director resigns from his office otherwise than on reconstruction or amalgamation of the company as aforesaid;
- where the office of the director is vacated under Section 167 (1) of the Companies Act, 2013;
- where the company is being wound up by the order of NCLT or voluntarily due to negligence or default of the director;
- where a director has been guilty of fraud or breach of trust or gross negligence or mismanagement of the affairs of the company or any subsidiary company or holding company thereof; and
- where a director has instigated or has taken part directly or indirectly in bringing about, the termination of his office.

In view of the above provisions of Section 202(2) of the Companies Act, 2013 above, Mr. Manoj will not be entitled for any compensation from Silver Ltd.

Answer 6(b)(i)

(i) The provisions of quorum for general meetings of the members of the company contained in Section 103 of the Companies Act, 2013 are stated as below.

(i) Unless the articles of association of a company provide for a larger number, the quorum for the general meetings of a Public Company shall be as under:

(a) In case of a Public Company

- five members personally present if the number of members as on the date of the meeting is not more than one thousand;

- fifteen members personally present if the number of members as on the date of the meeting is more than one thousand but upto five thousand;
- thirty members personally present if the number of members as on the date of the meeting exceeds five thousand.

(b) in the case of a private company, two members personally present, shall be the quorum of the general meeting.

Accordingly, Star Ltd being a Public company, having more than one thousand but upto five thousand members, is required to have personal presence of fifteen or more members at the general meetings to ensure presence of the quorum and the Board of Directors shall accordingly comply with the quorum requirements at the general meetings.

Answer 6(b)(ii)

As per Section 182(1) of the Companies Act, 2013 notwithstanding anything contained in any other provisions of this Act, a company other than a government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

As ABC Ltd. was registered in May, 2018, therefore it is in existence for less than 3 financial years and therefore the company is not eligible for making contribution to a recognised political party.

Answer 6(c)

(1) E-Form No. INC -18

Section 8(4)(ii) of the Companies Act, 2013 read with Rule 21(4) of Companies (Incorporation) Rules, 2014.

Application to Regional Director for conversion of section 8 company into company of any other kind.

(2) E -Form No. CHG - 6

Section 84(1) and Section 384 of the Companies Act, 2013 read with Rule 9(1) of Companies (Registration of Charges) Rules, 2014

Notice of appointment or cessation of receiver or manager.

(3) E-Form No. CRA - 4

Section 148(6) of the Companies Act, 2013 read with rule 6(6) of the Companies (cost records and audit) Rules, 2014]

Form for filing Cost Audit Report with the Central Government.

(4) E-Form No. FC - 4

Section 384(2) of the Companies Act, 2013 read with Rule 7 Companies (Registration of Foreign Companies) Rules, 2014 deals with Annual Return of a foreign company.

Answer 6(d)

The provisions of inspection of books of accounts and other books and papers maintained by the company are contained in Section 128(3) and 128(4) of the Companies Act, 2013 as under:

(i) As per Section 128(3) of the Companies Act, 2013 the books of account and other books and papers maintained by the company within India shall be open for inspection at the registered office of the company or at such other place in India by any director during business hours, and in the case of financial information, if any, maintained outside the country, copies of such financial information shall be maintained and produced for inspection by any director subject to such conditions as may be prescribed:

Provided that the inspection in respect of any subsidiary of the company shall be done only by the person authorised in this behalf by a resolution of the Board of Directors.

(ii) As per Section 128(4) of the Companies Act, 2013, where an inspection is made under Sub- section (3), the officers and other employees of the company shall give to the person making such inspection all assistance in connection with the inspection which the company may reasonably be expected to give.

As per the above mentioned provisions, only the Director of the company can inspect the books of accounts and other books and papers maintained by the company. A shareholder irrespective of the shares held by him, has no right to inspect the books of accounts and other books and papers maintained by the company.

The application of Mr. Kalyan is not in accordance with the provisions of the Act and therefore the application has to be declined by the company.

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SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART A

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

Question 1

(a) *Aroma Private Ltd. with paid-up capital of ₹60 Lakh is a subsidiary of Ayurvedic Ltd., a public company having a paid-up capital of ₹40 crore and turnover of ₹35 crore. During a Board meeting, Ram, one of the Directors, asked for furnishing the secretarial audit report of the company stating that it is a mandatory report and should be presented to the Board. The other Board members did not agree with Ram. Being a Company Secretary what would you advise to the Board ?* *(5 marks)*

(b) *One of the Directors of Marksmen Ltd. leaked an insider information in the market for personal profit. A, auditor of the company, in the course of performance of his duties finds out this offence which involves the amount of ₹ 2 crore or above. As the auditor of the company, what would A report about this ? Also state the consequences of non-compliance by the Auditor.* *(5 marks)*

(c) *List out the check points to be observed by Company Secretary while conducting the Secretarial Audit with regard to Attendance at meetings of the company as per Secretarial Standard-I.* *(5 marks)*

(d) *Aura Ltd. has received a request from Joe, one of the legal representatives of a deceased member James, for transmission of 1000 equity shares. Meanwhile Jennie, the spouse of James, being a joint holder along with James also approached the company for transmission of those 1000 equity shares in her favour. You, as a Company Secretary of the company, need to check these two claims of transmission of shares and effect the transmission in compliance with the provisions of the Companies Act, 2013. Indicate your course of action in this case.* *(5 marks)*

(e) *Ray, the Independent Director of a company has brought to the notice of the Board that the company is mandatorily required to file E-Form ACTIVE. As the Company Secretary of the company, you are required to highlight the relevant provisions and consequences of not filing the E-Form ACTIVE within the stipulated time.* *(5 marks)*

OR (Alternate Question to Q. No. 1)

Question 1A

(i) *VPS Construction Private Ltd. is working on a project of constructing 80 well*

equipped hospitals in 10 different cities. For raising capital, the company offered its securities to 400 investors (which include 150 Qualified Institutional Buyers and the Employees who have been given securities under ESOP Scheme) under private placement scheme in current financial year, maintaining record of offer letter in Form PAS-4. The share certificates were issued after 3 months of allotment of shares.

Being a Company Secretary, state with reasons whether or not the company has complied with the provisions of the Companies Act, 2013 with reference to the above activities ? (5 marks)

(ii) You are appointed as the Secretarial Auditor of Varuna Food Supplier Ltd., a BSE listed company, for conducting Secretarial Audit for the financial year 2018-19. During the audit, you find the following information :

(a) This year company got covered under Sec. 135 of Companies Act, 2013 and so constituted a Corporate Social Responsibility (CSR) committee.

(b) Mr. A, Director (Finance), resigned from the company.

(c) Notice of closure of the register of members, debenture holders and other security holders.

(d) The company applied for License under Sec. 8 of the Companies Act, 2013. State website disclosures requirements to be checked for above under the Companies Act, 2013. (5 marks)

(iii) State the disclosures that need to be annexed to the Report of Board of directors with regard to "Public Deposits" as per the Secretarial Standard-4 (SS-4). (5 marks)

(iv) "Secretarial Audit is to be on the principle of 'Prevention is better than cure' rather than a post mortem exercise and to find faults". Explain. (5 marks)

(v) List out the check points to be observed by a Company Secretary while conducting the Secretarial Audit with regard to Quorum of the meetings as per Secretarial Standard-1. (5 marks)

Answer 1(a)

Section 204 of the Companies Act, 2013 read with Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides for mandatory Secretarial Audit for every listed company and such prescribed class of companies as mentioned below:

(a) Every public company having a paid-up share capital of Fifty crore rupees or more; or

(b) Every public company having a turnover of Two Hundred Fifty crore rupees or more

Secretarial Audit is also applicable to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies as indicated above.

Hence, as company secretary, I will advise to the board of Aroma Private Ltd. that the company is not compulsorily required to present the Secretarial Audit Report to the board and annex the same with Board Report of the company, because paid up share capital of Aroma Limited and turnover and paid up share capital of Ayurvedic Limited are below the limits specified in Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

However, the companies which are not covered under section 204 may obtain Secretarial Audit Report voluntarily as it provides an independent assurance of the compliances of applicable laws of the company.

Answer 1(b)

Section 143(12) read with the Companies (Audit and Auditors) Rules, 2014 provides that if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers, the auditor shall report the matter to the Central Government.

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

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

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

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

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

(e) The report shall be on the letter-head of the auditor containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and

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

In case, the auditor does not comply with the provisions of section 143(12) of Companies Act, 2013, he shall be punishable with fine which shall not be less than one lakh Rupees but which may extend to twenty-five lakh rupees.

Answer 1(c)

CHECKLIST TO BE ENSURED BY THE COMPANY SECRETARY FOR THE ATTENDANCE AT THE MEETINGS AS PER THE SECRETARIAL STANDARD -1

This standard relates to meetings of the Board of Directors As per Para 4 of Secretarial Standard-1, the check points for Attendance at the Meetings are as under:

1. Para 4.1.1 of SS-1 prescribes that every company shall maintain Attendance Registers for the Meetings of the Board and Meetings of the Committee.
2. Para 4.1.2 of SS-1 prescribes that the attendance register shall contain the following particulars: serial number and date of the meeting; in case of a Committee Meeting name of the Committee; place of the Meeting; time of the Meeting; names and signatures of the Directors, the Company Secretary and also of persons attending the Meeting by invitation and their mode of presence, if participating through Electronic Mode.
3. Para 4.1.3 of SS-1 prescribes that the attendance register shall be deemed to have been signed by the Directors participating through Electronic Mode, if their attendance is recorded in the attendance register and authenticated by the Company Secretary or where there is no Company Secretary, by the Chairman or by any other Director present at the Meeting, if so authorized by the Chairman and the fact of such participation is also recorded in the Minutes.
4. Para 4.1.4 of SS-1 prescribes that the attendance register shall be maintained at the Registered Office of the company or such other place as may be approved by the Board.
5. Para 4.1.5 of SS-1 prescribes the attendance register is open for inspection by the Directors even after a person ceases to be a Director, he shall be entitled to inspect the attendance register of the Meetings held during the period of his Directorship.
6. Para 4.1.6 of SS-1 prescribes the attendance register shall be preserved for a period of at least eight financial years from the date of last entry made therein and may be destroyed thereafter with the approval of the Board.
7. Para 4.1.7 of SS-1 prescribes the attendance register shall be in the custody of the Company Secretary.
8. Para 4.2 of SS-1 prescribes leave of absence shall be granted to a Director only when a request for such leave has been communicated to the Company Secretary or to the Chairman or to any other person authorised by the Board to issue Notice of the Meeting.

Answer 1(d)

Transmission of shares

Article 23(i) of Table F of Schedule I of the Companies Act, 2013 provides that on the death of a member, the survivor or survivors where the member was a joint holder, and his nominee or nominees or legal representatives where he was a sole holder, shall be the only persons recognised by the company as having any title to his interest in the shares.

Accordingly, In case of Transmission of share, the Company Secretary should check whether:

- The shares have been transmitted to the legal representative of the deceased shareholder in the case of death of a sole shareholder; and
- In the case of joint holdings only to the survivor(s).
- Transmission of share is effected upon the production of succession certificate or probate or letter of administration or indemnity duly signed by the legal heirs of the deceased or as per procedure stipulated by the board and / or Article of Association.

In the present case, James was the deceased member who held 1000 Equity shares along with Ms. Jennie, being as joint holder and the only survivor and for the transmission of share they were two claimants:

1. Mr. Joe, the legal representative of the deceased member
2. Ms. Jennie, the spouse of the deceased member who is also the joint share holder of 1000 along with the deceased member.

Thus, in view of above, the shares shall be transmitted in favour of Ms. Jennie, being the survivor of shares held by her jointly with the deceased member of the company subject to the fulfillment of other applicable conditions.

Answer 1(e)

Active Company Tagging Identities and Verification (ACTIVE)

As per Rule 25A of Companies (Incorporation) Rules, 2014, every company incorporated on or before 31st December, 2017 shall file the particular of the company and its registered office in E-form ACTIVE (Active Company Tagging Identities and Verification) on or before 15th June, 2019.

Provide that any company which has not filed its due financial statements under section 137 or annual return under Section 92 or both of Companies Act, 2013 with the Registrar shall be restricted from filling E- from ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on the register.

Provided further that companies which have been struck off or are under process of striking off or under liquidation or amalgamated or dissolved, as recorded in the register, shall not be required to file E-Form ACTIVE.

The consequences of not filing E-from ACTIVE within the stipulated period are enumerated below:

In case a company does not intimate the prescribed particulars to the Registrar in E-Form ACTIVE, the company shall be marked as “ACTIVE -non-complaint” on or after 16th June, 2019 and shall he liable for action under sub-section (9) of section 12 of the Companies Act, 2013.

Provide also that no request for recording for the following event based information or change shall be accepted by the Registrar from such companies marked as “ACTIVE-

NON-COMPLIANT", unless the E-from ACTIVE is filled. Company could not file following event based e-Forms such as

- SH- 07 (Change in Authorized Capital)
- PAS-03 (Change in Paid-up Capital)
- DIR-12 (Change in Directorship except cessation)
- INC-22 (Change in Registered office)
- INC-28 (Amalgamation, de-merger)

It is to be noted that where a company files E-from Active on or after 16th June 2019, the company shall be marked as "ACTIVE Complaint ", on payment of fee of Rupees Ten Thousand.

DIR-12, Change in Directorship except in case of:

1. Cessation of any Director or
2. Appointment of Director when the total number of directors have fallen below the minimum number provided in clause (a) of sub-section (1) of section 149 on account of disqualification of all or any of the director under section 164 of Companies Act, 2013.
3. Appointment of any director in such company where DINs of all or any it's director(s) have been deactivated.
4. Appointment of director(s) for implementation of order passed by Court or Tribunal or Appellate Tribunal under provisions of Companies Act, 2013 or Insolvency and Bankruptcy Code, 2016.

Answer 1A (i)

A. As per the section 42 of the Companies Act, 2013 read with Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014, as a Company Secretary it is required to check the following compliances:

   - To ensure that persons to whom offer or invitation to subscribe securities under private placement may be made not to exceed 200 in the aggregate in a financial year. It is to be noted that any offer or invitation made to qualified institutional buyers or to employees of the company under scheme of employees stock option shall not be considered while calculating the limit of two hundred persons.
   - Issue of private placement offer cum application letter in Form PAS-4 serially numbered and addressed specifically to the person to whom offer is made and shall be sent to him, either in writing or in electronic mode, within 30 days of recording name of such person pursuant to sub-section (3) of Section 42 of Companies Act, 2013.
   - The Company shall maintain complete record of offer letters in Form PAS-5.

- A return of allotment of securities under section 42 of Companies Act, 2013 shall be filed with the Registrar within fifteen days of allotment in Form PAS-3 and with the fee as provided in the Companies (Registration offices and Fees) Rules, 2014 along with a complete list of all allottees.
- A company shall issue private placement offer cum application letter only after the relevant special resolution or Board resolution has been filed with the Registrar.

Provided that private companies shall file with the Registrar copy of the Board resolution or special resolution with respect to approval under clause (c) of subsection (3) of section 179 of Companies Act, 2013.

B. According to Section 56(4) of Companies Act, 2013, Share certificates are to be delivered within 2 months of allotment of shares / 6 months of allotment of debentures.

C. According to Section 2(68) of the Companies Act, 2013, a private company cannot have more than 200 Members.

Accordingly in the given case reasons for the non-compliance of the provisions of the Companies Act, 2013 shall be as under:

1. Private Company cannot have more than 200 members. Therefore, offer is invalid.
2. Further, the number of persons to whom the securities have been offered exceeding the limits of 200 as prescribed under Section 42 i.e. (400-150 = 250) (400 investors include 150 Qualified Institutional Buyers and employees who have been given securities under ESOP scheme).
3. The record of offer letters has not been maintained in PAS-5.
4. The share certificated has not been issued within 2 months of allotment of shares.

Based on the facts, it can be conclude that VPS Construction Private Ltd. has not complied with the provisions of the Companies Act, 2013.

Answer 1A(ii)

(a) Section 135 of the Companies Act, 2013 read with Rule 9 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, the Board of Directors of the company shall, after taking into account the recommendations of CSR Committee, approve the CSR Policy for the company and disclose contents of such policy in its report and the same shall be displayed on the company's website, if any.

(b) As per Section 168 of the Companies Act, 2013 read with Rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014, information about the resignation of the Director shall be posted on the website of the company, if any. Further, within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12.

Since, the company is a listed company, it shall comply with the regulations 30 of the SEBI (LODR) Regulations, 2015.

(c) As per Section 91 of the Companies Act, 2013 read with Rule 10(1) of the Companies (Management and administration) Rules, 2014, notice of closure of the register of members, debenture holder or other security holders shall be uploaded on the website of the company at least seven days before the closing the register of the members, if any, and on the website as notified by the Central Government.

(d) As per Rule 20(3)(b) of the Companies (Incorporation) Rules, 2014, the existing company shall, for the purpose of license under section 8 of the Companies Act, 2013 to publish a notice in the newspaper, and shall also be uploaded on the website as may be notified by the Central Government, within a week from the date of making the application to the Registrar.

However, Varuna Food Suppliers Ltd. is a listed company and the Companies Act, 2013 does not provide specifically for conversion of a listed company in to Section 8 Company.

Answer 1A(iii)

The Companies Act, 2013 requires the Board of directors of every company to attach its report along with the financial statements to be laid before the members at the Annual General Meeting.

Accordingly, the Secretarial Standard (SS-4) prescribes a set of principles for making disclosures in the Report of the Board of Directors of the company and other matters related thereto. The company as per this standard (SS-4) amongst various disclosures, a detailed information with regard to the Public Deposits shall be given which contains the following disclosures;

(a) Details of deposits accepted during the year;

(b) Deposits remaining unpaid or unclaimed as at the end of the year;

(c) Whether there has been any default in repayment of deposits or payment of interest thereon during the year and if so, the number of such cases and the total amount involved:

  (i) at the beginning of the year;

  (ii) maximum during the year (i.e. highest number of cases pending repayment of deposits or interest during the year and maximum amount that was due);

  (iii) at the end of the year;

(d) Details of deposits which are not in compliance with the requirements of the Act;

(e) Details of National Company Law Tribunal (NCLT) /National Company Law Appellate Tribunal (NCLAT) orders with respect to depositors for extension of time for repayment, penalty imposed, if any;

(f) In case of a private company, details of amount received from a person who at the time of the receipt of the amount was a Director of the company or relative of the Director of the company.

Answer 1A(iv)

The provisions of Secretarial Audit has been provided under Section 204 of the Companies Act, 2013 read with Rule 9 of the Companies (Appointment and Managerial Personnel) Rules, 2014. It is the process of independent verification, examination of level of compliance of applicable Corporate Laws to a company. The audit process if properly devised ensures timely compliance and eliminates any un-intended non-compliance of various applicable rules and regulations. An action plan of the Corporate Secretarial Department is to be designed so as to ensure that all event based and time based compliances are considered and acted upon. Secretarial Audit is to be on the principle of "Prevention is better than cure" rather than post mortem exercise and to find faults. Broadly, the need for Secretarial Audit is understood from the following points:

- Effective mechanism to ensure that the legal and procedural requirements are duly complied with.
- Provides a level of confidence to the directors & Key Managerial Personnel etc.
- Directors can concentrate on important business matters as Secretarial Audit thereby ensuring legal and procedural requirements.
- Strengthening the image and goodwill of a company in the minds of regulators and stakeholders
- Secretarial Audit is an effective governance and compliance risk management tool.
- It helps the investor in analyzing the compliance level of companies, thereby enhancing the reputation of the Company.

Answer 1A(v)

CHECKLIST FOR THE QUORUM TO BE ENSURED BY COMPANY SECRETARY AS PER SECRETARIAL STANDARD-1

This standard relates to meetings of Board of Directors, as per Para 3 of Secretarial Standard-1, the check points for the quorum are as under:

The Quorum for a Meeting of the Board shall be one-third of the total strength of the Board, or two Directors, whichever is higher.

- Para 3.1 states that the requisite quorum shall be present throughout the meeting.

  Quorum shall be present not only at the time of commencement of the Meeting but also while transacting business.
- Para 3.2 states that a Director shall neither be reckoned for Quorum nor shall be entitled to participate in respect of an item of business in which he is interested. However, in case of a private company, a Director shall be entitled to participate in respect of such item after disclosure of his interest.
- Para 3.3 states that directors participating through Electronic Mode in a Meeting shall be counted for the purpose of Quorum, unless they are to be excluded for any items of business under the provisions of the Companies Act, 2013 or any other law.

- Para 3.4 Meeting of the Board

  Para 3.4.1 The quorum for a meeting of the board shall be one third of the total strength of the Board, or Two directors, whichever is higher.

- Para 3.5 Meeting of the Committee

  Unless otherwise stipulated in the Act or the Articles or under any other law, the quorum for meeting of any Committee constituted by the board shall be as specified by the Board. If no such Quorum is specified, the presence of all the members of ant such committee is necessary to form the Quorum.

PART B

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

Question 2

(a) Economic and social factors are recognized and assessed while setting up an industry. State the factors which must be considered in respect of locations to be avoided in setting up an industry.

(b) Twinbirds Inc., a company registered in Mauritius has recently set up a back office at Hyderabad in the State of Telangana, wherein the company provides service to its customers. Wood Ltd., an Indian entity, holds 74% of equity in the above Mauritius based company. You are required to advise the company with regard to the compliance, if any, in line with the provisions applicable to a foreign company under the Companies Act, 2013.

(c) Prepare a checklist for right issue of shares. (5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Royal X Ltd., a listed company, has issued USD 50 Million Indian Depository Receipts (IDRs). Prepare a checklist for equitable treatment to IDR holders as per the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. (5 marks)

(ii) Ashu Ltd. and Pragarti PMC Ltd. have entered in to a Joint Venture Agreement (JVA). Pursuant to provisions of JVA, a Joint Venture Company (JVC) shall be incorporated to run the Project Management and Assistance Business in Cambodia. Apart from capital investment, both parties will provide knowhow and intellectual assistance including business secrets to JVC. In this regard, Ashu Ltd. and Pragarti PMC Ltd. need to enter in a Non-disclosure Agreement.

List out the points to be incorporated in the Undertaking Clause of the Non-disclosure Agreement. (5 marks)

(iii) Write a note on abuse of dominance under the Competition Act, 2002. (5 marks)

Answer 2(a)

Generally economic and social factors are recognized and assessed while setting up an industry. Environmental factors must also be taken into consideration in setting

up an industrial undertaking. Factors like, proximity of water sources, highways, major settlements, markets for products and raw material resources are desired for economy of production. Industries are, therefore, required to be established by striking a balance between economic and environmental considerations. Thus, with reference to site identification for setting up of industries the following factors must be considered :

- No forest land shall be converted into non-forest activity for the sustenance of the industry (Ref: Forest Conservation Act, 1980).
- No prime agricultural land shall be converted into industrial site.
- Land acquired shall be sufficiently large to provide space for appropriate treatment of waste water which may be still left for treatment after maximum possible reuse and recycle. Reclaimed (treated) waste water shall be used to raise green belt and to create water body for aesthetics, recreation and if possible, for aquaculture. The green belt shall be 1/2 km wide around the battery limit of the industry. For industry having odour problem, it shall be a kilometer wide.
- The green belt between two adjoining large scale industries shall be one kilometer.
- Enough space should be provided for storage of solid wastes so that these could be available for possible reuse.
- Lay out and form of the industry that may come up in the area must conform to the landscape of the area without affecting the scenic features of that place.
- Associated township of the industry must be created at a space having physiographic barrier between the industry and the township.
- Each industry is required to maintain three ambient air quality measuring stations the within 120 degree angle between the stations.

Answer 2(b)

According to Section 2 (42) of the Companies Act, 2013 a "foreign company" means any company or body corporate incorporated outside India which:

- Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- Conducts any business activity in India in any manner.

Section 379(1) of Companies Act, 2013 provides that Sections 380 to 386 (both inclusive) and sections 392 and 393 of Companies Act, 2013 shall apply to all foreign companies.

Further, section 379 (2) of the Companies Act, 2013 states that where not less than 50% of the paid up share capital whether equity or preference or partly equity and partly preference of a foreign company is held by one or more citizens of India or by one or more companies or body corporates incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII Companies Incorporated Outside India and such other provisions of the Companies Act, 2013 as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

In this present case in the question, the following facts are given:

(a) Twinbirds Inc. was incorporated in Mauritius and has a place of business in Hyderabad, hence it is a foreign company.

(b) The majority of the shareholding of 74% is held by M/S Wood Limited an Indian entity.

Thus Twinbirds Inc. would be covered under section 379 and shall comply with the provisions of Chapter XXII of the Companies Act, 2013 and such other provisions of the Companies Act, 2013 as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Answer 2(c)

As per Section 62(1) of the Companies Act, 2013 if the Company decides to issue fresh shares, these should be offered to existing shareholders in proportion to existing shareholding.

Checklist for Rights Issue :

1. Certified true copy of the resolution passed by the Board of Directors for issue of securities under proposed rights issue/approving the proposed fast track rights issue.
2. Certified true copy of the resolution passed by the Shareholders, if any;
   a. for issue of securities under proposed rights issue/fast track rights issue
   b. increase in the authorised share capital (if required)
   c. Check whether the copy of Form SH-7, MGT-14 filed with ROC.
3. Undertaking from the Company that the entire issued capital of the company is listed with Exchange and are fully paid up.
4. Certificate from all Lead Manager/Merchant Banker and Company with respect to compliances in case of fast track rights issue.
5. Whether the issuer company has made reservation of equity shares of the same class in favour of the holders of outstanding compulsorily convertible debt instruments, if any, in proportion to the convertible part thereof, while opening a rights issue of equity shares.
6. Check whether the equity shares so reserved were issued at the time of conversion of convertible debt instruments on the same terms at which equity shares offered in rights issues.
7. Whether the issuer company has made reservation for employees along with rights issue subject to the condition that value of allotment to any employee shall not exceed rupees two lakhs.
8. Check whether the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognised stock exchange where the equity shares of the issuer are listed.

9. Once the allotment is made, the company shall within 30 days of allotment, file with the Registrar are turn of allotment in Form PAS-3, along with the fee as specified in Companies (Registration of Offices and Fees) Rules, 2014.

Answer 2A(i)

Regulation 74 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 prescribes Equitable Treatment to Indian Depository Receipts (IDR) Holders.

The checklist for the equitable treatment of IDR may be as under:

- Check if the listed entity's equity shares or other securities representing equity shares are also listed on the stock exchange(s) in countries other than its home country, it shall ensure that Indian Depository Receipts's Holders are treated in a manner equitable with security holders in home country.
- Check whether the listed entity ensures that for all corporate actions, except those which are not permitted by Indian laws, it shall treat Indian Depository Receipts's holders in a manner equitable with security holders in the home country.
- Check in case of take-over or delisting or buy-back of its equity shares, the listed entity shall, while following the laws applicable in its home country, give equitable treatment to Indian Depository Receipts's holders vis-à-vis security holder in home country.
- Check whether the listed entity ensures protection of interests of Indian Depository Receipts's holders particularly with respect to all corporate benefits permissible under Indian laws and the laws of its home country and shall address all investor grievances adequately.

Answer 2A(ii)

Specimen Undertakings Clause of Non-Disclosures Agreement is as under:

Subject to the Exceptions Clause and in consideration of the disclosure of confidential information by the Disclosing Party, the Receiving Party agrees:-

(i) to keep confidential and not disclose to any third party, copy, reproduce, adapt, divulge, publish or circulate any part of or the whole of any Confidential Information without the prior written consent of the Disclosing Party; and

(ii) to restrict access to the Confidential Information disclosed to it under this Agreement to those of its employees and officers who need to know the same strictly for the Purpose; and

(iii) not to use Confidential Information disclosed to it under this Agreement for any purpose other than the Purpose; and

(iv) not to combine any part of or the whole of the Confidential Information with any other information; and

(v) not to disclose the whole or any part of the Confidential Information to any third party without the prior written consent of the Disclosing Party and prior to disclosure to such third party procuring that the third party is bound by obligations which are no less onerous than those contained in this Agreement; and

(vi) to procure that each employee and officer to whom Confidential Information is disclosed under this Agreement is, prior to such disclosure, informed of the terms of this Agreement and agrees to be bound by them; and

(vii) to procure that the Confidential Information in its possession is stored securely and that physical access to it is controlled.

Answer 2A(iii)

Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise alone or in concert. Such acts are prohibited under the law. Section 4(2) of the Competition Act, 2002 specifies the following practices by a dominant enterprise or group of enterprises as abuse of dominant position, when:

- directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;
- directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) o f goods or service;
- limiting or restricting production of goods or provision of services or market;
- limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;
- denying market access in any manner;
- making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- using its dominant position in one relevant market to enter into, or protect, other relevant market.

Question 3

(a) As a company secretary, state the corporate governance requirements with respect to subsidiary of a listed company under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. (8 marks)

(b) Sharma and Verma are the shareholders of Mukta Enterprises Ltd., an unlisted public company, holding 5000 equity shares each. Both the shareholders have their holdings in physical form. In June 2019, they decided to transfer their shares but could not transfer due to the recent changes in the law. Advise them about relevant rules and prepare checklist for the company to ensure compliance of rules relating to issue of securities in dematerialised form by unlisted public companies. (7 marks)

Answer 3(a)

Regulation 24 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 prescribe corporate governance requirements with respect to subsidiary of listed entity, as below:

(1) At least one independent director on the board of directors of the listed entity shall be a director on the board of directors of an unlisted material subsidiary, whether incorporated in India or not.

(2) The audit committee of the listed entity shall also review the financial statements, in particular, the investments made by the unlisted subsidiary.

(3) The minutes of the meetings of the board of directors of the unlisted subsidiary shall be placed at the meeting of the board of directors of the listed entity.

(4) The management of the unlisted subsidiary shall periodically bring to the notice of the board of directors of the listed entity, a statement of all significant transactions and arrangements entered into by the unlisted subsidiary.

Explanation.-For the purpose of this regulation, the term ?"significant transaction or arrangement" shall mean any individual transaction or arrangement that exceeds or is likely to exceed ten percent of the total revenues or total expenses or total assets or total liabilities, as the case may be, of the unlisted subsidiary for the immediately preceding accounting year.

(5) A listed entity shall not dispose of shares in its material subsidiary resulting in reduction of its shareholding (either on its own or together with other subsidiaries) to less than fifty percent or cease the exercise of control over the subsidiary without passing a special resolution in its General Meeting except in cases where such divestment is made under a scheme of arrangement duly approved by a Court/Tribunal, or under a resolution plan duly approved under section 31 of the Insolvency Code and such an event is disclosed to the recognized stock exchanges within one day of the resolution plan being approved.

(6) Selling, disposing and leasing of assets amounting to more than twenty percent of the assets of the material subsidiary on an aggregate basis during a financial year shall require prior approval of shareholders by way of special resolution, unless the sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal, or under a resolution plan duly approved under section 31 of the Insolvency Code and such an event is disclosed to the recognized stock exchanges within one day of the resolution plan being approved.

(7) Where a listed entity has a listed subsidiary, which is itself a holding company, the provisions of this regulation shall apply to the listed subsidiary in so far as its subsidiaries are concerned.

Answer 3(b)

Rule 9A of The Companies (Prospectus and Allotment of Securities) Rules, 2014 provides that

(1) every unlisted public company shall-

(a) Issue the securities only in dematerialised form; and

(b) Facilitate dematerialisation of all its existing securities

in accordance with provisions of the Depositories Act, 1996 and regulations made there under.

(2) every unlisted Public Company making any offer for issue of any securities or buy back of securities or issue of bonus shares or rights offer shall ensure that before making such offer, entire holding of securities of its promoters, directors,

key management personnel has been dematerialised in accordance with provisions of the Depositories Act, 1996 and regulations made there under:

(3) Every holder of securities of an unlisted public company,

(a) who intends to transfer such securities on or after 2nd October, 2018, shall get such securities dematerialised before the transfer; or

(b) who subscribed to any securities of an unlisted public company (whether by way of private placement or bonus shares or rights offer) on or after 2nd October, 2018 shall ensure that all his existing securities are in dematerialised form before such subscription.

Accordingly, the shareholders Mr. Sharma and Mr.Verma have to get their shares dematerialised before transfer of shares.

Further, sub-rule (4) and (5) of rules 9A of the Companies (Prospectus and Allotment of securities) Rules, 2014 provides that the company

- shall facilitate dematerialisation of all its existing securities by making necessary application to a depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996 and shall secure International Security Identification Number (ISIN) for each type of security and shall inform all the existing security holders about such facility.
- shall ensure that the company makes timely payment of fees (admission as well as annual) to the depositary and registrar to an issue and share transfer agent in accordance with the agreement executed between the parties.
- shall ensure that the company maintains security deposit, at all times, of not less than two year fees with the depository and registrar to an issue and share transfer agent in such form as may be agreed between the parties
- shall ensure that the company complies with the regulations or directions or guidelines or circulars, if any, issued by the Securities and Exchange Board or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto

Accordingly, Mukta Enterprises Limited shall ensure the compliances of above mentioned provisions.

Question 4

(a) Mention the time within which Public Announcement is required to be made to the Stock Exchange under the following circumstances :

(i) Disinvestment.

(ii) Acquisition of shares, voting rights or control over the Target Company pursuant to Preferential Issue.

(iii) Agreement to acquire shares or voting rights or control over the Target Company.

(iv) Acquiring shares or voting rights or control pursuant to conversion of convertible securities with a fixed date of conversion.

(v) Increase in voting rights pursuant to a buy-back not qualifying for exemption under Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

(b) As a company secretary state which companies are to be covered under the defaulter list of the Reserve Bank of India. Also prepare a checklist in this regard.

(c) State the provisions for registration of charges (created/modified) with the Registrar of Companies under the Companies Act, 2013. (5 marks each)

Answer 4(a)

The Public Announcement made under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, shall be sent to all the stock exchanges on which the shares of the target company are listed.

Further, a copy of the same shall also be sent to the Board and to the target company at its registered office within one working day of the date of the public announcement. The time within which the Public Announcement is required to be made to the Stock Exchanges under different circumstances is tabulated below:

	Particulars	*Applicable Regulation under SEBI (SAST) Regulation, 2011*	*Time of making Public Announcement to Stock Exchange*
(i)	In case of Disinvestment	13(2)(d)	On the same day as the date of execution of agreement for acquisition of shares or voting rights in or control over the Target Company.
(ii)	Acquisition of shares, voting rights or control over the Target Company pursuant to Preferential Issue.	13(2)(g)	On the date on which the board of directors of the target company authorizes such preferential issue.
(iii)	Agreement to Acquire Shares or voting Rights or Control over the Target Company.	13(1)	On the date of agreeing to acquire share, voting rights or control over the target company.
(iv)	Acquisition of shares, voting rights or control pursuant to conversion of convertible securities with a fixed date of conversion.	13(2)(c)	On the second working day preceding the scheduled date of conversion of such securities into shares of the Target company.
(v)	Increase in voting rights pursuant to a buy-back not qualifying for exemption under Regulation 10	13(2)(h)	No later than 90th day from the date of closure of the buyback offer by the target company.

Answer 4(b)

Companies which are to be covered under the defaulter list of RBI are termed as willful defaulters:

A "willful default" would be deemed to have occurred if any of the following events is noted:-

a. The company has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.

b. The company has defaulted in meeting its payment/repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

c. The company has defaulted in meeting its payment/repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

In order to prevent the access to the capital markets by the willful defaulters, a copy of the list of willful defaulters (non-suit filed accounts) and list of willful defaulters (suit-filed accounts) are forwarded to SEBI by RBI and Credit Information Bureau (India) Ltd. (CIBIL) respectively.

The Reserve Bank of India periodically releases the lists of Suit Filed Accounts and Willful Defaulters These are available on the Reserve Bank of India website on a special URL: defaultersrbi.org.in.

Checklist

(a) Check that the name of the Company or its Director(s) does not appear in the Defaulters list of Reserve Bank of India;

(b) Check whether the company has/has not entered into any One Time Settlement (OTS) arrangement with any FI/Bank(s) during the period to which the Report pertains.

Answer 4(c)

Sections 77 to 87 made under chapter VI of the Companies Act, 2013 provide for the registration of charges in so far as any security on the company's property or undertaking is created, modified or satisfied thereby.

Section 77(1) of the Companies Act, 2013 provides that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating or modifying such charge in E-Form CHG-1 (for other than debentures) or E-Form CHG-9 (for debentures including rectification), on payment of such fees and in such manner as may be prescribed in the Rules, with the Registrar within 30 days of from the date of creation/ modification of charge.

Provided that the Registrar may, on an application by the company, allow such registration to be made:

(a) in case of charges created before the commencement of the Companies (Amendment) Ordinance, 2019, within a period of three hundred days of such creation; or

(b) in case of charges created on or after the commencement of the Companies (Amendment) Ordinance, 2019, within a period of sixty days of such creation, on payment of such additional fees as may be prescribed.

Provided further that if the registration is not made within the period specified:

(a) in clause (a) to the first proviso, of Section 77 of the Companies Act, 2013 the registration of the charge shall be made within six months from the date of commencement of the Companies (Amendment) Ordinance, 2019, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;

(b) in clause (b) to the first proviso, of Section 77 of the Companies Act, 2013, the Registrar may, on an application, allow such registration to be made within a further period of sixty days after payment of such ad-valorem fees as may be prescribed.

As per Sub-rule (3) of Rule (3) of the Companies (Registration of Charges) Rules, 2014, where the company fails to register the charge in accordance with Sub-rule (1) of Rule (3) of The Companies (Registration of Charges) Rules, 2014, with in the period specified in section 77 on payment of additional fee or advalorem fees as prescribed in the Companies (Registration office and fees) Rules, 2014.

Where a charge is registered with the Registrar under sub-section (1) of Section 77 of the Companies Act, 2013, he shall issue a certificate of registration of such charge in such form and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favor the charge is created.

Question 5

(a) Write short notes on the following :

(i) Scope of legal due diligence.

(ii) Risks associated with non-compliance of law.

(iii) Justification for environmental due diligence. (3 marks each)

(b) (i) Prepare a checklist for compliance with terms and conditions set forth by a lending bank at the time of sanctioning a loan.

(ii) Mention description of the following forms required to be filed under the Companies Act, 2013 :

— Form No. DPT-3

— Form No. DIR-12

— Form No. INC-24 (3 marks each)

Answer 5(a)(i)

The scope of legal due diligence depends on the purpose and objectives which may vary from case to case. The scope of due diligence by a large institutional investor will vary from the scope of due diligence by the company which proposes to acquire a target company. Thus it is not possible to define the scope of due diligence specifically. However, certain mandatory issues that should be covered in any type of legal due diligence are as follows:

1. *Regulatory compliance* - It would include compliance requirements of the company under various applicable laws such as Companies Act, Income Tax Act, SEBI Act rules and regulations, employee related laws, other business related laws such as pollution control laws, patent laws, and applicable laws in the country where the target company is situated.

2. *Contractual compliance* - It would include the compliance by the company under various material contracts by the company with suppliers, customers, employees etc. and to verify whether the company has complied with the terms and conditions of different contracts.

3. *Compliance under intra-corporate aspects* - It would include the compliance by the company under the intra company documents such as Memorandum and Articles of Association, Corporate policies, procedures, code of conduct etc.

4. *Financial aspects* - It includes thorough reading of the balance sheet to identify the financial obligations of the company, penalties paid for violations of laws in the past etc.

5. *Non-financial aspects* - It includes analysis/examination of aspects such as reputation and goodwill of the company.

6. *Cultural aspects* - Especially in case of cross border transactions, compatibility and adaptability of corporate cultures are to be analysed to eliminate the problems that may arise out of cultural differences

Answer 5(a)(ii)

The various risks that a company may be exposed due to non-compliance of the laws are as under:

1. Cessation of business activities

2. Civil action by the authorities

3. Punitive action resulting in fines against the company/officials

4. Imprisonment of the errant officials

5. Public embarrassment

6. Damage to the reputation of the company and its employees

7. Attachment of bank accounts.

Answer 5(a)(iii)

Few reasons for performing environmental due diligence are enumerated below:

- To assess the emission of hazardous substances and mitigation measures through examination of industrial sites
- To ensure Regulatory compliances and to assess the cost of non-compliances if any
- Societal reaction to emission of effluents and its impact on the financial health of the company.
- To assess the overall impact on environment.
- To suggest remedial course of actions and environmental management plan
- To assess the sustainability initiatives of the company and its potential impact on the business.
- To allocate liabilities identified during the investigation, draft indemnities, or perhaps re-price the deal.

Answer 5(b)(i)

Checklist for Compliance with the terms and conditions set forth by the lending Institution at the time of availing the facility.

Check the following points to confirm that:

(a) Further funds have not been borrowed from bank(s)/financial institution(s) on hundis, other than from its bankers, without prior consent;

(b) No donations/contributions have been made to the charitable and other funds, which are not directly related to the business of the borrower or to the welfare of its employees, in excess of the indenture (if any), without the consent of the bank; and

(c) No merger / consolidation / re-organization /arrangement / compromise with the creditors / shareholders has been undertaken / permitted without the approval of the bank.

Answer 5(b)(ii)

From No. DPT-3	E-Form DPT-3, Return of deposits required to file with Registrar pursuant to section 73 of Companies Act, 2013 read with rule 16 of the Companies (Acceptance of Deposits) Rules, 2014.
From No. DIR-12	E-Form DIR-12 is to be filed for Appointment/Resignation or in case of Change in Designation of Directors of the Company by the Company pursuant to Sections 7(1)(c), 168 & 170 (2) of the Companies Act, 2013 and Rule 17 of Companies (Incorporation) Rules, and Rule 8, 15 & 18 of Companies (Appointment and Qualification of Directors) Rules, 2014.
From No. INC-24	Application for approval of Central Government for change of name, pursuant to Section 13(2) of the Companies Act, 2013 and Rule 29(2) of the Companies (Incorporation) Rules, 2014.

Question 6

(a) Greenfield Ltd. has borrowed from Trust Bank by way of Term Loan of ` 40 crore for its new hotel project with the consent of the Board. The paid up equity share capital and free reserves on the day of the borrowings were ` 10 crore and ` 18 crore respectively. In the recent Annual General Meeting, Dey, a shareholder of the company raised an objection that the company has contravened the provisions of the Companies Act, 2013 with regard to the borrowings. Is the contention of the shareholder correct ? Justify. Will your answer differ if the above company is a Private Company ?

(b) What are the benefits of Data Room under due diligence ?

(c) "The successful merger demands that strategic planners are sensitive to the human issues of the organizations". Discuss and mention the checks that need to be ensured in this regard. (5 marks each)

Answer 6(a)

Section 180 (1) (c) of the Companies Act, 2013 states that to borrow money, where the money to be borrowed together with the money already borrowed by the Company is in excess of aggregate of its paid-up share capital, free reserves and securities premium (excluding temporary loans obtained from the company's bankers in the ordinary course of business) then, such company shall obtain the approval of the members by way of Special Resolution in the General Meeting.

In the present case, the aggregate of paid-up capital and free reserves is (₹10 crore +₹18 Crore = ₹28 Crore) and Greenfield has borrowed ₹40 Crore with the consent of the Board only.

Thus, the contention of Mr. Dey is correct, as the Company has not obtained the approval of the Members in General Meeting by way of a Special Resolution for ₹40 Crore, which exceeds ₹28 Crore.

In case the Company being a Private Company, then the Company has complied with the provisions of the Companies Act, 2013 as Section 180 shall not be applicable to Private Companies as per exemption notification of June 2015.

Answer 6(b)

The benefits that may accrue from the Data Room are as under:

- Provides material information that helps in analysing the health status of the company and also doing a SWOT analysis.
- Provides clarity in the minds of the buyer with regard to the business and the financial models of the company, of their present operations and also about the existing profitability, growth prospects and the sustainability of the business that is proposed to be bought, which is under review.
- It helps for a better bargaining power for the buyer through the analysis of various data and information that may be gathered during due diligence.
- The exercise shall highlight the various transactions which may be abnormal or

have weakness or limitations in current business strategy which the seller may not disclose directly to the buyer or so.

- It highlights the strong points of the business and ethics of the seller, wherein the numerous data and information collated at the time due diligence shall help for better Valuation of Business which shall be useful for both the Buyer and Seller.

Answer 6(c)

The successful merger demands that strategic planners are sensitive to the human issues of the organisations.

For the purpose, following checks have to be made constantly to ensure that:

- sensitive areas of the company are pinpointed and personnel in these sections are carefully monitored;
- serious efforts are made to retain key people;
- a replacement policy is prepared to cope with inevitable personnel loss;
- employees are informed of what is going on in the organization i.e. even bad news is delivered systematically. Uncertainty is more dangerous than the clear, and logical presentation of unpleasant facts;
- training department is fully geared up to provide short, medium and long term training to both production and managerial staff;
- likely union reaction be assessed in advance;
- estimate cost of redundancy payments, early pensions and the like assets;
- comprehensive policies and procedures be maintained for employee related issues such as office procedures, new reporting, compensation, recruitment and selection, performance, termination, disciplinary action etc.;
- new policies to be clearly communicated to the employees especially employees at the level of managers and supervisors Further line manager, to be briefed about the new responsibilities of those reporting to them;
- family gatherings and picnics be organised for the employees and their families of merging companies during the transition period to allow them to overcome their inhibitions and breed familiarity.

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CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer ALL Questions.*

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

PART A

Question 1

(a) "Smaller is manageable but Bigger is Beautiful" are not the only reasons for indulging Corporate Restructuring exercise by the Management in managing the establishments. Elucidate the statement indicating need, scope and modes of corporate restructuring. (5 marks)

(b) ABC Ltd. intends to delist its shares from Delhi Stock Exchange for which the company has made required public announcement. Surewin Ltd., substantial shareholder in the said Company, made a counter offer. Apprise the Board with a short note regarding the outcome. (5 marks)

(c) "Dissatisfactory implementation of sanctioned compromise and arrangement for amalgamation or merger may lead to liquidation." Examine the statement in relation to powers of Tribunal in terms of Companies Act, 2013. (5 marks)

(d) "Non-compliance or contravention of the requirements prescribed under the Companies Act, 2013 and rules framed thereunder in framing or implementing the scheme of a compromise, arrangement involving transferor and transferee Companies may lead to prosecution." Briefly explain. (5 marks)

Answer 1(a)

In every corporate restructuring exercise, the aim is to eliminate disadvantages and to combine advantages. The various needs for undertaking a Corporate Restructuring exercise are as follows:

(i) to focus on core strengths, operational synergy and efficient allocation of managerial capabilities and infrastructure.

(ii) consolidation and economies of scale by expansion and diversion to exploit extended domestic and global markets.

(iii) revival and rehabilitation of a sick unit by adjusting losses of the sick unit with profits of a healthy company.

(iv) acquiring constant supply of raw materials and access to scientific research and technological developments.

(v) capital restructuring by appropriate mix of loan and equity funds to reduce the cost of servicing and improve return on capital employed.

(vi) improve corporate performance to bring it at par with competitors by adopting the radical changes brought out by information technology.

One of the modes is to amalgamate the units in order to get the advantage of a bigger and useful organization. On the other hand, to get rid of demerits of manageability, demerger is resorted to. Thus, mergers, demergers, reverse mergers, takeovers, joint ventures, strategic alliances, franchising, slump sale are the different strategies that forms part of corporate restructuring. Further, various aspects are to be examined such as valuation, funding, legal, procedural, taxation, stamp duty, accounting, competition as well as human and cultural synergies while under taking corporate restructuring.

Answer 1(b)

For the purpose of delisting of shares in a stock exchange the provisions of Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 need to be complied with. In the public announcement made pursuant to regulations 3, 4 or 5 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the acquirer need to publish intention of delisting.

In case approval of shareholders could not be obtained for delisting or offer for sale is not accepted by the shareholders as per the threshold limits under Regulation 17 of the Delisting Regulations or the acquirer rejected the discovered price – such failures need to be publicly announced by the acquirer. In case any counter offer is made, the acquirer is not entitled to delist and not liable to pay any interest for delay due to counter offer but is required to make a public announcement in newspapers within 2 working days.

Answer 1(c)

Mergers and amalgamations are not defined under the Companies Act, 2013, but the schemes submitted are in the nature of compromise and arrangement. Section 231(1) of the Act empowers the Tribunal to supervise the implementation of any such scheme of compromise or arrangement. The Tribunal may at the time of order or at any time, thereafter, may give such directions in regard to any matter, or make such modifications in the compromise or arrangement as it may consider necessary, for the proper implementation of the compromise or arrangement.

On the other hand, if the Tribunal finds to its satisfaction that the scheme could not be implemented even with modifications and the company is unable to pay its debts, the Tribunal may order winding-up of such company. Thus, dissatisfactory implementation of any scheme of compromise or arrangement may lead to the winding-up or liquidation and such an order shall be deemed to be an order made under section 273 of Companies Act, 2013.

Answer 1(d)

In terms of section 232(8) of the Companies Act, 2013, if a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than rupees one lakh but which may extend to rupees twenty-five lakh and every officer of such transferor or transferee company who is in default, shall be

punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than rupees one lakh, but which may extend to three lakh rupees, or with both.

Hence, a meticulous compliance needs to be undertaken in any proposal for a scheme of merger or amalgamation.

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

Question 2

(a) Internal accruals accumulate to reserves prompts management to venture more avenues through acquisitions or mergers but during and after the process, funds available internally are inadequate. Suggest available avenues to fund the bids for Takeovers and Mergers in addition to internal accruals. (5 marks)

(b) Persuasion Performers Ltd. has defaulted in payment of certain instalments of Bank Loan during the year 2012. On 17th October, 2016, Board passed a resolution to convene a general meeting to pass a resolution authorising Board to buy-back its shares to the extent not more than 20% of paid up capital and reserves. It is noted by the Board that the default to Bank was accidental and that has been made good by July 2013. The Extra-ordinary General Meeting has been scheduled for Friday 18th November, 2016. Can you help the Board as to legality of the proposal stating any other aspect to be looked, that prohibits buy-back of securities ? (5 marks)

(c) "Contracts entered into and in force need to be replaced by fresh contracts after merged or takeovers entities that have been integrated pursuant orders passed by Courts or Tribunals." Do you agree ? (5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) "Fairness, reasonableness and made in Good Faith are the premises on which the Judicial Authority approves any scheme for amalgamation, merger or demerger." Offer your comments supported by any judicial pronouncements.

(ii) Threshold limits triggering public announcement for acquiring shares in listed public Companies are not applicable in case of a listed company undergoing Corporate Insolvency Resolution Process (CIRP) in terms of Insolvency and Bankruptcy Code 2016 — explain indicating the threshold limits that can be ignored in case of CIRP ?

(iii) "Advocate may accompany a person summoned by the Director General in investigation under Competition Act, 2002." Briefly offer comments.

(5 marks each)

Answer 2(a)

Several modes are available to fund the mergers and takeovers, especially for an entity that has built-up balance sheet of robust financials. Further issue may be through equity shares either as rights, preferential or with differential rights. Cost of such funds is not fixed because more the revenue, more dividend can be given to shareholders.

Funds can also be borrowed by issuing instruments such as bonds and debentures. However, bond holders and debenture holders need to be paid coupon rates that is charged to revenue account. Further, borrowings can be made from banks and financial institutions that have fixed tenure. Merit of such funds coming under project finance is evaluated by banks or financial institution before extending finance. At the same time, one should also note that adoption of such process, in some cases, is an uninvited interference to dilute the management.In addition, default in payment of interest or instalment triggers the borrower as non-performing asset, which invites a case to be taken for insolvency under Insolvency and Bankruptcy Code, 2016.

The Company may borrow funds through the deposits from its directors, their relatives, business associates, shareholders and from public in the form of fixed deposits, external commercial borrowings (ECB) , issue of securities, loans from Central or State financial institutions, banks, rehabilitation finance, etc..

Answer 2(b)

Any default in payment of term loan, public deposits, and debentures becomes a hurdle in buy-back of securities. However, in the instant case, the default is remedied prior to 3 years of the proposal as stated in proviso to section 70(1)(c) of the Companies Act, 2013. Buy-back is also prohibited if done through any subsidiary or further subsidiaries down the line, through any sole or group investment companies and/or if there are failures in compliance of section 92 (annual return), sections 123 or 127 (distribution of dividends) or section 129 (financial statements) of the Companies Act, 2013.

In the given case the Company has default of payment of certain installments of the Bank was made good by July, 2013, and three (3) years has been passed before the passing of resolution by Board, So Company can go ahead for the Buy-back proposal.

Further, it is necessary to ensure debt to equity ratio is at least 1:2 post buy-back and shares ascribed for buy-back are fully paid-up. Process of buy-back need to be completed within 12 months of authorization. Shares bought back need to be destroyed within seven days of the last date of completion of buy-back.

Answer 2(c)

Legally speaking, orders of Court or Tribunal sanctioning scheme prevails and shall ensure that the contracts entered by the merging entity shall continue to be transferred in the name of merged entity from relevant date. However, other issues in the contracts with a third party may require company to inform about merger or may give rise to other party to terminate the contract. Normally lease agreements, that contain fixed tenure may release the landlord from such restriction in the event of restructure of lessee entity.

Further, the merged entity would need to check various rights and obligations spelt out in the contracts with third parties and should allocate teams to identify and ensure compliance of those requirements. In short, all existing contracts with its terms need revisit.

Answer 2A(i)

Any scheme which is fair, reasonable and made in good faith will be sanctioned if it could reasonably be supported by sensible people to be for the benefit to each class of

the members or creditors concerned. In *Sussex Brick Co. Ltd.*, Re, (1960) 1 All ER 772: (1960) 30 Com Cases 536 (CH D) it was held, inter alia, that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it.

It was further held that in order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies with the basic requirements to the extent of 100 per cent. It is the consistent view of the Courts that no scheme can be said to be fool-proof and it is the possible to find fault in a particular scheme but that by itself is not enough to warrant a dismissal.

Answer 2A(ii)

Regulation 3 of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 requires public announcement of making an open offer to acquire further shares if the acquirer along with 'persons acting in concert' hold less than 25% shares but, desires to acquire exceeding 25% shares by such further acquisition. In case, if already holding above 25% shares, any further acquisition above 5% in a financial year also requires public announcement.

However, the aforesaid threshold limits are of shares not applicable in terms of Securities and Exchange Board of India (Substantial Acquisition and Takeover) (Amendment) Regulation, 2018. As per the said amendment an explanation is added stating that any acquisition pursuant to a Resolution Plan approved under Section 31 of the Insolvency and Bankruptcy Code, 2016 is exempted, from the above mentioned compliances.

However, for indirect acquisition of shares or control (under Regulation 5 of SEBI (SAST) Regulations, 2011), where the 'target company' is to be controlled by 'persons acting in concert', the obligation for public announcement of an open offer gets attracted.

Answer 2A(iii)

As per the Competition Commission of India (General) Amendment Regulation, 2018 an advocate is authorized to accompany the person summoned by the Director General in investigation under the Competition Act, 2002. As per Regulation 46A, however, there are certain conditions. Such Advocate is not permitted unless a prior request in writing together with vakalatnama or power of attorney is made. He will not sit in front of the summoned person. During Examination on oath, he shall neither be in a hearing distance nor shall interact, consult, confer. There shall not be any misconduct on the part of such advocate. In case of any misconduct, if directed by the Commission, complaint may be forwarded to Bar Council of the concerned State, wherein the Advocate is a member.

Question 3

(a) *"Orders sanctioning amalgamation or absorption are covered by the Indian Stamp Act as if it were a Conveyance Deed." Justify the statement with judicial pronouncements.*

(b) *In cases of takeovers or demergers, dissenting shareholders have a right to voice a grievance — enumerate briefly the procedure.*

(c) *Rama Khadi Industries Ltd. is a fully owned subsidiary of Karishma Gramudyog*

Ltd. a State Government Company. The State Govt. took a policy decision to amalgamate the former with the latter. Illustrate briefly the steps to be taken in the matter.

(d) Several Credits Finance Company Ltd., a Non-Banking organisation is in the discussion for a merger with Hatak Bank Ltd., a scheduled Bank. Recommend the action points briefly.

(e) Saravana Synthetics Ltd. passed a resolution for reduction of capital that has been approved by the Tribunal. Being aggrieved on the valuation process employed Mr. Suman, a shareholder, holding about 4% of total capital, appealed against the said order. Will he be successful ? (3 marks each)

Answer 3(a)

'Conveyance' as is defined under section 2(10) of the Indian Stamp Act, 1899 refers to any instrument by which any moveable or immovable property is transferred inter vivos. Section 2(g)(iv) of the Bombay Stamp Act, 1958 specifically included orders under section 394 of Companies Act, 1956 that relates to amalgamation and absorption.

The landmark decision of Bombay High Court in *Li Taka Pharmaceuticals* v. *State of Maharashtra (1996) 8 SC 102 (Bom.)* has serious implications for mergers covered not just by the Bombay Stamp Act, 1958 but also mergers covered by Acts of other States. The following are the major conclusions of the Hon'ble Court:

(1) An amalgamation under an order of Court under Section 394 of the Companies Act, 1956 is an instrument under the Bombay Stamp Act, 1958.

(2) States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.

(3) Stamp duty would be levied not on the gross assets transferred but on the "undertaking", when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

Calcutta High Court has held in Emami Biotech Ltd (2012) with a similar view.

Answer 3(b)

As per section 235 of the Companies Act, 2013, the dissenting shareholders have been put at the limit of 10% of the value of the shares of the company. In case of listed companies, SEBI takes cognizance of even a single shareholder to initiate investigation for remedial action under SEBI (SAST) Regulations, 2011. In case of all companies, if promoters resort to take over under section 235 of the Companies Act, 2013, a transferee company, which has acquired 90% shares of a transferor company, through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders.

Dissenting shareholders have been provided with an opportunity to approach Tribunal. If the price fixed is not acceptable, even a single shareholder can approach National Company Law Tribunal to seek clarification and justice.

Answer 3(c)

In respect of compromise, arrangement or amalgamation of Government companies, it is not the Tribunal but the Central Government that approves such schemes. Unlike Companies Act, 1956, wherein approval by Central Government was pursuant to Section 621A of the said Act. Notification of Section 233 of the Companies Act, 2013 specifies the procedure for amalgamation etc. of certain companies that include Government companies. Section 233 has been made effective since December 2016 and relevant Rule 25 of Companies (Compromise, Arrangements and Amalgamations) Rule, 2016. Government has not come out with any new policy as stated under Section 237, hence existing policy prevails.

Answer 3(d)

In cases of scheme of merger by the Non-Banking Financial Company, approval needs to be obtained from National Company Law Tribunal, whereas the scheme by Banks need to obtain approval from Reserve Bank of India in accordance with the Master Directions by RBI, the banking Company need to ensure:

(a) The NBFC has not violated any RBI/SEBI norms;

(b) The NBFC complied with KYC of all its accounts holders;

(c) If it is found that the NBFC has any credit facilities from banks or financial institutions, whether the loan agreement mandate the NBFC to seek consent of the lending bank/financial institution for merger/amalgamation.

As per paragraph 17 of the Master Direction, to enable the Reserve Bank of India to consider the application for approval, the banking company shall furnish to the Reserve Bank of India, information as specified in the schedule to the direction (except certificate in respect of names of shareholders who gave notice in writing at or prior to the meeting to the NBFC that they dissented from the scheme of amalgamation) and also the information and documents relating to the valuation along with its computation and the quoted price details.

Answer 3(e)

Mr. Suman shall not be successful.

Resolution for reduction of capital is approved with requisite majority. Tribunal passed order of approval with proper reasoning. It was held in the matter of *Chander Bhan Gandhi* v. *Reckit Benckiser (India) Ltd. [2012] 107 CLA 511 (Del)* that in the absence of any fault in the reasoning of the Single Judge approving the reduction of capital, valuation of shares, the appeal by a sole shareholder is rejected. Merely determination of value of shares by some other method having a different conclusion is not a ground for appeal. [*Wartsila India Ltd* v. *Janak Mathuradas and other [2010] 99 CLA 463 (Bom)*]

PART B

Question 4

(a) "Fair Value of shares is in fact not fair but a compromise effort for bringing the parties to an agreement, just like sudden death in Hockey or Football". Justify with your views. (5 marks)

(b) *Management of a Company seeks your advice whether to go for sales in a nearby foreign country. They have furnished the following historical data :*

Units — 4,200, Wages — ₹12,600, Materials — ₹21,000, Fixed cost — ₹7,000, Variable cost — ₹2,100, Total — ₹ 42,700. Selling price in domestic market is ₹15. In the foreign land about 800 units may be sold only at ₹10 and additional 25 paise per unit will be expenses as freight etc. What would be your advice ? *(5 marks)*

(c) *Makeover More-growth Financials Ltd. is in the process of making Further Public Offer (FPO). Can you advise the Board on the precautions to be taken in fixing the price and price-band for the proposed FPO ?* *(5 marks)*

Answer 4(a)

Valuation is a complex task that requires several inputs not only tangible but also intangible data. There cannot be any method or formula to calculate fair value though it is possible to calculate book value, market value averaging quoted prices for certain period. However, efforts are made to ascertain fair value just like extension of play time in Hockey or Football in case of tie even in extra time. Resort to such valuation is done in case market value is independent of its profitability. Dividing the aggregate of values obtained through net assets method and yield method is the process to arrive at fair value. In another way the following well-known methods are applied to get fair value:

(a) The manageable profits basis method or the earning per share method;

(b) The net worth method or the break-up value method; and

(c) The market value method.

In nutshell, the methods most suitable to arrive at a reasonably fair conclusion is attempted.

Answer 4(b)

Before affording advice, we may compute the following:

	Domestic (4200 Units)	*Foreign (800 Units)*	*Total (5000 Units)*
Sales (Units x Price) (A)	63,000	8,000	71,000
Material (Rs.5 per unit)	Rs.21,000	Rs.4,000	Rs.25,000
Wages (Rs.3 per unit)	Rs.12,600	Rs.2,400	Rs.15,000
Variables (Rs.0.50 per unit)	Rs.2,100	Rs.400	Rs.2,500
Freight (Rs.0.25 per unit for foreign market)	---	Rs.200	Rs.200
Marginal Cost (B)	Rs.35,700	Rs.7,000	Rs.42,700
Contribution (A - B)	Rs.27,300	Rs.1,000	Rs.28,300
Less Fixed Cost	Rs.7,000	---	Rs.7,000
Overall Profit	**Rs.20,300**	**Rs.1,000**	**Rs.21,300**

From the above calculation, it can be concluded that accessing the foreign market enhances the overall profit to the Management.

Answer 4(c)

Board needs to be advised on the following precautions in fixing price or price band:

(a) In case of book building process, floor price or price band need to be stated in a red-herring prospectus and to determine later the price, before filing with ROC;

(b) Announce the price or price band at least five working days before opening the bid in case of IPO but in case of FPO at least one working day in all newspapers in which pre-issue advertisements got released as well as websites of stock exchanges in which listed;

(c) Announcements to specify financial ratios computed for upper and lower price band;

(d) The cap on price band shall be less than or equal to 120% of the floor price;

(e) The floor price or the final price shall not be less than the face value of specified securities involved in the Further Public Offer.

Question 5

(a) Paramhans Pharmaceuticals Ltd. is a listed company but the management decided to get the shares in the Company delisted from the stock exchange. The Directors desire to seek advice how to fix offer price. In the meantime Corporate Insolvency Resolution Process (CIRP) is initiated and a Resolution Plan has been resolved by the Committee of Creditors and awaiting approval of the Adjudicating Authority — Offer your advice. (5 marks)

(b) Brands build benefits of future business-inspect the statement with a view to dwell upon the importance of Brand valuation. (5 marks)

(c) "In comparison to demerger, slump sale is not generally tax efficient." Comment briefly with any case that had taken place. (5 marks)

Answer 5(a)

The problem stated in question has two scenarios – one is when the company is not a defaulter as per Insolvency and Bankruptcy Code, 2016 and the other is when it is in the Corporate Insolvency Resolution Process (CIRP). In case of former, offer price is determined through book building as per Securities Exchange Board of India (Delisting of Equity Shares) Regulations, 2009.

Final offer price shall be the price at which the maximum number of shares are tendered by equity holders. In case of latter, regulations were amended in 2018, the price shall be as per Tribunal approved Resolution Plan subject to that the price shall not be less than the liquidation value as determined by the Registered Valuer.

Answer 5(b)

Branding a product involves ascertaining product sustainability in the market. In order to protect the brands registration is done under several classes as per Trade

Marks Law. For a moment, think as to how much investment one has to make by means of money and other resources to adopt, develop and popularize a brand or a mark during the course of one's business. They create a value premium for the products and other services. Without a brand or mark, products and services are 'address less'. Brands connect markets with products and services and thereby they create value. Brands do not command any value unless they are able to bring cash flows to the company that has adopted the same. With increase in incremental cash flows, value of brand increases proportionately. Brands have to be constantly associated with good quality products and services. They require proper showcasing and servicing and they should remain active in appropriate markets.

Answer 5(c)

The statement is true since any undertaking being transferred, if held for more than 3 years prior to the date of the slump sale, the gains from such a sale would qualify as long-term capital gains, and the effective rate of tax would be 20%. If the undertaking had been held for 3 years or any period lesser than that, prior to the date of slump sale, then the income would be taxable as short-term capital gains, the effective rate of which is currently 30%. Also, any distribution by the company to its shareholders could attract dividend distribution tax. This did not however, prevent the acquisition of Formulation Business from Piramal Health Care Ltd. by Abbott Healthcare Private Limited in 2010.

PART C

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

Question 6

(a) "Default by Debtor was a crime punishable with imprisonment or death" — forgotten preception in the Law of Bankruptcy, transformed the phrase by giving opportunity to a Bankrupt or Insolvent for revival — express your views on evolution of Insolvency Law in Britain and U.S.A. ?

(b) Progress of enforcement of Insolvency and Bankruptcy Code, 2016 depends on four pillars apart from the Adjudicating Authorities — briefly state the role of such pillars.

(c) Samadhan Assets Management Company Ltd. is an Asset Reconstruction Company duly registered by the Reserve Bank in India. However, registration of the AMC is cancelled. The directors of the Co. seek your advice on their rights and obligations.

(d) Perfect Polyesters Ltd. is undergoing Corporate Insolvency Resolution Process as per Insolvency and Bankruptcy Code, 2016. Committee of Creditors is constituted. In the meantime, a Corporate Debtor — Perfect Polyesters Ltd. made a settlement with the applicant financial creditor and desires to get the application withdrawn and seeks your advice. *(5 marks each)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) In the "Resolution Process", define the functions of Insolvency Professionals. Is their contribution being noticed ?

(ii) *UNICITRAL Model Law is binding on member countries but at the best obiter dicta for Courts of the Member Countries' dealing in disputes relating to Cross Border Insolvency and International Trade — elucidate.*

(iii) *"Appointment of Voluntary Liquidator does not require approval of Tribunal but Company can be dissolved on the orders of National Company Law Tribunal." Discuss the above in the background of initiation of voluntary liquidation and consequent dissolution of a company.*

(iv) *"Banks and Financial Institutions do have a free hand to take possession of assets of a defaulting debtor under Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002." Are there any exceptions under that Act ?* *(5 marks each)*

Answer 6(a)

The statement today is a forgotten perception. First Bankruptcy Law enacted in England in 1542 wherein debtor was looked upon as if an offender, and the Law was mainly for the benefit of creditors. The erstwhile law was providing equal distribution of debtor's assets among creditors yet not relieving the debtor from punishment. However, at present, UK Insolvency Act, 1986 is prevalent to deal with insolvencies of individuals and companies. Opportunity is given to revive the company to emulate the 'rescue' culture that characterised the Corporate Sector in U.S.A.

Early bankruptcy laws in USA were draconian as were in England. Bankruptcy Abuse Prevention & Consumer Protection Act, 2005 in USA attempts to overhaul earlier Codes with specific reference to consumer protection, restoring personal responsibilities and integrity in the Bankruptcy system.

In USA, Chapter 11 bankruptcy proceedings are considered as re-organisation/ resurrection process for corporates. Companies, while remaining operational, are permitted to restructure their debt obligations.

In India also with promulgation of Insolvency and Bankruptcy Code, 2016, debtor is given revival opportunity before liquidation.

Answer 6(b)

Insolvency and Bankruptcy Board of India (IBBI), Insolvency Professional Agencies (IPA), Insolvency Professionals (IP) and Information Utilities (IU) are the four pillars for the progress and implementation of Insolvency and Bankruptcy Code, 2016. Adjudicating Authorities are National Company Law Tribunal (NCLT) in case of Companies and Limited Liability Partnerships and Debt Recovery Tribunal (DRT) in case of Individuals and Partnerships firms.

IBBI functions with a Chairman, 3 Central Government Officials, 1 RBI ex-officio and five members including 3 whole-time members as nominated by Central Government. IBBI is entrusted with framing regulations for Insolvency and Bankruptcy matters, setting eligibility and registering intermediaries i.e. IPA, IP and IU as well as monitoring those intermediaries.

IPAs are registered bodies to enrol Insolvency Professionals (IPs) before registration with IBBI. IP is entrusted with Corporate Debtor to frame Resolution Plan for revival

through Committee of Creditors. IU is to keep records of liabilities relating to debtors, creditors electronically.

Answer 6(c)

On receiving the communication from Reserve Bank of India as to cancellation of Registration, the Asset Reconstruction Company (ARC), if aggrieved may appeal to Central Government within thirty days of receipt of any such order. However, the said company has obligation to repay the entire investments held by it together with interest. Till such time it will be deemed to be recognised as a Reconstruction Company for the investments held by it on behalf of qualified buyers. Repayment needs to be made within such period as may be permitted by the Reserve Bank of India in the 'Order of Cancellation' of registration.

Answer 6(d)

Prior to the amendment made in 2018 in the Insolvency and Bankruptcy Code, 2016, there was no provision for withdrawal of Corporate Insolvency Resolution Process (CIRP) once the Adjudicating Authority admits the application. Section 12A of the Code has been inserted as per Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 enabling the Adjudicating Authority to permit withdrawal if consented by ninety per cent voting share of Committee of Creditors. Procedure is to be followed in terms of Regulation 30A of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Thereafter, the Corporate Debtor makes an application in Form FA to Resolution Professional and a Bank Guarantee for consideration by Committee of Creditors within 7 days and subsequently to Tribunal for approval.

Answer 6A(i)

Under Section 3(19) of Insolvency and Bankruptcy Code, 2016, Insolvency Professional (IP) means a person enrolled under Section 206 of the Code with an Insolvency Professional Agency as its member and registered with the IBBI under section 207 of the Code. The Code provides for IP as intermediaries who would play a key role in the efficient working of the insolvency and bankruptcy process.

The functions performed by Insolvency Professionals are:

i) Conducting Resolution Process;

ii) Conducting Meeting of Creditors;

iii) Management of operations of corporate debtor as going concern;

iv) Preparation of Information Memorandum;

v) Submission of resolution plan; and

vi) Conducting of Liquidation process under the order of Adjudicating Authority if the resolution plan is not accepted or approved, etc.

The contribution of IPs has become significant and Professional Bodies are imparting Training such that more IPs come to this profession. The contribution has just been initiated, but the role shall be greater and more prominent in future for IPs.

Answer 6(A)(ii)

Obiter dicta refers to opinion expressed in a court by the Judge but not essential to the decision and hence is not binding. Thus the statement emphasizes to adopt the law as legislation in member countries but not binding on courts unless incorporated in a legislation. Framing of UNCITRAL Model Law is necessitated due to:

a) Global expansion of trade and investment;

b) Inadequate and inharmonious legal approaches due to difference in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of the assets of the insolvent debtor against dissipation;

c) Increasing incidences of cross border insolvency due to integration of trade across countries;

d) National insolvency laws of different countries have by and large not kept pace with the trend.

Main thrust of the Model Law is to achieve fair and efficient administration of cross border insolvencies protecting the interest of every stakeholder.

Answer 6(A)(iii)

Provisions relating to voluntary liquidation are contained in section 59 of the Insolvency and Bankruptcy Code, 2016 and IBBI (Voluntary Liquidation Process) Regulations, 2017 that have come into effect on 1st April, 2017. The relevant sections of the Companies Act, 2013 relating to members or creditors winding-up has been deleted since then.

A resolution passed by special majority appointing none other than an Insolvency Professional as voluntary liquidator begins the initiation. Directors need to file a declaration of solvency at least 30 days prior to passing the resolution. In case there remains any creditors, 2/3rds in value of creditors should approve the resolution passed earlier within next 7 days. The resolutions need to be filed within next 7 days with ROC. The Insolvency Professional needs to be independent of corporate debtor. After realization and distribution, the voluntary liquidator files report before the Tribunal as per section 59(8) of the Code for dissolution.

Answer 6(A)(iv)

It is true that there are certain exceptions. Section 31 of the SARFAESI Act, 2002 specifies that none of the provisions will be applicable in the following instances:

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;

(b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;

(c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;

(d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;

(e) any rights of an unpaid seller under section 47 of the Sale of Goods Act, 1930;

(f) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908;

(g) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;

(h) any security interest created in agricultural land;

(i) any case in which the amount due is less than twenty percent of the principal amount and interest thereon.

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