GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2015

MODULE 1

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

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

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

C O N T E N T S

NOTE: Guideline Answers of the last Four Sessions need to be updated in the light of changes and references given below:

PROFESSIONAL PROGRAMME

UPDATING SLIP

ADVANCED COMPANY LAW AND PRACTICE

MODULE – 1 – PAPER 1

Examination Session	*Question No.*	*Updating required in the answer*
All previous sessions	—	All answers are based on the notified provisions of Companies Act, 2013 and the provisions of Companies Act, 1956 which are still in force. SEBI (ICDR) Regulations, 2009 as amended from time to time.

UPDATING SLIP

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

MODULE – 1 – PAPER 2

Examination Session	*Question No.*	*Updating required in the answer*
All previous sessions	—	All answers are based on the notified provisions of Companies Act, 2013 and the provisions of Companies Act, 1956 which are still in force. SEBI (SAST) Regulations, 2011 as amended from time to time. SEBI (ICDR) Regulations as amended from time to time. Consolidated FDI Policy as amended from time to time.

UPDATING SLIP

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

MODULE – 1– PAPER 3

Examination Session	*Question No.*	*Updating required in the answer*
All previous sessions	—	All answers are based on the notified provisions of Companies Act, 2013 and the provisions of Companies Act, 1956 which are still in force. However the provisions under Companies Act, 2013 pertaining to mergers/ acquisitions/winding up are yet to be notified and the provisions relating to buy back and alteration of capital are already notified. Accordingly most of the answers are based on the Companies Act, 1956. SEBI (SAST) Regulations, 2011 as amended from time to time.

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2015

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) Your client Vivek wants to form a private company with a share capital of ₹50,000. Examining the relevant provisions of the Companies Act, 2013, advise Vivek on the following issues with proper justification :

(i) Whether Vivek will be successful in the formation of the proposed company?

(ii) Whether public can be invited for subscribing to the share capital of the proposed company ?

(iii) Whether registration of articles of association of the proposed company is mandatory ?

(iv) Whether Vivek will be able to convert the proposed private company into 'one person company' at a later date, if need be ?

(v) As regards to stamp duty state whether it will make any difference if the proposed company is incorporated in the State of Haryana or in the State of Kerala. (5 marks)

(b) "Chairperson of an annual general meeting must make a speech or give a statement at the meeting." Explain the validity of this statement pursuant to the provisions of the Companies Act, 2013. (5 marks)

(c) William & Company, a company incorporated in U.K., decides to set-up its corporate office in Mumbai. Accordingly, the Board of directors of the company passes a resolution.

The Board seeks your advice on the procedure to be adopted to carry out the proposal of the company. Advise the Board about the procedure to be followed and forms and documents the company is required to file with the Registrar of Companies. (5 marks)

(d) The Board of directors of Wise Ltd., a company incorporated under the Companies Act, 2013 and listed at Bombay Stock Exchange, at its meeting resolves to issue certain number of shares with differential dividend and voting rights. The Board of directors presents the following information :

(i) The Board has decided to keep the shares with differential dividend and voting rights at 51% of the paid-up share capital.

(ii) As per the track record, the company has a record of distributable profits for the last two years only; before that the company had suffered heavy losses.

Examining the provisions of the Companies Act, 2013 and the rules framed thereunder, stating the conditions, if any, decide whether the company can proceed with the execution of Board's resolution for issue of shares with differential rights in respect of dividend and voting. *(5 marks)*

Answer 1(a)

(i) Section 2(68) of the Companies Act, 2013 defines the term 'private company' to mean a company having a minimum paid-up share capital as may be prescribed, and which by its Articles,—

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred and

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

Accordingly, since there is no requirement of minimum share capital, Vivek will be successful in the formation of the proposed company on complying with other provisions of the Companies Act, 2013.

(ii) In view of Section 2(68) defining the term 'private company' which prohibits any invitation to the public to subscribe for any securities of the company, the proposed company cannot invite for subscribing share capital.

(iii) Yes, registration of Articles of Association of the proposed company is mandatory. Section 7 of the Companies Act, 2013 deals with incorporation of company. Section 7(1) requires inter-alia to file Memorandum and Articles of the company duly signed by all the subscribers to the memorandum. Section 7(2) provides that the Registrar on the basis of documents and information filed shall register all the documents and issue a certificate of incorporation to the effect that the proposed company is incorporated under this Act.

(iv) Yes. Section 18 read with rule 7 of the Companies (Incorporation) Rules, 2014 provides that a private company other than a company registered under section 8 of the Act having paid up share capital of fifty lakhs rupees or less and average annual turnover during the relevant period is two crore rupees or less may convert itself into One Person Company by passing a special resolution in the general meeting. Before passing such resolution, the company shall obtain No objection in writing from members and creditors.

(v) Yes. Stamp duty on Incorporation documents (Form 1, MoA, AoA) is state subject under Constitution. Accordingly, each state has provided different rate of stamp duty for incorporation documents in the relevant Stamp Act/ Rules of the concerned State/ Union Territory Government.

Answer 1(b)

There is no statutory provision under Companies Act, 2013 under which Chairperson of an Annual General Meeting must make a speech or statement at the meeting. Rather, it is a convention that the Chairperson of Annual General Meetings makes a statement or

a speech which is a personal message or address to the shareholders. Chairman's speech usually gives an overview of the company's progress and future plans. Chairperson explains the working of the company during the year under review and current year in the speech. After chairperson's speech, ordinary and Special Businesses take place. Some companies also arrange for publication of Chairperson's statement in various newspapers, financial magazines and/ or website of company.

Answer 1(c)

As per 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.

Accordingly, William & Company, a company incorporated in U.K., in case, it sets up its corporate office in Mumbai would be termed as a 'Foreign Company' under the Companies Act, 2013. Accordingly, the following procedure would be required to comply with.

Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration [Section 380(1)] –

(a) a certified copy of the charter, statute or Memorandum and Articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not in English language, a certified translation thereof in the English language;

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

(c) a list of the directors and secretary of the company with particulars;

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

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

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

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

(h) other prescribed particulars.

In addition to above, a list of directors and Secretary of company, needs to be delivered to the Registrar (Rule 3) of Companies (Registration of Foreign Companies) Rules, 2014.

The Foreign Company shall, within a period of thirty day of establishment of its place of business in India, file Form FC – 1 of the Companies (Registration of Foreign Companies)

Rules, 2014 and the application shall also be supported with an attested copy of approval from Reserve Bank of India under Foreign Exchange Management Act or Regulations and also from other Regulators, if any.

Answer 1(d)

Section 43 of the Companies Act, 2013 empowers the company to have equity share capital of a company with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed.

Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014 deals with procedure for issuing equity shares with differential rights. It provides that no company limited by shares shall issue equity shares with differential rights as to dividend, voting or otherwise, unless it complies with the following conditions, namely:-

(a) the Articles of Association of the company authorizes the issue of shares with differential rights;

(b) the issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders. Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot;

(c) the shares with differential rights shall not exceed twenty-six percent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time;

(d) the company having consistent track record of distributable profits for the last three years;

(e) the company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares;

(f) the company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend;

(g) the company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government;

(h) the company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.

Since, these rules require that the shares with differential rights shall not exceed

twenty-six percent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time and the company having consistent track record of distributable profits for the last three years, the company cannot proceed with issuing shares with differential voting right with the given conditions:

- To keep shares with differential dividend and voting rights at 51% of paid up share capital;
- Record of distributable profits for last two years only.

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

Question 2

(a) Rohan, a person resident in India, has been running a hotel as a sole proprietor. He now wants to convert his business into a 'one person company' (OPC) as permissible under the provisions of the Companies Act, 2013 and seeks your advice in this regard. Advise him on the procedure to be followed for conversion of his business into an OPC. What shall be your advice if Rohan is a non-resident Indian ? Whether a partnership firm can form an OPC ?

(b) "Debenture trust deed is a written document legally conveying a property to the trustee, often for the purpose of securing a loan or mortgage." Discuss the statement in the context of the Companies Act, 2013 and rules framed thereunder.

(c) List out the additional items of business which cannot be passed through resolution by circulation and have to be placed before the Board at its meeting in case of a listed company.

(d) Board of directors of Clever Ltd., listed at Madras Stock Exchange, decides to issue equity shares to persons who are neither the existing shareholders nor the employees of the company. The articles of association of the company are silent on this issue. You being the corporate practitioner are approached by the Board to examine whether the Board's decision is valid. What shall be your advice in respect of pricing of the issue – (i) if the issue is for consideration of cash; and (ii) if the issue is for consideration other than cash ?

(4 marks each)

OR (Alternate question to Q.No. 2)

Question 2A

(i) Corporate Social Responsibility (CSR) provisions are applicable to Microskill Ltd. The company finalised the project under its CSR initiatives which require funds beyond the mandated 2% of average net profit of the company for last three financial years. Will such excess expense, when incurred, be counted in subsequent financial years as a part of CSR expenditure ? Advise.

(ii) A real estate company took advance money from its customers in the course of business on which no interest is supposed to be paid to the customers. At the end of financial year, company is in dilemma whether to treat this advance as 'advance' or 'deposit'. Advise the company on how to treat this amount without interest.

(iii) Mirage Ltd. is an unlisted company having 15 directors on its Board. The company has paid-up share capital of '200 crore and has achieved in the previous financial year a turnover of '400 crore. The provisions of the Companies Act, 2013 require the companies to have the following categories of directors on their Board :

(a) Women director

(b) Resident director

(c) Independent director

Examining the provisions of the Companies Act, 2013, decide whether the company must appoint directors under all the above categories.

(iv) Mention the classes of companies which are mandated by the Ministry of Corporate Affairs to file their financial statements in eXtensible Business Reporting Language (XBRL) mode with its key benefits. State exceptions, if any. (4 marks each)

Answer 2(a)

As per Rule 3 (1) of the Companies (Incorporation) Rules, 2014, only a natural person who is an Indian citizen and resident in India shall be eligible to incorporate a One Person Company.

Accordingly, Rohan may incorporate a one person company (OPC) and the OPC so incorporated may take over/purchase his business of hotel.

Rule 3 of the Companies (Incorporation) Rules 2014 provides that only a natural person who is an Indian citizen and resident in India:-

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

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

A person can incorporate only one 'One Person Company'.

The subscriber to the Memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company. The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in Form INC – 2 along with consent of such nominee obtained in Form INC – 3 and fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.

In case Rohan is a Non-Resident Indian, he cannot incorporate OPC as Rule 3 (1) requires that only a natural person who is an Indian citizen and resident in India One Person Company shall be eligible to incorporate a One Person Company.

Similarly a partnership firm cannot form OPC.

Answer 2(b)

Debenture Trust deed is a written document legally conveying property to a trustee often for the purpose of securing a loan or mortgage. It is the document creating and setting out the terms of a trust. It will usually contain the names of the trustees, the

identity of the beneficiaries and the nature of the trust property, as well as the powers and duties of the trustees. It constitutes trustees charged with the duty of looking after the rights and interests of the debenture holders.

As per Section 71 (7) of the Companies Act, 2013, any provision contained in a trust deed for securing the issue of debentures, or in any contract with the debenture-holders secured by a trust deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, any liability for breach of trust, where he fails to show the degree of care and due diligence required of him as a trustee, having regard to the provisions of the trust deed conferring on him any power, authority or discretion:

Provided that the liability of the debenture trustee shall be subject to such exemptions as may be agreed upon by a majority of debenture-holders holding not less than three-fourths in value of the total debentures at a meeting held for the purpose.

A trust deed for securing any issue of debentures shall be open for inspection to any member or debenture holder of the company, in the same manner, to the same extent and on the payment of the same fees, as if it were the register of members of the company; and a copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within seven days of the making thereof, on payment of fee.

As per Section 71 and sub-rule (1) of Rule 18 of the Companies (Share Capital and Debentures) Rules, 2014 a trust deed in Form No. SH.12 or as near thereto as possible shall be executed by the company issuing debentures in favour of the debenture trustees within sixty days of allotment of debentures.

Answer 2(c)

Section 179(3) of the Companies Act, 2013 provides that the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board (not by means of passing resolution by circulation), namely:—

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

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

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

(d) to borrow monies;

(e) to invest the funds of the company;

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

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

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

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

(k) any other matter which may be prescribed:

Rule 8 of the Companies (Meetings of Board and its powers) Rules, 2014 provides the following more items:

(1) To make political contributions;

(2) To appoint or remove key managerial personnel;

(3) To appoint internal auditors and secretarial auditor

Para 1.3.8 and Annexure A of the Secretarial Standard -1 on meetings of the Board provides for the illustrative list of business which shall not be passed by circulation and shall be placed before the Board at its meeting.

Answer 2(d)

Section 62(1)(C) read with Rule 13 of Companies (Share capital and debentures) Rules 2014 deals with the issue of shares on preferential basis and provides that where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered to any persons, if it is authorised by a special resolution, whether or not those persons include the persons who are existing shareholders or employees, either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

Rule 13(2) provides that the issue should be authorized by Articles of Association. In the given case since the Articles are silent on the issue, first, the Article will have to be amended to confer upon the company power to carry out the Board's decision. Accordingly, the company has to pass a special resolution at a general meeting and file Form MGT-14 with the Registrar of Companies within 30 days of passing the Resolution.

The issue on preferential basis should also comply with conditions laid down in section 42 of the Act.

Where shares or other securities are to be allotted for consideration other than cash, the valuation of such consideration shall be done by a registered valuer who shall submit a valuation report to the company giving justification for the valuation.

As per Rule 13(2), where the preferential offer of shares is made by a company whose share or other securities are listed on a recognized stock exchange, such preferential offer shall be made in accordance with the provisions of the Act and regulations made by the Securities and Exchange Board, and if they are not listed, the preferential offer shall be made in accordance with the provisions of the Act and rules made hereunder and subject to compliance with the requirements therein.

Regulation 73 of chapter VII of SEBI (ICDR) Regulations, 2009 provides that where specified securities are issued on a preferential basis to promoters, their relatives, associates and related entities for consideration other than cash, the valuation of the assets in consideration for which the equity shares are issued shall be done by an independent qualified valuer, which shall be submitted to the recognised stock exchanges where the equity shares of the issuer are listed.

Answer 2A(i)

In terms of Section 135 (5) of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every

financial year, at least 2% of the average net profits of the company made during the three preceding year.

There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over 2% could be considered as "voluntary higher spending".

Answer 2A(ii)

As per the Rule 2(xii) of the Companies (Acceptance of Deposits) Rules, 2014, deposit does not include any amount received in the course of, or for the purposes of the business of the company as an advance for supply of goods or provision of services/ received in connection with consideration for an immovable property/ as security deposit for performance of contract for supply of goods or services/ as advance received under long term projects for supply of capital goods.

But if the amount received becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission to deal in the goods or properties or services for which money is taken, then the amount received shall be deemed to be deposit.

Further, whether interest is charged or not is immaterial. Thus, advance taken from customers by Real Estate Company shall not be considered as deposits. But if it is not adjusted against the property in accordance with the terms of agreement or arrangement, then it will be treated as deposit.

Answer 2A(iii)

Woman Director

Proviso to Section 149(1) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director. These companies under the provisions are:

(1) Every listed company; and

(2) Every other public company having - (a) paid-up share capital of Rs. 100 crore or more; or (b) a Turnover of Rs. 300 crore or more.

Accordingly, since Mirage Limited is a public company and the paid up capital of company is Rs. 200 crores, the company shall appoint at least one woman director.

Resident Director

Section 149 (3) requires every company to have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. This section is applicable to every kind of company whether listed or unlisted, private or public.

Accordingly, the company is required to have one Resident Director.

Independent Director

As per Section 149(4), every listed company shall have at least 1/3rd of the total numbers as independent directors. The Central Government, may however, prescribe the

minimum number of Independent Directors in case of any class or classes of public companies. According to Rule 4 of the Companies (Appointment and qualification of Directors) Rules, 2014 provides that the following companies are required to have at least 2 directors as independent directors:

(i) The public companies have paid up share capital of Rs. 10 crore or more; or

(ii) Public companies having turnover of Rs. 100 crore or more; or

(iii) Public companies which have, in aggregate, outstanding loans, debentures, and deposits, exceeding Rs. 50 crore.

In the given case, since the company fulfils the conditions as required in respect of paid-up capital and turnover, the company must appoint atleast 2 independent directors.

Answer 2A(iv)

The following class of companies mentioned below are required to file financial statements in XBRL (extensible Business Reporting Language) mode and by using the XBRL taxonomy:

(i) All companies listed with any stock exchange(s) in India and their Indian subsidiaries; or

(ii) All companies having paid up capital of INR 5 crores and above;

(iii) All companies having turnover of INR 100 crores and above; or

(iv) All companies who were required to file their financial statements for FY 2010-11 using XBRL mode

However, Banking Companies, Insurance Companies, Power Companies And Non-Banking Financial Companies (NBFCs) are exempted from XBRL filing till further orders.

Key benefits of XBRL filing are as under:

Relevant data has tags and selective information can be fetched for specific purposes by various government and regulatory agencies.

It is in conformity with Global Reporting Standards, which helps in improved data mining and relevant information search.

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

Question 3

(a) Referring to the provisions of the Companies Act, 2013, examine the validity of the following appointments on the Board made by Star Ltd., incorporated on 3rd January 2015 :

(i) Dilip, an Indian national normally stays in U.S. During the calendar year 2014, he stayed in India for 120 days, appointed as a resident director.

(ii) Star Ltd. being an unlisted company having a turnover of '100 crore, appoints Ms. Tanya as the director on 1st February, 2015. Ms. Tanya already holds directorship in ten public companies. She is a whole-time Company Secretary in practice.

(iii) *Supatra, a Practicing Company Secretary holds directorship in eight public companies and six private companies. In addition, he also holds alternate directorship in three companies and directorship in three subsidiary companies of Star Ltd.*

(b) *Mohan, a director in Agile Ltd. holding director's identification number (DIN) allotted by the Central Government has now accepted directorship in two other public companies and three private companies. Referring to the provisions of the Companies Act, 2013, answer the following :*

(i) *Whether he is required to obtain DIN for each of the companies in which he has been appointed as director ?*

(ii) *After obtaining DIN, there are some changes in the particulars of Mohan. What procedure would you follow to get the changes incorporated in the DIN already allotted to Mohan ?*

(c) *"In case of listed companies, the management discussion and analysis report (MDAR) should either form a part of the Board's Report or be given as an addition thereto in the annual report to the shareholders." Discuss the statement and also state the contents to be included therein.*

(d) *Every company is required to follow useful life of assets as mentioned in Schedule II of the Companies Act, 2013. Is it possible to adopt different useful life of assets other than that mentioned in Schedule II of the Companies Act, 2013. Comment.* *(4 marks each)*

OR (Alternate question to Q.No. 3)

Question 3A

Write notes on the following :

(i) *Re-opening of books of account*

(ii) *Matters requiring special notice*

(iii) *Keeping documents, records, registers, minutes, etc., of the company in electronic form*

(iv) *Appointment of proxy for a general meeting wherein e-voting facility has been provided to the members.* *(4 marks each)*

Answer 3(a)

(i) Since Section 149(3) requires the person who has stayed in India for a total period of not less than 182 days in the previous calendar year can be a Resident Director. Accordingly, Dilip who has stayed for 120 days in India during calendar year 2014 cannot be appointed as Resident Director.

(ii) Section 165 of the Companies Act, 2013 regulates the appointment of directors in a company and the number of directorships an individual can hold. Accordingly, a maximum limit on total number of directorships has been fixed at 20 companies including a sub-limit of 10 for public companies, i.e. an individual cannot be a director of more than 10 public companies.

Accordingly, Ms. Tanya may not be appointed as director as this would be her 11th public unlisted company.

(iii) While counting the number of directorships in public company, directorship in private companies that are either holding or subsidiary company of a public company shall be included. Alternate directorship shall also be included in the above number.

Supatra's directorship is as follows:

— In 8 Public companies;

— In 6 private companies;

— Alternate directorships in 3 companies;

— 3 subsidiary public companies (subsidiary of Star Limited)

Accordingly, Since Supatra already holds 10 directorships in public companies, he cannot be so appointed in the 11th public company. If, he is appointed, he will have to vacate the directorship in one of the companies of his choice.

Answer 3(b)

(i) Section 155 of the Companies Act, 2013 provides for prohibition to obtain more than one Director Identification Number. An individual needs to have only one DIN. Accordingly, he is not required to obtain a separate DIN for each company. Only one DIN is sufficient.

Rule 12 of Companies (Appointment & Qualification of Directors) Rules, 2014 deals with the procedure for intimating changes in particulars of DIN as follows:

(ii) Every individual who has been allotted a DIN shall in the event of any change in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of 30 days of such change(s) in form DIR-6 in the following manner, namely:

(a) The applicant shall download Form DIR-6 from the portal and fill in the relevant changes, attach copy of the proof of the changed particulars and verification in the Form DIR-7 all of which shall be scanned and submitted electronically.

(b) The form shall be digitally signed by a Chartered Accountant in Practice or a Company Secretary in Practice, or a Cost Accountant in Practice.

(c) The applicant shall submit the Form DIR-6.

The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in electronic data base maintained by the Ministry.

The concerned individual shall also intimate the changes to the concerned company in which he is a director within 15 days of such change.

Accordingly, Mr. Mohan should follow the above procedure for getting the changes incorporated in the original DIN already allotted to him.

Answer 3(c)

In case of listed companies, the Management Discussion and Analysis Report (MDAR) should either form a part of the Board's Report or be given as an addition thereto in the annual report to the shareholders. As per para VIII (D) of clause 49 of the listing agreement, the MDAR should include a discussion on the following matters within the limits set by the company's competitive position:

— Industry structure and developments

— Opportunities and threats segment wise or product wise performance –

— Outlook

— Risk and areas of concern

— Internal control systems and their adequacy

— Discussion on financial performance with respect to operational performance

— Material developments in human resources / industrial relations front, including number of people employed.

MDAR should be considered and approved by the Board in a meeting of the Board and not through resolution passed by circulation. It is desirable that MDAR is signed in the same manner as in the case of the Board's Report.

NOTE : Regulation 34(2) of the SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 read with Schedule V thereof also require the same. Student, if any, mentioning same may be given same marks.

Answer 3(d)

Vide Notification dated 29th August, 2014 issued by MCA, it was clarified that the useful life of an asset shall not ordinarily be different from what is specified in Part C of Schedule II and the residual value of an asset shall not be more than five percent of the original cost of the asset.

It was further provided that where a company adopts a useful life different from what is specified in Part C or uses a residual value different from more than five percent, the financial statements shall disclose such difference and provide justification in this behalf duly supported by technical advice.

This requirement is voluntary in respect of the financial year commencing on or after 1st April, 2014 and mandatory for financial statements in respect of financial years commencing on or after the 1st April, 2015.

Therefore, it is possible to adopt different useful life of Assets than mentioned in Schedule II of the Companies Act, 2013.

Answer 3A(i)

Reopening of books of Accounts

Section 130 of the Companies Act, 2013 deals with the provisions relating to re-opening of books of accounts. A company shall not re-open its books of account and not

recast its financial statements, unless an application in this regard is made by the Central Government, the Income tax authorities, the Securities and Exchange Board, any other statutory regulatory body or authority or any person concerned or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that-

(i) The relevant earlier accounts were prepared in a fraudulent manner; or

(ii) The affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

The court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by that Government or the authorities

Answer 3A(ii)

Matters requiring special notice

Section 115 of the Companies Act, 2013 provides that where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent of total voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

The following matters require special notice under the Act:

(i) Resolution for appointment of an auditor other the retiring auditor at an annual general meeting [Section 140 (4)]

(ii) Resolution at an annual general meeting to provide that a retiring auditor shall not be reappointed [Section 140]

(iii) Resolution to remove a director before the expiry of his period of office [Section 169 (2)]

(iv) Resolution to appoint another director in place of the removed director [Section 169 (5)]

Answer 3A(iii)

According to Section 120, the documents, records, registers, minutes etc. may be kept and inspected in electronic form.

Rule 27 of Companies (Management and Administration) Rules, 2014 initially mandated every listed company or a company having not less than one thousand shareholders, debenture holders and other security holders may maintain its records, as required to be maintained under the Act or rules made thereunder, in electronic form.

According to Rule 27(2), the records in electronic form shall be maintained in such manner as the Board of directors of the company may think fit, provided that -

(a) the records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made there under;

(b) the information as required under the provisions of the Act or the rules made there under should be adequately recorded for future reference;

(c) the records must be capable of being readable, retrievable and reproducible in printed form;

(d) the records are capable of being dated and signed digitally wherever it is required under the provisions of the Act or the rules made thereunder;

(e) the records, once dated and signed digitally, shall not be capable of being edited or altered;

(f) the records shall be capable of being updated, according to the provisions of the Act or the rules made there under, and the date of updating shall be capable of being recorded on every updating.

Answer 3A(iv)

Appointment of proxy for a general meeting wherein e-voting facility has been provided to the members

"Proxy" means an instrument in writing signed by a Member, authorising another person, whether a Member or not, to attend and vote on his behalf at a Meeting and also where the context so requires, the person so appointed by a Member.

Section 105 of the Companies Act provides that any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Provided that a proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll.

Proxy is a facility given to a member to exercise his voting rights in case the member is unable to attend and vote himself. The provision for electronic voting is a platform facilitating the members to vote on their own. Secretarial Standard on General meeting provides that a Member who has already cast his vote through Remote e-voting may appoint a Proxy to attend the Meeting instead of himself, but such Proxy will not be able to cast his vote at the Meeting.

Question 4

(a) The net profits of ABC Ltd. as disclosed in the company's balance sheet for three preceding financial years are as under :

Financial year ended	*Net Profit (₹)*
31st March, 2013	*50 crore*
31st March, 2014	*70 crore*
31st March, 2015	*90 crore*

Board of directors of the company decides to contribute to a political party fund during the financial year 2015-16. The Board wants to contribute 20% of the average profits of the above three years' profits. Comment, explaining the provisions of the Companies Act, 2013 in this regard. (4 marks)

(b) State the conditions to be satisfied by a company before issuing bonus shares. Is it possible for a listed company to withdraw the decision of bonus issue once it is announced under the provisions of the Companies Act, 2013 ? (4 marks)

(c) You are the Company Secretary of a public limited company having paid-up capital ₹100 crore. On 25th May, 2015, CFO of the company informed the Board of directors that statutory audit for financial year 2014-15 is successfully over and Board may accordingly plan to have its annual general meeting. Board of directors of the company is not very clear on the contents of Board's Report as per the requirements of Companies Act, 2013.

Advise your management on the contents of Board's Report to comply with the requirements of the Companies Act, 2013. (8 marks)

Answer 4(a)

Contribution to political parties for political purposes are regulated by the provisions of Section 182 of the Companies Act, 2013. All the companies except the following may contribute any amount directly or indirectly to any political party:

1. Government companies;
2. The company which has been in existence for less than 3 financial years,

The aggregate amount which may be contributed by the company in any financial year shall not exceed seven and half per cent of its average net profits during the 3 immediately preceding financial years.

It further requires that no such contribution shall be made by a company unless a resolution authorizing the making of such contribution is passed at a meeting of the Board of Directors.

The Board's decision to contribute to political party 20% of its average profits for last three years is in excess of the permissible limit of 7-1/2% of the average profits of preceding 3 financial year. Therefore, the decision of the Board is not valid.

Answer 4(b)

Issue of bonus share is governed by the provisions of Section 63 read along with Rule 14 of the Companies (Share Capital and Debentures) Rules, 2014. The bonus shares can be issued out of Free Reserves, Securities Premium Account or Capital Redemption Reserve Account. Bonus shares cannot be issued by capitalizing reserves created by revaluation of assets. According to Section 63, the following conditions must be satisfied before issuing bonus shares:

(a) It is authorized by its articles;

(b) It has, on the recommendation of the Board, been authorized in the general meeting of the company;

(c) It has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;

(d) It has not defaulted in respect of the payment of statutory dues of the employees, such as, contributories to provident fund, gratuity and bonus;

(e) The partly paid up shares, if any outstanding on the date of allotment, are made fully paid up;

(f) It complies with such conditions as may be prescribed.

Rule 14 of the Companies (Share Capital and Debentures) Rules, 2014 provides that the company which has once announced the decision of its Board recommending a bonus issue shall not subsequently withdraw the same.

Answer 4(c)

Section 134(3) of the Companies Act, 2013 provides that there shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include -

(a) The extract of the annual return as provided under sub section (3) section 92.

(b) Number of meetings of the Board;

(c) Director's Responsibility Statement;

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

(e) a statement on declaration given by independent directors under Section 149 (6);

(f) In case of a company covered under Section 178 (1), company's policy on director's appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under sub-section (3) Section 178;

(g) Explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made -

  (i) By the auditor in his report; and

  (ii) By the company secretary in practice in his secretarial audit report

(h) Particulars of loan, guarantees or investments under Section 186;

(i) Particulars of contracts or arrangements with related parties referred to in sub section (1) of Section 188 in prescribed form;

(j) The state of the company's affairs;

(k) The amounts, if any, which it proposes to carry to any reserves;

(l) The amount, if any, which it recommends should be paid by way of dividend;

(m) Material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the financial statements relate and the date of the report;

(n) The conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed;

(o) A statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company;

(p) The details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;

(q) In case of a listed company and every other public company having such paid up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors

Further Rule 8(3) of the Companies (Accounts) Rules provides that the report of the Board shall contain the following information and details, namely:-

(A) Conservation of energy- (i) the steps taken or impact on conservation of energy; (ii) the steps taken by the company for utilising alternate sources of energy; (iii) the capital investment on energy conservation equipments;

(B) Technology absorption

(C) Foreign exchange earnings and Outgo

Rule 8(5) provides that In addition to the information and details specified in sub-rule (4), the report of the Board shall also contain –

(i) the financial summary or highlights;

(ii) the change in the nature of business, if any;

(iii) the details of directors or key managerial personnel who were appointed or have resigned during the year;

(iv) the names of companies which have become or ceased to be its Subsidiaries, joint ventures or associate companies during the year;

(iv) the details relating to deposits, covered under Chapter V of the Act;

(vi) the details of deposits which are not in compliance with the requirements of Chapter V of the Act;

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

(viii) the details in respect of adequacy of internal financial controls with reference to the Financial Statements

Question 5

Answer the following with the help of decided case law, if any :

(a) Does the acceptance of deposits by a public limited company from its director attract compliance of any of the provisions of section 188 ? (4 marks)

(b) A director resigns by giving notice in writing to the company. He forwards a copy

of resignation in Form DIR-11 to the Registrar of Companies (ROC) within the prescribed time. What would be the status of the director if the company fails to intimate about the resignation of the director to the ROC ? (4 marks)

(c) If the majority of shareholders decide to reduce the share capital of the company by special resolution, it has the right to decide how the reduction shall take place. Discuss. (4 marks)

(d) As per the Companies Act, 2013, all types of charges created by a company are to be registered with the Registrar of Companies. Non-filing the particulars of charges would invalidate the charge so created. Discuss. (4 marks)

Answer 5(a)

Providing finance to the company may not be considered as or equated to sale of goods or materials to the company. So also, the same would not tantamount to supply of any services by a director to the company. The consent of the Board of directors pursuant to Section 188 would not be required.

Whereas providing funds to the company may not be considered as a contract falling under Section 188, the same is definitely an arrangement in which director is directly or indirectly interested or concerned and therefore, the disclosure pursuant to Section 188 would invariably be required to be made to the Board of directors of the company.

Even after disclosing his interest, the concerned director should not take undue advantage because his position is very much like that of a trustee as was held in *Kailashnath* vs. *New Alok Ginning & Pressing Co. Ltd.* (1950) 20 Comp Cos 225 (Nag)

Answer 5(b)

As per Section 168 read with Rule 15 and Rule 16 of Companies (Appointment and Qualification of Directors) Rule, 2014, a director may resign from his office by giving a notice in writing to the company and shall also forward a copy of his resignation along with detailed reasons for the resignation in Form DIR 11 to the Registrar within thirty days of resignation. The company shall within 30 days from the date of receipt of notice of resignation from the director, intimate the Registrar of Companies in Form DIR- 12 and post the information on its website, if any.

As per Section 168(2), the resignation shall take effect from the date on which the notice is received by the company or on the date, if any, specified in the notice, whichever is later.

In case the company fails to intimate about the resignation of the director to ROC, even then as he has intimated in DIR-11 to the Registrar, the resignation shall take effect from the date on which the notice is received by the company or on the date, if any, specified in the notice, whichever is later.

Answer 5(c)

It is true if majority of shareholders decide to reduce the share capital of the company in the General Meeting and have the special resolution passed, there is no legal impediments or valid reasons for not allowing the reduction of share capital. In Siel Ltd., In re. {2008) 144 com. Cases 469 (Del.)}, reduction of capital was discussed that the

petitioner company proposed to reduce the share capital by cancelling its equity shares which amount was to be credited to the general reserve account of the company. The reduction was approved by a special resolution passed in accordance with the provisions of Section 189 of the Companies Act, 1956 (now Section 114 of the Companies Act 2013), at an Extraordinary General Meeting. The reduction was in accordance with the Articles of Association of the company. On the objection raised by the Central Government, the petition was allowed on the ground that the reduction of share capital of a company is a domestic concern of the company and the decision of the majority would prevail. If the majority by special resolution decides to reduce the share capital of the company, it has the right to decide that how the reduction should be affected. A selective reduction is permissible within the frame work of the law for a company limited by share. Thus while reducing the share capital the company can decide to extinguish some of its shares without dealing in the same manner with all other shares of the same class. When the creditors and shareholders of the company approved the reduction of share capital none is affected and there has been no unfair or inequitable transaction.

Answer 5(d)

Under Section 77 of the Companies Act, 2013, every company creating a charge shall register the particulars of charge signed by the company and its charge – holder together with the instruments creating. Important points in the Act relating to charge creation:

— Any charge created within or outside India;

— On property or assets or any of the company's undertakings;

— Whether tangible or otherwise, situated in or outside India shall be registered.

Hence all types of charges are required under the Act to be registered whether created within or outside India.

The statement that non filing the particulars of charges would invalidate the charge so created is not correct in view of the fact that according to Section 77 of the Companies Act 2013, all types of charges created by a company are to be registered with the Registrar of Companies. Where there is non-compliance and charge is not filed with the Registrar of Companies for registration, it shall be void against the liquidator and any other creditor of the company. In the case of *ONGC Ltd.* Vs *Official Liquidator of Ambica Mill Co. Ltd.* (2006) 132 Comp. Cas. 606 (Guj.), the ONGC had not been able to point out whether the so called charge, on the basis of which it was claiming preference as a secured creditors was registered or not. In the light of the failure to register the charge, ONGC could not be treated as a secured creditor. This does not, however, mean that the charge is altogether void and the debt is not recoverable. So long as the company does not go into liquidation, the charge is good and may be enforced.

In such circumstances, the liquidator on winding up of the company can ignore the charges and can treat the concerned creditor as unsecured creditor. The property shall be treated as free of charge i.e. the creditor cannot sell the property to recover its dues. Further if any subsequent charge is created and the earlier charge is not registered, the earlier charges would not have any consequences and the latter charge if registered would enjoy priority and the latter charge holder can have the property sold in order to recover its dues as secured creditors.

Thus non-filing of particulars of charge does not invalidate charge against the company as going concern, it is void only against the liquidator and the creditor at the time of liquidation. (Independent Automatic Sales Ltd. Vs. Knowles & Foster.(1962) 32 Comp. cas.

Question 6

(a) Arc Ltd. has two managing directors, three whole-time directors, and two part-time directors. Referring to the provisions of the Companies Act, 2013, state the extent to which the managing directors, whole-time directors and part-time directors can be paid remuneration, when the company has sufficient profits.

Further, what advice would you render when company's profits are inadequate ? Can the company continue to make payment of remuneration ? (4 marks)

(b) Prince was appointed as additional director by the Board of directors of John Ltd. on 1st March, 2015. He was simultaneously appointed as the company's managing director by majority voting at the same Board meeting. Referring to the provisions of the Companies Act, 2013, examine the validity of the appointment of Prince as additional director and as the managing director at the same time. What shall be your answer in case Prince failed to get appointed at the company's annual general meeting ? (4 marks)

(c) Jewel Ltd. called its annual general meeting on 25th September, 2015. At the meeting, the required quorum was present. The meeting started transacting the business slated on the agenda. After completion of few agenda items, the Chairman of the company adjourned the meeting on his own without seeking the consensus of the members of the company present at the meeting. The Chairman further stated that the adjourned meeting shall be scheduled at a later date to be decided by the Board of directors.

You being a corporate professional, examine the validity of the Chairman's decision to adjourn the meeting. Also explain the powers of the Chairman in this regard.

(4 marks)

(d) Decent Ltd. was incorporated under the Companies Act, 2013 on 1st January, 2014. The first financial year of the company was closed on 31st March, 2014. Explaining the provisions of the Companies Act, 2013 —

(i) State as to when should have the company held its first annual general meeting (AGM) and the subsequent AGM.

(ii) The meeting as per schedule was conducted but could not complete the business as slated on the agenda. As a result, the meeting was adjourned to a later date to transact the unfinished business. Certain shareholders give a notice to the company where they wanted certain new business to be transacted at the adjourned AGM. State whether the new business can be transacted at this adjourned meeting. (4 marks)

Answer 6(a)

Payment of managerial remuneration to Managing Directors, Whole-time directors and Part-time directors is regulated by the provisions of Companies Act, 2013 as contained under Section 197(1).

Accordingly, the total managerial remuneration payable by a public company to its directors (including managing director and whole-time directors) and manager in a financial year shall not exceed 11% of the net profits of the company.

Net profits are to be calculated as provided in Section 198.

Any remuneration exceeding 11% of net profits limit may be payable subject to compliance of conditions given in Schedule V. In case these requirements are not fulfilled, such remuneration will be subject to the approval of Central Government (First Proviso to Sec. 197(1).

The remuneration of any one Managing Director or Whole Time Director or Manager shall not exceed 5% of the net profits. Where, there are more than one Managing Director or Whole Time Director, the overall limit is 10% of the net profits. The remuneration my exceed this limit only after approval of company in general meeting and after satisfying the conditions given in this Section and Schedule V.

Remuneration in case of inadequacy of profits or no profits

(Section II Part II Schedule V): In case of inadequate profits or no profits, a company may pay to a managerial person without Central Government approval remuneration not exceeding the higher of the limits specified in Section II Part II of Schedule V) with ordinary/ special resolution as the case may be.

Remuneration to part-time directors

Section 197(1) regulates the remuneration payable to directors who are neither managing director nor whole time director and shall not exceed:

1. 1% of the net profits of the company, if there a managing or whole time director or manager.
2. 3% of the net profits in any other case.

Besides, these percentage/s directors shall also be entitled to get sitting fee for Board meeting and also for attending the committee meetings in which director/s member. The maximum fee is Rs. 1 lakh per meeting.

Answer 6(b)

Articles of a company may confer upon its Board power to appointment Additional Director, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier (Sec. 161(1)).

If a director, during his tenure as additional director of the company, had been appointed as managing director of the company, his appointment as managing director also ceases simultaneously with the termination of his directorship at the commencement of the AGM.

However, if such a person was elected as a regularized director at the AGM, he will continue to be a director of the company and also as its managing director for the period for which his appointment as managing director had been made under Section 196 of the Companies Act, 2013.

Since Prince was appointed first as additional director and then a managing director may be in the same director the appointment as MD is valid, but if he fails to get his appointment as additional director regularized in the AGM he will automatically cease to be Managing Director of the company.

Answer 6(c)

Adjournment of a meeting means the deferring or suspending the meeting to a future time, either at an appointed date or indefinitely or as decided by the members present at the scheduled meeting. For a valid adjournment of a General Meeting, the holding of the Meeting at its scheduled time is necessary.

It may be adjourned after some items of business have been transacted and the remaining items can be transacted at the adjourned meeting.

Once a meeting is called, the Chairman cannot adjourn it arbitrarily. Its continuance or adjournment rests entirely on the will of the members. If a Chairman vacates the Chair or adjourns the meeting regardless of the views of the majority, those remaining, even if a minority, can appoint a Chairman and conduct the business left unfinished by the former Chairman (*Catesby* v. *Burnett*, (1916) 2 Ch. 325 (Ch.D)

Where a meeting is unlawfully adjourned by the Chairman thinking that he is not likely to succeed in his object, the remaining members possess the right to continue the meeting and conduct the business left un-transacted by the Chairman (*Seth Sobhag Mai Lodha* v. *Edward Mills Co. Ltd.* (1972) 42 Com Cases 1 at 18 (Raj.)

Further in case of *United Bank of India Ltd.* v. *United India Credit and Development Corporation Ltd.* (1977) 47 Com Cases 689, it was held that every Chairman has the right to make a bona fide adjournment whilst a poll or other business is proceeding, if circumstances of violent interruption make it unsafe or seriously difficult for the members to tender their votes.

Therefore, though the Chairman has power to adjourn the meeting on its own but only in exceptional cases where it becomes extremely difficult to continue because of violent interruption and continuing the meeting will be unsafe.

Answer 6(d)

In accordance with the provisions of the Companies Act, 2013 as contained under Section 96(1), the first AGM of the company shall be held within a period of 9 months from the date of closing of the first financial year of the company. If a company holds its first AGM as aforesaid, it shall not be necessary to hold such a meeting in the year of its incorporation.

In case of subsequent meetings, AGM shall be held within a period of 6 months, from the date of closing of the financial year. Not more than 15 months shall elapse between the date of one AGM and that of the next. The Registrar may, for any special reason, extend the time within which any AGM, shall be held, by a period not exceeding three months. Registrar, however, can not extend the time for the first AGM.

Further, if the AGM is called and held on the scheduled date but could not complete the agenda and the meeting, can be adjourned at a later date (but not later than 30 days) to complete the unfinished agenda, Such an adjourned meeting is the continuation of the

meeting and only the unfinished agenda for proper notice was already given, shall be transacted. No new business can be transacted at this meeting.

Thus, applying the above provisions in the given case answers to sub-question are :

1. The first AGM of the company should be held within a period of 9 months from the closer of the first financial year of the company. The company should hold the AGM by 31st December, 2014. Any subsequent AGM must be held within a period of 6 months from the close of the financial year i.e. by 30th September, 2015.

2. The adjourned meeting as per the provisions as stated above is the meeting in continuation, only unfinished business can be transacted. Since no new business can be transacted at this adjourned meeting, shareholders contention in the given case shall not be tenable.

***

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) *Zeba Ltd. has a net worth of ₹400 crore, turnover for the financial year 2014-15 at ₹1,200 crore and a net profit for the financial year ended 31st March, 2015 at ₹25 crore. The company has asked you as a Company Secretary to prepare a check-list of compliances with respect to Corporate Social Responsibility (CSR) as per the provisions contained in the Companies Act, 2013. Also state the circumstances in which a company is required to constitute a CSR Committee.* *(5 marks)*

(b) *The Board of directors of Peeku Ltd. decided to :*

(i) *Have meeting of the Board through video conferencing to consider the approval of the annual financial statements; and*

(ii) *Circulate the draft minutes of the meeting among all the directors within thirty days of the meeting through e-mail.*

As a Company Secretary of the company you are asked by the Chairman of the Board to advise whether the Board of directors can do so ? *(5 marks)*

(c) *Top Ltd. is having a paid-up capital of ₹40 crore and turnover of ₹300 crore during the financial year 2014-15. The company decided to appoint a Company Secretary in Practice for conducting its secretarial audit. Mention the requirements of the secretarial audit report as per the provisions of the Companies Act, 2013. Examine whether it is mandatory for the company to have such a secretarial audit.* *(5 marks)*

(d) *Explain the requirements to be followed before passing a special resolution. State the circumstances under which a special resolution is to be passed in the following cases :*

(i) *Loans and investments by a company*

(ii) *Appointment of managing director, whole-time director or manager.*

(5 marks)

(e) *Excel Ltd. has borrowed a sum of ₹10 crore by mortgaging its fixed assets. As a Company Secretary, indicate the steps you would take to get the charge registered with the Registrar of Companies. State the consequences if the charge is not registered.* *(5 marks)*

OR (Alternate question to Q.No. 1)

Question 1A

(i) Crescent (Pvt.) Ltd. has its registered office at Mumbai and project office at Pune where the books of account have been kept. The company has sought financial assistance from the bankers who have agreed to grant loan subject to verification of the records pertaining to the books of account. Examine whether the action of the company in maintaining its books of account at its project office in Pune is in order. (5 marks)

(ii) Sameer has been co-opted as a non-executive director of a large manufacturing company and has to attend his first Board meeting. He has requested the Chairman of the company to provide him the basic information with regard to the secretarial audit as under :

(a) List of beneficiaries to the secretarial audit; and

(b) Will the secretarial audit report be circulated to all directors every month along with other MIS reports ?

Advise Sameer. (5 marks)

(iii) (a) Explain the provisions regarding penalty for incorrect audit report as per the provisions of the Companies Act, 2013. (3 marks)

(b) Cathy International Ltd., a foreign company, desires to invest US $50,00,000 in real estate business in India. Comment on its admissibility under the FDI Policy, 2015. (2 marks)

(iv) XYZ Ltd., an unlisted company, at its Board meeting decides to issue sweat equity shares to its employees at a discount. Some of the directors demand that such shares be issued to directors also for providing their technical know-how to the company. Examine the proposal and the steps to be taken by the company in this regard. (5 marks)

(v) Indus Securities Ltd. has been making several investments in companies but is not aware as to how the investments have to be recorded in its books. As a Company Secretary, advise the company the procedures to be followed in this regard as per the provisions of the Companies Act, 2013. (5 marks)

Answer 1(a)

Check Whether

- The company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year has constituted a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director is an independent director.
- The Board has approved the CSR Policy of the company as recommended by CSR Committee.
- The Composition of CSR Committee is disclosed in the Board's Report.
- The company has instituted a transparent monitoring mechanism for

implementation of the CSR projects or programs or activities undertaken by the company.

- The company has disclosed the contents of the policy in Board's report and at its website, if any.
- The Board of company shall ensure that the company spends, in every financial year, at least 2% of the average net profits of the company made during the three immediately preceding financial years.
- In case the company does not spend the specified amount aforesaid, Board's report specifies the reason for not spending.
- The company has complied with the procedure specified under rules.

Circumstances in which a company is required to constitute a CSR Committee

Every company whether private or public company (listed or unlisted) foreign companies having branches or project offices in India which meet any of the three specified criteria is required to contribute towards corporate social responsibility (CSR) i.e. a company which has networth of Rs. 500 crore or more or a turnover of Rs. 1000 crore or more or net profit of Rs. 5 crore or more to contribute towards CSR activities. A company that crosses any of the aforesaid limit shall be required to contribute 2% of its average net profits of the preceding three years towards CSR activities.

In the given case.Zeba Ltd., is having a networth of Rs. 400 crore, turnover of Rs. 1200 crore and net profit of Rs. 25 crore which is more than the prescribed thresholds for the constitution of CSR Committee under Section 135(1). Hence, Zeba Limited is required to constitute CSR committee and has to comply with the provisions of CSR.

Answer 1(b)(i)

As per Rule 4 of the Companies(Meeting of Board and its Directors)Rules 2014, the following matters shall not be dealt with in the meeting held through video conferencing or other audio visual means.-

(i) the approval of the annual financial statements;
(ii) the approval of the Board's report;
(iii) the approval of the prospectus;
(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement, if any, to be approved by Board under sub section (1) of Section 134 of the Act; and
(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

In view of the above, the decision of Board of Directors to have the meeting of the Board through video conferencing to consider approval of the annual financial statements is not valid.

Answer 1(b)(ii)

As per Rule 3(12)(a) of the Companies (Meeting of Board and its Directors)Rules 2014, the draft minutes of the meeting was circulated among all the directors within

fifteen days of the meeting either in writing or in electronic mode as may be decided by the Board. Accordingly the decision of the Board to circulate the draft minutes of the meeting within thirty days of the meeting is not valid.

Answer 1(c)

As per section 204 of the Companies Act, 2013 (the Act) read with Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 , every listed company, every public company having a paid-up share capital of fifty crore rupees or more; or every public company having a turnover of two hundred fifty crore rupees or more, are required to annex to its Board's report a secretarial audit report, given by a company secretary in practice. In the given case, Top ltd being a public company having a turnover of Rs 300 crore is required to annex Secretarial Audit Report with its Board's Report. It is mandatory for Top Ltd to have a Secretarial Audit.

Answer 1(d)(i)

Requirements to be followed before passing special resolution

There are some requirement which makes a resolution special resolution —

(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(b) the notice required under this Act has been duly given; and

(c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting."

As per the provisions of section 186 of the Act,

No Company shall, directly or indirectly:

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

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

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

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more unless the same is previously authorised by a special resolution passed in a general meeting.

Answer 1(d)(ii)

As per Section 196(3)(a) of the Act, no company shall appoint or continue the employment of any person as its managing director, whole time director or manager who is below the age of twenty-one years or has attained the age of seventy years. Proviso 196(3)(a) states that appointment of a person who has attained the age of seventy years may be made by passing a special resolution in which case the explanatory statement

annexed to the notice for such motion shall indicate the justification for appointing such person;

Answer 1(e)

Section 77(1) states that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation. According to Rule 3 of Companies (Registration of Charges) Rules, 2014 e-forms prescribed for the purpose of creating or modifying the charge is Form No.CHG-1 (for other than Debentures) or Form No.CHG-9 (fordebentures including rectification). Particulars of charges that is being filed with Registrar of Companies is to be signed by the company creating the charge and the charge holder in form CHG-1 or CHG-9 as the case may be.

According Rule 3(4), a copy of every instrument evidencing any creation or modification of charge and required to be filed with the Registrar in pursuance of section 77, 78 or 79 shall be verified as follows-

(a) where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either under the seal of the company, or under the hand of any director or company secretary of the company or an authorised officer of the charge holder or under the hand of some person other than the company who is interested in the mortgage or charge;

(b) where the instrument or deed relates, whether wholly or partly, to the property situated in India, the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorised officer of the charge holder.

Non-filing of particulars of a charge does not invalidate the charge against the company as a going concern. It is void only against the liquidator and the creditors at the time of liquidation. The company itself cannot have a cause of action arising out of non-registration [*Independent Automatic Sales Ltd.* vs. *Knowles & Foster* 1962 32 Com. Cases].

Answer 1A(i)

Section 128(1) requires every company to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office. However, all or any of the books of accounts may be kept at such other place in India as the Board of directors may decide. When the Board so decides the company is required within seven days of such decision to file with the Registrar a notice in writing in Form No AOC 5 giving full address of that other place. In the given case the books of accounts are to be kept at the Registered Office i.e Mumbai. Keeping the books of accounts at Pune without intimating the Registrar of the same is not valid.

Answer 1A(ii)(a)

The major beneficiaries of Secretarial Audit include:

(a) *Promoters*

Secretarial Audit will assure the Promoters of a company that those in-charge of

its management are conducting its affairs in accordance with requirements of laws.

(b) *Management*

Secretarial Audit will assure the Management of a company that those who are entrusted with the duty and responsibility of compliance are performing their role effectively and efficiently. This also helps the management to establish benchmarks for the compliance mechanism, review and improve the compliances on a continuing basis.

(c) *Non-executive directors*

Secretarial Audit will provide comfort to the Non-executive Directors that appropriate mechanisms and processes are in place to ensure compliance with laws applicable to the company, thus mitigating any risk from a regulatory or governance perspective; so that the Directors not in-charge of the day-to-day management of the company are not likely to be exposed to penal or other liability on account of non-compliance with law.

(d) *Government authorities/regulators*

Being a pro-active measure, Secretarial Audit facilitates reducing the burden of the law-enforcement authorities and promotes governance and the level of compliance.

(e) *Investors*

Secretarial Audit will inform the investors whether the company is conducting its affairs within the applicable legal framework.

(f) Financial Institutions, Banks, Creditors and Consumers are enabled to measure the law abiding nature of Company management.

Answer 1A(ii)(b)

Secretarial Audit on a continuous basis would help the company in initiating corrective measures and strengthening its compliance mechanism and processes.It is recommended that the Secretarial Audit be carried out periodically (quarterly/half yearly) and adverse findings if any, be communicated to the Board for corrective action. A monthly report on Secretarial Audit may be circulated along with MIS Reports for timely remedial action, though the mandatory Secretarial Audit for certain companies is held once a year.

Answer 1A(iii)(a)

Any failure or lapse on the part of secretarial auditor may attract penalty for incorrect report and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980. Further section 448 of Companies Act, 2013 deals with penalty for false statements. The section provides that if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—

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

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447 which deals with punishment for fraud..

Section 204(4) also cast responsibility on the company secretary in practice in case of default of provision of section 204 and shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Answer 1A(iii)(b)

Real estate business or construction of farm houses is under prohibited activities/ sector as provided under FDI Policy, 2015. Accordingly, the investment by Cathy International Limited in real estate business in India is not permitted.

Answer 1A(iv)

Section 2 (88) defines "sweat equity shares" so as to mean such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called. Therefore, the proposal is valid.

In case of an unlisted company

Check whether

- The issue is authorised by a special resolution passed by the company, ensuring that the special resolution authorising the same is valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.
- Not less than one year has, at the date of such issue, elapsed since the date on which the company had commenced business;
- The company has not issued sweat equity shares for more than fifteen percent of the existing paid up equity share capital in a year or shares of the issue value of rupees five crores, whichever is higher. Further it is to be ensured that the issuance of sweat equity shares in the Company has not exceeded twenty five percent, of the paid up equity capital of the Company at any time.
- The company is maintaining Register of Sweat Equity Shares in Form No. SH.3
- The Register of Sweat Equity Shares is maintained at the registered office of the company or such other place as the Board may decide.
- The entries in the register are authenticated by the Company Secretary of the company or by any other person authorized by the Board for the purpose.

Answer 1A(v)

Section 187(1) of the Act provides that all investments made or held by a company in any property, security or other assets shall be made and held by in its own name. A company may, however, hold any shares in its subsidiary company in the name of any nominee of the company, if it is necessary to ensure the number of members of the subsidiary company is not reduced below the statutory limit.

Where any securities in which investments have been made by a company are not held by in its own name, the company shall maintain a register containing such particulras as prescribed under rule 14 of Companies (Meetings of Board and its Powers) Rules, 2014

Check whether

1. A register of investment is maintained as per Form MBP 3, in accordance with Companies (Meetings of Board and its Powers) Rules, 2014.
2. The entries in the register are made chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name are to be entered.
3. The company has also recorded the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.
4. The company has also recorded when such investments are held in a third party's name for the time being or otherwise.
5. The register is maintained at the registered office of the company and is preserved permanently.
6. The custody of the register is with company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.
7. The entries in the register are authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

PART B

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

Question 2

(a) A2Z Ltd., an unlisted company having a paid-up share capital of ₹5 crore consisting of 50,00,000 equity shares of ₹10 each fully paid-up proposes to make an initial public offer (IPO) of 1,00,00,000 equity shares of ₹10 each at a premium of ₹5 per share in July, 2015. The promoters acquired 11,00,000 shares on 1st January, 2009 and another 11,00,000 shares on 1st January, 2015 at face value. What should be the minimum contribution required to be made by the promoters of the company in order to comply with the guidelines issued by the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ?

(5 marks)

(b) The balance sheet of Neema Ltd. contains the following information :

	As at 31.03.2013 (₹)	*As at 31.03.2014 (₹)*	*As at 31.03.2015 (₹)*
Paid-up capital	*60,00,000*	*65,00,000*	*85,00,000*
General reserve	*30,00,000*	*40,00,000*	*45,00,000*
Credit balance in statement of profit and loss	*6,00,000*	*7,00,000*	*9,00,000*

Debenture redemption reserve	*10,00,000*	*22,00,000*	*30,00,000*
Secured loans	*8,00,000*	*15,00,000*	*30,00,000*

In the forthcoming Board meeting scheduled to be held on 6th January, 2016, one of the items of the agenda among others is to decide about borrowing from Royal Chartered Bank. Based on above information, you are required to find out the amount up to which the Board can borrow from the bank as per the provisions of the Companies Act, 2013 without seeking the approval in general meeting. *(5 marks)*

(c) The key financial data of Zen Ltd., an unlisted public company as on 31st March, 2015 is given as under :

	₹ (in crore)
(a) Paid-up equity share capital	*12.00*
(b) Turnover for the year 2014-15	*80.00*
(c) Outstanding secured loans	*52.00*

The following are the Board of directors of the company :

1.	*Ketan*	–	*Managing Director*
2.	*Mrs. Chetana Ketan*	–	*Executive Director (Technical)*
3.	*Pankaj Ketan*	–	*Director (Finance)*
4.	*Ms. Rekha Ketan*	–	*Director*

(all belonging to the promoters family)

You are required to examine and comment on the compliance of the provisions of section 149 of the Companies Act, 2013 regarding appointment of independent directors and whole-time key managerial personnel. *(5 marks)*

OR (Alternate question to Q.No. 2)

Question 2A

(i) Jane Ltd., a foreign company decided to go for foreign direct investment in a non-SME venture in India which is permissible under the approval route. As a Company Secretary of the company you are asked to submit a check-list of required compliances. *(5 marks)*

(ii) Gems India Ltd. held a Board meeting on 30th June, 2015 to transact the items as per the agenda. One of the items was to fill-up a casual vacancy caused by the death of Shyam who was director of the company for the last eight years. The casual vacancy was filled by the appointment of Dev as a director. Dev met with an accident on 10th October, 2015 and subsequently on 20th October, 2015 he expired. The Board now wishes to fill-up the casual vacancy of director caused by the unfortunate death of Dev by appointing his brother Deepak in the forthcoming meeting of the Board. Advise the Board in this regard. *(5 marks)*

(iii) What are the primary components of due diligence on competition law ? *(5 marks)*

Answer 2(a)

In accordance with the Regulation 32 (1) of the SEBI (ICDR) Regulations, 2009 promoters of the issuer shall contribute in the public issue in case of an initial public offer, not less than twenty per cent of the post issue capital. In the above case, pre-issued capital is Rs 5 crore and proposed issue is Rs 10crore. Of the total issue capital i.e. Rs 15 crore, the promoters have to contribute minimum of Rs 3 crore (20% of Rs 15 crore).

For the purpose of promoters' contribution, the following securities shall be considered as ineligible as per Regulation 33 (i) (b).

Specified securities acquired by promoters during the preceding one year at a price lower than the price at which specified securities are being offered to public in the initial public offer: Provided that nothing contained in this clause shall apply: if promoters pay to the issuer, the difference between the price at which specified securities are offered in the initial public offer and the price at which specified securities had been acquired.

In the above case, 11,00,000 shares acquired by the promoters on 1st January, 2015 shall not be taken into account for the computation of promoter's contribution, as the allotment was made in the preceding one year at face value and the proposed IPO is at premium of Rs 5 per Share, unless the difference is paid by the promoter. However, 11,00,000shares acquired during the 1st January, 2009 shall be taken into account for promoter's contribution. Thus the fresh contribution to be brought in by promoters would be 8,00,000 shares thereby, the total contribution is Rs.3 crores.

Answer 2(b)

As per Section 180(1) (c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserve. Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business. Here free reserves do not include the reserves set apart for specific purpose i.e. Debenture Redemption Reserve.

Since the Board meeting to consider the said item of agenda will be held on 6th January 2016, the figures relevant for this purpose are the figures as per Balance Sheet as at 31.03.2015. According to the above provisions, the Board of Directors of Neema Ltd., can borrow without obtaining approval of shareholders in a general meeting upto an amount calculated as under:

Aggregate of paid up capital & free reserve Total borrowing power of the Board of Directors of the company

i.e. 100% of the aggregate of paid up capital and free reserve	1,39,00,000
Less : Amount already borrowed as secured loans	30,00,000
Amount upto which the Board of directors can further borrow without the approval of shareholders in a general meeting	1,09,00,000

Answer 2(c)

Section 149(4) provides that every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government

may prescribe the minimum number of independent directors in case of any class or classes of public companies Rule 4 of Companies (Appointment and Qualification of Directors) rules 2014, provides that the following class or classes of companies shall have at least two directors as independent directors -

(i) the Public Companies having paid up share capital of ten crore rupees or more; or

(ii) the Public Companies having turnover of one hundred crore rupees or more; or

(iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees.

Section 203 of the Companies Act, 2013 read with Rule 8 mandates the appointment of Key Managerial Personnel and makes it obligatory for a listed company and every other public company having a paid- up share capital of rupees ten crores or more, to appoint following whole-time key managerial personnel:

(i) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;

(ii) Company secretary; and

(iii) Chief Financial Officer:

In the present case of M/s Zen Limited, based on the information provided, the Company falls under the Class of Companies as the paid up capital and the outstanding loan is Rs.12 crores and Rs.52 Crores respectively and review of the present list of directors it is there are no independent directors.

Therefore, the company needs to appoint at least two independent directors and key managerial personnel, so as to comply with the provisions of section 149 and of the Companies Act, 2013.

Answer 2A(i)

Foreign Direct Investment under Approval Route

1. Check whether prior approval of Foreign Investment Promotion Board is obtained for FDI which are in excess of sectoral cap
2. Check whether the shares issued to person who is a citizen of Bangladesh or an entity incorporated in Bangladesh/ Pakistan under the FDI Scheme is with the prior approval of the FIPB and is subject to the prohibitions applicable.
3. Check whether the conversion of import payables / pre incorporation expenses / share swap is treated as consideration for issue of shares with the approval of FIPB.
4. Check whether the FDI in a non SME has exceeded 24% of paid up capital or sectoral cap whichever is lower, if such non SME has industrial licence for products reserved for SMEs? If so prior approval of FIPB is obtained?
5. Check whether there is any transfer of shares from resident to non resident which requires FIPB approval.

6. Check whether the Issue of shares to a non-resident against shares swap i.e., in lieu for the consideration which has been paid for shares acquired in the overseas company, can be done with the approval of FIPB.

7. Check whether the company has complied with reporting requirements for issue of shares under approval route.

Answer 2A(ii)

As per Section 161(4) if the office of any director appointed by a public company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may in default of and subject to any regulations in the Articles of Association of the company, be filled by the Board of directors at the meeting of the Board.Any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office, if it had not been vacated.

In the present problem, since Mr.Shyam was on the Board for the last eight years, it is presumed that he has been appointed at the General Meeting of the Company. The casual vacancy caused due to his death and filling of such casual vacancy by appointing Mr. DEV by the Board Meeting is valid and it has complied the provisions of the Act as mentioned above.

Subsequently on the death of Mr. DEV on 20.10.2015 and proposal to appoint Mr. Deepak to fill the casual vacancy, caused due to the death of Mr. DEV is not possible since Mr. DEV was never appointed in the General Meeting.

Answer 2A(iii)

Due diligence on competition law aspects is an examination of the actual operations and practices of an enterprise to determine the extent of its compliance with the competition law and to identify potential risks and liabilities, and assess the adherence to and effectiveness of the company's competition law compliance policy and training program.

Primary components of Competition Law due diligence are:

- An examination of selected company documents.
- Interviews with selected company personnel.
- Identify specific business activities that potentially could create antitrust exposure for the company.
- The results of the due diligence may suggest an enterprise to have an effective competition law compliance programme.
- The results of the due diligence may result in variation of deal value, withdrawal of deal and also make suggestions to structure a compliance program.

Question 3

(a) The Board of directors of Horizon Ltd. at a Board meeting has decided to augment resources for expansion and diversification projects which are scheduled to happen in the next three to five years. Henry, an independent director has offered his suggestion that the company should explore the possibility to raise

finance through American Depository Receipts (ADRs). The Board accepted Henry's suggestion and mandated you as a Practising Company Secretary to prepare a brief note in regard to :

(i) Nature of instruments and its various types

(ii) Scheme of sponsored ADRs. *(8 marks)*

(b) As a Practising Company Secretary, during the course of carrying out due diligence process of a merger and amalgamation, enumerate the obligations of target company and acquirer. *(7 marks)*

Answer 3(a)(i)

An American Depository Receipt ("ADR") is a dollar denominated form of equity ownership in the form of Depository receipts in a non-US company. It represents the foreign shares of the company held on deposit by a custodian bank in the company's home country and carries the corporate and economic rights of the foreign shares.

Following are the types of ADRs:

(a) *Level I ADR (unlisted, OTC traded/Pink Sheets)*

This is the least expensive level to provide for issuance of shares in ADR form in the US. The company issuing ADRs has to comply with the SEC registration requirements but can be exempted from full SEC reporting requirements under certain circumstances. It can only be traded over-the counter and cannot be listed on a national exchange in the US. The electronic OTC markets are also called pink sheets which is a centralized quotation service that collects and publishes market maker quotes for OTC securities in real time.

(b) *Level II ADRs US Listed, Non-capital Raising Transaction (i.e. without going for public issue)* This programme gives more liquidity and marketability as it enables listing of ADRs in one or more of the US exchanges. Under this programme the company has to comply with the registration requirements, reporting requirements of SEC.

(c) *Level III ADRs (US listed Capital Raising Transaction i.e., through fresh issue of shares)* – This type of ADRs which are to comply with SECA Registration, Reporting requirement and after document filing.

(d) *Rule 144A Depository Receipts* (Privately placed for QIBs and cannot be bought on the public exchanges or over the counter.)

Answer 3(a)(ii)

In a layman's language, the Scheme of Sponsored ADRs/GDRs is a process of disinvestments by the Indian shareholders of their holdings in overseas markets. The concerned company sponsors the ADRs/GDRs against the shares offered for disinvestments. Such shares are converted into ADRs/GDRs according to a pre-fixed ratio and sold to overseas investors. The proceeds realized are distributed to the shareholders in proportion to the shares sold by them.

(i) An Indian company may sponsor an issue of ADRs/GDRs with an overseas

depository against shares held by its shareholders at a price to be determined by the Lead Manager.

(ii) The proceeds of the issue shall be repatriated to India within a period of one month.

(iii) The sponsoring company shall comply with the provisions of the Scheme and guidelines issued in this regard by the Central Government from time to time.

(iv) The sponsoring company shall furnish full details of such issue, in the form specified under the Scheme, to the Foreign Investment Division, Exchange Control Department, Reserve Bank of India, Central Office, Mumbai within 30 days from the date of closure of the issue.

Answer 3(b)

Obligation of target company

Once a Public Announcement is made, the board of directors of the Target Company is expected to ensure that the business of the target company is conducted in the ordinary course. Alienation of material assets, material borrowings, issue of any authorized securities, announcement of a buyback offer etc. is not permitted, unless authorized by shareholders by way of a special resolution by postal ballot.

The target company shall furnish to the acquirer within two working days from the identified date,a list of shareholders and a list of persons whose applications, if any, for registration of transfer of shares, in case of physical shares, are pending with the target company.

- After closure of the open offer, the target company is required to provide assistance to the acquirer in verification of the shares tendered for acceptance under the open offer, in case of physical shares.
- Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations and such committee shall be entitled to seek external professional advice at the expense of the target company. The recommendations of the Independent Directors are published in the same newspaper where the Detailed Public Statement is published by the acquirer and are published at least 2 working days before opening of the offer. The recommendation will also be sent to SEBI, Stock Exchanges and the Manager to the offer.

Obligations of the acquirer

(1) Prior to making the public announcement of an open offer for acquiring shares under these regulations,the acquirer shall ensure that firm financial arrangements have been made for fulfilling the payment obligations under the open offer and that the acquirer is able to implement the open offer, subject to anystatutory approvals for the open offer that may be necessary.

(2) In the event the acquirer has not declared an intention in the detailed public statement and the letter ofoffer to alienate any material assets of the target

company or of any of its subsidiaries whether by way of sale, lease, encumbrance or otherwise outside the ordinary course of business, the acquirer, where he has acquired control over the target company, shall be debarred from causing such alienation for a period of two years after the offer period:

Provided that in the event the target company or any of its subsidiaries is required to so alienate assets despite the intention to alienate not having been expressed by the acquirer, such alienation shall require a special resolution passed by shareholders of the target company, by way of a postal ballot and the notice for such postal ballot shall inter alia contain reasons as to why such alienation is necessary.

(3) The acquirer shall ensure that the contents of the public announcement, the detailed public statement,the letter of offer and the post-offer advertisement are true, fair and adequate in all material aspects and not misleading in any material particular, and are based on reliable sources, and state the source wherever necessary.

(4) The acquirer and persons acting in concert with him shall not sell shares of the target company held bythem, during the offer period.

(5) The acquirer and persons acting in concert with him shall be jointly and severally responsible for fulfillment of applicable obligations under these regulations

Question 4

(a) "Audit is a financial post-mortem analysis whereas due diligence is a future decision and a process to achieve the desired comfort level about the potential investment." Comment. *(5 marks)*

(b) The public sector oil marketing companies increased diesel prices @ ₹4 per litre w.e.f. 1st December, 2013. All Road Licensed Transport Federation (ARLTF), a registered society since 1970 and a federation of motor transport associations in the field of road transport and truck industry has 5,000 truck associations and 5,00,000 truck owners as its members. The federation gave a call to its member associations to increase the truck freight by 20% w.e.f. 2nd December, 2013 on account of hike in diesel prices. The members increased the freight immediately in accordance with the direction given by the federation. Saurabh, one of the customers complained to the Competition Commission of India alleging the hike to be anti-competitive and against the interest of the customers. Examine the case as per the provisions of the Competition Act, 2002 and comment. *(5 marks)*

(c) Snow Ltd. is a closely held public company in the manufacturing sector. The company's net worth is ₹250 crore as on 31st March, 2015. The turnover of the company for the year 2014-15 is ₹750 crore. The profits earned by the company during the last five years are as under :

Year	*Profit ₹(in crore)*
2014-15	*7.50*
2013-14	*6.00*

2012-13	*4.50*
2011-12	*3.60*
2010-11	*3.00*

The company has spent ₹14 lakh during the year 2014-15 in an approved Corporate Social Responsibility (CSR) project for the benefit of weaker sections of the society. Examine whether the company is mandatorily required to comply with the CSR initiative and whether the action of the company is in adherence to the relevant provisions of the Companies Act, 2013. *(5 marks)*

Answer 4(a)

An audit is concerned with historical financial statements only and provides an opinion as to whether the financial statements represent a "true and fair" view of the company's operations. Due diligence, on the other hand, review not only look the historical financial performance of a business but also consider the forecast financial performance for the company under the current business plan. The following table describes the difference between Due Diligence and Audit.

Particulars	*Audit*	*Due diligence*
Scope	Limited to financial analysis	Includes not only analysis of financial statements, but also business plan, sustainability of business, future aspects, corporate and management structure, legal issues etc.
Data	Based on historical data	Covers future growth prospects in addition to historical data.
Mandatory	Mandatory	Mandatory based on the transaction.
Assurance	Positive assurance i.e. true and fairness of the financial statements	Negative assurance. i.e. identification of risks if any.
Type	Post mortem analysis	It is required for future decision.
Nature	Always uniform	Varies according to the nature of transaction
Repetitiveness	Recurring event	Occasional event

Answer 4(b)

In the Given case, All Road Licenced Transport Federation (ARLTF) and its associations are the enterprises within the ambit of the Competition Act. The word enterprise as per definition of the act means a person or a department of the Government, who or which is, or has been engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods and so on. Thus the conduct of the federation and its association come under the purview of horizontal agreement as

per section 3(3) of the Act as both the entities are in the similar business in the market. Further, the conduct and relation between the two in particular in the instant case i.e. acceptance and implementation of the arbitrary direction of the federation by the associations to increase to freight to 20 per cent i.e. fixation of price as per section 3(3) (a) of the Act immediately after the increase of 4 per cent hike in diesel price is in no way proportionate to the hike in diesel price and is anti-competitive business practice which is anti to the interests of customers and is harm to the competition in the market. Further, such decision of the federation also has cascading impact through various associations spread across the country in the market setting the chain reaction in motion in the process of distortion. Thus the federation ARLTF through its impugned act/conduct has contravened the provisions of section 3(3)(a) read with section 3(1) of the Act.

Answer 4(c)

As per Section 135(1) Companies having net worth of Rs 500 crores or more or turnover of Rs l,000 crores or more or net profit of Rs 5 crores or more during any financial year shall constitute a CSR Committee of Board comprising of 3 or more directors, one of whom shall be an independent director.Section 135(5) states that the companies covered under Section 135(1) should ensure that the company spends, in every financial year, at least two per cent of the average net profits (to be calculated in accordance with the provisions of Sec. 198) of the company made duringthe three immediately preceding financial years, in pursuance of its Corporate Social ResponsibilityPolicy.

"Any financial year" referred under sub-section(1) of section 135 of the Act read with Rule 3(2) of Companies CSR Rule, 2014, implies 'any of the three preceding financial years'.

Net Profit for the Financial Year 2013-14 is Rs. 6.00 crore where by provisions of Section 135(1) are applicable to the company. The company has spent more than 2% of average of its preceding three years of net profit.

Question 5

(a) Distinguish between the following :

(i) 'Diversion of funds' and 'siphoning of funds'.

(ii) 'Apparent', 'adequate' and 'absolute' compliance.

(iii) 'Private placement' and 'preferential issue'. (3 marks each)

(b) Write short notes on the following :

(i) Elements of ISO 14001 standard

(ii) Disadvantages of virtual data room. (3 marks each)

Answer 5(a)(i)

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

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

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

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

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

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

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

Siphoning of funds, should be construed to occur if any funds borrowed from banks/FIs are utilised for purposes un-related to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgement of the lenders based on objective facts and circumstances of the case. The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorised as wilful must be intentional, deliberate and calculated.

Answer 5(a)(ii)

Apparent compliance is a disguise form of non-compliance, which is worse than a non compliance. The classic example for Apparent Compliances are generating documents such as notice, agenda, minutes on papers for board and general meeting which are not actually held.

Adequate compliance is compliance in letters. The aspects specified in law are complied in letters, without getting into the spirit of the law, e.g. box ticking practices.

Absolute compliances are those which are in line with the spirit and intent of the law. A typical example in this regard is demonstrating shareholder democracy as prescribed by law.

Answer 5(a)(iii)

As per the explanation under Section 42(2) private placement means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of private placement offer letter which satisfies the conditions specified in Section 42.

Preferential Offer means an issue of shares or other securities, by a Company to any select person or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

Preferential allotment is offer of securities to persons other than the existing holders, under Section 62(1)(c). When a listed issuer issues shares or convertible securities, to a select group of persons in terms of provisions of Chapter VII of SEBI (ICDR) Regulations,

2009, it is also called a preferential issue. The issuer is required to comply with various provisions which inter-alia include pricing, disclosures in the notice, lock-in etc, in addition to the requirements specified in the Companies Act.

Answer 5(b)(i)

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

- Environmental policy
- Planning
- Implementation and operation
- Checking and corrective action
- Management review
- Continuous improvement

Answer 5(b)(ii)

Virtual Data Room is a site where all the required data of the prospective buyer are stored in digitalized orelectronic form. Due diligence exercise these days is carried out through creation of virtual data room in theform of internet site where all the confidential/ material business information is stored.

Some Disadvantages of Virtual Data Room

1. limited interaction with prospective sellers
2. lack of clarity of documents loaded on the data-site
3. inability to copy or print information some times becomes a hurdle
4. access to sensitive information such as contracts to third parties poses legal challenges relating to confidentiality of information.

Question 6

(a) E-Age Bank Ltd. has sanctioned a term loan of `10 crore to Evergreen Ltd., a media company, for its new FM Radio activity. The company has submitted all the required documents to obtain disbursement of loan from the sanctioned amount. Before the disbursement, the bank has sought your report as the banker's panel consultant to confirm whether the name of the company appears in the defaulters list of Reserve Bank of India. Give the list of compliance inputs and check-list in this regard. (5 marks)

(b) A group of investors are upset with the functioning of stock brokers of Bombay Stock Exchange and want to make a complaint to Securities and Exchange Board of India (SEBI) for intervention and redressal of their grievances. As a Company Secretary, identify the purposes of establishment of SEBI and examine what type of default by the stock brokers come under the purview of the Securities and Exchange Board of India Act, 1992. (5 marks)

(c) Sun Chemicals Ltd., a chemical speciality company proposes to get itself merged with Star Industries Ltd., a pioneer in chemicals, fertilizers and plastic moulds having a market share of more than 40%. List out the basic information that the company may require under the scheme of amalgamation. (5 marks)

Answer 6(a)

Compliance Inputs

- Register of Deposits
- Register of Loans
- Register of charges maintained under Companies Act, 1956 and 2013.
- RBI defaulters list
- Loan Agreements with Bank(s) / financial institution(s), if any
- Certified copy of the e-forms for creation/modification of charge signed by the company as well as the charge-holder and along with the original/certified copy of the instrument, filed with the ROC;
- Copies of the instruments creating/modifying charges.
- Copy of the instrument creating/modifying charge/a copy ofdebenture of the series, if any, required to be registered;
- Endorsed copies of documents obtained from the ROC in regard tothecreation/ modification/satisfaction of charge;

Checklist

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

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

(c) To search the CIBIL reports of the borrower in all loan cases and commercial CIBIL report in case of firms/ companies. CIBIL reports should be analyzed thoroughly viz. whether borrower availed loans from other banks or financial institutions is there any overdue amount. There should be documentary proof to satisfy these irregularities.

(d) If mortgage of property is involved in the loan then before proceeding further search should be made on CERSAI or CIBIL Mortgage site to ascertain that there is no mortgage outstanding against the property in any other bank/ FI.

(e) Assets and liabilities statements of all borrowers must be prepared on prescribed format mentioning full detail of assets & liabilities duly signed by borrower.

(f) Credit rating must be done in all the loan cases as per bank's guidelines.

(g) valuation of property to be mortgaged is to be done from valuer on banks panel.

Answer 6(b)

The Securities and Exchange Board of India (SEBI) was established primarily for the purpose of:

- To protect the interests of investors in securities
- To promote the development of securities market
- To regulate the securities market and for matters connected therewith and incidental thereto

Section 15F of SEBI Act deals with penalty for default in case of stock brokers. The following defaults by stock brokers come under the purview of SEBI

Any failure on the part of the stock broker:

- to issue contract notes in the form and in the manner specified by the stock exchange
- to deliver any security or to make payment of the amount due to the investor in the manner and within the period specified in the regulations
- Collection of brokerage in excess of the brokerage as specified in the regulations.
  - — In respect of client's rights to dividends, rights or bonus shares etc.

Answer 6(c)

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

- Brief history of the companies seeking approval
- Rationale of the proposed Scheme of Amalgamation
- Nature of business of transferor and transferee Company
- Listing status of transferor and transferee companies
- Detailed valuation report with related calculations on the basis of which the swap ratio is determined.
- Detailed valuation report with related calculations on the basis of which the swap ratio is determined.
- Financial details (Annual Reports) of the transferor and transferee company for last 3 years.
- Provisional Net Worth (excluding revaluation reserve) certificate of the transferee company pre- and post- amalgamation.
- Details of directors and promoters of the transferor and transferee company pre- and post- amalgamation and clarification regarding change in management control if any.
- Details about the cross holdings between the companies, if any.
- Definitions of the transferor and transferee as well as the definition of the undertaking of the transferor company.

- Authorized, issued and subscribed capital of transferor and transferee companies.
- Basis of scheme should be explained briefly on the recommendation of the valuation report, covering the assets/liabilities. Specific date, reduction or consolidation of capital, application to financial institutions as lead institution for permission etc.,
- Change of name, objective and accounting year
- Protection of employment
- Dividend position and prospects
- Management structure, indicating the number of directors of the transferee company and the transferor company
- Applications under the provisions of the Companies Act to obtain approval from the High Court.
- Expenses of Amalgamation.
- Conditions of the scheme to become effective and operative and the effective date of amalgamation.

***

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) Blueberry Ltd., a subsidiary of Greenberry Ltd., merged with its holding company. Greenberry Ltd. was holding 92% equity shares in merged subsidiary company. The management of holding company has sought your opinion about incidence of stamp duty payment. Give your opinion in light of the provisions of the Companies Act, 2013. (5 marks)

(b) The Competition Commission of India has power to initiate investigation for any combination and there is set procedure for the same under section 29 of the Competition Act, 2002. Mention important milestones of the procedure for the investigation of a combination. (5 marks)

(c) The Board of directors of Bright Electronics Ltd. (BEL) has decided to amalgamate with Comfort Electricals Ltd. (CEL) which is the holding company of BEL. In order to fasten their amalgamation process, they approached their secured and unsecured creditors to seek their written consent to the proposed scheme of amalgamation. All the secured creditors of CEL have given their consent in writing but unsecured creditors have raised their doubt on the scheme and they refused to give their consent. The Board of directors of CEL requested the court to grant exemption or waiver from calling the meeting of secured and unsecured creditors of CEL on the ground that the proposed amalgamation would help them to pay off the entire outstanding dues of unsecured creditors. Offer your comments as to whether CEL can get exemption from convening the meeting of secured and unsecured creditors. (5 marks)

(d) Sameer, an acquirer along with persons acting in concert (PACs) is holding 23% shares in Purpleberry Ltd. (a BSE listed company). Now, he intends to acquire 3% additional equity shares in Purpleberry Ltd. through secondary market in the current financial year. He is acquiring less than 5% shares in the financial year and is of the view that he need not to make open offer to public. Give your opinion regarding the need to make an open offer to the public. (5 marks)

Answer 1(a)

The Central Government has exempted the payment of stamp duty on instrument evidencing transfer of property between companies limited by shares, in a case:

(i) Where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or

(ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other, or

(iii) Where the transfer takes place between two subsidiary companies each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company:

Provided that in each case a certificate is obtained by the parties from the officer appointed in this behalf by the local Government concerned that the conditions above prescribed are fulfilled.

Therefore, if property is transferred by way of order of the High Court in respect of the Scheme of Arrangement/Amalgamation between companies which fulfill any of the above mentioned three conditions, then no stamp duty would be levied provided a certificate certifying the relation between companies is obtained from the officer appointed in this behalf by the local Government (generally this officer is the Registrar of Companies).

However, stamp being a state subject, the above would only be applicable in those states where the State Government follows the above stated notification of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said notification.

Since, here Greenberry is holding 92% Equity Shares of Blueberry, so there is no requirement to pay any Stamp Duty in this merger, subject to State laws.

Answer 1(b)

The procedure for investigation by the Commission has been stipulated under section 29 of the Act. It involves the following stages:

(i) The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted.

(ii) After receipt of the response of the parties to the combination, the Commission may call for the report of the Director General.

(iii) When pursuant to response of parties or on receipt of report fo the Director General whichever is later, the Commission is, prima facie, of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days, direct the parties to the combination to publish within ten working days, the details of the combination, in such manner as it thinks appropriate so as to bring to the information of public and persons likely to be affected by such combination.

(iv) The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within fifteen working days of the publishing of the public notice, with the Commission for its consideration.

(v) The Commission may, within fifteen working days of the filing of written objections,

call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the parties above referred within fifteen days from the expiry of the period notified by the Commission.

(vi) After receipt of all the information and within 45 days from expiry of period for filing further information, the Commission shall proceed to deal with the case, in accordance with provisions contained in section 31 of the Act.

Thus, the provisions of section 29 provides for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on Commission a time limit of 45 working days from the receipt of additional or other information called for by it under sub-section (4) of section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

Answer 1(c)

Section 391 deals with the rights of a company to enter into a compromise or arrangement (i) between itself and its creditors or any class of them; and (ii) between itself and its members or any class of them. In the given case the proposed scheme is not acceptable to unsecured creditors of the holding company. In order to safeguard the interest of the unsecured creditors of the holding company, it is necessary to convene the meeting the unsecured creditors and waiver may not be allowed.

Further, a subsidiary company being a creditor cannot be included along with other unsecured creditors; their interest in supporting a scheme proposed by the holding company would not be the same as the interest of the other unsecured creditors [*Hindustan Development Corporation Ltd.* v. *Shaw Wallace & Co. Ltd. (supra)*]. Secured creditors should not be clubbed together with the unsecured creditors. Their interest would not be the same.

Since secured creditors of CEL have given their consent in writing, hence CEL can be exempted from calling the meeting of secured creditors but not from calling the meeting of unsecured creditors.

Answer 1(d)

One of the trigger for open offer is when an acquirer, who (along with PACs, if any) holds less than 25% shares or voting rights in a target company and agrees to acquire shares or acquires shares which along with his/PAC's existing shareholding would entitle him to exercise 25% or more shares or voting rights in a target company, will need to make an open offer before acquiring such additional shares.

In the given case Mr. Sameer is already holding 23% shares and intends to acquire 3% additional equity shares that would entitle him 26% and thus have to comply with open offer requirements.

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

Question 2

(a) Metal Ltd. (transferee company) filed a petition under sections 391 to 394 of the Companies Act, 1956 for approval and sanction of the scheme of reconstruction,

arrangement and demerger between Metal Ltd. and Brass Ltd. (transferor company). The Regional Director objected that the authorised share capital of the transferee company is not sufficient to allot new shares to the members of the transferor company and therefore, the transferee company should be directed to increase its authorised share capital after following the procedure prescribed under the Companies Act, 2013. Will the objection hold good ? Explain. *(5 marks)*

(b) 'Crown jewel' strategy for prevention of takeover bids is not a successful tool in Indian context. Comment. *(5 marks)*

(c) The voting rights of Vaibhav Pharma Ltd. (VPL) which is one of the promoter company of Poorvi Adhesive Ltd. (PAL) has increased beyond 75% of the total paid-up capital of the company due to the buy-back of shares by PAL pursuant to section 68. The Securities and Exchange Board of India issued a show cause notice to VPL alleging that they had to make a public announcement to acquire shares from the shareholders of the company and by not doing so they have violated provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Keeping in view the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, give your comments. *(5 marks)*

OR (Alternate question to Q.No. 2)

Question 2A

(i) Success of a merger depends upon various factors. What are the factors relevant in evaluating the effectiveness of a merger ? *(5 marks)*

(ii) Delta Overseas Ltd., an industrial company incorporated in the year 2009, has merged with Mars India Ltd. Mention the tax benefits available to the remaining entity namely Mars India Ltd. *(5 marks)*

(iii) CIPL, a non-banking finance company, had submitted an application for approval of a scheme of arrangement under section 391 of the Companies Act, 1956 before the High Court. Soham, a depositholder of CIPL, has filed an application before the Company Law Board (CLB) for ordering repayment of deposits. The CLB passed an order to repay the deposits under section 45QA(2) of the Reserve Bank of India Act, 1934. The CIPL challenged the order of CLB in the High Court. Offer your comments whether CLB is correct in passing such an order in the given circumstances. *(5 marks)*

Answer 2(a)

Sanction to scheme of amalgamation cannot be refused on the ground that the transferee company does not have sufficient authorised capital on the appointed date. If the scheme is sanctioned, the transferee company can thereafter increase its authorised capital to give effect to the scheme [Re: Mahavir Weaves Pvt. Ltd. (1985) 83 Comp. Cas 180] and *In Re: - Mahavir Marketing Surat (Pvt.) Ltd.*

In these cases it was held that Sec 391 to 394 is single window clearance system. So if increasing authorised capital is part of scheme, no further separate procedure is required. Hence objection of Regional Director is not hold good.

Answer 2(b)

The central theme in such a strategy is the divestiture of major operating unit most coveted by the bidder-commonly known as the "crown jewel strategy". Consequently, the hostile bidder is deprived of the primary intention behind the takeover bid. A variation of the "crown jewel strategy" is the more radical "scorched earth approach". Vide this novel strategy, the target sells off not only the crown jewel but also properties to diminish its worth. Such a radical step may however be, self-destructive and unwise in the company's interest. However, the practice in India is not so flexible. The Companies Act, 2013 lays down certain restrictions on the power of the Board with respect to sale of undertaking, without obtaining the permission of the company in a general meeting. However, the SEBI (Substantial Acquisitions and Takeover) Regulations, it will be difficult for any target company to sell, transfer, encumber or otherwise dispose of or enter into an agreement to sell, transfer, encumber or for dispose of assets once the predator has made a public announcement. Thus, the above defense can only be used before the predator/bidder makes the public announcement of its intention to take over the target company.

Answer 2(c)

As per Regulation 10, An increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back of shares shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in sub-regulation (1) of regulation 3 within ninety days from the date on which the voting rights so increase. In case of *Hari Dalmia* Vs. *SEBI*, SAT has decided that if percentage increase in voting rights was not by reason of any act of appellant but was incidental .ie buy-back of shares, such passive increase would not attract open offer obligations, Hence in the given case Vaibhav Pharma Ltd., is not obligated to comply with the requirements of open offer.

Answer 2A(i)

Every merger is not successful. The factors which are required to measure the success of any merger are briefly discussed below.

1. The earning performance of the merged company can be measured by return on total assets and return on net worth. It has been found that the probability of success or failure in economic benefits was very high among concentric mergers. Simple vertical and horizontal mergers were found successful whereas the performance of concentric mergers was in between these two extremes i.e. failure and success.

2. Whether the merged company yields larger net profit than before, or a higher return on total funds employed or the merged company is able to sustain the increase in earnings.

3. The capitalisation of the merged company determines its success or failure. Similarly, dividend rate and payouts also determines its success or failure.

4. Whether merged company is creating a larger business organisation which survives and provides a basis for growth.

5. Comparison of the performance of the merged company with the performance of similar sized company in the same business in respect of (I) Sales, (ii) assets, (iii) net profit, (iv) earning per share and (v) market price of share.

   In general, growth in profit, dividend payouts, company's history, increase in size provides base for future growth and are also the factors which help in determining the success or failure of a merged company.

6. Fair market value is one of the valuation criteria for measuring the success of post merger company. Fair market value is understood as the value in the hands between a willing buyer and willing seller, each having reasonable knowledge of all pertinent facts and neither being under pressure or compulsion to buy or sell. Such valuation is generally made in pre merger cases.

7. In valuing the whole enterprise, one must seek financial data of comparable companies in order to determine ratios that can be used to give an indication of the company position. The data is analyzed to estimate reasonable future earnings for the subject company.

   The following information must be made available and analyzed for post-merger valuation:

   (i) All year-end balance sheets and income statements, preferably audited, for a period of five years and the remaining period upto the valuation date.

   (ii) All accounting control information relating to the inventory, sales, cost, and profit contribution by product line or other segment; property cost and depreciation records; executives and managerial compensation; and corporate structure.

   (iii) All records of patents, trademarks, contracts, or other agreements.

   (iv) A history of the company, including all subsidiaries.

   Analysis of these items provides data upon which forecasts of earnings, cash flow, etc. can be made.

8. Gains to shareholders have so far been measured in terms of increase or decrease in share prices of the merged company. However, share prices are influenced by many factors other than the performance results of a company. Hence, this cannot be taken in isolation as a single factor to measure the success or failure of a merged company.

9. In some mergers there is not only increase in the size of the merged or amalgamated company in regard to capital base and market segments but also in its sources and resources which enable it to optimize its end earnings.

10. In addition to the above factors, a more specific consideration is required to be given to factors like improved debtors realisation, reduction in non-performing assets, improvement due to economies of large scale production and application of superior management in sources and resources available relating to finance, labour and materials.

Answer 2(A)(ii)

The remaining company is entitled to the following benefits.

Amortization of Preliminary Expenses

The benefit of amortization of preliminary expenses under section 35D are ordinarily available only to the assessee who incurred the expenditure. However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortisation is transferred to another Indian company in a scheme of amalgamation within the 10 years/5 years period of amortisation. In that event the deduction in respect of previous year in which the amalgamation takes place and the following previous year within the 10 years/5 years period will be allowed to the amalgamated company and not to the amalgamating company.

Capital Expenditure on Scientific Research

In the case of an amalgamation if the amalgamating company transfers to the amalgamated company, which is an Indian company, any asset representing capital expenditure on scientific research, provision of section 35 would apply to the amalgamated company as they would have applied to amalgamating company if the latter had not transferred the asset.

Expenditure on Acquisition of Patent Right or Copyright

Where the assessee has purchased patent right or copyrights he is entitled to a deduction under Section 35A for a period of 14 years in equal instalments. The amalgamated company gets the right to claim the unexpired instalments as a deduction from its total income.

The deduction under this section is however available for expenditure incurred before 1st April, 1998 only.

Expenditure on Amalgamation

Section 35DD provides that where an assessee being an Indian company incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.

Expenditure on know-how

Section 35AB(3) of the Income-tax Act provides that where there is a transfer of an undertaking under a scheme of amalgamation or demerger and the amalgamating or the demerged company is entitled to a deduction under this section, then the amalgamated or the resulting company, as the case may be, shall be entitled to claim deduction under this section in respect of such undertaking to the same extent and in respect of the residual period as it would have been allowable to the amalgamating company or the demerged company, as the case may be, had such amalgamation or demerger not taken place.

The deduction under this section is however available for any lump sum consideration

paid in any previous year relevant to the assessment year commencing on or before 1.4.1998.

Expenditure for obtaining Licence to Operate Telecommunication Services (Section 35ABB)

The provisions of the section 35ABB of the Income Tax Act relating to deduction of expenditure, incurred for obtaining licence to operate communication services shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the latter had not transferred the licence.

Answer 2(A)(iii)

The facts of the given question is similar to the facts of Manipal Sowbhagya Nidhi Ltd where Hon'ble High Court of Kerala held that where application have been filed before the CLB seeking the repayment of deposit, When an application for approval of a scheme of arrangement under Section 391 of Companies Act 1956 is pending before the High Court, CLB ought not to grant any relief and on the other hand, it should dispose the same by ordering to await the order of High Court.

Question 3

(a) Comment on the following :

(i) Applicability of Accounting Standard (AS) – 14 for amalgamation.

(ii) Issue of preference shares to persons outside India under external commercial borrowing (ECB) guidelines.

(iii) Compulsory acquisition of shares of minority shareholders of unlisted companies. (3 marks each)

(b) Distinguish between 'demerger' and 'slump sale'. (6 marks)

Answer 3(a)(i)

Accounting Standard (AS)-14 recognizes two types of amalgamation:

(a) Amalgamation in the nature of merger.

(b) Amalgamation in the nature of purchase.

This standard does not deal with cases of acquisitions which arise when there is a purchase by one company (acquiring company) of the whole or part of the shares, or the whole or part of the assets, of another company (acquired company) in consideration by payment in cash or by issue of shares or other. Securities in the acquiring company or partly in one form and partly in the other. The distinguishing feature of an acquisition is that the acquired company is not dissolved and its separate entity continues to exist.

Answer 3(a)(ii)

Preference shares (i.e. non-convertible, optionally convertible or partially convertible) for issue of which, funds have been received on or after May 1, 2007 would be considered as debt and should conform to policy. Accordingly, all the norms applicable for ECBs, viz. eligible borrowers, recognized lenders, amount and maturity, end use stipulations,

etc. shall apply. Since these instruments would be denominated in Rupees, the rupee interest rate will be based on the swap equivalent of LIBOR plus the spread as permissible for ECBs of corresponding maturity.

Answer 3(a)(iii)

Section 395 of the Companies Act contains a compulsory acquisition mode for the transferee company to acquire the shares of minority shareholders of Transferor Company.

Where the scheme has been approved by the holders of not less than nine tenth (90%) in value of the shares of the transferor company whose transfer is involved, the transferee company, may, give notice to any dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Court Orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

Answer 3(b)

Both Demerger/slump sale result in hiving of a division or undertaking, but the following are the differences.

- In slump sale values are not being assigned to individual assets and liabilities and the sale of undertaking is for a lump sum consideration called slump price. In demerger, valuation of individual assets and liabilities are mandatory.
- In case of demerger, the shareholders of demerged company has to be issued the shares of resulting company and in case of slump sale the issue of shares does not take place.
- Demerger results in reorganization of capital where as slump sale does not result in reorganization of capital.
- In case of demerger, the resulting company has to continue the business of transferred undertaking of demerged company, where as in slump sale it is not so.

PART B

Question 4

(a) Explain the pricing of shares issued under FDI Policy, 2015 to persons resident outside India by an Indian company. (5 marks)

(b) The share capital of Suraj Ltd. is ₹1,00,00,000 (60,000 equity shares of ₹100 each and 4,00,000, 12.5% preference shares of ₹10 each). The company has earned a profit of ₹65,00,000 after payment of 35% income-tax amounting to ₹35,00,000. Calculate earnings per share (EPS) of Suraj Ltd. (5 marks)

(c) "Super profits are calculated as the difference between maintainable future profits and the return on net assets." Comment. (5 marks)

Answer 4(a)

Price of shares issued to persons resident outside India under the FDI Policy, shall not be less than -

(a) the price worked out in accordance with the SEBI guidelines, as applicable,

where the shares of the company are listed on any recognised stock exchange in India;

(b) the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and

(c) the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

However, where non-residents (including NRIs) are making investments in an Indian company in compliance with the provisions of the Companies Act, as applicable, by way of subscription to its Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme

Answer 4(b)

Profit After Tax	Rs. 65,00,000
Less Preference Dividend @12.5% on 40,000	Rs. 5,00,000
Profit available for equity shareholders	Rs. 60,00,000

EPS = 60, 00,000/60,000 = Rs. 100 per share.

Answer 4(c)

Valuation based on super profits

This approach is based on the concept of the company as a going concern. The value of the net tangible assets is taken into consideration and it is assumed that the business, if sold, will in addition to the net asset value, fetch a premium. The super profits are calculated as the difference between maintainable future profits and the return on net assets. In examining the recent profit and loss accounts of the target, the acquirer must carefully consider the accounting policies underlying those accounts. Particular attention must be paid to areas such as deferred tax provision, treatment of extraordinary items, interest capitalisation, depreciation and amortisation, pension fund contribution and foreign currency translation policies. Where necessary, adjustments for the target's reported profits must be made, so as to bring those policies into line with the acquirer's policies. For example, the acquirer may write off all R&D expenditure, whereas the target might have capitalised the development expenditure, thus overstating the reported profits.

Question 5

(a) The Wind Urja Ltd. (WUL) is a closely held unlisted company with financial details as under :

	Market Value on 31.03.2015
Assets	*(Rs. in lakh)*
Land and building	*6,500*
Plant and machinery	*2,000*
Furniture and fixtures	*20*

Trade receivables	*1,000*
Cash and cash equivalents	*30*
Spares	*10*
Outside Liabilities	
Trade payables	*20*
Long-term loans	*2,000*
Outstanding expenses	*5*

Worldwide Wind Energy Ltd. (WWEL) is ready to take over WUL by paying 35% premium over the market value of assets and liabilities as goodwill. Calculate the price which WWEL is ready to pay to shareholders of WUL. (5 marks)

(b) You are a Company Secreta0ry of Modern India Ltd., which is planning to go for an IPO. The Managing Director of your company asked you to advise about the differential pricing norms necessarily to be followed by the issuer company as per the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. Advise the company about the conditions for differential pricing. (5 marks)

(c) Write a note on the procedure adopted by the government when amalgamation of government companies is in public interest. (5 marks)

Answer 5(a)

In the case of Wind Urja Limited (WUL) , market value of assets and liabilities is given. On the basis of data given, we know :

I Net Market Value of the WUL = Market value of (land and building + plant and machinery + furniture and fixtures +trade receivables +cash and cash equivalents + spares) – (Trade payable + long term loans + outstanding expenses) = Rs. (6500 + 2000 + 20 + 1000+30+10) - (20 + 2000+05) = Rs. (9560-2025) lacs = Rs. 75, 35, 00,000

II Plus 35% premium over value

= 35%of Rs 75, 35, 00,000 = Rs. 26, 37, 25,000/-

III Price to be paid by WWEL

= Value plus 35% premium

= Rs (75, 35, 00,000 + 26, 37, 25,000)

Price Payable = Rs. 101, 72, 25,000/-

Answer 5(b)

An issuer may offer specified securities at different prices, subject to the following:

(a) retail individual investors or retail individual shareholders or employees of the issuer entitled for reservation made under regulation 42 making an application for specified securities of value not more than one lakh rupees, may be offered

specified securities at a price lower than the price at which net offer is made to other categories of applicants: Provided that such difference shall not be more than ten per cent of the price at which specified securities are offered to other categories of applicant;

(b) in case of a book built issue, the price of the specified securities offered to an anchor investor shall not be lower than the price offered to other applicants;

(c) in case of a composite issue, the price of the specified securities offered in the public issue may be different from the price offered in rights issue and justification for such price difference shall be given in the offer document;

(d) in case the issuer opts for the alternate method of book building in terms of Part D of Schedule XI, the issuer may offer specified securities to its employees at a price lower than the floor price: Provided that the difference between the floor price and the price at which specified securities are offered to employees shall not be more than ten per cent. of the floor price.

Answer 5(c)

The Ministry of Corporate Affairs (MCA) have been dealing with the amalgamation of Government Companies in the Public Interest under section 396 of the Companies Act, 1956 by following the procedures prescribed under Companies (Court) Rules, 1959 which are applicable to amalgamation under Sections 391-394 of the Companies Act, 1956. Without prejudice to the generality of Section 396, it has now been decided that, in appropriate cases, simpler procedures shall be adopted for the amalgamation of Government Companies under section 396 of the Companies Act, 1956 as given below:-

(1) (a) Every Central Government Company which is applying to the Central Government for amalgamation with any other Government Company or Companies under the simplified prescribed procedure, shall obtain approval of the Cabinet i.e. Union Council of Ministers to the effect that the proposed amalgamation is essential in the 'public interest'.

(b) In the case of State government companies, the approval of the State Council of Ministers would be required.

(c) Where both central and state government companies are involved, approval of both State Cabinet(s) and Central Cabinet shall be necessary.

(2) (i) A Government Company may, by a resolution passed at its general meeting decide to amalgamate with any other Government Company, which agrees to such transfer by a resolution passed at its general meeting;

(ii) Any two or more Government Companies may, by a resolution passed at any general meetings of its Members, decide to amalgamate and with a new Government Company.

(3) Every resolution of a Government Company under this section shall be passed at its general meeting by members holding 100% of the voting power and such resolution shall contain all particulars of the assets and liabilities of amalgamating government companies.

(4) Before passing a resolution under this section, the Government Company shall give notice thereof of not less than 30 days in writing together with a copy of the proposed resolution to all the Members and creditors.

(5) A resolution passed by a Government Company under this section shall not take effect until (i) the assent of all creditors has been obtained, or (ii) the assent of 90% of the creditors by value has been received and the company certifies that there is no objection from any other creditor.

(6) The resolutions passed by the transferor and transferee companies along with written confirmation of the Cabinet decision shall then be submitted to the Central Government which shall, if it is satisfied that all the requirements of Section 396 and the circular issued by MCA on this behalf have been fulfilled, order by notification in the Gazette that the said amalgamation shall take effect.

PART C

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

Question 6

(*a*) *Genre Ltd. having registered office at Noida (U.P.) entered into an agreement with Parsu Trading for supply of raw material worth `2 crore. It was clearly mentioned in the agreement that all disputes will be referred to the Delhi High Court. Genre Ltd. has defaulted in payments. The management of Parsu Trading has approached you for opinion about jurisdiction since they want to file winding-up petition. Give your advice with decided case laws.* *(5 marks)*

(b) In relation to insolvency laws, mention four reforms carried out in India in 21st Century. *(5 marks)*

(c) Fair Deal Ltd. (FDL) is aggrieved by the order of the Debt Recovery Tribunal (DRT). The management of FDL has decided to file an appeal against the order of DRT. Advise. *(5 marks)*

(d) Labour union of MG Textile Ltd. (MGL) filed a winding-up petition for unpaid wages of workmen. Will the petition be maintainable ? Based on case laws, give your opinion as to the workers' right in winding-up. *(5 marks)*

OR (Alternate question to Q.No. 6)

Question 6A

(i) Auto Components Ltd. (ACL), an industrial company became sick and the Board of directors of the company referred it to the BIFR on 15th March, 2013. Credit Bank Ltd. (CBL), a secured creditor of ACL took possession of the land and building of the company on 18th November, 2013 under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The company has challenged the action of the bank on the ground that the company is under reference to BIFR. Give your opinion as to whether the contention of the company will hold good. *(5 marks)*

(ii) Lalit Hardware Ltd. (LHL) was ordered to be wound-up and Nayan was appointed as the official liquidator. The official liquidator sought to sell the goods, which were imported by availing duty exemption granted in favour of 100% export oriented unit under the scheme without payment of any customs duty by bonding the goods to the Department. Since export obligations were not fulfilled, the

Commissioner of Customs claimed recovery of customs duty and central excise duty and requested the official liquidator to incorporate in the sale notice that the removal of the goods are subject to payment of duty components as the goods are bonded goods. Official liquidator refused to accept this condition. The Commissioner of Customs filed writ petition seeking prevention of removal of goods without settlement of customs duty, central excise duty and interest payable thereon.

Based on the above facts, give your opinion whether writ petition in the case of a company which is in the process of liquidation by the order of company court is maintainable ? *(5 marks)*

(iii) Mention the effects of recognition of foreign main proceedings under the UNCITRAL Model Law. *(5 marks)*

(iv) Subrata, one of the guarantors for debt facilities taken by Krishna Ltd., is aggrieved against the order of recovery officer of the Debt Recovery Tribunal (DRT). He intends to initiate action against order of the recovery officer. Advise him about next course of action. *(5 marks)*

Answer 6(a)

In terms of the provisions of Section 10 of the Companies Act, 1956, the jurisdiction for entertaining winding up petition vests either in the High Court having jurisdiction in relation to the place where the registered office of the company is situate or the District Court of the area subordinate to the High Court, in which the jurisdiction has been vested either by the Act or by the Central Government by notification in the Official Gazette. In *GTC Industries Ltd.* v. *Parasrampuria Trading* (1999) 34 CLA 380 (All HC), it was held that only High Court where the registered office is situated has jurisdiction in winding up, even if there was agreement between parties that dispute between parties will be resolved before High Court where registered office is not situated. Regardless of where agreement is executed, Company Court having jurisdiction over the place where the registered office is situated, will have the jurisdiction to entertain a petition for winding up. *LKP Merchant Financing* v. *Arwin Liquid Gases* (2001) 103 Comp. Cas. 211 (Guj.). Accordingly in the given case since the registered office is situated in Noida, High Court of UP situated in Allahabad or its regional bench would have jurisdiction.

Answer 6(b)

Over the last two decades, the Indian financial system has undergone tremendous transformation. Various financial sector reforms have been initiated aimed at promoting an efficient, well-diversified and competitive financial system with the ultimate objective of improving the allocative efficiency of resources so as to accelerate economic development. As India swiftly moves to the centre stage of world economy there has been a consistent effort by the policy makers to undertake comprehensive reforms in the laws and systems to bring them at par with international standards and incentivise the foreign investors to invest in the Indian economy.

Justice Eradi Committee

In the year 1999, the Government of India set up a High Level Committee headed by Justice V.B.Eradi, to examine and make recommendations with regard to the desirability

of changes in existing law relating to winding up of companies so as to achieve more transparency and avoid delays in the final liquidation of the companies; The Committee recognized after considering international practices that the law of insolvency should not only provide for quick disposal of assets but in Indian economic scene, it should first look at the possibilities of rehabilitation and revival of companies. The Committee also recommended that the jurisdiction, power and authority relating to winding up of companies should be vested in a National Company Law Tribunal instead of the High Court as at present. The Committee strongly recommended appointing Insolvency Professionals who are members of Institute of Chartered Accountant of India (ICAI), Institute of Company Secretaries of India (ICSI), Institute of Cost and Work Accountants of India (ICWAI), Bar Councils or corporate managers who are well versed in Corporate management on lines of U.K. Insolvency Act.

Dr J J Irani Expert Committee on Company Law

Dr. J.J.Irani Expert Committee on Company Law was set up by the Government to recommend a new company law as a part of the on-going legal and financial sector reform process in the country. Committee submitted its report to the Government of India on 31 May 2005. The Committee has proposed significant changes in the law to make the restructuring and liquidation process speedy, efficient and effective.

Provisions of Companies Act 2012 Relating to Insolvency Administrators

- *Appointment as interim administrator*

  The Tribunal may appoint an interim administrator or a company administrator from the panel of Company Secretaries, Advocates, CAs, CWAs, etc. maintained by the Central Government.

- *Company Liquidators*

  The Tribunal may appoint Provisional Liquidator or the Company Liquidator from a panel maintained by the Central Government consisting of Company Secretaries, Chartered Accountants, Advocates and Cost and Works Accountants.

- *Professional assistance to Company Liquidator*

  The Company Liquidator may, with the sanction of the Tribunal, appoint one or more professionals including Company Secretaries to assist him in the performance of his duties and functions under the Act.

Recently Bankruptcy and Insolvency Code 2015 was introduced in the parliament based on vishwanathan committee recommendations.

Answer 6(c)

Section 20 of the Act provides that any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter. No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties. Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and accompanied by such fee as may be prescribed. Provided that the

Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal, the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. The Appellate Tribunal shall send a copy of every order, made by it to the parties to the appeal and to the concerned Tribunal. The appeal filed before the Appellate Tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

Deposit of amount of debt due, on filing appeal: Where an appeal is preferred by any person from whom the amount of debt is due to a Bank or a Financial Institution or a consortium of Banks or Financial Institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five percent of the amount of debt so due from him as determined by the Tribunal. Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited.

Answer 6(d)

There is nothing in the Act which prohibits workers from being heard in a winding up petition. Accordingly, the workers would be entitled to be heard though as interveners and not as parties. Further after the winding up order is made, the workers may appeal against it. But once the order becomes final, the workers shall not participate in any further proceedings [*National Textile Workers' Union* v. *P.R. Ramakrishnan* (1983) 53 Comp. Cas. 184].

Answer 6A(i)

The Sick Industrial Companies (Special Provisions) Act, 1985 has been amended to the extent it provides that after the commencement of SRFAESI Act, 2002 and if the financial assets have been acquired by securitization or Reconstruction Company, no reference shall be made to BIFR. Moreover, after the commencement of SRFAESI Act, 1956 and if the reference is pending, then the reference shall abate, if 75% of the Secured Creditors have taken measures to recover their Secured Debts. Thus the contention of the company may not hold good.

Answer 6(A)(ii)

The Writ Petition is not maintainable. The Companies (court) Rules give wide powers to the company court to pass and order in furtherance of justice and taking into consideration of Charge created over properties, which were directed to be sold by the official liquidator under direction of the company court. The Commissioner of Custom was required to make request to the company court and appropriate direction could be framed from the company court. After the appointment of official liquidator, the entire affairs of the company had come to the hands of the official liquidator controlled by the Company Court. Hence the writ petition is not maintainable and commissioner of Customs, if desired, may approach the company court. *Commissioner of Customs and Central Excise* v. *Official Liquidator* (2007)139 company case 591 (Mad).

Answer 6(A)(iii)

Effects of recognition of a foreign main proceeding (Article 20)

Once foreign proceeding is recognized which is a foreign main proceeding, the following are the effects:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The effects provided by Article 20 are not discretionary in nature. These flow automatically from recognition of the foreign main proceeding. The automatic effects under Article 21 apply only to main proceedings.

Answer 6(A)(iv)

Any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. On receipt of an appeal, the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive).

In the cases of *Pravin Gada* v. *Central Bank of India* [2013] 176 Comp Cas 101(SC), *Allahabad Bank* v. *Canara Bank* [2000] 101 Comp Cas 64 (SC) and *Rajsthan Financial Corporation* v. Official Liquidator [2005] Com Cas 387(SC), Supreme Court held that anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal. The Debts Recovery Tribunal has the powers under the 1993 Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of powers under sections 25 to 28 of the 1993 Act.

***