GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2019

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(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.

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PROFESSIONAL PROGRAMME EXAMINATION

JUNE 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) Rigid Limited during an Internal Audit in March 2019 noticed the following :

(a) A charge for the mortgage of company's lands in Chennai created on 1st October 2018 in favour of the company's Bankers against a term loan of ₹20 crore, has not been registered till date.

(b) The company has failed to register the charge on its Administrative Buildings to cover a loan of ₹25 Crore created on 5th November 2018 in favour of LIC.

Advise the Board of the Company on the remedial action. (5 marks)

(b) Dynamic Limited, a Company registered in India, has a wholly owned subsidiary M Inc registered in USA. M Inc has further layers of wholly owned subsidiaries N Inc and P Inc, all registered in USA.

Advise the Company on the following :

(a) N Inc wants to exit their holdings in P Inc and take over Q Inc as a wholly owned subsidiary.

(b) Dynamic Ltd. wants to mirror image a similar set up in France. Advise the feasibility of creating such layers of subsidiaries in France. (5 marks)

(c) Comment, if in the following cases, the person concerned will be disqualified to be appointed as a director of a public limited company :

(a) Ram has an application pending for adjudication as an insolvent and the application is not yet decided by the authority.

(b) Govind was convicted for an offence, not involving any moral turpitude, and sentenced to imprisonment for a term of 8 years, but a period of more than 5 years has elapsed from the expiry of the sentence.

(c) Raja has not paid the final call on 10,000 equity shares held by him in the Company so far. The company had fixed 31st May, 2019 as the last date for the payment of the call money.

(d) Keshav, who was a director in another company previously, had contravened the provisions relating to related party transactions and was convicted during 2017.

(e) Prakash holds directorship in a total of 15 companies as on date comprising of 9 public companies, 2 private companies which are subsidiaries of a public company and 4 private companies. (5 marks)

(d) Elegant Ltd., engaged in the retailing of petroleum products sourced from the national oil companies, sells petrol and diesel, in addition to other outside customers, to the companies in which the directors of the Company hold directorship. The total value of supplies made to such companies during the year 2018-19 amounted to ₹125 Crore. This forms 12% of the annual turnover of Elegant Ltd.

Explain the compliance requirements for Elegant Limited assuming : (i) The products are sold by Elegant Limited to those companies at the market price announced by the oil marketing companies and (ii) Elegant Ltd. provides a discount of 10% on such market price on its sale to only those companies and not to others. (5 marks)

Answer 1(a)

(a) As per section 77 of the Companies Act, 2013, as amended by the Companies (Amendment) Second Ordinance, 2019 w.e.f. 02.11.2018, In respect of a charge created before 02.11.2018, the registration of the charge is to be done within a time limit of 30 days from the date of creation of the charge, upon payment of normal fees. If not registered within the said period of 30 days from the date of creation of charge, a further period of 270 days, beyond such initial 30 days, is allowed to the registrar to accept registration of the charge upon payment of additional fee as may be prescribed. If a company fails to register the creation of charge, even within the above 300 days from the date of creation of the charge, the ROC may, register the charge, within a further time of 6 months from the commencement of the ordinance i.e., 02.11.2018, on an application from the company, subject to payment of additional fee as may be prescribed. In this case, Rigid Ltd has created charge on 01.10.2018 i.e. before commencement of Companies (Amendment) Second Ordinance, 2019. Since six months from commencement of the said ordinance falls due on 2nd May 2019, and 300 days from the creation of the charge falls due on 27.07.2019, the company, should get the charge registered within 300 days i.e. latest by 27.07.2019 with payment of additional fee. In case the company doesn't get the charge registered before 27.07.2019, the company and its every officer in default shall be liable for a penalty under section 86 of the Companies Act, 2013.

(b) In terms of Section 77(1) of the Act, as amended by Companies (Amendment) Second Ordinance 2019, in respect of a charge created on or after 02.11.2018, the registration is required to be done within a time limit of 30 days from the date of creation of charge, upon payment of normal fee. A further period of 30 days, beyond the initial period of 30 days is allowed upon payment of additional fee as may be prescribed. However, if the company still fails to register within the above 60 days from the date of creation of charge, a further period of 60 days is allowed subject to payment of such advalorem fee as may be prescribed. Accordingly, the charge created on 05.11.2018 should have been registered by Rigid Ltd with payment of advalorem fees by 05th day of March, 2019 i.e. 120 days from the creation of the charge. As the company has failed to register the

charge within the overall maximum period of 120 days from the date of creation of charge, as prescribed under Section 77(1) of the Act, the company and its every officer in default, shall be liable for penalty prescribed under Section 86 of the Act.

Answer 1(b)

Section 186(1) of the Act read with Rule 2 of the Companies (Restriction on number of layers) Rules, 2017, prohibits a company from having more than two layers of subsidiaries. Further, every company existing on or before the commencement of these rules, which has number of layers in excess of two shall file with the registrar a return in form CRL-1 and shall not after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date. Also, the company, in case one or more layers of its subsidiaries are reduced by it subsequently to the commencement of these rules, shall retain the layers after such reduction subject to maximum of two layers. Further, second proviso of rule 2 of Companies (Restriction on number of layers) Rules, 2017 provides that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

Applying the above provisions, M Inc., being wholly owned subsidiary of Dynamic Ltd. shall not be counted into a layer, under the aforesaid provisions of the Companies (Restriction on number of layers) Rules, 2017.

(a) Excluding M Inc. the wholly owned subsidiary, Dynamic Ltd. Has only two layers of subsidiaries i.e. N Inc. and P Inc. Hence, N Inc. can exit from P Inc. and take over Q Inc. while being compliant with the applicable provisions.

(b) And yes, it can create such layers of subsidiaries in France also, if it is permitted under the local laws of France, as long as the number of layers of subsidiaries as computed under Section 186(1) read with Rule 2 of Companies (Restriction on number of layers) Rules, 2017 doesn't exceeds more than 2 layers.

Answer 1(c)

Section 164 of the Companies Act, 2013 provides disqualification for Appointment of Director resulting a person is considered as disqualified for his appointment as a director of the company. Accordingly,

(a) A person who has applied to be adjudicated as an insolvent and his application is pending shall be disqualified. Therefore, Ram is disqualified from appointment.

(b) A person who has been convicted for an offence, whether or not involving moral turpitude and sentenced for more than 7 years cannot be appointed even after the lapse of 5 years from the expiry of the sentence, shall be disqualified. Hence, Govind is disqualified.

(c) A person who has not paid the calls on shares due and a period of 6 months have elapsed from the due date fixed for payment, shall be disqualified. In this case, since a period of 6 months has not yet elapsed from the due date fixed for payment of call money, which is 31st May 2019 and therefore, Raja is not disqualified.

(d) A person who has contravened the provisions of section 188 and has been convicted any time during the last 5 years shall be disqualified. Keshav was

convicted for violation of section 188, during 2017 which is within preceding 5 years and is therefore disqualified.

(e) Section 165 provides that the maximum number of companies in which a person can be a director shall not exceed 20 companies in which public companies should not be more than 10. Private companies that are subsidiaries of public companies shall be treated as public companies for this purpose. Accordingly, Prakash, who is a director in 11 public companies shall be disqualified to be so appointed in another public company.

Answer 1(d)

Section 188 of the Companies Act, 2013, read with Rule 15(3) of the Companies (Meetings of the Board and its powers) Rules, 2014 provides that where the related party transaction in a financial year for sale or supply of goods, materials exceeding Rs. 100 crores or 10% of the turnover of the company, whichever is lower, such contract shall not be entered except with the consent of the Board of Directors given by a resolution at a meeting of the Board and prior approval of the company by a resolution passed at a General Meeting. The 4th proviso to the Section 188(1) further provides that where the transaction is entered into in the ordinary course of business and the transactions are at arm's length basis, the provisions of Section 188(1) shall not apply to such transaction.

(i) In the given case, Elegant Ltd has crossed the threshold limit of the transaction by way of sale of petroleum products for Rs. 125 crore which forms 12% of its turnover. However, then such petroleum products are sold, in the ordinary course of business at arm's length prices, i.e. without offering any discount at the market price fixed by the oil marketing companies. Accordingly, the provisions of Section 188(1) shall not apply to this transaction and such transactions could be done as any other routine business transaction.

(ii) In the given case, Elegant Ltd is allowing a discount of 10% to such related parties, and therefore the transaction cannot be considered to be at arm's length. Moreover, the value of Transaction with such related parties during the financial year is more than the limit prescribed under Rule 15(3) of the Companies (Meetings of the Board and its powers) Rules 2014, being 10% of the turnover and hence, consent of the Board of Directors given by a resolution at a meeting of the Board and prior approval of the company by a resolution passed at a General Meeting is required for entering into each of such contract.

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

Question 2

(a) Alpha Ltd, during the regular audit, ascertained the following contraventions during the financial year 2018-19, which have not been rectified till date :

(a) The annual returns and financial statements for the year ended March 2018 have not been filed with the Registrar.

(b) Cumulative debentures amounting to ₹5 crore which became due for redemption during March 2019 were not redeemed.

(c) Charge created on the factory premises in June 2018 was not registered with the Registrar.

The Company proposes to change its name from Alpha Ltd. to Gama Limited. Advise on the feasibility. (4 marks)

(b) Tarun deposited ₹1,00,000 in April 2018 with F Ltd., an unlisted public company carrying on manufacturing operations for a term of 3 years. Tarun seeks your advice on the following :

(a) Tarun has an emergency in November 2018 at home for which he needs the above funds immediately. Can he get back the money without any deductions?

(b) During December 2018, F Ltd. was issued a notice by the Reserve Bank of India declaring the deposit scheme invalid as F Ltd. had paid brokerage in excess of the limits prescribed by RBI. Can Tarun be paid back the whole amount of deposit with accrued interest without any deduction ? (4 marks)

(c) Crown Limited during the course of statutory audit, found that Dinesh, their whole time director whose managerial remuneration was approved at ₹100 lakh per annum has drawn remuneration amounting to ₹125 lakh during the financial year 2018-19. Dinesh does not want to refund the excess remuneration drawn by him and the company is also keen to waive the recovery of the sum refundable by Dinesh. The company has defaulted in all the instalments of term loan recoverable by them during the year amounting to ₹50 lakh. Advise the company on the course of action. (4 marks)

(d) Examine whether the following companies can be considered as Foreign Companies under the Companies Act, 2013 :

(i) A Company which is incorporated outside India employs agents in India but has no place of business in India.

(ii) A Company incorporated in India but all the shares are held by foreigners. (4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Pluto Limited has a paid-up equity share capital of ₹10 crore comprised of :

(a) 80 lakh equity shares of ₹10 each fully paid up

(b) 40 lakh equity shares of ₹10 each on which only ₹5 per share is paid up.

The company wants to pay dividend in proportion to the amount paid up, even though the articles of the company is silent on this, Is it tenable ? (4 marks)

(ii) Narrate the eligibility conditions for appointment of auditors under the Hong Kong Companies Ordinance. (4 marks)

(iii) Decide, quoting the relevant provisions, if the following shareholders of Minimum Ltd. fall under the definition of Significant Beneficial Owner :

(a) Lakshman holds 12 % of the equity share capital in Minimum Limited, as a sole shareholder;

(b) C Ltd. holds 20% of the equity share capital of Minimum Limited. Krishna

holds 75% of the equity share capital in C Limited while Guha holds the balance 25% equity in C Ltd.

(c) Ashok is the trustee of a Charitable Trust , which holds 20% of equity share capital in Minimum Limited. *(4 marks)*

(iv) Fresh Limited wants to extend a loan of ₹2 crore to High Private Limited. Harihar, a director of Fresh Limited is also a director in High Private Limited. Is it feasible? *(4 marks)*

Answer 2(a)

Rule 29 of the Companies (Incorporation) Rules, 2014 provides that the change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the registrar or which has failed to pay or repay matured deposits or debentures and interest thereon. The proviso to the rule states that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon, as the case may be.

In the instant case, Alpha Ltd has defaulted in filing of annual returns and financial statements for the year ended March, 2018 with the Registrar and also the redemption of debentures which were due for redemption during March, 2019. Hence, in terms of the above referred rule 29 the company will be allowed to change its name from Alpha Limited to Gama Limited only after the ratification of such contraventions.

However, non-filing of charge is not covered under the above referred rule 29 and hence the application for change of name can be proceeded with, even before filing for registration of the charge.

Answer 2(b)

Rule 15 of the Companies (Acceptance of Deposits) Rules, 2014 provides that where a company makes a repayment of the deposits on the request of the depositor, after the expiry of 6 months but before the expiry of the period for which such deposits was accepted, the rate of interest payable on such deposit shall be reduced by the one percent from the rate which the company would have paid had the deposits been accepted for the period for which it has actually run and the company shall not pay interest at any rate higher than the rate so reduced.

(a) Since, Tarun is seeking a withdrawal of his Deposit after expiry of six months from the date of deposit, he is entitled to get an interest @ 1% less than the rate which the company would have paid had the deposits been accepted for the period for which it has actually run.

(b) The above provision will not apply where the company is forced to refund the deposits due to non-compliance with the provision of rule 3, which includes the limit of the brokerage to be paid as fixed by the Reserve Bank of India. As F Ltd has violated the maximum rate of brokerage fixed, the company has to return the deposits without any deduction in the interest rate of amount.

Answer 2(c)

Section 197(9) and (10) of the Companies Act, 2013, provides that where any director has received remuneration in excess of the limit prescribed under this section, he shall

refund such sums to the company within two years or such lesser period as may be allowed by the company. The company cannot waive the recovery of any such sum refundable unless approved by the company by special resolution within two years from the date the sum becomes refundable. Further where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of such bank or financial institution or the debenture holder or the secured creditor as the case may be, shall be obtained by the company before obtaining the company approval in the general meeting. Therefore, the Crown Ltd. has to take an approval from the lender to whom the loan instalments are due and thereafter also obtain the approval of the company in general meeting for such waiver.

Answer 2(d)

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

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

(i) Since in the given case, the company mentioned herein satisfy only one condition. It is not a foreign company until it starts business activities in India.

(ii) A company incorporated in India but having all the foreign shareholders will be an Indian Company as defined under Section 2(20) of the Act. Hence such company is not a foreign company u/s 2(42) of the Act.

Answer 2A(i)

Section 51 of the Companies Act, 2013 provides that a company may, if so authorised by its articles, pay dividends in proportion to the amount paid- up on each share. The section allows a company to pay dividends in proportions to the amount paid-up on each share, when they are not uniformly paid up.

In the instant case, Pluto Ltd has equity shares that are not uniformly paid up. But, the articles of association of the company is silent as to whether dividends can be paid on pro rata basis. Hence, Pluto Ltd cannot pay dividend in proportion to the amount paid up, unless the articles of association of the Pluto Ltd expressly provide for such pro rata payment.

Answer 2A(i)

The following are eligible conditions for appointment of auditor, under the Hong Kong Companies Ordinance:-

Only a practice unit is eligible for appointment as auditor and the following are disqualified for appointment as auditor:-

(a) A person who is an officer or employee of the company

(b) A person who is a partner or employee of a person mentioned in (a) above

(c) A person who is:

(i) by virtue of (a) and (b) above, disqualified for appointment as auditor of any other undertaking that is a subsidiary undertaking or a parent undertaking of the company or is a subsidiary undertaking or parent undertaking of the company or is a subsidiary undertaking or parent undertaking or

(ii) Would be so disqualified if the undertaking were a company.

(d) Auditor must be appointed for each financial year.

Answer 2A(iii)

(a) According to Rule 2(1) (e) of the Companies (Significant Beneficial Owner) Rules, 2018, to be a SBO the name of SBO should not be in the Registered of Member. In this case Lakshman is holding 12% of the equity share capital as a sole shareholder in his own name. Therefore, he does not fall under the definition.

(b) According to Explanation I (i) to Rule 2(1)(e) of the Companies (Significant Beneficial Owner) Rules, 2018, where the member is a company, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. share capital of the company or who exercises significant influence or control in the company through other means.

In present case, Krishna who holds 75% of the equity capital in C Ltd is indirectly holding 15% (75% of 20%) in Minimum Ltd as C Ltd holds 20% of the equity share in Minimum Ltd and hence, he is a significant beneficial owner.

Guha who holds only 25% in C Ltd is indirectly holding 5% (25% of 20%) in Minimum Ltd as C holds 20% equity share capital in C Ltd hence he is not a significant beneficial owner.

(c) Accordingly to Explanation I (iv) to Rule 2(1)(e) of the companies (Significant Beneficial Owner) Rules 2018, where the member is a trust (through trustee), the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with not less than ten per cent. interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership,

Ashok, the Trustee of a charitable trust that holds 20% equity in Minimum Ltd falls under the definition of significant beneficial owner.

Alternate Answer

Companies (Significant Beneficial Owners) Amendment Rules, 2019

Rule 2(h) of the Companies (Significant Beneficial Owner) Amendments Rules 2019 defines the term significant beneficial owner in relation to a reporting company as an individual, who acting alone or through one or more persons or trust possesses one or more of the following rights or entitlements in the reporting company –

a. Holds indirectly or together with direct holdings not less than 10% of shares

b. Holds indirectly or together with direct holdings not less than 10% of voting rights in shares.

c. Has a right to receive or participate in not less than 10% of the total distributable dividend or any other distribution in a financial year through indirect holdings along or together with any direct holdings.

d. Has a right to exercise or actually exercises significant influence or control in any manner other than through direct holdings alone.

Further:

(i) in terms of Explanation I and Explanation II (i) to Rule 2(h) of the Companies (Significant Beneficial Owner) Rules 2018, if the shares in the reporting company representing such right or entitlement are held in the name of the individual then such individual shall not be considered to be SBO.

(ii) in terms of Explanation III(i)(a) to Rule 2(h) of the Companies (Significant Beneficial Owner) Rules 2018, where the member of the reporting company is a body corporate (whether incorporated in Indian or not), then the significant beneficial owner shall be such natural person, who holds majority stake of that member

(iii) in terms of Explanation III(iv)(a) to Rule 2(h) of the Companies (Significant Beneficial Owner) Rules 2018, where the member of the reporting company is a Charitable trust (through trustee), the individual who is the Trustee in case of a Charitable Trust, shall be considered to be the SBO.

Accordingly:

(a) Lakshman is holding 12% of the equity share capital in the reporting company in his own name and therefore cannot be considered as SBO.

(b) Krishna who holds 75% of the equity capital, i.e. is a majority stakeholder in C Ltd which is a member of Minimum Ltd and hence Krishna is a significant beneficial owner. Guha who holds only 25% and not a majority stake, does not fall under the definition.

(c) Ashok, the trustee of a charitable trust that holds 20% equity in Minimum Ltd falls under the definition of significant beneficial owner.

Answer 2A(iv)

Section 185(2) of the Companies Act, 2013 provides that a company may advance any loan to any person in whom any of the directors of the company is interested subject to –

a. passing of a special resolution by the company in general meeting and the explanatory statement in the notice for the relevant general meeting shall indicate the full details of the loan and the purpose for which the loan is to be utilized by the recipient of the loan and

b. The loan is utilized by the borrowing company for its principal business activities.

For the purpose of these provisions the term, “Any person in whom any of the directors of the company is interested” includes any private company of which any such director is a director or member.

Accordingly, Fresh Ltd can extend loan of Rs. 2.00 crores to High Private Ltd., in which Harihar is a common director, subject to the fulfilment of the above referred conditions of Section 185(2).

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

Question 3

(a) The Board of Directors of Fast Limited decided at their first Board meeting that every year, the board meeting shall be scheduled on the four dates, viz. 10th April, 10th July, 10th September and 10th January, with a view to enable the directors to plan their other activities. This was unanimously agreed to by all the directors and was recorded in the minutes of the meeting.

(i) Rahul, the Company Secretary of the Company took a position that no notice for the Board Meeting is required to be issued in view of the above arrangement agreed in the first board meeting. Is it tenable ?

(ii) An item business not included in the agenda item was taken up by one of the directors. Can Rahul refuse to take it up for discussion ?

(b) You are appointed by Crook Limited to conduct Secretarial Audit for the year ended March, 2019. During the course of the audit, you encounter certain transactions that make you believe that an offence of fraud involving an amount of ₹2 crore has been committed in the company by its officers and employees. Explain the action required from your side to comply with the Act.

(c) Growth Limited has designed an Employee Stock Option Scheme and has formed a trust for the purpose of executing the scheme. The Company seeks your advice on the conditions to be complied for providing necessary funds to the trust for purchasing the shares in the Company. Advise.

(d) Modest Limited, a listed company with more than 5000 shareholders, wants to send the notice of the ensuing Annual General Meeting to all its shareholders by e-mail. Advise the Company on the compliance points to be addressed in this regard. *(4 marks each)*

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on the following :

(i) Bonus debentures

(ii) NFRA's role to enhance quality of audit profession

(iii) Omnibus approval of RPT

(iv) Public Vs. Private Trusts. *(4 marks each)*

Answer 3(a)

(i) Section 173 of the Companies Act, 2013, which deals with board meetings and the requirement of notice to be given for a board meeting to be convened, is silent on the above situation. However, Secretarial Standards (SS-1), which deals with the best practices for a board meeting provides specifically under clause 1.3.5 that the notice of the meeting shall be given even if meetings are held on pre-determined dates or at pre-determined intervals. In view of the above,

Rahul cannot take a position that no notice for the board meeting is required in the instant case. A notice has to be issued for every meeting even though the dates of the meeting have been pre-determined and agreed to by all the directors.

(ii) Clause 1.3.10 of the SS-1 further provides that any item of business not included in the agenda may be taken up for a consideration with the permission of the chairman and with the consent of a majority of the directors present in the meeting, which shall include at least one independent director, if there is one. Thus, where majority of the directors including one independent director consent to the inclusion of the subject and the chairman has no objection, Rahul cannot refuse to take up the subject to discussion.

Answer 3(b)

Section 143 of the Companies Act, 2013 read with Rule 13 of the Companies (Audit and Auditors) Rules, 2014 provides that where an auditor in the course of an audit of a company has reason to believe that an offence of fraud, which involves or is expected to involve, individually an amount of Rs. 1 crore and above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government in the following steps-

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

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

(iii) In case, he fails to get any reply or observations as above, he shall forward his report to the Central Government along with a note containing details of his report that was forwarded to the Board or the Audit Committee. The report to Central Government shall be in the form of a statement as specified in e-form ADT-4.

As per Section 143(14)(b) of the Act, the above referred provisions of Section 143 apply mutatis mutandis to the cost audit conducted by a secretarial audit conducted by a company secretary.

Answer 3(c)

Rule 16 of the Companies (Share Capital and Debentures) Rules, 2014 provides for the following conditions to be complied with when a company wants to provide funds to the trust for purchasing the shares of the Company for the purpose of ESOP-

a. The scheme for the provision of money for purchase of or subscriptions of shares is approved by the members by passing a special resolution.

b. Such purchase of shares shall be made only through recognized stock exchange in case the shares are listed and not by way of private offers or arrangements.

c. Where shares of the company are not listed, the valuation at which shares are to be purchased shall be made by registered valuer.

d. The value of shares to be purchased or subscribed in the aggregate together with the money provided by the company shall not exceed 5% of the aggregate paid-up share capital and free reserves of the company.

e. The explanatory statement to be annexed to the notice of the meeting for passing special resolution shall contain particulars of the class of employees for whose benefits the scheme is being implemented and the particulars of the trustee or employees in whose favour such shares are to be registered.

Answer 3(d)

According to Rule 18 of the Companies (Management and Administration) Rules, 2014 the following are the conditions to be complied with when Modest Ltd wants to send the notice of the ensuing AGM to all its shareholders by email-

a. The email shall be addressed to the person entitled to receive such email as per the records of the company as provided by the depository.

b. The company shall provide an advance opportunity at least once in a financial year, to the member to register his email address and changes therein and such request may be made by only those members who have not got their email id recorded or to update a fresh email id and not from the members whose email ids are already registered.

c. The subject line in email shall state the name of the company, notice of the type of meeting, place and date on which the meeting is scheduled.

d. The company should ensure that it uses a system which produces confirmation of the total number of recipients emailed and a record of each recipient to whom the notice has been sent as well as failed transmissions and subsequent resending shall be retained by the company as proof of sending.

e. If a member entitled to receive notice fails to provide or update relevant email address to the company or the depository participant, the company shall not be in default for not delivering the notice.

f. The notice shall be simultaneously placed on the website of the company and on the website as may be notified by the Central Government.

g. The company may send the email through in house facility or it's registrar and transfer agent or authorize any third party agency providing bulk email facility.

Answer 3A(i)

Companies which have adequate build-up of reserves and surplus can issue debentures to the existing shareholders, free of cost, redeemable at the end of stipulated period as bonus debentures. Such debentures shall be eligible for interest at stipulated rate, payable periodically as spelt out in the scheme.

The debenture could be listed in any stock exchange to provide liquidity to the owner of the debenture.

The companies Act does not contain any provisions relating to issue of bonus debentures. Hence the scheme shall be an arrangement to be approved by the

shareholders, SEBI, MCA, Tribunal and RBI. Therefore, the process of issue of bonus debentures could be time consuming.

The major advantages of the scheme are-

There is no dilution in equity value, as in the case of bonus share and hence the promoters would welcome the scheme. As equity gets reduced due to transfer of reserves to debentures, the return on equity could improve. The interest payable on debentures would be an expense deductible for the purpose of tax by the company.

However, the company has to pay dividend distribution tax as this will be considered as deemed dividend and the individual will also be subject to tax on deemed dividend if the value of debentures allotted exceeds Rs. 10 lakhs. The interest on debentures receivable by the owners of the debentures will be taxable as interest income.

Answer 3A(ii)

According to Section 132(2) of the Companies Act, 2013, the National Financial Reporting Authority shall—

(a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;

(b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;

(c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and

(d) perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.

According to Section 132(4) of the Companies Act 2013, the National Financial Reporting Authority shall have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.

Answer 3A(iii)

Section 177 of the Companies Act, 2013 read with Rule 6(A) of the Companies (Meetings of Board and its Powers) Rules, 2014 provides for omnibus approval of the related party transactions by the Audit Committee (instead of approval on a case to case basis) subject to the following conditions-

a. The Audit Committee shall state the criteria for making the omnibus approval which shall include maximum value of the transaction in aggregate which can be allowed under the omnibus route in an year; the maximum value per transaction; extent and manner of disclosures to be made to the Audit committee at the time of seeking omnibus approval; review of the transactions at such intervals as the committee may deem fit; transactions which cannot be subject to omnibus approval.

b. The Audit Committee shall consider factors like repetitiveness of the transaction in the past or in the future and justification for the need of omnibus approval.

c. The Audit Committee shall satisfy itself on the need for omnibus approval for transaction of repetitive nature and that such approval is in the interest of the company.

d. The omnibus approval shall indicate – the name of the related parties, nature and duration of the transaction; maximum amount of the transactions; indicative base price with formula for variation in price if any

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

f. Omnibus approval shall not be made for transaction in respect of selling or disposing of the undertaking of the company.

Answer 3A(iv)

Public trust is constituted for the benefit of public at large or some portion of it having a particular description. They are of a permanent and indefinite character and not confined to any limits prescribed in a settlement.

The criterion for deciding whether a particular trust is or is not of private nature, is whether the said trust is or is not for the benefit of individuals. Where the intention of the founder, as shown by the recitals in his will was that property was to be dedicated for the benefit of idols, the trust is undoubtedly of a public nature and not for the benefit of individual members of his family.

The essential difference between a private and public trust is that in the former, the beneficiaries are definite and ascertained individuals or individuals who within the defined time can be definitely ascertained, but in the latter, the beneficial interest may be vested in an uncertain and fluctuating body of persons either the public at large or some considerable portion of it having a particular description.

A public-cum-private trust is one in which a religious trust is created for the immovable property like a temple in the nature of a public trust but there is a direction for use of income through offerings for public purposes and also a part thereof to persons in charge of the temple. A public cum private trust may become a fully public trust when the private beneficiaries renounce their rights to which they are entitled.

Question 4

(a) An investigation has been ordered in respect of Liberty Limited and consequently, the Central Government has directed the company to preserve the books of accounts of the company for the past 12 years. Subsequently, based on an application form, the Central Government, NCLT has ordered that the books of accounts relating to past 12 years should be reopened to rectify certain anomalies. The Company contends that the reopening cannot be ordered in respect of years earlier than 8 years from the current financial year. Is it tenable ?

(4 marks)

(b) Lakshman has been appointed as the managing director of Lucky Limited (which

does not have any other whole time directors) on the following terms and conditions :

(i) Remuneration amounting to 5% of the net profits of the company.

(ii) A fee of ₹5,00,000 per annum towards actuarial services, even though Lakshman does not hold any professional qualification in actuarial science.

(iii) Company has paid a premium of ₹7,00,000 towards Directors and Officers Liability policy to protect the Company against any negligence on the part of Lakshman.

(iv) Sitting fee of ₹25,000 for every meeting of the board or the Committee thereof attended by Lakshman.

The Company has defaulted in the repayment of interest and prinicipal on term loans borrowed from banks, which default is still subsisting.

Suggest if the above package of remuneration contravenes any provision of the Act and the remedial action required from the company. (4 marks)

(c) Young Limited, an unlisted public company was incorporated on 1st September 2018 with an authorized share capital of ₹1 crore. The Company has A and B as subscribers to the Memorandum of Association wherein each of them have undertaken to subscribe to 50,000 equity shares of the Company having a face value of ₹10 each. Now, it is found that no action has been taken by the Company to collect the share subscription amount from A and B. Advise the Company on the contravention, if any, committed by them and the consequences. (4 marks)

(d) National Bank Limited advanced certain loans to Silver Limited while the memorandum of the borrower company did not provide for such borrowing. What are the consequences ? Does it make any difference if the memorandum contained a provision for taking mortgage loans, but the directors who exercised the borrowing power did not have any specific authority to mortgage company's property ? (4 marks)

Answer 4(a)

Section 128(5) of the Companies Act, 2013 stipulates that the books of account of every company relating to a period of not less than eight financial years immediately preceding a financial year or where the company has been in existence for a period less than eight years, in respect of all the preceding years together with the vouchers relevant to any entry in such books of accounts shall be kept in good order. But where an investigation has been ordered in respect of the company, the Central Government may direct that the books of accounts may be kept for such longer periods as it may deem fit.

Section 130 of the Companies Act, 2013 provides that company shall revise and restate their accounts based on an order made by a court of competent jurisdiction or NCLT and such order shall not be made in respect of re-opening of books of accounts relating to a period earlier than eight financial years immediately preceding the current financial year. However, where a direction has been issued by the Central Government under section 128(5) for keeping of books of accounts for a period longer than 8 years, the books of accounts may be ordered to be revised or reopened within such longer period.

In the light of the above, Liberty Ltd has no grounds to contend the order of the NCLT for revision of accounts for the past 12 years.

Answer 4(b)

The overall limit on managerial remuneration indicated in section 197 of the Companies Act, 2013 read with Schedule V of the Act has the following further conditions:

a. The remuneration shall not include any fee for services rendered by such director in other capacity if the services are of professional nature and in the opinion of the Nomination and Remuneration committee or the Board of Directors, as the case may be, the director possesses the prescribed qualification for the practice of the profession.

b. Premium paid on insurance taken to indemnify the directors against any liability arising out of their negligence, default etc. is not included in the overall remuneration, provided the concerned director is not guilty.

c. Sitting fee for attending the meeting of the Board or a committee thereof, is not included in the overall remuneration.

Considering the above provisions, the fee payable for actuarial services is to be added to Lakshman's remuneration as he does not possess professional qualification to practice actuarial science. In that case, the overall remuneration exceeds the limit of 5% of net profits as provided in the section. Therefore, the company has to get the approval of the shareholders by way of a special resolution in terms of Section 197. As the company has defaulted in payment of interest and principal on term loans to the banks, the company should also take a prior approval of the banks for paying the above remuneration to Lakshman, before passing the special resolution by shareholders.

Answer 4(c)

Section 10 (2) of the Companies Act, 2013 provides that all monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

However Section 10 A of the Companies Act, 2013 inserted by Companies (Amendment) Ordinance, 2018 (effective from 02.11.2018), provides that:

"A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless—

(a) a declaration is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration;"

Since, Section 10A is applicable to the Company incorporated on or after 02nd November, 2018. In the instant case, the company is incorporated on 1st September, 2018, Section 10A is not applicable. Hence company is not in contravention of any provision of the Act.

Answer 4(d)

Section 179 of the Companies Act, 2013 provides that the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in the Companies Act, 2013, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under, including regulations made by the company in general meeting.

The act of borrowing of loan by Silver Ltd from National Bank Ltd is valid as the memorandum of association of the company is silent for on borrowings, it is neither allowing nor restricting. The Board of Directors of a company shall exercise the powers of borrowing the money and investing the funds of the company on behalf of the company by means of resolutions passed at meetings of the Board. The National Bank Ltd can recover the loan from the Silver Ltd.

In case, the memorandum contained a provision for taking mortgage loans, the directors can exercise such power. The power to provide security in respect of loans is there with the directors under section 179(3) of the Companies Act, 2013. It is not required to give specific authority to directors for this purpose.

Question 5

(a) Rich Limited was just incorporated last week. The incorporation documents indicated that the Registered office would be located in their office premises in Chennai City.

(i) Narrate the compliance requirements related to verification of registered office;

(ii) Due to operational reasons, Rich Ltd. operates entirely from their factory premises on the outskirts of Chennai, without any presence at the registered office premises.

Does it involve any contravention of the provisions of the Act ? (4 marks)

(b) Efficient Ltd, an unlisted public company, having a paid up share capital of ₹50 crore held by 150 shareholders in physical form, proposes to issue secured debentures for an amount of ₹25 crore. The Company needs an advice as to whether the issue of secured debentures has to be in a dematerialized format and further if the existing equity shares of the company also needs to be dematerialized. (4 marks)

(c) Beta Limited, a listed company, had built its bank borrowings to over ₹25 Crore over the past 5 years and there have been multiple defaults in payment of interest and principal amount. The Company has accumulated significant amount of losses. The consortium of bankers, on 1st April 2019, have therefore mooted a debt restructuring plan in accordance with the guidelines issued by the Reserve Bank of India, which requires a conversion of the total debt into equity shares of the Company to be made at a discount of 10% on the face value of the equity shares. However, the company argues that Section 53 of the Act prohibits any issue of shares at a discount. Can Beta Ltd succeed in its argument ? (4 marks)

(d) X & Co. was incorporated in March 2018 as a One Person Company. During the financial year ending March 2019, the Company achieved a turnover of ₹5 Crore. Advise the Company as to whether there is any contravention of the provisions of the Act and if so, the remedial action required. (4 marks)

Answer 5(a)

(i) Section 12 of the Companies Act, 2013 provides that a company shall within 30 days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The Company will get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications and have its name printed on hundies, promissory notes, bills of exchange and such other documents. Further Rule 25 of the Companies (Incorporation) Rules, 2014 states that

(1) The verification of the registered office shall be filed in Form No.INC. 22 along with the fee, and

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

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

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

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

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

Rich Ltd. has to comply with the above requirements as a recently incorporated company.

(ii) Further, Section 12(9) has been inserted in the Act effective from 2nd November 2018 which provides that if the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may without prejudice to section 12(8) cause a physical verification of the registered office of the company and if any default is found in complying with the requirements of section 12(1), initiate action for the removal of the name of the company from the register of companies. Therefore, unless Rich Ltd ensures full compliance of the provisions of Section 12(1) of the Act requiring maintaining a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it, it runs the risk of verification by the Registrar in which case it could lead to action to remove the name of the company from the register of companies. Rich Ltd should either ensure compliance of Section

12(1) or can initiate action to alter the registered office of the company to its actual business premises and comply with the requirements so that any action from Registrar can be avoided.

Answer 5(b)

As per the Rule 9A of the Companies (Prospectus and Allotment of Securities) Rules, 2014, every unlisted public company with effect from 2nd October 2018, shall issue securities only in dematerialised form and also facilitate dematerialization of all its existing securities in accordance with the provisions of the Depositories Act, 1996 and the regulations made there under. They shall further ensure that before making any fresh issue of securities, the entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised. Every holder of securities of an unlisted public company who intends to transfer such securities on or after 2nd October 2018, shall get such securities dematerialised before such transfer. Further, every holder who subscribes to any securities of an unlisted public company (whether by way of private placement or bonus or rights offer) on or after 2nd October 2018 shall ensure that all his existing securities are held in dematerialized before such subscription.

In the light of the above referred provisions, it is mandatory for the company to issue the secured debentures in dematerialised form only and also to ensure that all the existing securities already issued by the company are also converted to dematerialised form.

Answer 5(c)

Section 53 of the Companies Act, 2013 stipulates that a company shall not issue shares a discount, except when an issue of sweat equity shares is made in compliance with section 54 of the Act. Any such issue of shares by a company at a discount shall be void.

Section 53(2A) however provides an exception to a company when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the RBI Act or the Banking (Regulation) Act, 1949.

In view of the above, as there is a proposal from Beta Ltd's bankers for a conversion of total debt into equity shares of the company at a discount of 10% on the face value of such shares, the company can issue shares at a discount provided the conversion is in pursuance of a debt restructuring plan in accordance with the guidelines issued by the RBI. Accordingly, the company cannot sustain argument of prohibition under section 53 in view of the provision under section 53(2A) which exempts the above transaction.

Answer 5(d)

As per Rule 3(7) of the Companies (Incorporation) Rules, 2014, no one person company (OPC) can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of one person company, except when threshold limit (paid-up share capital) is increased beyond Rs.50 lakhs or its average annual turnover during the relevant period exceeds Rs.2 crores.

In terms of Rule 6 of the said Rules, where the average annual turnover of the

company exceeds Rs.2 crores, it shall cease to be entitled to continue as One Person Company.

Such one person company shall within a period of 60 days from the date of applicability, give a notice to the Registrar in e-form INC-5 informing that it has ceased to be a one person company and that it is now required to convert itself into either a private company or a public company by virtue of its average annual turnover having exceeded the threshold limit.

Such one person company shall be required to convert itself, within six months from the last date of the relevant period during which its average annual turnover exceeds Rs.2 crores, into either a private company with minimum of two members and two directors or a public company with at least seven members and three directors.

Rule 7A provides that where a one person company or any officer of such company contravenes any of the provisions of these rules, the one person company or any officer of such company shall be punishable with fine which may extend to five thousand rupees and with a further fine which may extend to five hundred rupees for every day after the first offence during which such contravention continues.

Accordingly, in terms of Rule 6 of the Companies (Incorporation) Rules, 2014, X & Co. OPC, needs to convert itself into a Private company or a Public company within a period of 6 months from the end of the Financial Year ended 31st March, 2019, failing which it shall be liable for penalty under Rule 7A of the said Rules.

Question 6

(a) Draft a resolution seeking members' approval for the acceptance of deposits from members and public, assuming necessary data as may be relevant. *(8 marks)*

(b) Mahesh holds 75% of the equity share capital in Maximum Ltd. Infra Limited is an unlistedcompany in which Maximum Ltd. holds 15% equity stake. Explain the compliance requirements, if any, under the Companies (Significant Beneficial Owners) Rules 2018. *(4 marks)*

(c) Rocking Infra Limited, a company engaged in the business of BOOT contracts of national highways is looking at raising funds for future projects by issue of redeemable preference shares. The Contract bid by the company generally yield flow back of funds over a period of 25 to 30 years and hence is looking at extended maturity period of 30 years. Is it feasible ? Further, the company, keeping in mind the funds generation in long-term infra projects, also wants to ensure that there are alternative solutions like roll-over, in case the company is forced to face a default in redeeming such preference shares. Advise. *(4 marks)*

Answer 6(a)

Type of meeting – Shareholder's meeting

Type of resolution – Ordinary resolution

RESOLVED THAT pursuant to the provisions of Section 73 and 76 of the Act read

with the Companies (Acceptance of Deposits) Rules 2014 and other applicable provisions if any, and subject to such conditions, approvals, permissions as may be necessary, consent of the members be and is hereby accorded to the Company to invite/accept/ renew/receive money by way of unsecured/secured deposits from its members and public subject to a maximum limit of an amount aggregating to not more than Rs. …… outstanding at any one point of time or an amount representing ……% of the paid-up share capital and free reserves as per the latest audited balance sheet whichever is less, in accordance with the provisions of Companies (Acceptance of Deposits) Rules, 2014, framed under section 73 and section 76 of the Companies Act, 2013 on such specific terms and conditions as mentioned in the circular or circular in the form of advertisement to be issued in this regard.

RESOLVED FURTHER THAT Mr. Shyam Agarwal, Chairman and Managing Director, be and is hereby authorized to issue the circular or circular in the form of advertisement which has been approved by the Board of Directors of the company at their meeting held on 2nd May 2019 and which contains the salient features of the deposit scheme of the company and other relevant particulars as prescribed by the Act and Rules.

RESOLVED FURTHER THAT Mr. Shyam Agarwal, Chairman and Managing Director, be and is hereby authorized to have the circular or circular in the form of advertisement which has been duly signed by the majority of the Directors filed with the Registrar of Companies, Chennai, pursuant to the Rules and to publish the same in English language in The Hindu (Chennai Edition) and in Tamil language in Dinamalar (Chennai Edition).

RESOLVED FURTHER THAT for the purpose of giving effect to this resolution, the Board of Directors be and is hereby authorized to do such acts, deeds, matters and things as Board of Directors may in its absolute discretion consider necessary, proper, expedient, desirable or appropriate for such invitation/acceptance/renewal/receipts as aforesaid and matters incidental thereto.

Answer 6(b)

Accordingly to Explanation I (i) to Rule 2(1)(e) of the Companies (Significant Beneficial Owner) Rules 2018, where the member is a company, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. share capital of the company or who exercises significant influence or control in the company through other means.

Every significant beneficial owner shall file a declaration in Form No. BEN-I to the company in which he holds the significant beneficial ownership on the date of commencement of these rules within ninety days from such commencement and within thirty days in case of any change in his significant beneficial ownership. [Rule 3]

Where any declaration under rule 3 is received by the company, it shall file a return in Form No. BEN-2 with the Registrar in respect of such declaration, within a period of thirty days from the date of receipt of declaration by it, along with the fees as prescribed in companies (Registration offices and fees) Rules, 2014. [Rule 4]

The company shall maintain a register of significant beneficial owners in Form No. BEN-3. [Rule 5]

Alternate Answer

In terms of Explanation III(i)(a) Rule 2(h) of the Companies (Significant Beneficial Owners) Amendment Rules 2019, Mahesh, being a majority stake holder in Maximum Ltd, which in turn holds, 15% equity stake of Infra Ltd, shall be considered to be SBO for the shares of Infra Ltd held by Maximum Ltd. Therefore, Infra Ltd, being the reporting company has to comply with the following –

a. In terms of Rule 2A(1) of the Companies (Significant Beneficial Owner) Amendment Rules 2019, Infra Ltd should take necessary steps to identify, if there is any individual who is a Significant Beneficial Owner as defined u/s. 90(1) of the Act and cause him to file declaration in form BEN-1.

b. Further in terms of Rule 2A of the said Rules, Infra Ltd shall give notice in form BEN-4 to all its members (other than individuals) including Maximum Ltd who hold more than 10% equity stake, seeking information about the SBO and to every such person who, in the view of Infra Ltd is the SBO or has the information about the SBO.

c. If Infra Ltd doesn't receives any response to the form BEN-4 sent to Maximum Ltd and any other non-individual member holding 10% or more equity stake, within the stipulated time or the information is insufficient, then Infra Ltd shall apply to the NCLT under Rule 7 of the said Rules to direct that restrictions shall apply in dealing with those shares.

d. If Infra Ltd does receives within the prescribed period, form BEN-1 from Mahesh, should within 30 days of receipt of such BEN-1 file a return of Significant Beneficial Owner in form BEN-2 to the Registrar. The company should maintain register of Significant Beneficial Owners in form BEN-3.

Answer 6(c)

Section 55 of the Act provides that a company limited by shares may, if authorize by its articles, issue preference shares which are liable to be redeemed within a period not exceeding 20 years from the date of their issue subject to such conditions as may be prescribed. However, a company engaged in the setting up and dealing with infrastructure projects may issue preference shares for a period exceeding 20 years but not exceeding 30 years, subject to the redemption of a minimum of ten percentage of such preference shares per year from the 21st Year onwards or earlier on proportionate basis, at the option of the preference shareholders. Thus, Rocking Infra Ltd being engaged in Infrastructure projects, can issue redeemable preference shares for a period between 20 years to 30 years, subject to the compliance with the provisions of Section 55.

The section also provides for roll-over of the preference shares. Where a company is not in a position to redeem any preference shares to pay dividend, if any, on such shares in accordance with the terms of the issue, it may with the consent of the holders of three fourths in value of such preference shares and with the approval of NCLT on a petition made in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon in respect of the unredeemed preference shares and on the issue of such further redeemable shares, the unredeemed preference shares shall be deemed to have been redeemed. NCLT shall order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares, in the above case.

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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) *Commercial International Ltd., a listed company, secures an accommodation for the residence of one of its directors by entering into a lease agreement under which the company has to deposit ₹ 10 lakh with the landlord to secure compliance with the terms of the lease agreement. Comment in the light of provisions of the Companies Act, 2013 whether it is to be considered as a loan to the director ? (5 marks)*

(b) *XYZ Ltd., an unlisted company, issued partly convertible debentures to the tune of ₹ 500 crore out of which convertible (into equity shares) portion is ₹300 crore. Pursuant to Rule 18(7) of the Companies (Share Capital and Debentures) Rules, 2014, it created a Debenture Redemption Reserve (DRR) to the tune of ₹125 crore soon after the issue.*

As the Secretarial Auditor of the Company how will you ensure the compliances relevant to the creation of DRR by XYZ Ltd. and the sufficiency of the amount of DRR ? (5 marks)

(c) *As per the Foreign Direct Investment (FDI) policy in India, the foreign investor either does not require any approval or should obtain prior approval of the Government of India for the investment.*

(1) *Are there any exceptions to the above provision ? Enumerate.*

(2) *A Non-Resident Indian X in USA wants to invest in a Central Public Sector Enterprise in India producing uranium. Whether X can do so ? (5 marks)*

(d) *The base record for providing corporate benefits to the shareholders of a company is its Register of Members, a Statutory Register. Provide a check list for the verification of the same during the course of Secretarial Audit. (5 marks)*

(e) *The Board of directors of Pace Power Corporation Ltd. has asked you as a Company Secretary of the company to prepare the agenda item for related party transactions as per provisions of the Companies Act, 2013 for the upcoming Board meeting at which the resolution to it is to be moved. List out the details to be included in this agenda item. (5 marks)*

OR (Alternate Question to Q. No. 1)

Question 1A

(i) *XYZ Ltd. attracted by the provisions of Section 135 of the Companies Act, 2013 does not want to spend 2% of its average net profit on CSR activities in pursuance*

of its CSR policy. You are the Secretarial Auditor of XYZ Ltd. and it needs your advice on the instance of attracting any penalty for not spending on CSR activities. CSR stands for corporate social responsibility. (5 marks)

(ii) Sippy Ltd. engaged in setting up of infrastructure projects, proposes to issue secured debentures for a period of 12 years. Referring to the provisions of the Companies Act, 2013, state whether it is permissible for the company to issue the secured debentures ? The company also needs your advice about the various documents which may be checked by the secretarial auditor in the above case for compliance under the Companies Act, 2013. (5 marks)

(iii) Sohan is conducting the Secretarial audit of Geo Ltd. The company could not produce records of minutes/resolutions/registers pertaining to the charges etc. as they were in possession of other government authorities for which the company has acknowledgement given by the authorities. As a consequence, Sohan is not able to conclude on his reporting.

(a) Advise Sohan about the course of action, he is required to take, citing the relevant provisions of the Companies Act, 2013.

(b) State the limit for issuing of secretarial audit reports by the Secretarial Auditor for the financial year 2018-19. (3 + 2 = 5 marks)

(iv) The provision of the corporate benefit of Capitalization of profits for issue of bonus shares to the shareholders is a process inviting rigorous vouching by the Secretarial Auditor of the company. Provide a checklist for vouching of bonus issue. (5 marks)

(v) The financial statements of XYZ Ltd., an unlisted company, could not be adopted in its scheduled Annual General Meeting (AGM) for want of some clarifications by the shareholders and hence, the agenda was proposed to be carried to the adjourned AGM. Advise the company as to the filing requirements relevant to the financial statements with the Registrar of Companies (ROC).

Also advise on the filing requirements of the financial statements with ROC, if AGM itself has not been held. (5 marks)

Answer 1(a)

As per Section 185 of the Companies Act, 2013, a company shall not directly or indirectly advance any loan to its directors or any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

In the present case, Commercial International Ltd. has provided a housing accommodation to one of its directors. It does not amount to a loan because of the following reasons:

i. The company has not given any deposit or advance to the director. The amount deposited with the landlord cannot be said to be an 'Indirect loan' to director;

ii. It is usual practice to give a security deposit to the landlord with whom a rent or lease agreement is entered into. Thus, the company has made the security deposit on account of bonfide business considerations; and

iii. It is of no concern of the director as to the terms on which the company secures housing accommodation for him.

Thus, it is the company and not the director who has entered into the lease agreement and company can at any time use the accommodation for any other purpose and the director will have to vacate the accommodation, as and when desired by the company. Hence, this amount will not be considered as a loan to the director.

Answer 1(b)

The following points to be checked and ensured under rule 18(7) of the Companies (Share Capital and Debenture) Rules, 2014, for compliance for creation of Debenture Redemption Reserve (DRR) by XYZ Ltd.

1. The DRR is created out of the profits of the company available for payment of dividend.
2. The amount of DRR shall be at least 25% of the value of outstanding debentures.
3. Whether or not, on or before 30th April in each year, XYZ Limited has invested or deposited, as the case may be, a sum which shall not be less than 15% of the amount of its debentures maturing during the year ending on 31st March of the next year, in anyone or more of the method as provided in Clause (c) of Rule 18(7) of the Companies (Share Capital and Debentures) Rules, 2014.
4. That the amount of DRR has not been utilised except for the purpose of redemption of debentures.

The 25% mentioned in point '2', applies only to the non-convertible portion of the Debenture issue which is Rs. 200 crore which comes to Rs. 50 crores. Since the requirement is creation of minimum 25% of the outstanding debentures, the company can create more DRR, the creation of Rs. 125 crores of DRR is in compliance with the requirements.

Answer 1(c)

(1) Under the Foreign Direct Investment (FDI) policy, there are only 2 routes of investment viz, Automatic route, where no approval is required and general permission is allowed and another is Approval route where the prior permission from the Government is required. However, there are prohibited sectors which act as an exception for direct investment. These are mentioned as under:

(i) Lottery business including Government/private lottery/private lottery, online lottery, etc.

(ii) Gambling and betting including casinos, etc.

(iii) Chit funds.

(iv) Nidhi company.

(v) Trading in TORs.

(vi) Real estate business or construction of farm house.

(vii) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

(viii) Activities/sectors not open to private sector investment, e.g., Atomic Energy and Railway transport (Other than Mass Rapid Transport Systems).

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities.

(2) In the instant case, a non-resident Indian X in USA cannot invest in a Central Public Sector Enterprise in India producing uranium because it falls under point (viii) above i.e. investment in private sector like Atomic Energy is not open as per FDI policy in India. Since Uranium is used in the production of Atomic energy, a foreign national is prohibited from investing in any unit which is engaged in the production of any product used for Atomic energy.

Answer 1(d)

The following points need to be verified in the course of Secretarial Audit:

1. The company having share capital has maintained Register of Members (ROM) as per Form MGT -1 prescribed under the Companies the (Management and Administration) Rules, 2014.
2. The Register contains particulars as mentioned in the aforesaid Rule 3(2).
3. The company maintains register of debenture holders or any other security holders as per Form MGT-2 prescribed under Companies (Management and Administration) Rules, 2014.
4. Aforesaid Registers are maintained at the registered office of the Company.
5. If the aforesaid registers are maintained at some other place in which more than one-tenth of the total members entered in the register of members reside or some other place within the city where registered office is situated, whether a special resolution has been passed.
6. An index of members is maintained by the company, when the number of members is equal to or more than fifty. Necessary entries shall be made in the index simultaneously with the entry for allotment or transfer of security in the Register.
7. Every change is incorporated within seven days of such change approved at a board or its duly constituted committee meeting.
8. The entries in the aforesaid registers index included therein are authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose, and the date of the board resolution authorising the same is mentioned therein.
9. The company has made a note of the declaration received in Form MGT- 4 in duplicate, w.r.t. beneficial interest in any shares, in the register of members.
10. The company has filed Form MGT-6 with the Registrar within a period of thirty days from the date of receipt of aforesaid declaration.

In case of Foreign Registers, the following needs to be checked:

11. The Articles of the company authorises maintenance of the foreign register.

12. The company has within thirty days from the date of the opening of any foreign register, filed with the Registrar notice of the situation of the office where such register is kept in Form MGT-3 in accordance with the Companies (Management and Administration) Rules, 2014.

13. Notice of every change is incorporated in the aforesaid register or its discontinuance is filed with registrar within thirty days in Form MGT-3.

14. The company maintains a duplicate register at its registered office and changes are duly incorporated from time to time.

15. The entries are authenticated by the company secretary of the company or person authorised by the Board by appending his signature to each entry.

Answer 1(e)

The Rule 15 of the Companies (Meetings of Board & its Powers) Rules, 2014 prescribes the list of disclosures to be made in the agenda of the Board meeting at which the resolution approving the related party transaction is proposed to be moved. Accordingly, the agenda of the Board meeting of Pace Power Corporation Ltd. at which the resolution is proposed to be moved shall disclose-

(a) the name of the related party and nature of relationship;

(b) the nature, duration of the contract and particulars of the contract or arrangement;

(c) the material terms of the contract or arrangement including the value, if any;

(d) any advance paid or received for the contract or arrangement, if any;

(e) the manner of determining the pricing and other commercial terms, both included as part of contract and not considered as part of the contract;

(f) whether all factors relevant to the contract have been considered, if not, the details of factors not considered with the rationale for not considering those factors; and

(g) any other information relevant or important for the Board to take a decision on the proposed transaction.

Answer 1A(i)

The second proviso of Section 135(5) of the Companies Act, 2013 (Act), says that "Provided further that if the company fails to spend such amount, the Board shall, in its report made under Section 134(3) (o), specify the reasons for not spending the amount."

The provisions of Section 135(5) of the Companies Act, 2013 (Act) is based on the principle of 'comply or explain'. Section 135 of the Act does not lay down any penal provisions in case XYZ Ltd. fails to spend 2% of its average net profits on CSR activities. However, it shall in its Board's Report specify the reasons for not spending on CSR activities, because-

(i) Section 134(3) (o) of the Act, says that the Board's Report shall include" the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year";

(ii) Section 134(8) of the Act, says that if a company contravenes the provisions of this Section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extent to twenty five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both".

Hence, the advice to XYZ Ltd would be, to include the reasons for not spending on CSR activities in its Board's Report for not attracting any penalty.

Answer 1A(ii)

Debentures (Section 71 of the Companies Act, 2013 read with relevant rules)

An issue of secured debentures may be made, provided the date of its redemption does not exceed ten years from the date of issue. However, there are certain class of companies as mentioned under rule 18 of the Companies (Share capital and Debentures) Rules, 2014, which may issue secured debentures for a period exceeding ten years but not exceeding thirty years. These classes includes the companies engaged in setting up of infrastructure projects.

In the instant case, since Sippy Ltd. is engaged in the setting up of Infrastructure Project issuing of secured debentures for a period of 12 years is permissible and the issue shall be secured by creation of charge on the properties or assets of the company having a value which is sufficient for the due repayment of the amount of debentures and interest thereon.

Indicative list of documents to be checked:

- Minutes of Board Meeting.
- Notice along with explanatory statement.
- Minutes of General meeting.
- Resolution of board filed with ROC.
- Charge documents.
- Prospectus or letter of offer for subscription of debenture• Written consent from debenture trustee.
- Trust deed (Form SH -12).
- Financial Statements.

Answer 1A(iii)

(a) Pursuant of Section 204 of the Companies Act, 2013 and Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the Secretarial Auditor is required to give his report in form MR-3. The details relating to reporting with qualification are as under:

i. Qualifications/reservations or adverse remarks, if any, should be stated by

the secretarial auditor at the relevant places in his report in bold type or in italics.

ii. If the secretarial auditor is unable to express an opinion on any matter, he should mention that he is unable to express an opinion on that matter and the reasons therefor. If the scope of work required to be performed is restricted on account of restrictions imposed by the company or on account of circumstantial limitations (like certain books or papers being in the custody of another person who is not available or a Government Authority), the Report should indicate such limitations. If such limitations are so material that the secretarial auditor is unable to express any opinion, the secretarial auditor should state that in the absence of necessary information and records, he is unable to report on compliance(s) relating to such areas by the Company.

In the above mentioned case, Sohan, the Secretarial Auditor, can report the qualifications/ reservations and the adverse remarks i.e. non-providing the cited documents during the audit, at the relevant places in his report in bold type or in italics and indicate his opinion as per details mentioned as above.

(b) As decide by the Council of the ICSI, the limits for the issue of Secretarial Audit Reports for the financial year 2016-17 onwards are as under:

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

In the instant case, these limits will be applicable for financial year 2018-19.

Answer 1A (iv)

The following points shall be the focus of the checklist for vouching the capitalization of profit for issue of Bonus shares by the company:

1. Whether the issuer company is authorised by its articles of association for issue of bonus shares, if not special resolution has been passed and a certified true copy of the resolution passed in the EGM/AGM has been filed with the Registrar in Form MGT-14.
2. In case the issuer company is authorised by its articles, check the certified true copy of the resolution passed by the Board of Directors in which the company has proposed to issue Bonus Shares to the shareholders of the company.
3. In case of a listed entity,
   a. the certificate that the proposed bonus shares would be ranking pari-passu in all respect including dividend with the existing equity shares of the company should be checked.
   b. confirmation that all the existing securities of the company are fully paid-up and are listed on the Exchange to be made.
   c. the names of the Stock Exchanges where the securities of the company are listed and intimation given to them as per listing regulations.

4. A certified true copy of latest Annual Report.

5. Check whether the issuer, announcing a bonus issue after the approval of its board of directors and not requiring shareholders' approval, has implemented the bonus issue within fifteen days from the date of approval of the issue by its board of directors.

6. Check whether the bonus issue was implemented within two months from the date of the meeting of its board of directors wherein the decision to announce the bonus issue was taken subject to shareholders' approval.

7. In case of unlisted company the issuer company shall comply with Section 63 of the Companies Act, 2013.

8. 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, and whether the equity shares so reserved have been issued at the time of conversion of such convertible debt instruments.

Answer 1A(v)

If the financial statements are not adopted at annual general meeting, such un-adopted financial statements along with the required documents shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.

After holding the adjourned annual general meeting, the adopted financial statement are filed within thirty days of the date of adjourned annual general meeting.

Where the annual general meeting for any year has not been held, the financial statements duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held.

PART B

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

Question 2

(a) Aero Ltd. proposes to shift its cement manufacturing unit from location X to another location Y in the same State in the country. As a Company Secretary in Practice, suggest the basic factors for Environmental Impact Assessment that should be addressed with regard to the existing pollution levels at location X vis-à-vis pollutants from the proposed location at Y.

(b) Jain Motors Ltd. wishes to raise US $ 400 million through Foreign Currency Convertible Bonds (FCCBs) via public issue from international market in the financial year 2019-20. Advise the company in accordance with the relevant provisions of the law on the following issues :

(i) Whether the raising of fund of US $ 400 million is permissible ?

(ii) If the company wants to raise the fund via private placement, who can be a party to private placement ?

(iii) The estimated issue related expenses are US $ 35 million, whether it is within the limit to incur ?

(iv) The company wants to mature the FCCBs in 4 years. Is it allowed ?

(v) What is the requirement relating to furnishing the reports to RBI ?

(c) Det Ltd. has made a final call of ₹5 on the shares of ₹10 each on the total allotment of 2,50,000 shares made on 30th June, 2018. Out of this, 2,15,000 shares have been paid fully by the allottees and the balance call amount on the remaining shares is still pending. As a Company Secretary explain the time limit for receiving the call money with reference to the provisions under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) [SEBI (ICDR)] Regulations, 2018. (5 mark each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Sherman Ltd. approached a financial institution for a loan. The financial institution asked you as a Company Secretary in Practice to submit a search report giving the relevant details as per provisions of the Companies Act, 2013 for assessment of the company. Elaborate the points to be included in the preparation and compilation of search report.

(ii) One of the areas of coverage by the Diligence Report to be obtained by banks is the foreign currency exposure of their borrowers. X Bank Ltd. has appointed you, a Practicing Company Secretary, to provide a Diligence Report on one of its proposed borrowers who is in export/import business. Provide a check list of items of foreign currency exposure of the borrower, you would verify and the sources of their verification, to complete your Diligence Report.

(iii) Brief about the following prescriptions of ISO 14001 Standard relevant to pollution control to the industries:

(a) Recovery-Reuse of waste products

(b) Vegetal Cover

(c) Disaster planning

(d) Human Settlements

(e) House-keeping. *(5 marks each)*

Answer 2(a)

Aero Ltd. should prepare Environmental Impact Assessment (EIA) on the basis of the existing background pollution levels at location X vis-a-vis pollutants from the proposed location Y. The EIA should address some of the basic factors listed below:

1. Meteorology and air quality Ambient levels of pollutants such as Sulphur Dioxide,

oxides of nitrogen, carbon monoxide, suspended particulate matters, should be determined at the centre and at three other locations on a radius of 10 km with 120 degrees angle between stations.

2. Additional contribution of pollutants at the locations are required to be predicted after taking into account the emission rates of the pollutants from the stacks of the proposed plant, under different meteorological conditions prevailing in the area.
3. Hydrology and water quality.
4. Site and its surroundings.
5. Occupational safety and health.
6. Details of the treatment and disposal of effluents (liquid, air and solid) and the methods of alternative uses.
7. Transportation of raw material and details of material handling.
8. Control equipment and measures proposed to be adopted.

Preparation of Environment Management Plan is required for formulation, implementation and monitoring of environmental protection measures during and after commission of projects.

Answer 2(b)

(i) Whether the raising of fund of US $ 400 million is permissible?

The issue of FCCBs shall be subject to a ceiling of US $ 500 million in anyone financial year. In the present case, the company is allowed to raise US $ 400 million in 2019-20 as it is within the prescribed limit.

(ii) If the company wants to raise the fund via private placement, who can be a party to private placement?

In case of private placement, the placement shall be with banks; or with multilateral and bilateral financial institutions or foreign collaborators or foreign equity holder having a minimum holding of 5% of the paid-up equity capital of the issuing company. Private placement with unorganized source is prohibited.

(iii) The estimated issue related expenses are US $35 million, whether it is within the limit to incur?

The issue related expenses shall not exceed 4% (4% of 400 US $ million=US$ 16 million) of issue size and in case of private placement, shall not exceed 2% (2% of 400 US $ million= US $ 8 million) of the issue size. US $ 35 million is not within the prescribed limit.

(iv) The company wants to mature the FCCBs in 4 years. Is it allowed?

The maturity period of the FCCBs shall not be less than 5 years. So, in this case it is not allowed.

(v) What is the requirement relating to furnishing the Report to RBI?

The company shall within 30 days from the date of completion of the issue,

furnish a report to the concerned Regional Office of the Reserve Bank of India through a designated branch of an Authorized Dealer giving the details and documents mentioned as under:

(a) The total amount of FCCBs issued;

(b) Name of investor's resident outside India and number of FCCBs issued to each of them.

Answer 2(c)

As per provisions under Regulations 48 of the SEBI (ICDR) Regulations, 2018, it has to be ensured that the entire subscription money, if made in calls, the outstanding subscription money is called within 12 months from the date of allotment and if any applicant fails to pay the call money within the said twelve months, the equity shares on which there are calls in arrear along with the subscription money already paid on such shares shall be forfeited. However, it shall not be necessary to call the outstanding subscription money within twelve months, if the issuer has appointed a monitoring agency.

In the mentioned case, considering the size of issue which is less than Rs. 100 Crore, appointment of monitoring agency was not required, so the outstanding subscription money is correctly called within 12 months from the date of allotment and if any applicant fails to pay the call money within the said twelve months i.e. up to 30th June 2019, then the equity shares on which there are calls in arrear along with the subscription money already paid on such shares shall be liable to be forfeited.

Answer 2A(i)

Compilation and Preparation of Search Report

A Search Report prepared enables the Bank /Financial Institution to evaluate the extent up to which the company has already borrowed money and created charges on the security of its movable and/or immovable properties. Search Report compiled on the basis of the scrutiny of the various documents, e.g. Company Master Data, Article of Association, Particulars of charges, modification, register of charge, verification of documents relating to charges and through MCA-21 downloading of public documents, it is related and restricted to only those documents which are available for the inspection on MCA-21 on the date(s) when the search is carried out.

An index of the charges is available on the website of MCA. This index provides charge ID, the date of filing of the document, charge amount secured, name of charge holder and its address. In order to view index of charges, it is primarily necessary to quote CIN/FCRN of the company. This number will primarily be available at the website of the ministry.

It is advisable to note down from the index, the short particulars of all Forms CHG-1, 4, 9 for the purpose of cross-checking and ensuring that no document is missed in the Search Report.

Also, it would be advisable to mention in the Search Report by way of a footnote as to what was the last document which was available for inspection when the scrutiny was taken /completed. This information can be helpful in identifying the forms and based on which the Search Report is given.

Answer 2A(ii)

S. No.	Type of Exposure	Source for Verification
1	Packing credit in Foreign currency	a. Packing credit loan ledger supported by Bank Advice for each disbursement. b. Internal MIS including Trial Balance.
2	Post shipment credit in Foreign Currency	a. Post shipment loan Ledger. b. Bill-wise advise from bank. c. Trial Balance/Internal MIS. d. Export Collection Bills. e. Advance against FOBCs.
3	Foreign Currency Loans	a. Last Audited Balance Sheet. b. Bank Advise for disbursement of the loan. c. Loan Ledger. d. Statement of Account from Lender (Bank).
4	External Commercial Borrowings	a. Reporting of loan agreement details under FEMA, 1999. b. Form ECB-2 under FEMA, 1999 (Details of actual transaction of Foreign Currency Loan/ Financial Lease other than short-term Foreign currency Loans). c. Last Interest fixation notification from the Lender. d. Loan Ledger.
5	Foreign Currency Convertible Bond (FCCB)	a. Issuance Approval (if applicable). b. Form ECB-2 (if applicable). c. Board Memorandum copy on FCCB reporting. d. Information filed with Stock Exchange.
6	American Depository Receipt (ADR)	a. Board Resolution for issuance of ADR. b. Copy of listing agreement filed with NYSE or NASDAQ. c. Statement from RTA.
7	Loans from Non Residents	
	a. J.V. Partner	a. Copy of loan agreement.
	b. Promoter/Director	b. Copy of FIRC.
	c. Others (In all cases :)	c. Ledger account extract.

Answer 2A(iii)

The brief of the following terms under ISO 14001 Standards relevant to pollution control of Industries are as under:

(a) Recovery - Reuse of waste products: Efforts should be made to recycle or recover the waste materials to the extent possible. The treated liquid effluents can be conveniently and safely used for irrigation of lands, plants and fields for growing non-edible crops.

(b) Vegetal Cover Industries should plant trees and ensure vegetal cover in their premises. This is particularly advisable for those industries having more than 10 acres of land.

(c) Disaster Planning : Proper disaster planning should be done to meet any emergency situation arising due to fire, explosion, sudden leakage of gas etc. Firefighting equipment and other safety appliances should be kept ready for use during disaster/emergency situation including natural calamities like earthquake/ flood.

(d) Human Settlements : Residential colonies should be located away from industries and the solid and liquid waste dumping areas. Meteorological and environmental conditions should be studied properly before selecting the site for residential areas in order to avoid air pollution problems.

Persons who are displaced or have lost agricultural lands as a result of locating the industries in the area, should be properly rehabilitated.

(e) House-Keeping: Proper house-keeping and cleanliness should be maintained both inside and outside of the industry

Question 3

(a) (i) X Ltd. is an unlisted and ₹200 crore networth company having paid up share capital of ₹4 crore and turnover of ₹90 crore as on 31st March, 2019. Its networth increased to ₹300 crore in April 2019. The company seeks your advice on filing its financials of FY 2018-19 in Extensible Business Reporting Language (XBRL mode) with the Registrar of Companies. Advise the company quoting relevant legal provisions.

(ii) Will your advice differ if X Ltd. is a listed company and other things in point (i) above remain constant ?

(iii) What will be your advice if the increase in the networth was to ₹300 crore in March 2019, other things remain same as per point (i) above ?

(iv) Can you indicate any difference in the advice for point (ii) and point (iii) above ? (8 marks)

(b) Zen Systems Plc. incorporated in Australia wants to raise funds from India through issue of Indian Depository Receipts (IDRs). As a Finance Consultant of the company in India, comment upon each of the following with reference to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) [SEBI (ICDR)] Regulations, 2018.

(i) Issue size is ₹40 crore;

(ii) Minimum application amount is ₹ ten thousand;

(iii) At least sixty per cent of the IDRs shall be allotted to the qualified institutional buyers;

(iv) At any given time there shall be two denominations of IDR of the issuing company;

(v) The issuing company is prohibited to issue securities by the regulatory body in Australia;

(vi) The issuing company is not listed in its home country; and

(vii) If the issuing company fails to refund the entire subscription amount within the stipulated period, it is liable to pay the amount with interest @ eighteen per cent per annum for the period of delay to the subscribers. (7 marks)

Answer 3(a)(i)

The advise to X Ltd. on the each point should be as under:

As per Rule 3 of the Companies (filing of Documents and Forms in Extensible Business Reporting Language) Amendment Rules, 2017 (XBRL) (Rule 3), the following class of companies shall file their financial statements and other documents under Section 137 of the Companies Act, 2013 with the Registrar in e-form AOC-4 XBRL :-

(a) companies listed with stock exchanges in India and their Indian subsidiaries;

(b) companies having paid up capital of five crore rupees or above;

(c) companies having turnover of one hundred crore rupees or above;

(d) all companies which are required to prepare their financial statements in accordance with the Companies (Indian Accounting Standards) Rules, 2015.

The benchmark is considered on the basis of the figures as on 31st March of the financial year, for which the documents are filed. Hence my advice would be:

As none of the conditions mentioned in Rule 3 of the Companies (Filing of Document and Forms in Extensible Business Reporting Language) Amendment Rules, 2017 was satisfied, X limited need not file its financials in XBRL mode for FY2018-19.

Answer 3(a)(ii)

If X Ltd. is a listed company, it has to file its financials for FY2018-19 in e form AOC4- XBRL.

Answer 3(a)(iii)

As per Rule 4(1)(iii)(b) of the Companies (Indian Accounting Standards) Rules, 2015, unlisted companies having net worth of rupees two hundred and fifty crore or more but less than rupees five hundred crore are required to prepare their financial statement in accordance with the Companies (Indian Accounting Standards) Rules, 2015. If the increase in net worth was to Rs. 300 crore in March 2019, X Ltd. has the file the financials for the FY 2018-19 in XBRL mode with the Registrar of Companies.

Answer 3(a)(iv)

Yes, in case of Point "ii" the taxonomy of the financial statements shall be as provided in 'Annexure II" of Rule 3 indicated above and in case of point "iii" the same shall be as provided in Annexure IIA of Rule 3 cited as above.

Answer 3(b)

As a finance consultant of Zen Systems Plc., the following comments shall be made on the each points with reference to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

(i) Issue size is Rs. 40 crore.

Issue size shall not be less than fifty crore Rupees. [Regulation 183 (2)(a)]

(ii) Minimum application amount is ten thousand rupees.

Minimum application amount shall be twenty thousand. [Regulation 191(2)]

(iii) At least sixty per cent of the IDR issued shall be allotted to qualified institutions buyers.

At least fifty per cent of the IDR issued shall be allotted to qualified institutional buyers [Regulation 192(1)(a)]

(iv) At any given time there shall be two denominations of IDR of the issuing company.

At any given time, there shall be only one denomination of IDR of the issuing company. [Regulation 183 (2)(b)]

(v) The issuing company is prohibited to issue securities by the regulatory body in Australia.

No, the issuing company should not be prohibited to issue securities by any regulatory body in its home country i.e., Australia. [Regulation 183 (1)(b)]

(vi) The issuing company is not listed in its home country.

The issuing company should be listed in its home country for at least three immediately preceding years. [Regulation 183 (1)(a)]

(vii) If the issuing company fails to refund the entire subscription amount within the stipulated period, it is liable to pay the amount with interest at the rate of fifteen percent annum for the period of delay.

Question 4

(a) Under Section 230(1) of the Companies Act, 2013, relevant to Compromises, Arrangements and Amalgamations, National Company Law Tribunal (NCLT) has ordered a meeting of creditors of X Ltd. (unlisted), on an application by the company. The total debts of the company towards the cited creditors were ₹ 100 crore. All the creditors (14 in number) attended the meeting.

As a practicing Company Secretary, throw light on the validity of the approval

for compromising decisions taken at the meeting under the following circumstances, if :

(i) 6 creditors of the value of ₹75 crore voted in favour of the proposed compromise ?

(ii) 9 creditors of the value of ₹70 crore voted in favour of the proposed compromise ?

(iii) 9 creditors of the value of ₹76 crore voted in favour of the proposed compromise ?

(b) You are the Company Secretary of Peeka Ltd., a Small and Medium Enterprise (SME). The Managing Director of your company has asked you to give advice and submit a report on the benefits and exemptions available for securities of your company, if listed at SME Exchange. Advise and submit the report.

(c) Gippy Ltd. has requested you as a Company Secretary in Practice to ascertain financial position of the company as per Para no.13 of the Diligence Report to be submitted to the bank in accordance with the RBI notification dated 21st January, 2009; 10th February, 2009 and 12th February, 2009. Prepare the check list. *(5 marks each)*

Answer 4(a)

As per section 230(6) of the Companies Act, 2013, where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, and the contributories of the company.

Hence, points to be considered for deciding the validity of the decision in each case are-

a. The number of the voters for the decision shall be more than 7 (majority).

b. The value of the voters for the decision shall be equivalent or more than Rs. 75 crores. (3/4th value of the debts of the company towards creditors).

The validity in case of -

i. the proposed compromise cannot be implemented, as voting majority is not existing though the value of voters is 3/4th value of the debts.

ii. the proposed compromise cannot be implemented, though the voting majority is existing, the value of voters is not in compliance as it is less than 3/4th value of the debts of the company.

iii. the proposed compromise can be implemented, as both majority of voters with more than 3/4th value of the debts are voting in favour of the compromise.

Answer 4(b)

Benefit for listing of Peeka Ltd. at SME Exchange

Going for a public issue of capital would provide the SMEs with equity financing opportunities to grow their business - from expansion of operations to acquisitions. In addition, equity financing lowers the debt burden leading to lower financing costs and healthier balance sheets for the firms. The continuing requirement for adhering to the stock market rules for the issuers lowers the on-going information and monitoring costs for the banks. With the SME Exchanges the SMEs can access capital markets easily, quickly and at lower costs through SME exchange to provide better, focused and cost effective service to SME sector.

Some of the Benefits of the SME Exchanges are:

- *Easy access to Capital* : SME provides an avenue to raise capital through equity infusion for growth oriented SME's.
- *Enhanced Visibility and Prestige* : The SME's benefit by greater credibility and enhanced financial status leading to demand in the company's shares and higher valuation of the company.
- *Encourages Growth of SMEs* : Equity financing provides growth opportunities like expansion, mergers and acquisitions thus being a cost effective and tax efficient mode.
- *Enables Liquidity for Shareholders* : Equity financing enables liquidity for shareholders, provides growth opportunities like expansion, mergers and acquisitions, thus being a cost effective and tax efficient mode.
- *Equity financing through Venture Capital* : Provides an incentive for Venture Capital Funds by creating an Exit Route and thus reducing their lock in period.
- *Efficient Risk Distribution* : Capital Markets ensure that the capital flows to its best uses and that riskier activities with higher payoffs are funded.
- *Employee Incentives* : Employee Stock Options ensures stronger employee commitment, participation and recruitment incentive.

Chapter IX of the SEBI (ICDR) Regulations, 2018 deals with the public offer by the small and medium enterprises, the chapter provides lesser and simplified compliance requirements in comparison to the listing on the main board. Under the following regulations exemptions are available for securities at SME Exchange:

a. Filing of draft offer document- The company is not required to file draft offer document

b. In-principle approval from the recognized exchanges- The company is not required to obtain in-principle approval from the recognized exchanges.

   (a) Submission of certain documents before opening of an issue- Since the board is not issue any observation on the offer documents of SME, the SME Companies are exempted for submission of some of the due diligence certificates before opening of an issue.

c. Draft offer document to be made to the public- The Company is not required to make the Draft offer document available to public for comments.

d. Minimum Application Value related provisions. Minimum Application size in case of SME Listing is one lakh rupees per application.

Answer 4(c)

Illustrative checklist for ascertainment of financial position of the company under para no. 13 of the Diligence Report should be as under:

Para 13. The Company has complied with the terms and conditions, set forth by the lending bank/financial institution at the time of availing any facility and also during the currency of the facility.

To verify the financial position of the company, the company secretary should ensure that:

a. The company has neither put its funds, nor invested them in purchase of shares of any other concern, without the prior approval of the bank(s)/financial institution(s) as stipulated in the loan agreement;

b. No money has been withdrawn from the business, out of the capital or in anticipation of profits, without prior consent of the bank(s)/financial institution(s); and

c. Proposals to undertake inter-corporate loans or other investments, have the prior approval of the bank(s)/financial institution(s).

d. The company has provided adequate provision on depreciation as required under the companies act, 2013 in its book of accounts.

e. Foreign currency exposure of the company as on date.

In case of project under implementation —

1. Check whether the margin money has been brought in by the promoters as per the terms of sanction.
2. Furnish the details of inflow viz. date, amount, channel (name of bank(s)), etc.
3. Check the compliance of the provisions of the Companies Act, 2013 regarding the powers of the Board.

Question 5

(a) Write short notes on the following :

(i) Two-way fungibility of global depository receipts.

(ii) Documents to be covered during the legal due diligence of Material Contracts.

(iii) Relevant Market under the Competition Act, 2002. (3 marks each)

(b) Distinguish between the following :

(i) 'Bid rigging' and 'Resale Price Maintenance'

(ii) 'Operational Due Diligence' and 'Financial Due Diligence'. (3 marks each)

Answer 5(a)(i)

Two-way Fungibility of Global Depository Receipts

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

Answer 5(a)(ii)

Documents to be covered during the legal due diligence of material contracts are as under:

1. A schedule of all subsidiary, partnership, or joint venture relationships and obligations with copies of all related agreements.
2. Copies of all contracts between the company and employees, shareholders and other affiliates.
3. Loan agreements, letters of credit, promissory notes etc.
4. Security agreements, mortgages, etc. to which the company is a party.
5. Any distribution agreements, sales representative agreements, marketing agreements, etc.
6. All non-disclosure or non-competition agreements.
7. Other material contracts.

Answer 5(a)(iii)

Relevant Market under Competition Act, 2002

"Relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

"Relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

"Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Answer 5(b)(i)

Bid Rigging [Section 3(3)(d) of Competition Act, 2002]

An agreement, between enterprises or persons engaged in identical or similar

production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Bid rigging is a particular form of collusive price-fixing behaviour by which firms coordinate their bids.

Resale price Maintenance [Section 3(4)(e) of Competition Act, 2002]

Resale price maintenance includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

It is a situation in which the supplier forces the distributor/retail seller to sell the good to the customer at prices stipulated by the supplier.

Bid rigging is a horizontal agreement i.e. agreement between enterprises or persons engaged in identical or similar production or trading of goods or provision of services whereas Resale Price Maintenance is a vertical agreement i.e. agreement between enterprises that are at different stages or levels of production chain and therefore in different markets.

Answer 5(b)(ii)

Operational Due Diligence

Operational due diligence aims at the assessment of the functional operations of the target company, connectivity between operations, technological up-gradation in operational process, financial impact on operational efficiency etc. It also uncovers aspects on operational weakness, inadequacy of control mechanisms etc.

Financial Due Diligence

Financial due diligence includes review of accounting policies, review of internal audit procedures, quality and sustainability of earnings and cash flow, condition and value of assets, potential liabilities, tax implications of deal structures, examination of information systems to establish the reliability of financial information, internal control systems etc.

Question 6

(a) Explain the process of Corporate Compliance Reporting.

(b) Enumerate the important things that one should take cognizance for Pre-diligence and during Due Diligence process from the corporate viewpoint.

(c) ZM Communication Ltd. and Tele Developer Ltd. are of the view that Zetka Communication Ltd. is abusing its dominant position in the telecom industry. They want to lodge a complaint against Zetka Communication Ltd. before the Competition Commission of India. Explain the factors that will be considered by the Commission to ascertain whether Zetka Communication Ltd. is enjoying dominant position in the industry in the first instance. (5 marks each)

Answer 6(a)

The actual process of compiling the information under the various laws may vary from company to company and is dependent on various factors such as the number of

units and scale of operations, a brief process of the Corporate Compliance Reporting mechanism is as follows:

i. Functional heads for the reporting of various laws have to be identified. For instance, the Company Secretary would be the functional head for reporting of Company Law, Listing Regulations and Commercial Laws. Similarly, the head of the Personnel Department could report the compliance of Labour and Industrial Laws and the Fiscal Law Compliance would be the domain of finance/accounts departments.

ii. Each of the functional heads may collect and classify the relevant information from the various units/locations pertaing to their department and consolidate them in the form of a report.

iii. The report shall carry an affirmation from the functional heads that the said report has been prepared based on the inputs received from the various units/ offices and then list out the specific compliances/non-compliances, as already circulated to the functional heads.

iv. Each of the functional heads will forward their respective compliance reports to the Company Secretary/Managing Director.

v. The Company Secretary would then brief the Managing Director and with suitable inputs from the Company Secretary, the Managing Director would consolidate and present, under his signature, a comprehensive Corporate Compliance Reporting to the Board for its information, advice and noting.

vi. The whole process of Corporate Compliance Reporting is contingent on the creation and implementation of comprehensive legal Management Information System (MIS).

Answer 6(b)

Pre Diligence

A Pre diligence is primarily the activity, which includes the management of paper, files and people by:

1. Signing the Letter of Intent (LOI) and the Non-Disclosure Agreement (NDA)/ Engagement letter.
2. Receipt of documents from the company and review of the same with the checklist of documents already supplied to the company.
3. Identifying the issues.
4. Organising the papers required for a diligence.
5. Creating a data room.

Some of the important things that one should take cognizance of from the corporate view point for pre-diligence and during due diligence are the following:

a. Do not delay deadlines (leads to suspicion).

b. Mark each module of the checklist provided for separately.

c. In case some issues are not applicable spell it out as "Not Applicable".

d. In case some issues cannot be resolved immediately, admit it.

e. Put a single point contact to oversee the process of diligence.

f. Keep a register, to track people coming in and going out.

g. An overview on the placement of files.

h. Introduction to the point person.

During due diligence

During the diligence, care should be taken to adhere to certain hospitality issues, like:

(a) Be warm and receptive to the professionals who are conducting diligence.

(b) Enquire on the Due Diligence team.

(c) Join them for lunch.

(d) Ensure good supply of refreshments.

(e) In case of any corrections – admit and rectify.

Answer 6(c)

The Competition Commission of India (CCI), while inquiring whether Zetka Communication Ltd. is enjoying dominant position in the industry or not under section 4 of Competition Act, 2002 will take, the following factors, either all or any of them, into account :

i. Market share of the enterprise;

ii. Size and resources of the enterprise;

iii. Size and importance of the competitors;

iv. Economic power of the enterprise including commercial advantages over competitors;

v. Vertical integration of the enterprises or sale or service network of such enterprises;

vi. Dependence of consumers on the enterprise;

vii. Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;

viii. Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

ix. Countervailing buying power;

x. Market structure and size of market;

xi. Social obligations and social costs;

xii. Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

xiii. Any other factor which the commission may consider relevant for the inquiry.

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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) Corporate restructuring is one of the means employed by the company to achieve strategic and financial synergies. It is a process undertaken by corporates for arranging the business for increased efficiency and profitability. In context of the above statement, briefly discuss the scope and modes of corporate restructuring. (5 marks)

(b) What is the procedure for regulation of combination by Competition Commission of India ? Which institutions are exempt from giving a notice to the Commission regarding the proposed combination ? (5 marks)

(c) Ramesh, who is promoter of Green Ltd. holds 20% of paid-up share capital of the company. The shares of the company are listed on National Stock Exchange. Ramesh intends to pledge his shares for obtaining loan. State the requirements for disclosure of pledged shares under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. (5 marks)

(d) "Amalgamation of Government Companies requires a simplified procedure for compliance".

List out the steps involved upto the stage of approval by Central Government for amalgamation of Government companies. (5 marks)

Answer 1(a)

Scope of Corporate Restructuring

The scope of Corporate Restructuring encompasses enhancing economy (cost reduction) and improving efficiency (profitability). When a company wants to grow or survive in a competitive environment, it needs to restructure itself and focus on its competitive advantage. A larger company, resulting from merger of smaller ones, can achieve economies of scale. If the size is bigger, it enjoys a higher corporate status. The status allows it to leverage the same to its own advantage by enabling it to raise larger funds at lower costs. The reduction in the cost of capital translates into profits.

Portfolio and Asset Restructuring

This type of restructuring can be performed in the following ways:

— Merging of two or more companies.

— Purchasing assets of another company

— Acquisition of equity shares of another firm resulting in change of ownership

— Financial re-engineering

— Buying-back of shares

— Issuing different types of shares like non-voting or differential voting rights or preference shares

— Issuing different types of debts to meet the need for fixed and working capital

— Infusing foreign debts and equity

Internal streaming and reorganizing the business process:

— Reducing the head count

— Closing uneconomical units

Inducting programme to reduce costs:

— Disposing off obsolete and un-workable/idle assets

— Reorganizing the business process and techniques

Different modes of Corporate Restructuring are as under:

1. Merger
2. Demerger
3. Reverse Merger
4. Disinvestment
5. Takeovers
6. Joint Venture
7. Strategic alliance
8. Franchising
9. Slump Sale

Answer 1(b)

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

Any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission. No combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission or the Commission has passed orders, whichever is earlier.

Exemptions

The provisions of section 6 shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. The public financial institution, foreign institutional investor, bank or venture capital fund shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the Commission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

Answer 1(c)

Disclosure of pledged shares

Regulation 31 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 contains provisions relating to disclosure of pledged shares. Since the company is a listed company, hence provisions of Regulation 31 of SEBI (SAST) Regulations, 2011 would apply.

The promoter Ramesh shall disclose details of shares pledged with the bank within 7 working days of such pledge to the target company at its registered office and to the stock exchange where the shares of the target company are listed.

Further, Ramesh shall inform the target company at its registered office and the Stock Exchange, where the shares of the company are listed, the details of any invocation or release of such pledge of shares held by him within 7 working days of the occurrence of such an event.

Answer 1(d)

Broad steps involved in the amalgamation of Government companies are as under:

1. Government companies applying for amalgamation should obtain approval of Cabinet i.e. Union Council of Ministers. In case of State Undertakings approval of State Council of Ministers is required.

2. In case of amalgamation of Joint Holding of State and Central Government in companies, approval of both Central and State government is to be obtained.

3. Government companies intending to amalgamate should pass resolution at a general meeting of members of both the companies with all necessary compliances.

4. Every resolution of a government company should be passed at the general meeting by members holding 100% of the voting power and such resolution should contain complete details showing assets and liabilities of amalgamating companies.

5. Before passing resolution as above, 30 days' notice in writing together with a copy of proposed resolution should be given by the Government company to all the members and creditors.

6. A resolution passed by the Government company is not valid and does not take effect, unless (i) the assent of all creditors has been obtained, or (ii) assent of 90% of the creditors by value has been received and the company certifies that there is no objection from any other creditor.

7. Resolution passed by both the amalgamating companies along with approval of Cabinet should be sent to the Central Government. On being satisfied, the Central Government may order by notification in the Official Gazette, that the said amalgamation shall take effect.

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

Question 2

(a) Using any evident case, explain the concept of funding through leveraged buy-out for the acquisition of a company.

(b) The incidence of stamp duty is an important consideration for the planning of any merger.

Discuss the stamp duty payable when amalgamation is between a holding company and a subsidiary company.

(c) What is meant by demerger ? Differentiate it with the slump sale.

(5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Going global is rapidly becoming the Indian company's mantra of choice. What are the benefits and challenges involved in cross border takeover ? Name some recent cross border takeovers. (5 marks)

(ii) Explain Inbound and Outbound merger as defined in the Foreign Exchange Management (Cross Border Merger) Regulations, 2018. (5 marks)

(iii) The main purpose of a merger or acquisition is to achieve the expected financial results namely the earnings and cash flow. But there are certain other measures that serve as key indicators for measuring post merger efficiency. What are these key indicators ? (5 marks)

Answer 2(a)

Leveraged Buy-out

A leveraged buyout (LBO) is the purchase of a company using a large amount of debt or borrowed cash to fund the acquisition. In other words, it's when a company use a large amount of borrowed funds to purchase another company instead of using its own money or raising capital from investors. A leveraged buyout, is an acquisition of a company or its division majorly financed with borrowed funds. The acquirer resorts to a combination of a small investment and a large loan to fund the acquisition. The loan capital is availed through a combination of repayable bank facilities and/or public or privately placed bonds.

Alternatively, the acquiring company could float a Special Purpose Vehicle (SPV) as a 100% subsidiary with a minimum equity capital. The SPV can leverage this equity to gear up significantly higher debt to buyout the target company. The target company's assets can be used as collaterals for availing the loan and once the debt is redeemed, the acquiring company has the option to merge with the SPV. The debt will be paid off by the SPV using the cash flows of the target company. The purpose of leveraged buyouts is to allow companies to make large acquisitions without having to commit a lot of capital.

Bharti - Zain deal

Bharti started its telecom services business by launching mobile services in India in 1995. Zain established in 1983 was the first mobile operator in Kuwait. In 2010 Bharti Airtel entered into exclusive agreement with KSC (Zain) for the acquisition of Zain Africa International BV (Zain Africa).

The acquisition deal was done as a leveraged buyout and the loan for financing the transaction was availed by two Special Purpose Vehicles (SPVs). The acquisition was routed through SPVs keeping Bharti Airtel's standalone financials intact. However, it did not relieve Bharti from its responsibility as a borrower.

Answer 2(b)

Amalgamation between a Holding and a Subsidiary company is exempt from the payment of Stamp Duty subject to certain conditions. These conditions are as under:

1. When at least 90% of the issued capital of the transferee company is in the beneficial ownership of the transferor company, or
2. When the transfer is between a parent and a subsidiary company, one of which is a beneficial owner of not less than 90% of the issued share capital of the other, or
3. When the transfer takes place between two subsidiary companies each of which is having not less than 90% of the share capital in the beneficial ownership of the parent company.

Stamp duty being a State subject, these exemptions will be applicable only in those States where the State Government follows the notification of the Central Government in this regard.

Stamp duty on transfer of assets is governed by the relevant State Stamp Act. In terms of stamp duty, though the State laws provide for rates of stamp duty to be paid on various instruments, it is observed that generally there is no specific entry for a High Court (now NCLT) order sanctioning the scheme of amalgamation or demerger, in the absence of which High Courts have taken the view that the High Court (now NCLT) order involving the transfer between two juristic persons of certain movable and immovable property, is a 'conveyance' and should therefore be chargeable to stamp duty.

Answer 2(c)

'Demerger' is a form of corporate restructuring in which the entity's business operations are segregated into one or more components. In simple words, it means division or

separation of different undertakings of a business functioning under a common corporate umbrella, it is in fact a corporate partition of a company in two undertakings. A demerger is often done to help each of the segments operate more smoothly, as they can focus on a more specific task after demerger.

Demerger under section 2(19AA) of the Income-tax Act, 1961 means the transfer, pursuant to a scheme of arrangement under section 230 to 232 of the Companies Act, 2013, by a demerged company of its one or more undertakings to the resulting company.

'Slump sale' is transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities. If a company sells or disposes of the whole or substantially the whole of its undertaking for a predetermined lump sum consideration called slum price, then it results in a slump sale.

Section 2(42C) of the Income-tax Act, 1961, recognizes 'slump sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. Sale includes transfer of an asset from one person to another for some consideration, where consideration can be in kind or in cash.

The conceptual difference lies in the valuation methodology and the end purpose to be achieved for the specific action taken.

Answer 2A(i)

Going global is rapidly becoming Indian company's mantra of choice. Indian companies are looking for ways to reduce costs, innovate speedily and increase their international presence. One of the best ways for this is cross border takeovers. Globalization has helped in increasing the number of cross border takeovers.

Cross border takeover has several benefits as mentioned below:

1. It provides newer and better technology
2. It increases the size of the firm
3. It create employment opportunities
4. It enhances the market capitalization

Cross border takeover is a complex process involving various challenges as mentioned below:

1. Taxation issues
2. Legal issues (company law, market regulations, self-regulations, etc.)
3. Cultural differences
4. Volatility in share prices
5. Technological changes
6. Political considerations
7. Power and pervasiveness of labor unions and employee representatives

Some of the recent cross border takeovers are:

- Walmart – Flipkart
- Bayer – Monsanto
- Hindalco – Aleris Corporation
- Rosneft Oil Company – Essar Oil
- General Electric – Alstom

Answer 2A(ii)

Inbound and outbound merger as defined in the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 are explained hereunder:

Inbound Merger

An inbound merger is one where a foreign company merges with an Indian company (or domestic company) resulting in an Indian company being formed. Following are the key aspects which need to be followed during an inbound merger:

1. The resultant company post cross-border merger can transfer any security including a foreign security to a person resident outside India.
2. An office/ branch outside India of the foreign company shall be deemed to be the resultant company's office outside India.
3. The borrowings of the transferor company would become the borrowings of the resulting company.
4. Assets acquired by the resulting company can be transferred in accordance with the provisions of the Companies Act, 2013 or any regulations framed thereunder for this purpose.
5. The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction.

Outbound Merger

An outbound merger is one where an Indian company (or domestic company) merges with a foreign company resulting in a foreign company being formed. The following are the key aspects governing an outbound merger:

1. The securities issued by a foreign company to the Indian company, may be issued to both, persons resident in and outside India.
2. An office of the Indian company in India may be treated as the branch office of the resultant company in India.
3. The borrowings of the resultant company shall be repaid in accordance with the sanctioned scheme.
4. Assets which cannot be acquired or held by the resultant company should be sold within a period of two years.
5. The resultant company can now open a Special Non-Resident Rupee Account.

Answer 2A(iii)

The main purpose of a merger or acquisition is to deliver the expected financial results namely earnings and cash flow. However, the criterion to judge a successful merger differs depending upon the conditions. Different factors may be considered for making value judgments such as growth in profit, dividend, company's history, and increase in size, base for growth, etc.

There are certain measures that serve as key indicators for measuring post-merger efficiency. The indicators may be grouped as:

a) Financial outcomes.

b) Component measures of these outcomes namely revenues, costs, net working capital and capital investments.

c) Organizational indicators such as customers, employees and operations.

There are broadly four possible reasons for business growth and expansion which is to be achieved by the merged company. These are (1) Operating economies, (2) Financial economies, (3) Growth and diversification, and (4) Managerial effectiveness.

Question 3

Comment on the following :

(a) Negotiated deals, private arrangement and spot transaction methods of buy back of shares are allowed under SEBI (Buy Back of Securities) Regulation, 1998.

(b) An open offer made under SEBI (SAST) Regulations, 2011 cannot be withdrawn except under certain circumstances.

(c) A conditional offer and a competing offer are one and the same under SEBI (SAST) Regulations, 2011.

(d) Securities premium can be utilized for reducing share capital.

(e) Accounting Standard-14 is applicable to demerger. (3 marks each)

Answer 3(a)

Regulation 4(vi) of SEBI (Buy-back of Securities) Regulations, 2018 does not permit buy-back through negotiated deals (of and on stock exchange), private arrangement and spot transactions.

According to Regulation 4(iv) of the SEBI (Buy-back of Securities) Regulation, 2018, a company may buy-back its own shares or other specified securities by any one of the following methods:

(a) from the existing shareholders or other specified securities holders on a proportionate basis through the tender offer;

(b) from the open market through:

(i) book-building process

(ii) stock exchange

(c) from odd-lot holders.

No offer of buy-back for 15% or more of paid-up capital and free reserves, shall be made from the open market.

Alternate Answer [based upon SEBI (Buy-back of Securities) Regulations, 1998]

Regulation 4(2) of erstwhile SEBI (Buy-back of Securities) Regulations, 1998 does not permit buy-back through negotiated deals (of and on stock exchange), private arrangement and spot transactions.

According to Regulation 4(1) of the SEBI (Buy-back of Securities) Regulation, 1998, a company may buy-back its own shares or other specified securities by any one of the following methods:

(a) from the existing shareholders or other specified securities holders on a proportionate basis through the tender offer;

(b) from the open market through:

(i) book-building process

(ii) stock exchange

(c) from odd-lot holders.

No offer of buy-back for 15% or more of paid-up capital and free reserves, shall be made from the open market.

Answer 3(b)

As per regulation 23 of the SEBI (SAST) Regulations, 2011, an open offer once made cannot be withdrawn except in the following circumstances:

1. Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the detailed public statement and the letter of offer;
2. Any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer;
3. The acquirer, being a natural person, has died;
4. Such circumstances which in the opinion of SEBI merit withdrawal of open offer.

Answer 3(c)

'Conditional offer' and 'competing offer' are different under SEBI (SAST) Regulations, 2011.

Conditional offer : As per regulation 19, a conditional offer is an open offer to acquire shares along with the condition as to the minimum level of acceptance. If shares up to a minimum level are not offered to the acquirer, he may not acquire any shares.

Competing offer : As per regulation 20, when a public announcement for acquiring shares of a target company in an open offer is made, any person, other than the acquirer who has made such public announcement, shall be entitled to make a public announcement of an open offer within fifteen working days of the date of the detailed public statement made by the acquirer.

Unless the open offer first made is an open offer conditional as to the minimum level of acceptances, no acquirer making a competing offer can be made conditional as to the minimum level of acceptances.

Answer 3(d)

Securities premium can be utilized for reducing share capital. Utilization of securities premium and general reserve for reduction of share capital is permissible if:

(i) There is no diminution of liabilities, or

(ii) There is no repayment of paid-up capital, or

(iii) There is no reduction of issued, subscribed or paid-up share capital.

Vide Alembic Ltd. Re (2008) 144 Comp cases 105; (2009) 89 SCL 19 (Guj.)

Answer 3(e)

Accounting Standard-14 (Accounting for Amalgamations) is applicable only in case of amalgamation and not in case of demerger. Accounting Standard-14 lays down the accounting and disclosure requirements in respect of amalgamations of companies and the treatment of any resultant goodwill or reserves.

In the scheme of arrangement between Sony India Private Limited (Sony India) and Sony Software Centre Private Limited (Sony Software), the Delhi High Court, while approving scheme of arrangement between Sony India has clarified that AS-14 is applicable only to amalgamations and not to demerger. The same was also upheld by Gujarat High court in the case of Gallops Realty Private Limited.

PART B

Question 4

(a) Fund Raising is an important exercise for any business activity. What are the important parameters to be kept in mind while doing valuation for fund raising ?

(b) Merger and Amalgamation is one of the most attractive routes to enter into a new business. Explain the advantages of starting a new business through merger/ amalgamation.

(c) Firm A is a profit making firm whereas Firm B has accumulated losses of ₹1,000 lakh.

Firm A acquires firm B. The projected profits before taxes, of firm A, for the next three years are given in the table :

Year	*Projected Profit Amount (₹ in lakh)*
1	*350*
2	*500*
3	*700*

Determine the present value of tax gains which the Firm A gains on account of merger with Firm B.

Assume corporate tax rate 35 per cent. Discount rate 12 per cent.

Present Value (PV) factor at 12% : one year 0.893, two year 0.797, three year 0.712. *(5 marks each)*

Answer 4(a)

Fund raising is an important exercise for any business activity. Raising money is a complicated multi-stage process. Valuation of business is one of the most important steps before going for fund raising. A business valuation requires a working knowledge of a variety of factors, and professional judgment and experience. This includes recognizing the purpose of the valuation, the value drivers impacting the subject company, and an understanding of industry, competitive and economic factors, as well as the selection and application of the appropriate valuation approach (es) and method(s).

Business valuation is a process that follows a number of key steps. The five steps are:

1. Planning and preparation
2. Analysing the financial statements
3. Choosing the business valuation methods
4. Applying the selected valuation method
5. Reaching the business value conclusion

The important parameters to be kept in mind while doing valuation of a business for fund raising are as under:

1. To work out how much money you want to raise. The short answer is that one should raise enough money to get to the next valuation milestone and then have time left to go out and find the next round.
2. The practical thing to do is to put oneself inside the mind of the target venture capitalist and think like the investor. If one can guess how they would value the business then it can be ensured that the amount being raised is consistent with the 10-25% dilution guideline and structure the pitch accordingly.

Answer 4(b)

An organisation could venture into a new business taking any of the routes like

funding a start-up, joint venture, strategic partnership. The reasons why mergers and acquisitions appears to be the most attractive route, despite all the compliances are as under:

1. It is a much quicker way to enter the market *vs.* starting from the scratch *vide* a start-up route.
2. Another advantage is synergy; one can grab a bigger market share, create a backward or forward integration and attract a much larger customer base, and simultaneously looking to reduce the cost of operations.
3. Overcoming the entry barriers and changing the league on the value chain itself by positioning itself as a larger conglomerate.
4. Ready availability of the necessary infrastructure.
5. Ready availability of a brand name.
6. Skipping the entire gestation period which is cumbersome and costly in terms of time and effort.

Answer 4(c)

Present value of tax gains

(Rs. in lakh)

S. No.	*Particulars*	*Year-1*	*Year-2*	*Year-3*
1	Profit before tax (PBT)	350	500	700
2	Profit adjusted against loss of Firm-B	350	500	150 (1,000 - 350 - 500)
3	Reduction in tax payment	350 x 0.35 = 122.50	500 x 0.35 = 175.00	150 x 0.35 = 52.50
4	PV factor at 12%	0.893	0.797	0.712
5	PV of tax [(3) x (4) above]	109.39	139.47	37.38

Total tax savings = 109.39 + 139.47 + 37.38 = Rs.286.24 lakh

Question 5

(a) The following information is available in respect of acquiring company FM Ltd. and target company VM Ltd. :

Particulars	*FM Ltd*	*VM Ltd*	*Remarks*
Earnings after Tax	*₹2000 lakh*	*₹400 lakh*	*PAT*
No. of shares issued and paid up	*200 lakh*	*100 lakh*	*Face Value ₹10*
P/E Ratio	*10*	*5*	*—*

You are required to calculate :

(i) Swap Ratio on Current Market Price. *(2 marks)*

(ii) EPS of FM Ltd. after acquisition *(1 mark)*

(iii) Expected Price per share of FM Ltd. after acquisition, assuming PE Ratio of FM Ltd. remaining unchanged. *(1 mark)*

(iv) Total Value of Merged Company. *(1 mark)*

(b) When no mistake is found in exchange ratio worked out by a recognized and reputed firm of Chartered Accountants and the same has been adopted by the shareholders/creditors with overwhelming majority, Court/Tribunal still can, substitute the exchange ratio. Do you agree ? Discuss. *(5 marks)*

(c) 'Valuation is an art, not a science'. Explain this statement with reference to different methods to be applied while arriving at the fair value of shares. *(5 marks)*

Answer 5(a)

S. No.	*Particulars*	*FM Ltd.*	*VM Ltd.*
1	Earnings Per Share (EPS)	Rs.2,000 lakh / 200 lakh = Rs. 10	Rs. 400 lakh / 100 lakh = Rs.4
2	Market Price (EPS x PE ratio)	10 x 10 = Rs.100 per share	4 x 5 = Rs.20 per share

(i) Swap Ratio = 20/100 = 0.2 i.e. 1 share of FM Ltd. for every 5 shares of VM Ltd.

No. of shares to be issued = 100 x 0.2 = 20 lakh shares

(ii) EPS after merger = (Rs.2,000 lakh + Rs.400 lakh) / (200 lakh + 20 lakh)

= 2,400 / 220 = Rs.10.91

(iii) Expected share price after merger when PE ratio remain unchanged:

Expected share price after merger = EPS after merger x PE ratio

= 10.91 x 10 = Rs.109.10

(iv) Total value of the merged company FM Ltd. = Share price x No. of shares

= 109.10 x 220

= Rs.240.02 crore

Answer 5(b)

Law on valuation of shares is well settled. Regarding valuations by expert and recognized firm of Chartered Accountants, the Supreme Court in *Miheer H. Mafatlal* v. *Mafatlal Industries Ltd.* (1996) held that if Share Exchange Ratio is fixed by Chartered Accountant upon consideration of various factors and approved by majority of shareholders

in meeting, the Court will not disturb ratio once the exchange ratio of the shares of the transferee company to be allotted to the holders of shares of the transferor company has been worked out by a recognized firm of Chartered Accountants who are expert in the field of valuation and if no mistake can be pointed out in the said valuation, it is not for the court to substitute its exchange ratio, especially when the same has been accepted without demur by the overwhelming majority of the shareholders of two companies or to say that the shareholders in their collective wisdom should not have accepted the said exchange ratio on the ground that it will be detrimental to their interests.

Further, in Re Maknam Investments Ltd. (1995)(LJ) the Calcutta High Court observed:

"Courts do not go into the matter of fixing of exchange ratios /in great details or to sit in appeal over the expert decision of concerned Chartered Accountants of repute. Courts only see whether there has been any manifest unreasonableness or manifest fraud involved in the matter."

Answer 5(c)

Valuation is generally done on the basis of fair value when market value of a company is independent of its profitability.

The fair value of shares is arrived at after consideration of different modes of valuation and diverse factors. There is no mathematically accurate formula of valuation. An element of guesswork or arbitrariness is involved in valuation.

The following four factors have to be kept in mind in the valuation of shares:

(i) Capital cover

(ii) Yield

(iii) Earning capacity; and

(iv) Marketability

For arriving at the fair value of shares, three well known methods applied are:

(a) the manageable profit basis (earnings per share method)

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

(c) the market value method.

The fair value of a share is the average of the value obtained by the net assets method and the one obtained by the yield method. This is, in fact, not a valuation, but a compromise formula for bringing the prices to an agreement.

Thus, the valuation of shares is more of an art than science due to the mix of qualitative and quantitative factors involved in valuation process.

PART C

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

Question 6

(a) The term 'Person' and 'Corporate Person' have been used differently at different places in the Insolvency and Bankruptcy Code, 2016. Define the term person and corporate person and explain the difference between the two.

(b) *A foreign representative has applied to the court for recognition of the foreign proceedings.*

When shall such a foreign proceedings be recognized under the UNCITRAL Model Law ?

(c) *You being a Registered valuer conducted valuation of a company. What is all that you will cover in your valuation report ?*

(d) *What is the time limit for completion of the corporate insolvency resolution process under the IBC Code, 2016 ? A resolution process could not be completed within the specified time limit, what recourse is available to the Resolution Professional to get an extension of time period ?* *(5 marks each)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) *Explain the term 'Security Interest' under the SARFAESI Act, 2002.* *(5 marks)*

(ii) *Discuss the functions and code of conduct of Insolvency Professional under the Insolvency and Bankruptcy Code, 2016.* *(5 marks)*

(iii) *Though UNCITRAL Model Law is not a substantive law, yet it recommends protection to creditors and other interested persons. Briefly describe what are the protections provided under the UNCITRAL Model Law.* *(5 marks)*

(iv) *Asset Reconstruction Company (ARC) acts as an agent for any bank or financial institution for the purpose of recovering their dues from borrowers. Explain the statement with legal provisions.* *(5 marks)*

Answer 6(a)

The terms 'person' and 'corporate person' have been used differently at different places in the Insolvency and Bankruptcy Code, 2016.

Though the definitions of 'person', are wide, it will have to be read in context in which the word 'person' has been used. The following definition of 'person' may not apply at each place, where the word person has been used. "Person includes individual, HUF, Company, Trust, Partnership, LLP and any other entity established under the Statutes. It also includes a person resident outside India (Section 3(23) of the Insolvency and Bankruptcy Code, 2016).

"Corporate Person" means a company as defined in section 2(20) of the Companies Act, 2013, a limited liability partnership as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2009, or any other persons incorporated with limited liability under any law for the time being in force but shall not include any financial service provider *vide* section 3(7) of Insolvency and Bankruptcy Code, 2016.

In the definition of 'person' the word individual has been used but in the word 'corporate person' such word has not been used. Corporate person, includes person, as has been included in the word person with limited liabilities excluding financial service provider, as defined in section 3(7) of the Code.

Definition of Corporate Person completely excludes financial service providers. The reasons are that they are regulated by specialized agency. Thus, the Code does not cover Banks, Financial Institutions, Insurance Companies, ARCs, Mutual Funds or Pension Funds, etc.

Answer 6(b)

Decision to recognize a foreign proceeding (Article 17 of the UNCITRAL Model Law)

Subject to Article 6, a foreign proceeding shall be recognized under UNCITRAL Model Law if:

(a) The foreign proceeding is a proceeding within the meaning as defined under Article 2;

(b) The foreign representative applying for recognition is a person or body within the meaning as defined under Article 2;

(c) The application meets the requirements of Article 15; and

(d) The application has been submitted to the court referred to in Article 4.

The foreign proceeding shall be recognized as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests (COMI); or as a foreign non-main proceeding if the debtor has an establishment. The purpose of Article 17 is to indicate that, if recognition is not contrary to the public policy of the enacting State and if the application meets the above said requirements, recognition will be granted as a matter of course. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as decision of any other court.

Answer 6(c)

The valuer shall cover the following in the Valuation Report:

a) Background information of the assets being valued

b) Purpose of valuation and appointing authority

c) Identity of the valuer and any other experts involved in the valuation

d) Disclosure of valuers interest or conflict, if any

e) Date of appointment, valuation date and date of report

f) Inspections and/or investigations undertaken

g) Nature and sources of the information used or relied upon

h) Procedures adopted in carrying out the valuation and valuation standards followed; restrictions on use of the report, if any

i) Major factors that were taken into account during the valuation

j) Conclusion; and

k) Caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

Answer 6(d)

Section 12(1) of the Insolvency and Bankruptcy Code, 2016 lays down that subject to sub-section (2), the corporate insolvency resolution process (CIRP) shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

Section 12(2) of the Code provides that the resolution professional shall file an application to the NCLT to extend the period of the CIRP beyond one hundred and eighty days, if he is instructed to do so by a resolution passed in a meeting of the committee of creditors (CoC) by a vote of sixty-six per cent of the voting shares.

Section 12(3) of the Code provides that if the NCLT is satisfied that the subject matter of the case is such that CIRP cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but such period cannot exceed ninety days.

Answer 6A(i)

Security Interest

According to section 2(zf) of the SARFAESI Act, 2002, 'Security interest' means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes —

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.

Answer 6(A)(ii)

As per section 208(1) of the Insolvency and Bankruptcy Code, 2016, where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters —

(a) a fresh start order process

(b) individual insolvency resolution process

(c) corporate insolvency resolution process

(d) individual bankruptcy process

(e) liquidation of a corporate debtor firm

As per section 208(2) of the Code, every insolvency professional shall abide by the following Code of Conduct —

(a) to take reasonable care and diligence while performing his duties;
(b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
(c) to allow the insolvency professional agency to inspect his records;
(d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
(e) to perform his functions in such a manner and subject to such conditions as may be specified.

Answer 6(A)(iii)

The UNCITRAL Model Law contains following provisions to protect the interest of the creditors (in particular local creditor), the debtor and other affected persons –

a) Availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court, it is expressly stated that in granting such relief the court must be satisfied that the interests of the creditors and other interested persons including the debtors are adequately protected (Article 22).
b) The court may subject the relief it grants to conditions it considers appropriate.
c) The court may modify or terminate the relief granted, if so required by a person affected thereby (Article 22).

In addition to those specific provisions, the UNCITRAL Model Law in a general way provides that the court may refuse to take an action governed by the Model Law if the action would be manifestly contrary to the public policy of the enacting State (Article 6).

Answer 6(A)(iv)

'Asset Reconstruction Company', means a company registered with Reserve Bank of India under section 3 of SARFAESI Act, 2002 for the purposes of carrying on the business of asset reconstruction or securitization or both. The buying of impaired assets from banks or financial institutions by ARCs will make their balance sheets cleaner and they will be able to use their time, energy and funds for development of their business. ARCs may be able to mix up their assets, both good and bad, in such a manner to make them saleable.

The main objective of asset reconstruction company (ARC) is to act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges, to act as manager of the borrowers' asset taken over by banks, or financial institution, to act as the receiver of properties of any bank or financial institution and to carry on such ancillary or incidental business with the prior approval of Reserve Bank of India wherever necessary. If an ARC carries on any business other than the business of asset reconstruction or securitization or the business mentioned above, it shall cease to carry on any such business within one year of doing such other business.

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