GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2016

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 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.*	*Updations required in the answers*
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. SEBI (LODR) Regulations, 2015 as amended from time to time.

UPDATING SLIP

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

MODULE – 1 – PAPER 2

Examination Session	*Question No.*	*Updations required in the answers*
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.*	*Updations required in the answers*
All previous sessions	—	Provisions under the Companies Act, 2013 relating to mergers, winding up are already notified. Provisions of Insolvency and Bankruptcy Code relating to Insolvency Professionals, Insolvency Professionals Agency, Corporate Insolvency Resolution Process, Liquidation Process, Insolvency and Bankruptcy Board of India etc. are already notified.

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2016

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) Watson Ltd., a company incorporated in Australia, has a place of business through an agent in Mumbai. The agent transacts the business on behalf of the company through electronic mode. As regards Watson Ltd., answer the following:

(i) Whether Watson Ltd. shall be called a foreign company within the meaning of the Companies Act, 2013 ?

(ii) What are the regulatory requirements under the Companies Act, 2013 to be complied with by such a company which has established its place of business in India ?

(iii) State the regulatory provisions under the Foreign Exchange Management establishment in India of Branch or Office or other Place of Business) Regulations, 2000. (5 marks)

(b) Ruchi (Pvt.) Ltd., a company incorporated under the provisions of the Companies Act, 2013, gives you the following information :

Paid-up equity share capital	*₹40 lakh*
Average annual turnover during the last 3 years	*₹1 crore*

The Board of directors of the company decides to convert the company into a one person company (OPC). Examining the provisions of the Companies Act, 2013, advise the Board about the statutory requirements to be complied with for giving effect to the Board's proposal. (5 marks)

(c) Priya Ltd. has passed a resolution in the general meeting of the company for alteration of articles of association, thereby adopting new set of articles of association by following the statutory procedure in accordance with the provisions of the Companies Act, 2013. In this connection, answer the following :

(i) What are the implications of adoption of new articles of association ?

(ii) Draft a specimen resolution with explanatory statement for alteration of the articles and adoption of new set of articles of association. (5 marks)

(d) "The e-forms are required to be authenticated by the authorised signatories using digital signatures." With reference to e-filing of documents with the Registrar of Companies, identify the users of digital signature who are required to obtain

digital signature certificate (DSC) and enlist the requirements of obtaining DSC in the case of foreign directors. (5 marks)

Answer 1(a)(i)

In accordance with the provisions of the Companies Act, 2013, as contained under section 2(42) '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;

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

In this case since the foreign company (incorporated in Australia) transacts its business through an agent by electronic mode in Mumbai, it is a foreign company.

Answer 1(a)(ii)

Such a company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar (Registrar of Companies) for registration the following documents through filing of Form FC-1 as prescribed under section 380 (1) of the Companies Act,2013 and Rule 3(3) of the Companies (Registration of Foreign Companies) Rules, 2014:

- 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;
- Full address of the registered or principal office of the company;
- a list of directors and secretary of the company with particulars;
- the names and addresses of one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- the full address of the office of the company in India which is deemed to be its principal place of business in India;
- particulars of opening and closing of a place of business in India on earlier occasions;
- declaration that none of the directors of the company or authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad.

According to Section 380 (3) of the Companies Act, 2013 and Rule 3 (3) of the Companies (Registration of Foreign Companies) Rules, 2014 where any alteration is made or occurs in the document delivered to the Registrar for registration under sub-section (1) of section 380, the foreign company shall file with the Registrar, a return in Form FC-2 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 containing the particulars of the alteration, within a period of thirty days from the date on which the alteration was made or occurred.

Answer 1(a)(iii)

A foreign company or individual planning to set up business operations in India can do so through a Liaison Office /Representative Office, Project Office or a Branch office. The Foreign Exchange Management (Establishment in India of Branch and Office or other place of business) Regulations, 2000 govern the opening and operation of such offices Accordingly, Companies incorporated outside India, desirous of opening a Liaison Office or Branch Office in India have to make an application in Form FNC1 through an AD Categaory I bank which is authorized by RBI to forward such application to the Chief–Manager-in-charge of RBI Foreign Exchange Department, FDI division, Central Office, Mumbai-400001.

Answer 1(b)

In terms of Rule 7 of Companies (Incorporation) Rules, 2014 a private company other than a company registered under Section 8 of the Companies Act, 2013, having paid-up share capital of Rs. 50 lacs or less or average annual turnover during the relevant period is Rs. 2 crore 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. The OPC shall file copy of the special resolution with the Registrar of Companies within 30 days from the date of passing such resolution in Form No. MGT-14.

The company shall file an application in Form No. INC-6 for its conversion into OPC along with fees as provided in the Companies (Registration offices and Fees) Rules, 2014, by attaching the following documents, viz.:

1. The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid-up share capital of the company is Rs. 50 lacs or less and average annual turnover is less than Rs.2 crore, as the case may be;
2. The list of members and list of directors;
3. The latest Audited Balance Sheet and the Profit & Loss Account, and
4. The copy of No Objection letter of secured creditors.

On being satisfied with compliance of above-mentioned requirements, the Registrar shall issue the Certificate of Incorporation in the same manner as its first registration.

Accordingly, since the paid – up equity share capital and an average annual turnover of the company are within the prescribed limits as referred above, it can be converted into an OPC, by following the procedure as stated above (Rule 7 of Companies (Incorporation) Rules, 2014 and also by alteration of Memorandum and Articles of Association of the company as per the provisions of Section 18 of the Companies Act, 2013).

Answer 1(c)(i)

Section 14 of the Companies Act, 2013 lays down that subject to the provisions of the Act and to the conditions contained in its memorandum, a company may, by a special resolution, alter its articles.

Every alteration shall be filed with the Registrar together with a printed copy of the altered articles within a period of 15 days. [Section 14(2)].

Any alteration of the articles so registered, shall be valid as if it were originally in the articles. A company may alter its articles in accordance with the above provisions in any of the manners mentioned below :

(i) By adoption of new set of articles,

(ii) By addition/insertion of an article;

(iii) By amendment of a specific article; or

(iv) By substitution of a specific article

Implications of adoption of new articles of association:

In terms of section 14(3), any alteration of the articles registered with Registrar shall be valid as if it were originally in the articles.

All members of the company become bound by a valid alteration whether they voted for or against it. (*Hari Chandana Yoga Deva* v. *Hindustan Co-op Insurance Society Ltd.* AIR 1925 Cal. 690.) A provision of the Articles which has the effect of limiting the company's share capital to a fixed amount would have no effect being contrary to the Act. [*Muheer Hemant Mafatlal* v. *Mafatlal Industries Ltd.* (1987) 89 Bom LR 86 (Bom)].

Power of alteration can be exercised only in good faith in the interest of the company as a whole. A discriminatory amendment depriving some members of their rights qua members would be struck down as invalid.[*Tapas Sinha Roy* v. *Linkman Services P. Ltd.* (2007) 77 CLA 340 (CLB)]

Answer 1(c)(ii)

Specimen of the Special Resolution:

"RESOLVED THAT the Regulations contained in the document submitted for consideration and approval of this meeting, and initialed by the Chairman of the meeting for the purpose of identification, be and are hereby approved and adopted as the Articles of Association of the company in substitution for, and to the exclusion of, the present Articles of Association of the company."

Specimen of an Explanatory Statement for the Special Business of an Alteration of Articles of Association of the Company pursuant to the provisions of section 102(1) of the Companies Act, 2013:

The present Articles of Association of the company were adopted in.....

They were based on the Companies Act, 1956, as amended till that point of time. The Act has since been amended several times.

Moreover, certain other Acts have affected various provisions of the Companies Act, 2013.

The directors of the company believe that it is desirable that the articles of association of the company be revised so that they fully reflect not only the law governing the

company and rules and regulations made thereunder, but is also in conformity with modern secretarial practices and complies with the requirements of the listing agreements of the stock exchanges on which the company's shares are listed.

Since the proposed alterations, deletions, insertions etc. to the present articles of association are numerous, it is more convenient to adopt an altogether new set of articles of association incorporating all the proposed alterations. Your directors recommend the proposed resolution for your consideration and adoption of the new set of Articles of Association of the company to replace the existing Articles of Association of the Company.

A copy of the existing Articles of Association is available at the registered office of the company for the inspection of any member during office hours on all working days.

None of the directors, Key Managerial Personnel and their relatives are interested in passing of the proposed resolution except to the extent of their shareholding.

Answer 1(d)

With reference to e-filing of documents with the Registrar of Companies, the authorized signatories including Managing Director, Directors, Manager, Chief Executive Officer, and Company Secretary of the Company, who may sign the e-Forms for and on behalf of the Company are required to obtain the DSC and register the same with the MCA portal for the submission of e-forms with the Ministry Corporate Affairs, GOI.

Practicing professionals i.e. CA, CS & CWA and Adv. should obtain their DSC and get the same registered on MCA portal.

Requirements for obtaining DSC in case of foreign directors

Foreign directors are required to obtain Digital Signature Certificate from an Indian Certifying Authority (List of Certifying Authorities is available on the MCA portal). The process of registration of DSC is same as applicable to others.

In case of Foreign Directors, the DSC application is to be made to one of the Indian Certifying Authorities which is licensed u/s. 24 of the Information Technology Act, 2000 and mentioned in the list available on the MCA portal. The said application should be duly filled by such applicant with the relevant enclosures. Such DSC application then to be physically submitted with the necessary documents. Further, the said documents be attested and notarized by the Notary Public or Apostilled by the Foreign Ambassador/ Diplomatic.

In this manner, the Foreign director can obtain the DSC from C.A. on the successful verification of the Application along with the documents and information.

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

Question 2

(a) Ajay Ltd. had given a loan of ₹10 crore to Binoy Ltd. and created a charge on the assets of the company. But Binoy Ltd. failed to register the charge within the stipulated time. Can Ajay Ltd. register the charge with the Registrar of Companies? If yes, what shall be the procedure ? (4 marks)

(b) *Promoters of a company to be formed enter into certain contracts for purchase of land, building and machinery. On incorporation of the company, promoters want the company to undertake the liability towards the payments to be made for the above.*

Examining the provisions of the Companies Act, 2013, decide whether the company be held liable for the payments for the contracts entered into by the promoters before incorporation of the company. *(4 marks)*

(c) *Charminar Ltd. raised money through prospectus with the object of starting a new automobile spare parts manufacturing unit. After investing in this manufacturing unit, few crore of rupees are left unutilised and the company proposes to invest the same for some other purpose than what is mentioned in the prospectus. Advise.* *(4 marks)*

(d) *Rise Ltd. was incorporated under the provisions of the Companies Act, 2013 and a certificate of incorporation was issued by the Registrar of Companies (ROC), New Delhi. Due to inadvertence, the name of the company was found to be similar to the name of another company already registered with the ROC. The ROC on knowing this fact serves a notice upon the company for rectification of the name. Referring to the provisions of the Act, answer the following :*

(i) *What action shall the company take in response to the notice served upon the company by the Registrar of Companies ?*

(ii) *What will be the position in case the directors of the company suo motu apply to the Central Government for rectification of name of the company ?*

(iii) *What are the implications of rectification of name of the company on the contracts already entered into by the company ? Also, state whether the change/rectification shall result in the dissolution of the company.* *(4 marks)*

OR (Alternate question to Q.No. 2)

Question 2A

(i) *Board of directors of Western Ltd. decides to issue equity shares to the extent of ₹10 crore on private placement basis. Explain the procedure the company should follow to give effect to the Board's proposal.* *(4 marks)*

(ii) *A company wishes to invest in excess of the prescribed limit as per the Companies Act, 2013. Draft a resolution to give authority to the Board of directors mentioning the type of resolution required.* *(4 marks)*

(iii) *Alia Ltd. declared dividend but failed to make payments to shareholders. Advise the company about the consequences for such default and also list out the offences which shall not be deemed to have been committed.* *(4 marks)*

(iv) *Bright Ltd. wants to go for public issue of secured debentures for which the company issues prospectus. In light of the provisions of the Companies Act, 2013 :*

(a) *State the restrictions which are applicable in this regard.*

(b) *In what way does the Act and the rules thereof regulate the appointment of debenture trustee ? Explain.* *(4 marks)*

Answer 2(a)

Yes, Ajay Ltd. can register the charge with the Registrar of Companies by making an application for registration of charge by the charge – holder u/s. 78 of the Companies Act, 2013 subject to the other applicable provisions of the Companies Act, 2013 and the rules made thereunder; if any.

According to Section 78 of the Companies Act, 2013 where a company fails to register the charge within the period specified, the person in whose favour the charge is created any apply to the Registrar for registration of the charge along with the instrument created for the charge in Form No.CHG-1 or Form No. CHG-9, as the case may be, duly signed along with fee. (Rule 3 of Companies (Registration of Charges) Rules, 2014. The Registrar may, on such application, give notice to the company about such application. The company may either itself register the charge or shows sufficient cause why such charge should not be registered. On failure on the part of the company, the Registrar may allow registration of such charge within fourteen days after giving notice to the company as above-stated.

Where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company, the amount of any fee or additional fees paid by him to the Registrar for the purpose of registration of charge.

Answer 2(b)

During the pendency of the incorporation of the company or while taking procedural steps for the incorporation of the company which may take time, promoters may enter into contracts on behalf of the proposed company, like purchase of land, ordering machinery, employing key personnel, investment tie up etc. and also incur expenses relating to incorporation of the company. The same must be ratified on the incorporation of the company since these are the pre-incorporation agreements and contacts.

The Articles of the company must authorize the directors to pay the expenses relating to registration of the company. However, pre-incorporation contracts are not binding upon the company, if the same are not adopted or accepted by the company after its incorporation.

In accordance with the provisions of the Specific Relief Act, 1963, as contained under section 15 of the said Act, if promoters have made a contract before incorporation of a company for the purpose of the proposed company, and if the contract is warranted by the terms of incorporation, the company may adopt and enforce the contract. The term 'warranted by terms of incorporation' means 'within the scope of the company's objects as stated in the memorandum of the company'. Thus, the contract should be for the purposes of the company. As per section 19 of the Specific Relief Act, 1963, if the pre-incorporation contract is adopted or accepted by the company after its incorporation and if it is within the terms of incorporation, the other party can also enforce the contract, if such acceptance (adoption) was communicated to other party to the contract.

Hence, if the provisions are therein the object clause of the Memorandum Of Association of the company empowering for the same and the Articles of Association of the company empowers to the directors to adopt such pre-incorporation contracts in

the board meeting then on passing of the board resolution to that effect in the first board meeting after the incorporation of the company based on the statement containing the details of pre-incorporation contracts prepared for the approval of the board meeting, then the said resolution will bind the company.

If the above procedure has been followed by the promoters of the company then the company will be held liable for the payments for the contracts entered into by the promoters before incorporation of the company otherwise not.

Answer 2(c)

Rule 32 of Companies (Incorporation) Rules, 2014 in respect of the provisions for change of objects for which the money is raised through prospectus is also to be followed by Charminar Ltd.; which reads as under:

(1) Where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not change the objects for which the money so raised is to be applied unless a special resolution is passed through postal ballot and the notice in respect of the resolution for altering the objects shall contain the following particulars, namely:-

  (a) The total money received;

  (b) The total money utilized for the objects stated in the prospectus;

  (c) The unutilized amount out of the money so raised through prospectus;

  (d) The particulars of the proposed alteration or change in the objects;

  (e) The justification for the alteration or change in the objects;

  (f) The amount proposed to be utilized for the new objects;

  (g) The estimated financial impact of the proposed alteration on the earnings and cash flow of the company;

  (h) The other relevant information which is necessary for the members to take an informed decision on the proposed resolution;

  (i) The place from where any interested person may obtain a copy of the notice of resolution to be passed.

(2) The advertisement giving details of each resolution to be passed for change in objects which shall be published simultaneously with dispatch of postal ballot notices to shareholders.

(3) The notice shall also be placed on the website of the company, if any.

In addition to the above specific procedure, the company should alter the objects clause of the Memorandum of Association of the company by following the procedure for the alteration of Memorandum of the Association of the Company as provided u/s. 13 of the Companies Act, 2013.

On the successful completion of the procedure as mentioned herein above, and passing of the special resolution by postal ballot Charminar Ltd., may invest the unutilized funds/money for some other purpose which is different from an object of starting a new automobile spare parts manufacturing unit for which the money is raised through the issue of prospectus.

Answer 2(d)

In accordance with the provisions of the Companies Act, 2013, as contained under section 16(1)(a), if a company is registered through inadvertence or otherwise by a name which is identical with or too nearly resembles, the name by which a company in existence has been previously registered, the company itself shall change the name by passing of an ordinary resolution at the direction of the Central Government. In such a case, the company should pass an ordinary resolution within 3 months from the date of the issue of such direction. There is no time limit for Central Government to issue such direction.

Further, according to Section 16(1)(b) of the Companies Act, 2013, a registered proprietor of a trademark may apply to the Central Government within 3 years of incorporation or registration or change of name of the company whether under this Act or any previous company law for issuing direction to the company for change of its name on the ground that the name of the said company is identical with or too nearly resembles to a registered trademark of such proprietor under the Trademarks Act, 1999 . Where, in the opinion of the Central Government the name is identical with or too nearly resembles to an existing trademark, it may direct the company to change its name. And, the company shall change its name or new name as the case may be, within a period of 6 months from the date of issue of such direction by adopting an ordinary resolution.

Accordingly:

(i) The company shall apply to the Central Government for rectification of name by filing of Form INC-1 for the name availability and then by passing an ordinary resolution within 3 months from the date of issuance of such direction and the same be intimated to the concerned ROC for the issuance of the Fresh Certificate of Incorporation of the company as prescribed under section 16(2) of the Companies Act, 2013.

(ii) If the directors *suo motu* applying to the Central Government for the change of name of the company then they have to follow the regular procedure of the change of name of the company as prescribed under Section 13 of the Companies Act, 2013.

(iii) In third case, change of name shall not affect any rights or obligations of the company (i.e. there will be no adverse effect on the contracts already entered by the company). Further, the change of name of the company does not result in the company's dissolution. And, the fresh Certificate of Incorporation issued on the approval of the change of name of the company would not be treated as given for reforming or re-incorporating the company as a new entity since the salient feature of the company of the continuance existence of the company would remain in force even after completion of the procedure for the change of name of the company.

Answer 2A(i)

In accordance with the provisions of the Companies Act, 2013, as contained in Explanation II to section 42(1) the term 'private placement' means offer of securities or invitation to subscribe securities to a selected group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in Section 42 of the Companies Act, 2013.

Under the private placement, the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding 50 or such higher number as may be prescribed, (excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employee stock option), in a financial year and on such conditions as may be specified under Rule 14(2) of Companies (Prospectus and Allotment of Securities) Rules, 2014. (At present, the limit upon the offer to be made to the no. of persons is 200 persons in the aggregate in a financial year.)

Procedure to make allotment through Private Placement:

1. The issue shall be authorized by the Articles of the Company.
2. Hold the board meeting and pass board resolution for convening the meeting of members and approving draft notice of meeting of members.
3. Hold the general meeting and pass the special resolution.
4. Send letter of offer in Form PAS-4 along with application form to the proposed subscribers.
5. File Form MGT-14 along with the fees with the Registrar within 30 days of passing the resolution.
6. Annex the explanatory statement
7. Ensure that the offer or invitation be made to not more than 200 persons in the aggregate in a financial year excluding QIBs and employees offered securities under ESOP.
8. Ensure that all monies receivable towards the subscription of such equity shares under section 42 of the Companies Act, 2013 be received / accepted through cheque/DD/other banking channels but not by cash.
9. The company shall maintain a complete record of private placement offers in Form PAS-5.
10. File form PAS-5 along with private placement offer letter in Form PAS-4 with the Registrar with the prescribed fee and where the company is listed, with SEBI within a period of 30 days of circulation of private placement offer letter.
11. Return of allotment of securities under Section 42 shall be filed with the Registrar within 30 days of allotment in Form PAS-3 with the prescribed fee along with a complete list of all security holders containing the prescribed particulars, and the intimation be sent to depository immediately on allotment of such shares.
12. Issue share certificates and update minutes book and registers.

Answer 2A(ii)

Specimen of the Special resolution to be passed at the general meeting of the Company along with an explanatory statement:

Specimen of the Special Resolution

Type of Meeting : General Meeting (Annual General Meeting/ Extra-Ordinary General Meeting)

Kind of Resolution: Special Resolution

"RESOLVED THAT pursuant to the provisions of Section 186 of the Companies Act, 2013 and other applicable provisions, if any, the consent of the members of the company be and is hereby granted to make investments of a sum not exceeding Rs..... by way of subscription and/or purchase of equity shares/ marketable securities of any other kind of M/s ..... Ltd., notwithstanding that such investment or such investment together with the company's existing investment in all other body corporates shall be in excess of the limits prescribed under section 186 of the Act.

RESOLVED FURTHER THAT the Board of directors of the company be and is hereby authorized to do all such acts, deed, matters and things as, in its absolute discretion, may be considered necessary, expedient or desirable and to settle any question or doubt that may arise in relation thereto in order to give effect to the foregoing resolution or otherwise considered by the Board of directors to be in the best interest of the company"

Explanatory Statement:

As on date the aggregate amount of the investments in shares/debentures, loans, and guarantee(s)/security(ies) made, given, or provided by the company to other bodies corporate are within the limits provided in Section 186 of the Companies Act,2013. Since the Board wants to invest in excess of the prescribed limit specified in Section 186 of the Companies Act, 2013 approval of the shareholders of the company is required.

The Board of Directors in its meeting held on .....decided to recommend the special resolution as set out in the notice for approval of the shareholders.

None of the directors, Key Managerial Personnel or their relatives save and except Mr. ... and Mr. .... are concerned or interested in this resolution.

Answer 2A(iii)

In accordance with Section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, then-

(a) every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and with fine which shall not be less than one thousand rupees for every day during which such default continues; and

(b) the company shall be liable to pay simple interest at the rate of eighteen percent per annum during the period for which such default continues.

No offence under this section shall be deemed to have been committed-

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

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

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

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

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

Answer 2A(iv)

(a) According to section 71(3) and Rule 18(1) of the Companies (Share Capital & Debentures) Rules, 2014, the company shall not issue secured debentures, unless it complies with the following restrictions/conditions: viz.

(1) An issue of such debentures may be made, provided the date of its redemption shall not exceed 10 years from the date of issue. However, a company engaged in the setting up of infrastructure projects, may issue such debentures for a period exceeding 10 years but not exceeding 30 years;

(2) Such an issue shall be secured by the creation of a charge, on the properties or assets of the company, having a value which is sufficient for the due repayment of the amount of debentures and interest thereon;

(3) The company shall appoint a debenture trustee before the issue of the Prospectus or letter of offer for subscription of its debentures and not later than sixty days after the allotment of the debentures, execute a debenture trust deed; and

(4) The security for the debentures by way of a charge or mortgage shall be created in favour of the debenture trustee.

(b) *Appointment of Debenture Trustee*

Section 71(5), specifies that no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding 500 for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees. Further, Rule 18 specifies that for secured debentures issued by any type of company, the company shall appoint a debenture trustee before the issue of prospectus or letter of offer for subscription of its debentures and not later than 60 days after the allotment of the debentures.

The conditions governing the appointment of debenture trustees through which the appointment of the debenture trustee is being regulated under sub-section (5) of section 71 of the Companies Act, 2013 are prescribed under Rule 18(2) of the Companies (Share Capital and Debentures) Rules, 2014, which reads as under:

(A) The names of the debenture trustees shall be stated in letter of offer inviting subscription for debentures and also in all the subsequent notices or other communications sent to the debenture holders;

(B) Before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures;

(C) A person shall not be appointed as a debenture trustee, if he-

(i) beneficially holds shares in the company;

(ii) is a promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;

(iii) is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

(iv) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(v) has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;

(vi) has any pecuniary relationship with the company amounting to two per cent or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(vii) is relative of any promoter or any person who is in the employment of the company as a director or key managerial personnel

(D) The Board may fill any casual vacancy in the office of the trustee but while any such vacancy continues, the remaining trustee or trustees, if any, may act: Provided that where such vacancy is caused by the resignation of the debenture trustee, the vacancy shall only be filled with the written consent of the majority of the debenture holders.

(E) Any debenture trustee may be removed from office before the expiry of his term only if it is approved by the holders of not less than three fourth in value of the debentures outstanding, at their meeting.

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 whether a member of the company ceases to be the member thereof in the following situations :

(i) A member whose shares are under lien with a company and the company exercises lien on these shares and the shares are sold.

(ii) A member whose company has gone in winding-up and the winding-up proceedings have commenced.

Give reasons in support of your answer. (4 marks)

(b) Draft general notice to the members of the company in respect of the following:

(i) Central Government's approval for the appointment of Joe as the Managing Director of Shine Ltd.

(ii) Central Government's approval to increase remuneration of Yash as the Managing Director by Johnson Ltd. (4 marks)

(c) What role is played by a Company Secretary in relation to the following under the provisions of the Companies Act, 2013 :

(i) Preparation of annual return of a public limited company.

(ii) Certification under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. (4 marks)

(d) Explaining the provisions of the Companies Act, 2013 and the rules thereof relating to the appointment of audit committee, its composition and the role played by such committee, state whether the following companies are required to appoint such committee :

(i) A public company having a turnover of ₹900 crore.

(ii) A public company which has aggregate outstanding deposits of ₹100 crore. (4 marks)

OR (Alternate question to Q No. 3)

Question 3A

Write notes on the following :

(i) Secretarial standard on passing of resolution by circulation

(ii) Key managerial personnel (KMP)

(iii) Trust as a non-profit organisation

(iv) Claiming of unpaid/unclaimed dividend. (4 marks each)

Answer 3(a)

(i) If the company has exercised lien on the shares of a member in accordance with the provisions in its Articles of Association, the member ceases to be a member on removal of his name from the register of members/beneficial owners if the company enforces its lien by way of sale of such shares.

(ii) A member does not cease to be a member merely because winding up of the company has commenced. He continues to be a member of the company so long as the requirements of Section 2(55) of the Companies Act, 2013, read with Section 88, are complied with. [National Steel & General Mills v. Official Liquidator, (1990) 69 Com Cases 416(Del)].

Answer 3(b)

(i) *Notice in respect of Central Government's approval for appointment of Joe as Managing Director of Shine Limited*

Pursuant to the provisions of Section 201 of the Companies Act, 2013, notice is hereby given that the Company intends to apply to the Central Government for its approval under section 200 of the Companies Act, 2013 for the appointment of Mr. Joe as managing director of the company, for a period of fiveyears effective from....on the terms and conditions as stated in the Draft Agreement approved by the Board of Directors on.....

Registered Office: For Shine Limited

Date: Secretary

(ii) *Notice in respect of Central Government's approval to increase remuneration of Yash as Managing Director of Johnson Limited*

Notice is hereby given pursuant to Section 201 of the Companies Act, 2013 that the company intends to make an application to the Central Government for its approval under Section 200 of the Companies Act, 2013 to increase in the remuneration payable to Mr. Yash, Managing Director of the company.

Registered Office: For Johnson Limited

Date: Secretary

Answer 3(c)

(i) *Role of Company Secretary in preparation of annual return of a public limited company*

Every company shall prepare a return in Form No. MGT-7 containing the particulars as they stood on the close of the financial year regarding the particulars as mentioned in Section 92(1).

Such annual return is required to be signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

Since one of the signatory to the return is Company Secretary, he has to ensure that:

- the return states the facts, as they stood on the date of the closure of the financial year aforesaid correctly and adequately.
- the whole of the amount of unpaid/ unclaimed dividend/other amounts as applicable have been transferred to the Investor Education and Protection Fund in accordance with section 125 of the Act.
- the Company has maintained all the registers as per the provisions of the Act and the rules made there under and
- the Company has complied with the applicable provisions of the Act during the financial year.

(ii) *Role of Company Secretary in certification under SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015*

SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015 provides for the following certifications from Company Secretaries:

- In terms of Regulation 7(3), the listed entity shall submit a compliance certificate to the exchange, duly signed by both the compliance officer of the listed entity and the authorised representative of the share transfer agent, wherever applicable, within one month of end of each half of the financial year.
- In terms of Regulation 27(2), every listed company is required to submit a quarterly Compliance Report on Corporate Governance within 15 days from

close of the quarter. Such report shall be signed by the Compliance officer or chief executive officer of the company.

- In terms of Regulation 40(9), the listed entity shall ensure that the share transfer agent and/or the in-house share transfer facility, as the case may be, produces a certificate from a practicing company secretary within one month of the end of each half of the financial year, certifying that all certificates have been issued within thirty days.
- In terms of Regulation 56(1)(d), a half-yearly certificate regarding the maintenance of hundred percent asset cover in respect of listed non convertible debt securities, by either a practicing company secretary or a practicing chartered accountant, along with the half yearly financial results.
- In accordance with the Schedule V regarding Annual Report, Part-E regarding Compliance Certificate, provides that the Compliance certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance shall be annexed with the directors' report.

Answer 3(d)

Appointment of Audit Committee

In terms of section 177 (1) of the Companies Act, 2013, the Board of Directors of every listed company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee.

Rule 6 of the Companies (Meetings of Board and Its Powers) Rules, 2014, provides for prescribed class-

(i) all public companies with a paid up capital of ten crore rupees or more;

(ii) all public companies having turnover of one hundred crore rupees or more;

(iii) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more.

Composition of an Audit Committee

In terms of Section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.

Role of Audit Committee

As per Sub-section (4) of Section 177 of the Companies Act, 2013; Every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include,—

(i) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

(ii) review and monitor the auditor's independence and performance, and effectiveness of audit process;

(iii) examination of the financial statement and the auditors' report thereon;

(iv) approval or any subsequent modification of transactions of the company with related parties;

Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed;

(v) scrutiny of inter-corporate loans and investments;

(vi) valuation of undertakings or assets of the company, wherever it is necessary;

(vii) evaluation of internal financial controls and risk management systems;

(viii) monitoring the end use of funds raised through public offers and related matters.

Accordingly,

(i) A public company having turnover of Rs. 900 crore is required to constitute Audit Committee.

(ii) A public company which has aggregate outstanding deposits of Rs. 100 crores are required to constitute Audit Committee.

Answer 3A(i)

Resolutions passed by circulation are deemed to be passed at a duly convened meeting of the Board and have equal authority.

Provisions of Secretarial Standard on passing of resolution by circulation

The Chairman of the Board or in his absence, the Managing Director or in his absence, the Wholetime Director and where there is none, any Director other than an Interested Director, shall decide, before the draft Resolution is circulated to all the Directors, whether the approval of the Board for a particular business shall be obtained by means of a Resolution by circulation.

Procedure

A Resolution proposed to be passed by circulation shall be sent in draft, together with the necessary papers, individually to all the Directors including Interested Directors on the same day by hand, or by speed post or by registered post or by courier, or by e-mail or by any other recognized electronic means.

Approval

The Resolution is passed when it is approved by a majority of the Directors entitled to vote on the Resolution, unless not less than one-third of the total number of Directors for the time being requires the Resolution under circulation to be decided at a Meeting.

Recording

Resolutions passed by circulation shall be noted at the next Meeting of the Board and the text thereof with dissent or abstention, if any, shall be recorded in the Minutes of such Meeting.

Validity

Passing of Resolution by circulation shall be considered valid as if it had been passed at a duly convened Meeting of the Board.

Answer 3A(ii)

Key Managerial Personnel

Section 203 of the Act read with Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules,2014 provides that every listed company and every other public company having a paid up share capital of ten crore rupees or more shall have whole-time key managerial personnel comprising of –

- Managing Director, or Chief Executive Officer (CEO) or manager and in their absence, a whole time director;
- Company Secretary; and
- Chief Financial Officer (CFO)

A whole time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

Every KMP shall be appointed by means of Board Resolution.

If the office of any whole time key managerial personnel is vacated, the resulting vacancy shall be filled up by the Board at a meeting of the board within a period of 6 months from the date of such vacancy.

If a company contravenes the provisions of the section 203 of the Companies Act, 2013, the company shall be punishable with fine from Rs. 1 Lac to Rs. 5 Lacs and every director and KMP who is in default will be punishable with fine upto Rs. 50,000/- and in case of continuation of such contravention fine upto Rs. 1000/- for every day for such contravention after the first during which the contravention continues.

Answer 3A(iii)

Trust as a Non-Profit Organization

Non-profit organizations in India (a) exist independently of the state; (b) are self-governed by a board of trustees or 'managing committee'/ governing council, comprising individuals who generally serve in a fiduciary capacity; and (c), are 'non-profit-making', in as much as they are prohibited from distributing a monetary residual to their own members.

There are three pertinent legal forms of not-for-profit entities under Indian law: trusts, societies, and section 8 companies. Other forms also include cooperatives and trade unions.

Trusts

Public charitable trusts, as distinguished from private trusts, are designed to benefit members of an uncertain and fluctuating class. In determining whether a trust is public or private, the key question is whether the class to be benefited constitutes a substantial segment of the public.

Legislation

Different states in India have different Trusts Acts in force, which govern the trusts

in the state; in the absence of a Trusts Act in any particular state or territory the general principles of the Indian Trusts Act, 1882 are applied.

Many state and central government agencies have regulatory authority over trusts. For example, Trusts are required to file tax returns and audited account statements annually with various agencies. At the state level, the agency is Charity Commissioner.

Main Instrument

The main instrument of any public charitable trust is the trust deed, wherein the aims and objects and mode of management (of the trust) should be enshrined.

Answer 3A(iv)

Claiming of unpaid or unclaimed dividend

In accordance with Section 124 of the Companies Act, 2013, a dividend which has been declared by a company but has not been paid, or claimed, within thirty days from the date of the declaration, to/by any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed within the said period of thirty days, to a special account to be opened by the company in that behalf in any scheduled bank to be called the unpaid dividend account.

Any person claiming to be entitled to any money transferred to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed. [Section 124(4)]

The person can claim this amount from company only within seven years of its transfer to Unpaid Dividend Account. After completion of this period of seven consecutive years, not only his dividend amount but also shares shall be transferred to the Investor Education and Protection Fund (IEPF).

In terms of 125(3) and (4), the person whose amounts transferred to Investor Education and Protection Fund after the expiry of the period of 7 years shall be entitled to get refund out of the fund in respect of such claims in accordance with rules and accordingly may apply to the authority for the payment of the money claimed.

Question 4

(a) Explain the manner in which the appointment of a 'nominee director' is regulated under the provisions of the Companies Act, 2013 and also state :

(i) Whether the 'nominee director' can be called 'independent director' ?

(ii) What is the tenure of a nominee director ?

(iii) Whether a nominee director is liable to retire by rotation and can be removed by the company in general meeting ? (8 marks)

(b) Discuss and decide with reference to the provisions of the Companies Act, 2013 and the rules made thereunder, whether the following shall be considered as 'deposits' accepted by a private company :

(i) A company has taken ₹50 lakh from a director of the company by way of loan.

(ii) A company has accepted ₹50lakh by means of inter-corporate deposits.

(iii) A company has taken ₹50 lakh as an advance from its customers towards the contracts for supply of certain products produced by the company.

(iv) A company has taken ₹50 lakh from its promoters. (4 marks)

(c) "Listed companies are required to comply with SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and should provide a separate section on 'corporate governance' in the annual report of the company. " Discuss this statement and suggest list of items relating to general meetings and disclosures to be included in such report. (4 marks)

Answer 4(a)

Appointment of Nominee Directors

Explanation to Section 149(7) of the Companies Act, 2013 defines the term 'nominee director'. Accordingly, it means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government or any other person to represent its interests. Nominee Director shall not be deemed to be independent director as per Section 149(6).

Companies, which secure financial assistance from the financial institutions, banks, major shareholders, debenture holders, etc. usually confer on their lenders, power to appoint and terminate the appointments of their nominees on their Boards. Such power is conferred by incorporating appropriate provisions in the financial assistance agreements.

These institutions/banks etc. also insist on borrowing companies to alter their articles of association so as to empower them to appoint and terminate the services of their nominee directors on the Board of the company as and when they like. These directors are known as nominee directors. They are not liable to retire by rotation and hold office at the pleasure of their nominating agencies.

Accordingly:

(i) The answer to the first question, nominee directors cannot be called ‘independent director’.

(ii) Regarding the tenure or term of office of nominee directors there is no fixed term for nominee directors, both appointment and termination depends upon the financial institution/bank or the government, and the terms of the agreement; as the case may be. In short, it can be said that the term of office of nominee director would be the term during the pleasure of the nominating agencies/ authorities such as financial institution, banks or government, as the case may be.

(iii) Retirement by rotation of nominee directors as well as their removal in general meeting is guided by the Agreement between the nominating Agency and the company. In case the agreement is silent, then provisions of Articles of Association will prevail.

Answer 4(b)

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

The provisions regarding the exclusion of any receipt of money from being treated the same as deposit are provided under Rule 2(1)(c) of Companies (Acceptance of Deposits) Rules,2014.

Accordingly:

(i) In the given case, the company can receive loan from its director. It is assumed that such director has furnished a declaration in writing to the company that the loan given is from his own funds and not from borrowed money in any way. Then, the said loan would not be treated as deposit since it is specifically excluded vide Rule 2(1)(c)(viii) of the Companies (Acceptance of Deposits) Rules, 2014.

(ii) In the given case, inter corporate deposits are accepted which are not covered in the definition of deposits. Hence, the said inter-corporate deposits would not be treated as deposit since it is specifically excluded vide Rule 2(1)(c)(vi) of the Companies (Acceptance of Deposits) Rules, 2014.

(iii) In the given case, an advance was received from customers towards the contract of supply of certain products produced by the company. However, such advance should be adjusted within 365 days from the date of receipt of advance. Otherwise it would be termed as deposits. Assuming the fact that the said advance was for the supply of goods accounted for in any manner whatsoever is appropriated against the supply of certain products i.e. goods within a period of 365 days from the acceptance of such advance in absence of any legal proceedings in respect of the said matter. The same would not be treated as deposit since it is specifically excluded vide Rule 2(1)(c)(xii)(a) of the Companies (Acceptance of Deposits) Rules, 2014.

(iv) In the given case, it is assumed that an amount brought in by the promoters of the company is by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank subject to the fulfilment of the following conditions, viz.

  (a) The loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance.

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

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

Hence, the said amount brought in by the promoters of company by way of unsecured loan will not be treated as deposit since it is specifically excluded vide Rule 2(1)(c)(xiii) of the Companies (Acceptance of Deposits) Rules, 2014.

Answer 4(c)

In terms of Regulation in respect of the Annual Report i.e. Regulation 34(3) of SEBI (LODR) Regulations, 2015, a listed company is required to provide any other disclosures specified in Companies Act, 2013 along with the other requirements as specified in Schedule V of these regulations.

The list of items related to general meetings and disclosures in a separate section on 'corporate governance' section of annual report as prescribed in Part C regarding Corporate Governance Report of Schedule V in respect of Annual Report, as under:

Regarding General Meetings

(a) location and time, where last three annual general meetings held;

(b) whether any special resolutions passed in the previous three annual general meetings;

(c) whether any special resolution passed last year through postal ballot – details of voting pattern;

(d) person who conducted the postal ballot exercise;

(e) whether any special resolution is proposed to be conducted through postal ballot;

(f) procedure for postal ballot.

Other Disclosures

(a) disclosures on materially significant related party transactions that may have potential conflict with the interests of listed entity at large;

(b) details of non-compliance by the listed entity, penalties, strictures imposed on the listed entity by stock exchange(s) or the board or any statutory authority, on any matter related to capital markets, during the last three years;

(c) details of establishment of vigil mechanism, whistle blower policy, and affirmation that no personnel has been denied access to the audit committee;

(d) details of compliance with mandatory requirements and adoption of the non-mandatory requirements;

(e) web link where policy for determining 'material' subsidiaries is disclosed;

(f) web link where policy on dealing with related party transactions;

(g) disclosure of commodity price risks and commodity hedging activities.

Further, the annual report of the listed company shall contain the additional disclosures with the prescribed details regarding Related Party Disclosure, Management Discussion and Analysis, Declaration signed by the chief executive officer stating that the members of board of directors and senior management personnel have affirmed compliance with the code of conduct of board of directors and senior management, Compliance certificate from either the auditors or practicing company secretaries regarding compliance of conditions of corporate governance shall be annexed with the directors' report, Disclosures with respect to demat suspense account/ unclaimed suspense account.

Also, non-compliance of any requirement of corporate governance report of sub-paras (2) to (10) as prescribed in Part-C regarding Corporate Governance Report of the Schedule V of the SEBI (LODR) Regulations, 2015, with reasons thereof shall be disclosed.

The corporate governance report shall also disclose the extent to which the discretionary requirements as specified in Part E of Schedule II have been adopted.

The disclosures of the compliance with corporate governance requirements specified in regulation 17 to 27 and clauses (b) to (i) of sub-regulation (2) of regulation 46 shall be made in the section on corporate governance of the annual report.

Question 5

(a) A casual vacancy has arisen in the office of auditor in Kiran Ltd., which is a company controlled by the Central Government. The Comptroller and Auditor General of India (CAG) has failed to appoint auditor to fill-up the casual vacancy within the stipulated time as required under the provisions of the Companies Act, 2013. What remedy is available to the company in this regard under the provisions of the Act ? (4 marks)

(b) Explaining the meaning of the term 'related party' in relation to a company under the provisions of the Companies Act, 2013, decide whether the following shall be treated as 'related party':

(i) Kamal, a director of Deep Ltd. holds 17o in the company's paid-up share capital.

(ii) Fair Ltd. is an associate company of Mohan Ltd.

Also explain whether a company can enter into a contract with a related party' for leasing of the company's property and also for sale of any goods produced by the company. (4 marks)

(c) Advice on the following with reference to the provisions of the Companies Act, 2013 :

(i) Victory Ltd. wants to acquire certain premises for its official use from Joy, director of the company for consideration other than cash. Whether the company can proceed with the deal ?

(ii) Amar, a director in Sunrise Ltd. which is a subsidiary of Victory Ltd., wants to acquire certain secondhand machineries from the company without any consideration. Can he do so ? (4 marks)

(d) Explain the scope of 'secretarial audit' and decide :

(i) Whether a listed company is required to get the secretarial audit conducted under the provisions of the Companies Act, 2013 ?

(ii) Whether the non-listed companies are required to comply with the provisions of the Companies Act, 2013 related to secretarial audit ? (4 marks)

Answer 5(a)

In terms of Point (ii) of section 139(8) of the Companies Act, 2013, in the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller

and Auditor-General of India, any casual vacancy in the office of an auditor shall be filled by the Comptroller and Auditor-General of India within thirty days.

Provided that, in case the Comptroller and Auditor-General of India do not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next thirty days.

Accordingly, Board of Directors of Kiran Limited shall fill the casual vacancy within next thirty days as stated above.

Answer 5(b)(i)

In accordance with the provisions of the Companies Act, 2013, as contained under section 2(76), 'related party' means:

(1) A director or his relative;

(2) A key managerial personnel or his relative;

(3) A firm, in which a director, manager or his relative is a partner.

(4) A private company in which a director or manager or his relative is a member or director.

(5) A public company in which a director or manager is a director and holds along with his relative more than 2% of its paid-up share capital.

(6) Anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager.

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

Provided that nothing in point 6 and 7 shall apply to the advice, directions or instructions given in a professional capacity.

(8) Any company which is -

i. a holding, subsidiary or an associate company of such company; or

ii. a subsidiary of a holding company to which it is also a subsidiary.

(9) Such other person as may be prescribed.

Alternative I

Assuming that Kamal is holding 1% of paid up capital of Deep Limited, then Kamal is related party as he is director [2(76)(i)]

Alternative II

Assuming that Kamal is holding 1% of paid up share capital of other public company wherein he is also a director of other public company, then such other public company is not a related party. [2(76)(v)]

Answer 5(b)(ii)

Fair Limited is a 'related party' within the meaning of the term, as defined under section 2(76), since the company is an associate company of the company in question i.e. Mohan Limited.

Further, in accordance with the provisions of the Companies Act, 2013, as contained under Section 188(1), no company shall enter into any contract or arrangement with a related with respect to the matters as provided in this sub-section. Accordingly, the company in question cannot enter into any contract for neither leasing of the company's property nor for sale of any goods produced by the company except by complying with procedure as prescribed in Section 188 of the Companies Act, 2013 and the relevant rules made thereunder.

Answer 5(c)(i)

In accordance with the provisions of Section 192(1) of the Companies Act, 2013, no company shall enter into an arrangement by which

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

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

The company in this case can proceed with the deal by passing a resolution in company's general meeting in compliance with the requirement of prior approval by way of passing of resolution at the general meeting. The Notice for such approval shall also state the value of the assets involved in such deal calculated and certified by a registered valuer.

Answer 5(c)(ii)

Alternative I

Section 192(1) of the Companies Act, 2013, permits a company to enter into an arrangement and acquires or is to acquire assets for consideration other than cash after following the procedure given in the section.

Accordingly, the company in this case can proceed with the deal by passing a resolution in company's general meeting and by following the procedure provided in this section.

Amar can acquire the machinery without any consideration.

Alternative II

Amar, director in Sunrise limited, cannot acquire machineries from the company without any consideration as under this section, only consideration other than cash is permissible.

Answer 5(d)

According to Sub-Section (1) of Section 204 of the Companies Act, 2013; every listed company and a company belonging to other class of companies as may be prescribed shall annex with its Board's report made in terms of sub-section (3) of section 134, a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed.

Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 prescribes the other class of companies as under:

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

(b) every public company having a turnover of rupees two hundred fifty crore or more.

Accordingly,

(i) Yes, a listed company is required to get the secretarial audit conducted under the provisions of the Companies Act, 2013;

(ii) In respect of non-listed companies, in case they fall in the criteria as stated above are required to comply with the provisions related to the secretarial audit.

Question 6

(a) A group of persons including two foreigners desirous of forming a society seek your advice on the purposes for which such a society can be formed under the provisions of the Societies Registration Act, 1860. Advise and also state the procedure to be followed in this regard.

(b) Draft a Board resolution for declaration of interim dividend on equity shares and to authorise the Managing Director and Company Secretary through required resolutions enabling them to disburse the same to the members.

(c) Explain the concept of 'insider trading' and define the same as per the Companies Act, 2013.

(d) In what way does Rule 8(4) of the Companies (Accounts) Rules, 2014 regulate the preparation of report by the Board of directors on the annual evaluation made by the Board of its own performance, its committees and the individual directors ? Explain. (4 marks each)

Answer 6(a)

Registration of Societies-Purposes

A society can be registered by minimum of 7 individuals which may include foreigners, or registered society for the promotion of literature, science or fine arts or diffusion of useful knowledge and political education, or charitable purposes, as specified in Section 20 of the main Act.

Following documents are required to be filed with the Registrar of Societies for registration of a society under the main Act or corresponding Acts of various State Governments -

1. Covering letter requesting for registration stating various documents annexed to

it addressed to the registering authority and signed by all the subscribers to the Memorandum or by a person authorized by all of them.

2. Memorandum of Association (in duplicate) containing (a) name of the society, (b) the objects of the society, (c) the names, addresses and occupation of the members of the governing body (d) the place of registered office or the Society and (e) the names, addresses and full signatures of the 7 or more persons subscribing their names to the memorandum of association. Their signatures should be witnessed and attested.

3. Rules and Regulations/ Bye-laws in duplicate, duly signed and certified to be a correct copy by at least 3 members of the governing body.

4. Affidavit on non-judicial stamp paper of requisite value by the President or Secretary of the Society duly attested by Oath Commissioner or Notary Public or Magistrate of first class.

5. Documentary proof such as rent receipt or property tax receipt in respect of the Registered Office of the Society or no-objection of the owner of the premises.

6. Registration fee in cash or by demand draft.

The formalities and requirements may differ from State to State. Hence, it is advised that the applicant should contact the registering authority of the State in advance besides being conversant with the respective State Act and the Rules framed there under.

The Registering authority shall satisfy itself about the compliance of the provisions of the Act and correctness of the documents and only thereafter certify under its hand that the Society is registered under the main Act or the corresponding Act of the State. On registration, the Society becomes a legal entity or a judicial person.

Answer 6(b)

Specimen of board resolution for declaration of interim dividend on equity shares

RESOLVED THAT an interim dividend of Rs._____/- on each fully paid up _____ no. of equity shares of Rs.___/- each of the company amounting to Rs._____/- be paid out of the profits of the company for the half year ended 20__ to those members of the company whose names would appear on the register of members of the company on the _____day of 20__.

RESOLVED FURTHER THAT a bank account to be designated as “Interim Equity Dividend (20___) account of ____ Ltd. be opened with _____ bank at its branch at _____ and a sum of Rs._____/- being the total Interim Dividend amount, be deposited in the said account within 5 days.

RESOLVED FURTHER THAT Shri ....., Managing Director and Shri .....,the Company Secretary of the company be and are hereby authorised to open the bank account by signing the account opening form and by furnishing to the said bank the required papers, documents, information etc. and completing all other required formalities for the purpose of opening the bank account and to make arrangements with the said bank for the payment at par, of the interim dividend within thirty days from the date of this resolution.

RESOLVED FURTHER THAT Shri ....., Managing director and Shri ....., Company Secretary of the company for the time being, be and are hereby authorised to jointly sign the dividend warrants to be issued on the said bank and the said bank be and is hereby authorised to honour the interim dividend warrants jointly signed by the said authorised signatories, as and when presented for encashment.

Answer 6(c)

As per section 195 of the Companies Act, 2013, No person including any director or KMP of a company shall enter into insider trading except any communication required in the ordinary course of business or profession or employment or under any law.

In terms of explanation to Section 195(1), the term "Insider Trading means-

(i) an act of subscribing, buying or selling, dealing or agreeing to subscribe, buy, sell or deal in any way by any director or key managerial personnel or any other officer of the company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company, or

(ii) an act of counselling about, procuring or communicating directly or indirectly any non-public price sensitive information to any person;

"Price Sensitive information" means any information which relates to, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

Answer 6(d)

Annual Evaluation in the Board's Report

According to Rule 8(4) of Companies (Accounts) Rules 2014, every listed company and every other public company having a paid up share capital of twenty five crore rupees or more calculated at the end of the preceding financial year shall include, in the report by its Board of directors, 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.

Schedule IV to the Companies Act provides on Evaluation mechanism as under:

1. The performance evaluation of independent directors shall be done by the entire Board of Directors, excluding the director being evaluated.

2. On the basis of the report of performance evaluation, it shall be determined whether to extend or continue the term of appointment of the independent director.

Further, section 178 (2) provides that the Nomination and Remuneration Committee shall identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down, recommend to the Board their appointment and removal and shall carry out evaluation of every director's performance.

In this manner by adopting the evaluation mechanism and requiring disclosure of 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 under rule 8(4) of Companies (Accounts) Rules 2014 regulates the preparation of the report by the Board of directors on the annual evaluation made by the Board as above-stated.

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SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART A

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

Question 1

(a) *Royal Ltd. raised external commercial borrowings with prepayment plan for an amount of USD 600 million under approval route. You are required to prepare a check-list for conducting secretarial audit.*

(b) *Smily Ltd. had a track record of declaring dividends @ 10%, 15% and 14% in the three financial years preceding the financial year 2015-16. In the year 2015-16, the company declared dividend @ 15% even though there was inadequacy or absence of profit. As a secretarial auditor, what are the checks to be observed in declaration of dividend in case of inadequacy or absence of profit ? Examine the validity of dividend declared in the year 2015-16.*

(c) *Sunshine Ltd. is a listed company. As a secretarial auditor, prepare a check-list for verifying the compliances relating to retirement of directors as per provisions of the Companies Act, 2013.*

(d) *Explain the establishment, objectives, scope and functions of the Secretarial Standards Board.*

(e) *Secretarial audit is a process to check compliance with the provisions of all applicable laws including rules, regulations and procedures. Draw a labelled block diagram explaining the process.* *(5 marks each)*

OR (Alternate question to Q.No. 1)

Question 1A

(i) *What are the principles laid down under the Secretarial Standard on General Meetings (SS-2) with regard to 'conduct of poll' you would adhere to as a Company Secretary ?* *(5 marks)*

(ii) *Keshav Ltd. is an unlisted company with a paid-up share capital of ₹35 crore and turnover of ₹100 crore. Advise Keshav Ltd., whether it is required to annex to its Board's report, a secretarial audit report by the Company Secretary in Practice. Justify your answer.* *(5 marks)*

(iii) *The articles of association of Bright Ltd. provides that a meeting of the Board of directors shall be held at 10.00 A.M. on the first Saturday of every month. Relying on this, the company did not send notice to the directors for the Board meeting held on Saturday, 2nd April, 2016. The validity of Board meeting was*

questioned by directors Somya and Tony saying that notices were not sent to them. Are Somya and Tony justified in questioning the validity of the meeting ? Advise. *(5 marks)*

(iv) As a Secretarial Auditor, what are the checks to be observed in case of direct investment outside India under approval route ? *(5 marks)*

(v) Explain the principles relating to maintenance and recording of minutes of Board meetings as per Secretarial Standard on Meetings of the Board of Directors (SS-1). *(5 marks)*

Answer 1(a)

ECBs refer to commercial loans in the form of bank loans, securitized instruments (e.g. floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares), buyers' credit, suppliers' credit availed of from non-resident lenders with a minimum average maturity of 3 years. In the given question Royal Ltd. raised ECB with prepayment plan for an amount of USD 600 million under approval route.

Prepayment of ECB beyond USD 500 million is considered by the Reserve Bank of India which is subject to compliance with the stipulated minimum average maturity period as applicable to the loan under the Approval Route.

The following points should be included in the checklist for the purpose of secretarial audit:

1. Check the recognition of lender.
2. Check whether total outstanding stock of ECBs (including the proposed ECBs) from a foreign equity lender should not exceed seven times the equity holding, either directly or indirectly of the lender (in case of lending by a group company, equity holdings by the common parent would be reckoned).
3. Check the all in cost ceiling.
4. Check the permitted end use requirements.
5. Check whether the parking of ECB funds is as per the norms.
6. Check whether the company has taken prior approval from Reserve Bank at the time of receipt of ECB.
7. Check the provisions regarding refinancing/rescheduling of ECB, if any.
8. Check whether provisions regarding stipulated minimum average maturity as applicable to the contracted loan has been complied with.
9. Check for the Approval of the Concerned Sectoral / Prudential Regulator
10. Security for the ECB
11. Check for the Borrowing powers limits under Section 180 of the Companies Act, 2013.
12. Check the returns filed by the company.

Answer 1(b)

Smily Ltd. declared dividend @ 15% in the financial year 2015-16 even though there was inadequacy or absence of profit.

Section 123 of the Companies Act, 2013 read with rule 3(1) of Companies (Declaration & Payment of Dividend) Rules, 2014 provides that in case of inadequate profits or absence of profits, the rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year.

Declaration of dividend @15% by Smily Ltd. is not valid as it has exceeded the average rate of dividend declared in the preceding three financial years.

Whereas, if the company has not declared any dividend in each of the three preceding financial year, the limit prescribed above shall not apply.

As a Secretarial Auditor of the Company, in the event of inadequacy or absence of profits in any year, compliance of the following shall have to be ensured-

1. The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year. However, this sub-rule shall not apply to a company which has not declared any dividend in each of the three preceding financial year.
2. The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.
3. The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.
4. The balance of reserves after such withdrawal shall not fall below fifteen per cent of its paid up share capital as appearing in the latest audited financial statement.
5. No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year are set off against the profit of the company of the current year.

Answer 1(c)

Checklist for verifying the compliances relating to retirement of directors as per section 152 (6) of Companies Act, 2013 for Sunshine Ltd., a listed company is given below:-

Check whether

1. One third of directors for the time being are liable to retire by rotation, or if their number is not three or a multiple of three, then the number nearest to one third need to retire from their office at every annual general meeting, except first annual general meeting. (*Note*: in calculating the total number of directors, independent directors should not be included);

2. The directors retiring by rotation are those who have been longest in office since their last appointment;

3. Between directors appointed on the same day, the retirement was, in default of and subject to any agreement among themselves, determined by draw of lots;

4. The company may fill up such vacancy caused by aforesaid retirement by appointing the retiring director or some other person; and in the notice of General Meeting, shareholders must be provided with the following information :

   a. a brief resume of the director;

   b. nature of his expertise in specific functional areas;

   c. disclosure of relationships between directors inter-se;

   d. names of listed entities in which the person also holds the directorship and the membership of Committees of the board; and

   e. shareholding of non-executive directors.

5. The provisions of the Act, Articles of Association and other applicable rules have been complied with.

Answer 1(d)

Establishment of Secretarial Standards Board and its Objectives

The Institute of Company Secretaries of India (ICSI), recognising the need for integration, harmonisation and standardisation of diverse secretarial practices, has constituted the Secretarial Standards Board (SSB) with the objective of formulating Secretarial Standards.

Secretarial Standards are developed:

— in a transparent manner;

— after extensive deliberations, analysis, research; and

— after taking views of corporates, regulators and the public at large.

Scope and Functions of the Secretarial Standards Board

The scope of SSB is to identify the areas in which Secretarial Standards need to be issued by the Council of ICSI and to formulate such Standards, taking into consideration the applicable laws, business environment and best secretarial practices. SSB will also clarify issues arising out of such Standards and issue guidance notes for the benefit of members of ICSI, corporates and other users.

The main functions of SSB are:

(i) Formulating Secretarial Standards;

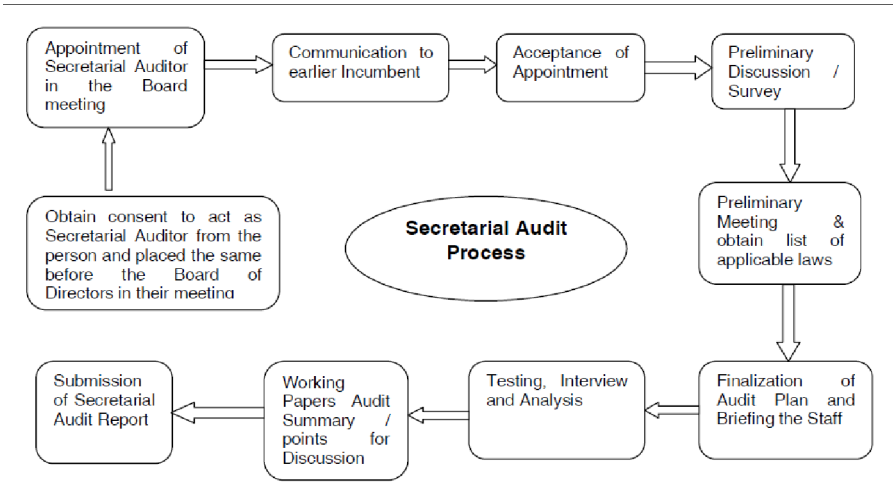
(ii) Clarifying issues arising out of the Secretarial Standards;

(iii) Issuing Guidance Notes; and

(iv) Reviewing and updating the Secretarial Standards/Guidance Notes at periodic intervals.

Answer 1(e)

The Secretarial Audit is a process to check compliance with the provisions of all applicable laws including rules, regulations and procedures. It can be explained with the help of the following diagram :



Answer 1A(i)

The principles laid down under the Secretarial Standard on General Meetings (SS-2) with regard to 'conduct of poll' are as follows:-

Conduct of Poll

9.1 When a poll is demanded on any Resolution, the Chairman shall get the validity of the demand verified and, if the demand is valid, shall order the poll forthwith if it is demanded on the question of appointment of the Chairman or adjournment of the Meeting and, in any other case, within forty-eight hours of the demand for poll.

9.2 In the case of a poll, which is not taken forthwith, the Chairman shall announce the date, venue and time of taking the poll to enable Members to have adequate and convenient opportunity to exercise their vote. The Chairman may permit any member who so desires to be present at the time of counting of votes.

9.3 Each Resolution put to vote by poll shall be put to vote separately. One ballot paper may be used for more than one item.

9.4 Appointment of scrutinisers

The Chairman shall appoint such number of scrutinisers, as he deems necessary, who may include a Company Secretary in Practice, a Chartered Accountant in Practice, a Cost Accountant in Practice, an Advocate or any other person of repute who is not in the employment of the company, to ensure that the scrutiny of the votes cast on a poll is done in a fair and transparent manner.

9.5 Declaration of results

9.5.1 Based on the scrutiniser's report, the Chairman shall declare the result of the poll within two days of the submission of report by the scrutiniser, with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not

9.5.2 The result of the poll with details of the number of votes cast for and against the Resolution, invalid votes and whether the Resolution has been carried or not shall be displayed on the Notice Board of the company at its Registered Office and its Head Office as well as Corporate Office, if any, if such office is situated elsewhere, and in case of companies having a website, shall also be placed on the website.

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

It is the duty of company secretary to assist the board in conduct of poll and ensure compliance required under the act and under the Secretarial Standards on General Meeting SS-2.

Answer 1A(ii)

Section 204 of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides for mandatory secretarial audit for :

— every listed company;

— 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

Such companies are required to annex a Secretarial Audit Report with its Board's Report.

Since the Paid up share capital and Turnover in the given case is below the threshold limits, the Secretarial Audit is not mandatory.

Therefore, Keshav Ltd. with a paid up share capital of Rupees 35 crore and a turnover of Rupees 100 crore is not required to comply with the provision of Section 204 of the Companies Act, 2013 which requires companies to annex a secretarial audit report to its Board Report.

Answer 1A(iii)

The Secretarial Standard -1 on the meeting of the Board of Directors provides :

1.3.5 The Notice of a Meeting shall be given even if Meetings are held on pre-determined dates or at pre-determined intervals.

1.3.6 Notice convening a Meeting shall be given at least seven days before the date of the Meeting, unless the Articles prescribe a longer period.

Further Section 173(4) of the companies Act, 2013 provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of twenty-five thousand rupees

Therefore, questioning the validity of the meeting by Somya and Tony is valid as the SS-1 requires that the notice shall be given for the predetermined meeting also.

Answer 1A(iv)

The following checks need to be observed for direct investment outside India under approval route :

1. Check whether prior approval of Reserve Bank of India is obtained in all cases which are not covered under the automatic route.
2. Check whether specific approval of RBI is obtained for creating charge on immovable / moveable property and other financial assets (except pledge of shares of overseas JV / WOS) of the Indian party / group companies in favour of a non-resident entity within the overall limit fixed (presently 100%) for the financial commitment subject to submission of a 'No Objection' by the Indian party and their group companies from their Indian lenders.
3. Whether approval of RBI is obtained for issuance of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries.
4. Check whether the investment by Indian Mutual funds registered with SEBI is as per the norms.
5. Check whether FIPB approval is obtained if the investment is by share swaps.

Answer 1A(v)

The SS-1 provides the following principles relating to maintenance and recording of Minutes of Board Meetings -

7.1. Maintenance of Minutes

7.1.1 Minutes shall be recorded in books maintained for that purpose.

7.1.2 A distinct Minutes Book shall be maintained for Meetings of the Board and each of its Committees.

7.1.3 Minutes may be maintained in electronic form in such manner as prescribed under the Act and as may be decided by the Board. Minutes in electronic form shall be maintained with Timestamp.

7.1.4 The pages of the Minutes Books shall be consecutively numbered.

7.1.5 Minutes shall not be pasted or attached to the Minutes Book, or tampered with in any manner.

7.1.6 Minutes of the Board Meetings, if maintained in loose-leaf form, shall be bound periodically depending on the size and volume and coinciding with one or more financial years of the company.

7.1.7 Minutes of the Board Meeting shall be kept at the Registered Office of the company or at such other place as may be approved by the Board.

7.3. Recording of Minutes

7.3.1 Minutes shall contain a fair and correct summary of the proceedings of the Meeting.

7.3.2 Minutes shall be written in clear, concise and plain language.

7.3.3 Any document, report or notes placed before the Board and referred to in the Minutes shall be identified by initialling of such document, report or notes by the Company Secretary or the Chairman.

7.3.4 Where any earlier Resolution (s) or decision is superseded or modified, Minutes shall contain a reference to such earlier Resolution (s) or decision.

7.3.5 Minutes of the preceding Meeting shall be noted at a Meeting of the Board held immediately following the date of entry of such Minutes in the Minutes Book.

PART B

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

Question 2

(a) State the requirements under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 with respect to :

(i) Minimum subscription

(ii) Minimum allottees

(iii) Monitoring agency

(iv) Minimum application value

(v) Final post issue report. (1 mark each)

(b) Who is not eligible for making public issue of specified securities under SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ? (5 marks)

(c) Explain the restrictions on allotment under qualified institutional placement for due diligence. (5 marks)

OR (Alternate question to Q.No. 2)

Question 2A

(i) Enumerate the points to be checked in respect of the Air (Prevention and Control of Pollution) Act, 1981. (5 marks)

(ii) (a) What is 'preferential offer' according to Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 ?

(b) Madhav Ltd. makes preferential offer of securities for consideration other than cash. How is such consideration valued ?

(c) Prakash Ltd. makes preferential offer of shares for consideration other than cash. Name the two methods by which this non-cash consideration is treated in the books of account of Prakash Ltd. (5 marks)

(iii) Bright Star Ltd. made a public issue of 10 crore shares at ₹200 per share. 3 Crore shares were offered to retail category of investors. The issue was oversubscribed by 5 times whereas the retail category was oversubscribed by 6 times. Three retail investors Akhil, Bhanu and Chandan applied for 80 shares, 64 shares and 40 shares respectively. As per the issue document, applications would be made for a minimum of 8 shares and in multiples thereof. Find out the entitlements of Akhil, Bhanu and Chandan vis-d-vis SEBI guidelines.

(5 marks)

Answer 2(a)

(i) Minimum Subscription (Regulation 14)

The minimum subscription to be received in an issue shall not be less than ninety percent of the offer through offer document.

(ii) Minimum allottees (Regulation 26 (4)

An issuer shall not make an allotment pursuant to a public issue if the number of prospective allottees is less than one thousand.

(iii) Monitoring agency (Regulation 16)

If the issue size exceed five hundred crores rupees, the issuer shall make arrangements for the use of proceeds of the issue to be monitored by a pubic financial institution or by one of the scheduled commercial banks named in the offer document as bankers of the issuer.

(iv) Minimum Application Value (Regulation 49)

The issuer shall stipulate in the offer document, the minimum application size in terms of number of specified securities which shall fall within the range of the minimum application value of ten thousand rupees to fifteen thousand rupees.

"Minimum application value" shall be with reference to the issue price of the specified securities and not with reference to the amount payable on application.

Minimum sum payable on application shall be twenty five per cent of the issue price.

(v) Final post issue reports (Regulation 65)

In public issue, the lead merchant banker shall submit final post-issue report as specified in Part C of Schedule XVI, within seven days of the date of finalization of basis of allotment or within seven days of refund of money in case of failure of issue.

In rights issue, the lead merchant banker shall submit final post issue report in specified format within fifteen days of the date of finalisation of basis of allotment or within fifteen days of refund of money in case of failure of issue.

Answer 2(b)

Regulation 4 (2) - General Condition for public issue and rights issue under the SEBI (ICDR) Regulations, 2009 state that the following public companies are not eligible to make a public issue or rights issue of specified securities, where:

(a) The issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by SEBI;

(b) If any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by SEBI;

(c) Unless it has made an application to one or more recognised stock exchanges for listing of specified securities on such stock exchanges and has chosen one of them as the designated stock exchange: In case of an initial public offer, the issuer shall make an application for listing of the specified securities in at least one recognised stock exchange having nationwide trading terminals;

(d) Unless it has entered into an agreement with a depository for dematerialisation of specified securities already issued or proposed to be issued;

(e) Unless all existing partly paid-up equity shares of the issuer have either been fully paid up or forfeited;

(f) Unless the company has made firm arrangements of finance through verifiable means towards seventy five per cent of the stated means of finance, excluding the amount to be raised through the proposed public issue or rights issue or through existing identifiable internal accruals.

Answer 2(c)

Regulation 86 - Restrictions on allotment of the SEBI (ICDR) Regulations provides as under:

- Allotment under the qualified institutional placement shall be made subject to the following conditions:

  (a) Minimum of ten per cent of eligible securities shall be allotted to mutual funds:

  If the mutual funds do not subscribe to said minimum percentage or any part thereof, such minimum portion or part thereof may be allotted to other qualified institutional buyers;

  (b) No allotment shall be made, either directly or indirectly, to any qualified institutional buyer who is a promoter or any person related to promoters of the issuer:

  A qualified institutional buyer who does not hold any shares in the issuer and who has acquired the said rights in the capacity of a lender shall not be deemed to be a person related to promoters.

- In a qualified institutional placement of non-convertible debt instrument along

with warrants, an investor can subscribe to the combined offering of non-convertible debt instruments with warrants or to the individual securities, that is, either non- convertible debt instruments or warrants.

- The applicants in qualified institutional placement shall not withdraw their bids after the closure of the issue.

Answer 2A(i)

The following points to be checked with respect to The Air (Prevention & Control of Pollution) Act, 1981[Read with the Air (Prevention & Control of Pollution) Rules, 1982].

Ensure that:

1. The company is adhering to the directions of State Government regarding use of approved fuel. (Section 19)
2. The company has obtained prior consent of the State Board, to establish or operate any industrial plant in an Air Pollution Control Area.
3. The installation of control equipment of such specification as approved by State Board.
4. The existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board.
5. The control equipment referred above shall be kept at all times in good running condition.
6. The Company not to operate any industrial plant, in any air pollution control area, which shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board (Section 22)
7. Whether in any area the emission of any air pollutant into the atmosphere in excess of the standards laid down by the State Board occurs or is apprehended to occur due to accident or other unforeseen act or event. (Section 23)
8. The Company operating any control equipment or any industrial plant, in an air pollution control area and has rendered all assistance to the person empowered by the State Board for carrying out the functions.
9. Whether any person wilfully delays or obstructs any person empowered by the State Board in the discharge of his duties, he shall be guilty of an offence under this Act. [Section 24(3)]
10. The Company has complied with all the directions given by the State Board (Section 31A)

Answer 2A(ii)(a)

According to the Section 42 and Section 62 read with explanation to Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, '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.

Answer 2A(ii)(b)

According to the Section 42 and Section 62 read with rule 13(2)(i) of the Companies (Share Capital and Debentures) Rules, 2014, 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.

Answer 2A(ii)(c)

As per rule 13(2)(j) of the Companies (Share Capital and Debentures) Rules, 2014,

(j) where the preferential offer of shares is made for a non-cash consideration, such non-cash consideration shall be treated in the following manner in the books of account of the company-

(i) where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or

(ii) where clause (i) is not applicable, it shall be expensed as provided in the accounting standards.

Answer 2A(iii)

The allotment of specified securities to applicants other than retail individual investors and anchor investors shall be on proportionate basis within the specified investor categories and the number of securities allotted shall be rounded off to the nearest integer, subject to minimum allotment being equal to the minimum application size as determined and disclosed by the issuer.

The allotment of specified securities to each retail individual investor shall not be less than the minimum bid lot, subject to availability of shares in retail individual investor category, and the remaining available shares, if any, shall be allotted on a proportionate basis.

In the given case the allotment shall be as under

(a) Akhil applied for 80 shares will get 80/6= 13.13 round off to 13 shares.

(b) Bhanu applied for 64 shares will get 64/6 = 10.66 round off to 11 shares

(c) Chandan applied for 40 shares will get 40/6 = 6.66 round off to 7 shares

Accordingly, the application of C is rejected as it is less than the minimum application size.

Question 3

(a) Weak Industries Ltd. is contemplating to sell its business to Expensive

Enterprises Ltd. (EEL). As a Practising Company Secretary, EEL has engaged you to create a 'data room' and take further steps. Explain to the management of EEL :

(i) What is data room;

(ii) What benefits it will provide; and

(iii) In what circumstances creation of data room will be required ? (8 marks)

(b) Superb Plc., a company registered in United Kingdom, while issuing Indian depository receipts, has failed to comply with the provisions of the Foreign Exchange Management Act, 1999. As a Practising Company Secretary, advise the management of Superb Plc. about the penal provisions and remedial measures. (7 marks)

Answer 3(a)(i)

A Data Room provides all important business documents/information which may be on financial, regulatory, IPR, marketing, press report or any important material aspect pertaining to a business transaction. Otherwise it provides for a common platform/place where all records of important business information are kept for review by a potential buyer after signing of a Non-Disclosure Agreement (NDA). As data room discloses confidential data which is not available for public and may relate to business process, trade secret, technology information etc., the access to data room is made after signing of Non-Disclosure Agreement.

Answer 3(a)(ii)

Benefits

A Data Room provides the following benefits:-

1. Removes ambiguity in the minds of buyer about the profitability, growth prospectus, and sustainability of business that is proposed to be bought.
2. Provides material information that helps in doing a SWOT analysis.
3. It enables the buyer to do a better bargain through the analysis of the data.
4. May expose the weakness of the seller which is not directly provided to the buyer- For example, a material off balance sheet transaction.
5. Provides data that helps in better Valuation of business for both buyer and seller.

Answer 3(a)(iii)

Circumstances under which creation of data room is required

1. Mergers, Amalgamations and Acquisitions,
2. Strategic Alliances,
3. Partnering agreement,
4. Business Coalitions,

5. Outsourcing agreement,
6. Technology or Product Licensing,
7. Joint Ventures through technical or financial collaboration,
8. Venture Capital investment, and
9. Public Issue

Answer 3(b)

The following penal provisions will be applicable on Superb Plc. in case of non-compliance of FEMA provisions while issuing the Indian Depository Receipt.

As per Section13(1), if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorization is issued by the Reserve Bank, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

The following remedial measures are available in case of the Non-compliance of FEMA provisions:

As per Section 13 (2), any Adjudicating Authority adjudging any contravention under sub-section(1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Question 4

(a) Under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, when are the shares of target company said to be infrequently traded ? State how the minimum open offer price will be calculated. (5 marks)

(b) A limited two-way fungibility scheme has been put in place by the Government of India for ADRs/GDRs. Explain the scheme with relevant provisions. (5 marks)

(c) What is 'anti-competitive agreement' under the Competition Act, 2002 ?Mention any three anti-competitive agreements under horizontal agreements. (5 marks)

Answer 4(a)

According to the Regulation 8 of SEBI (SAST) Regulations, 2011, the shares of the target company will deemed to be infrequently traded if the traded turnover on any stock exchange during the 12 calendar months preceding the calendar month, in which the PA is made, is less than 10% of the total number of shares of the target company.

If the target company's shares are infrequently traded then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

- Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;
- Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");
- Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;
- The price determined by the acquirer and the manager to the open offer after taking into account valuation parameters including book value, comparable trading multiples, and such other parameters that are customary for valuation of shares of such companies.

It may be noted that the Board at the expense of the acquirer may require valuation of shares by an independent merchant banker other than the manager to the offer or any independent chartered accountant in practice having a minimum experience of 10 years.

Answer 4(b)

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

Answer 4(c)

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

Anti-Competitive agreements under horizontal agreements are as follows:-

(i) *Price Fixing [Section 3(3) (a)]*

Price fixing occurs when two or more firms agree to raise or fix the prices in order to increase their profits by reducing competition. It is an attempt at forming a collective monopoly.

(ii) *Limiting the Production or supply [Section 3(3)(b)]*

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

(iii) *Allocation of Market Share [Section 3(3)(c)]*

It means agreement among enterprises that will have exclusive or preferential

rights in a designated area for sale, production or provision of services or otherwise.

(iv) *Bid Rigging [Section (3(3)(d)]*

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

Question 5

(a) Distinguish between the following :

(i) 'Relevant geographic market' and 'Relevant product market'

(ii) 'IPO' and 'FPO'.

(iii) 'Diversion of funds' and 'siphoning of funds'. (3 marks each)

(b) Write short notes on the following :

(i) Compliance management

(ii) Importance of search,/ status report. (3 marks each)

Answer 5(a)(i)

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

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

Answer 5(a)(ii)

Initial Public Offering (IPO) is when an unlisted company makes either a fresh issue of securities or an offer for sale of its existing securities or both for the first time to the public. This paves way for listing and trading of the issuer's securities.

A **Further Public Offering (FPO)** is when an existing listed company makes either a fresh issue of securities to the public or an offer for sale to the public, through an offer document. An offer for sale in such scenario is allowed only if it is made to satisfy listing or continuous listing obligations.

Answer 5(a)(iii)

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

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

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

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

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

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

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

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

The identification of the willful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/ incidents. The default to be categorised as willful must be intentional, deliberate and calculated.

Answer 5(b)(i)

Compliance Management

A compliance management system is the method by which corporates manage the entire compliance process. It includes the compliance program, compliance audit, compliance report etc. and in other words it is called compliance solution.

The compliance program consists of the policies and procedures which guide in adherence of laws and regulations. The compliance audit is independent testing of the level of compliance with various laws and regulations applicable.

The established compliance management system is a supporting system of risk management as it reduces compliance risk to a great extent. Section 134(5)(f) of the Companies Act, 2013 provides that the directors of the company should devise proper systems to ensure compliance with the provisions of all applicable laws which shall be adequate to the size of the company and which should also operates effectively. To ensure an effective approach to compliance, the participation of senior management in the development and maintenance of a compliance program is necessary. They should review the effectiveness of its compliance management system at periodic intervals, so as to ensure that it remains updated and relevant in terms of modifications/ changes in regulatory regime including acts, rules, regulations etc. and business environment

Answer 5(b)(ii)

Importance of search /status report

The scope of a search report depends upon the requirements of the Bank or Financial

Institution concerned. A search report enables the Bank/Financial Institution to evaluate the extent up to which the company has already borrowed money and created charges on the security of its movable and/or immovable properties. This information is vital for considering the company's request for grant of loans and other credit facilities. The Bank/Financial Institution, while assessing the company's need for funds, can take a conscious decision regarding the quantum of loan/credit facility to be sanctioned, sufficiency of security required and its nature, as also other terms and conditions to be stipulated. The search report, thus, acts as an important source of information enabling the lending Bank/Institution to take an informed and speedy decision, and it also assures about the credit-worthiness or otherwise of the borrowing company.

Question 6

(a) As a Practising Company Secretary, while carrying out due diligence regarding the loans taken by Quick Ltd. from a nationalised bank, how would you ensure that the company has not committed any wilful default in the matter of repayment of loans ? Also, state the consequences if a false diligence report is submitted. (5 marks)

(b) "Environmental non-compliances may not only result in huge financial liability or reputation wreck but also may result in business discontinuity or huge public damage." Elaborate the statement with two specific case studies. (5 marks)

(c) Strong Ltd. is contemplating to introduce Employees Stock Purchase Scheme (ESPS). As a Practising Company Secretary, advise the management on the following issues :

(i) Whether directors of the company are eligible for ESPS ?

(ii) Is there any restriction on the price of shares to be issued under ESPS ?

(iii) The nature of approvals to be taken from the shareholders of the company.

(iv) Lock-in-period. (5 marks)

Answer 6(a)

The following are the checkpoints to ensure that the name of the company has not committed any wilful default in the matter of the repayment of the loan :

(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.

Professional Responsibility and Penalty for False Diligence Report

Any failure or lapse on the part of a Practising Company Secretary (PCS) in issuing a Diligence Report may not only attract penalty for false reporting and disciplinary action for professional or other misconduct under the provisions of the Company Secretaries Act, 1980 but also make him liable for any injury caused to any person due to his/her negligence in issuing the Diligence Report. Therefore, it becomes imperative for the PCS that he/she exercises great care and caution while issuing the Diligence Report

and also adheres to the highest standards of professional ethics and excellence in providing his/her services.

While preparing the Diligence Report the PCS should ensure that no field in the report is left blank. If there is nothing to be reported or the field is not applicable to the company, then the PCS should write 'none' or 'nil' or 'not applicable' as the case may be.

The PCS should obtain a list of statutes applicable to the Company before proceeding with the assignment for issue of Diligence Report.

Answer 6(b)

Environmental non-compliances may not only result in huge financial liability or reputation wreck, but also may result in business discontinuity or huge public damage. The following case studies would throw some light on the impact of environmental failures.

1. **Sri Ram Food and Fertilizer Case** (*M.C. Mehta* v. *Union of India*, AIR 1987 SC 1086)

   In this case, a major leakage of Oleum Gas affected a large number of persons, both amongst the workmen and public. The Supreme Court held that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident in the operation of such hazardous and inherently dangerous activity resulting in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such a liability is not subject to any exception. Hon'ble Supreme Court also pointed out that the measure of compensation in such kind of cases must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it.

2. **Dehradun Valley Case** (*Rural Litigation & Entitlement Kendra* v. *Slate of U.P.*, AIR 1985 SC 652; Also see AIR 1988 SC 2187)

   In this case, carrying haphazard and dangerous limestone quarrying in the Mussoorie Hill range of the Himalaya, miners blasting out the hills with dynamite, extracting limestone from thousands of acres had upset the hydrological system of the valley. The Supreme Court ordered the closing of limestone quarrying in the hills and observed and this would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance. Thus, the Hon'ble Supreme Court attended to the need to balance environmental and ecological integrity against industrial demands on forest resources.

3. **Effluents by tanneries in river Ganga** [*M.C. Mehta* v. *Union of India*, AIR 1115, 1988 SCR (2) 530]

   In *M.C. Mehta* v. *Union of India*, the Apex Court directed that the work of those tanneries be stopped, which were discharging effluents in River Ganga and

which did not set up primary effluent treatment plants. It held that the financial incapacity of the tanners to set up primary effluent treatment plants was wholly irrelevant. The Court observed the need for

(a) imparting lessons in natural environment in educational institutions,

(b) group of experts to aid and advise the Court to facilitate judicial decisions,

(c) constituting permanent independent centres with professional public spirited experts to provide the necessary scientific and technological information to the Court, and

(d) setting up environmental courts on regional basis with a right to appeal to the Supreme Court.

Answer 6(c)

(i) A director of the company, whether a whole time director or not but excluding an independent director is eligible for the ESPS whereas an employee who is a promoter or a person belonging to the promoter group; or a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company is not eligible for the ESPS.

(ii) The company may determine the price of shares to be issued under an ESPS, provided they conform to the provisions of accounting policies under regulation 15.

(iii) No scheme shall be offered to employees of a company unless the shareholders of the company approve it by passing a special resolution in the general meeting. The explanatory statement to the notice and the resolution proposed to be passed by shareholders for the schemes shall include the information as specified by in Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014.

(iv) Shares issued under an ESPS shall be locked-in for a minimum period of one year from the date of allotment whereas the ESPS is part of a public issue and the shares are issued to employees at the same price as in the public issue, the shares issued to employees pursuant to ESPS shall not be subject to lock-in.

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CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer ALL Questions.*

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

PART A

Question 1

(a) "Corporate restructuring aims at different things at different times for different companies but the single common objective in every restructuring exercise is to eliminate the disadvantages and combine the advantages." Comment on the statement highlighting various needs for undertaking corporate restructuring. (5 marks)

(b) What do you understand by 'over-capitalised' company ? Discuss the corrective measures required to be undertaken by an over-capitalised company. (5 marks)

(c) What is meant by 'goodwill on amalgamation' ? Which factors are to be taken into account in estimating useful life of goodwill ? (5 marks)

(d) Certain aspects should be ensured by designated authority other than the High Court while granting approval of amalgamation of a non-banking financial company (NBFC) with a banking company. Name the authority and discuss the aspects to be ensured. (5 marks)

Answer 1(a)

Corporate Restructuring aims at different things at different times for different companies and the single common objective in every restructuring exercise is to eliminate the disadvantages and combine the advantages. The various needs for undertaking a Corporate Restructuring exercise are as follows:

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

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

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

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

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

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

Answer 1(b)

A company is said to be over-capitalized, if its earnings are not sufficient to justify a fair return on the amount of share capital and debentures that have been issued. Otherwise, it is said to be over capitalized when total of owned and borrowed capital exceeds its fixed and current assets i.e. when it shows accumulated losses on the assets side of the balance sheet.

If a company is over-capitalized, its capital also requires restructuring by taking following corrective measures:

(i) Buy-back of own shares.

(ii) Paying back surplus share capital to shareholders.

(iii) Repaying loans to financial institutions, banks, etc.

(iv) Repaying fixed deposits to public, etc.

(v) Redeeming its debentures, bonds, etc.

Answer 1(c)

Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life. Due to nature of goodwill, it is difficult to estimate its useful life, but estimation is done on a prudent basis. Accordingly, it should be appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified.

The following factors are to be taken into account in estimating the useful life of goodwill:

(i) the forceable life of the business or industry;

(ii) the effects of product obsolescence, changes in demand and other economic factors;

(iii) the service life expectancies of key individuals or groups of employees;

(iv) expected actions by competitors or potential competitors; and

(v) legal, regulatory or contractual provisions affecting the useful life.

Answer 1(d)

Amalgamation of an NBFC with a banking company

Where the NBFC is proposed to be amalgamated into a banking company, the banking company should obtain the approval of the Reserve Bank of India after the scheme of amalgamation is approved by its Board but before it is submitted to the High Court for approval.

The following are ensured while granting the approval:

(a) The NBFC has violated /is likely to violate any of the RBI/SEBI norms and if so,

ensure that these norms are complied with before the scheme of amalgamation is approved.

(b) The NBFC has complied with the 'Know Your Customer' norms for all the accounts, which will become accounts of the banking company after amalgamation.

(c) The NBFC has availed of credit facilities from banks/FIs and if so, whether the loan agreements mandate the NBFC to seek consent of the bank/FI concerned for the proposed merger/amalgamtion.

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

Question 2

(a) "There have been occasions when shareholders holding miniscule shareholdings have made frivolous objections against the restructuring scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections." Comment on the statement with relevant case law. (5 marks)

(b) Elucidate the obligations of a merchant banker as per Regulation 20 of SEBI (Buyback of Securities) Regulations, 1998. (5 marks)

(c) Narrate the conditions precedent and subsequent to court's order sanctioning a scheme of arrangement. (5 marks)

OR (Alternate question to Q.No. 2)

Question 2A

(i) Discuss in brief the provisions regarding carry forward and set-off of accumulated business losses and unabsorbed depreciation by an amalgamated company. (5 marks)

(ii) Explain the tax aspects on slump sale. (5 marks)

(iii) Describe the 'pooling of interests method' of accounting adopted by amalgamated company. (5 marks)

Answer 2(a)

There have however been some instances when shareholders holding a small number of shares, have made frivolous objections against the scheme, just with the objective of deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections. But Companies had to bear the consequences in the form of time and cost over-runs.

In case of Parke-Davis India Limited

In 2003, Parke-Davis India Limited and Pfizer Limited were considering implementation of a Scheme of Merger. The Minority shareholders of Parke-Davis India Ltd objected to the Scheme on the grounds that the approval from the requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed an urgent petition before the division bench of the Bombay High Court. The division bench of the Bombay

High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme of amalgamation, which was further extended till September 2003. The dissenting shareholders filed a Special Leave Petition with the Supreme Court. The turmoil came to an end when the Supreme Court dismissed the petition filed by the shareholders. Parke-Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

In case of Tomco with HLL Merger

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

Answer 2(b)

Regulation 20 provides that the merchant banker should ensure that:

(a) the company is able to implement the offer;

(b) the provision relating to escrow account has been made;

(c) firm arrangements for monies for payment to fulfil the obligations under the offer are in place;

(d) the public announcement of buy-back is made and the letter of offer has been filed in terms of the Regulations;

(e) the merchant banker should furnish to SEBI, a due diligence certificate which should accompany the draft letter of offer;

(f) the merchant banker should ensure that the contents of the public announcement of offer as well as the letter of offer are true, fair and adequate and quoting the source wherever necessary;

(g) the merchant banker should ensure compliance of Section 77A and Section 77B of the Companies Act, and any other applicable laws or rules in this regard;

(h) upon fulfillment of all obligations by the company under the Regulations, the merchant banker should inform the bank with whom the escrow or special amount has been deposited to release the balance amount to the company and send a final report to SEBI in the specified form, within 15 days from the date of closure of the buy-back offer.

Answer 2(c)

The court shall not sanction a scheme of arrangement for amalgamation, merger etc. of a company which is being wound up with any other company or companies unless it has received a report from the Company Law Board (Central Govt. acting through Regional Director) or the Registrar of Companies to the effect that the affairs of the company have not been conducted in a manner prejudicial to public interest. When an order has been passed by the court for dissolution of the transferor company, the transferor company is required to deliver to the Registrar a certified copy of the order for registration within thirty days and the order takes effect from the date on which it is so delivered.

Copies of the order of High Court are required to be affixed to all copies of Memorandum and Articles of Association of the transferee company issued after certified copy has been filed as aforesaid. The transferor company or companies will continue in existence till such time the court passes an order for dissolution without winding up, prior to which it must receive a report from the official liquidator to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interest of the members or to public interest. The practice in India is that in certain High Courts the Order on amalgamation is passed only after the Report of the Official Liquidator is received, whereas in certain cases the order of dissolution is passed after which amalgamation is approved by the concerned High Court.

The law requires approval of the shareholders both in majority in number and three-fourth in value, it has to be ensured that adequate number of shareholders, whether in person or by proxy attend the meeting so that the resolution can be passed by the requisite majority. Normally the time frame for such merger will depend on the opposition, if any, to the proposed merger shareholders or creditors but in normal case it may take anything between six months to one year to complete the merger from the time the Board approves the scheme of amalgamation till the merger becomes effective on filing of the certified copies of the Court's Order.

Answer 2A(i)

Under Section 72A, a special provision is made which relaxes the provision relating to carrying forward and set off of accumulated business loss and unabsorbed depreciation allowance in certain cases of amalgamation. Where there has been an amalgamation of a company owning an industrial undertaking or a ship or a hotel with another company, or an amalgamation of a banking company referred to in clause (c) of Section 5 of the Banking Regulations Act, 1949 (10 of 1949) with a specified bank; or one or more public sector company or companies engaged in the business of operation of aircraft with one or more public sector company or companies engaged in similar business, then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or; as the case may be, allowance for depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set-off and carry forward of loss and allowance for depreciation shall apply accordingly.

Unabsorbed losses of the amalgamating company are deemed to be the losses for the previous year in which the amalgamation was effected, the amalgamated company will have right to carry forward the loss for a period of eight assessment years immediately succeeding the assessment year relevant to the previous year in which the amalgamation was effected.

However, the above relaxations shall not be allowed in the assessment of the amalgamated company unless the amalgamating company:

(i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths in the book value of fixed assets of amalgamating company acquired in a scheme of amalgamation.

(ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation.

(iii) fulfills such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

It further provides that in case where any of the above conditions are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of amalgamated company chargeable to tax for the year in which such conditions are not complied with.

Answer 2A(ii)

As per Section 2(42C) of Income Tax Act, 1961, unless the context otherwise requires, the term "slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Computation of Capital Gains from Slump Sale

Special provisions relating to computation of capital gains from 'Slump Sale' under Section 50B of the Income Tax Act, 1961, are as under:

(1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place.

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section.

Answer 2A(iii)

Since merger is a combination of two or more separate business, there is no reason to restate carrying amounts of assets and liabilities. Accordingly, only minimal changes are made in aggregating the individual financial statements of the amalgamating companies.

In preparing the transferee company's financial statements, the assets, liabilities

and reserves (whether capital or revenue or arising on revaluation) of the transferor company should be recorded at their existing carrying amounts and in the same form as at the date of the amalgamation. The balance of the Profit and Loss Account of the transferor company should be aggregated with the corresponding balance of the transferee company or transferred to the General Reserve, if any.

If, at the time of the amalgamation, the transferor and the transferee company having conflicting accounting policies, a uniform set of accounting policies should be adopted following the amalgamation. The effects on the financial statements of any changes in accounting policies should be reported in accordance with Accounting Standard (AS-5), Net Profit or Loss for the Period 'Prior Period Items and Changes in Accounting Policies'.

The difference between the amount recorded as share capital issued (plus any additional consideration in the form of cash or other assets) and the amount of share capital of the transferor company should be adjusted in reserves. Furthermore, reserve created on amalgamation is not available for the purpose of distribution to shareholders as dividend and/or bonus shares. It means that if consideration exceeds the share capital of the transferor company(or companies), the unadjusted amount is a capital loss and adjustment must be made, first of all in the capital reserves and in case capital reserves are insufficient, in the revenue reserves. However, if capital reserves and revenue reserves, are insufficient the unadjusted difference may be adjusted against revenue reserves by making addition thereto by appropriation from profit and loss account. There should not be direct debit to the profit and loss account. If there is insufficient balance in the profit and loss account also, the difference should be reflected on the assets side of the balance sheet in a separate heading.

Question 3

Comment on the following :

(a) Poison pill defense is a strategy against hostile takeover.

(b) Circumstances which prohibit buy-back of shares or other specified securities under the Companies Act, 2013.

(c) Compliance of the Competition Act, 2002 in relation to merger and amalgamation.

(d) Demerger may take the shape of spin-off, split-off or split-up.

(e) Open offer can be withdrawn under Regulation 23 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. (3 marks each)

Answer 3(a)

Poison Pills Defenses

A poison pill is a tactic utilized by companies to prevent or discourage hostile takeovers. A company targeted for a takeover uses a poison pill strategy to make shares of the companys stock look unattractive or less desirable to the acquiring firm.

There are two types of poison pills:

1. A "flip-in" permits shareholders, except for the acquirer, to purchase additional shares at a discount. This provides investors with instantaneous profits. Using

this type of poison pill also dilutes shares held by the acquiring company, making the takeover attempt more expensive and more difficult.

2. A "flip-over" enables stockholders to purchase the acquirer's shares after the merger at a discounted rate. For example, a shareholder may gain the right to buy the stock of its acquirer, in subsequent mergers, at a two-for-one rate.

Answer 3(b)

Under Section 70 of the Companies Act, 2013, no company shall directly or indirectly purchase its own shares or other Securities-

— through any subsidiary company including its own subsidiary companies;

— through any investment company or group of investment companies.

— If a default, is made by the company, in repayment of deposits accepted either before or after the commencement of the Act, interest payment thereon to any financial institution or banking company. However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed-after such default ceased to subsist.

— No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provision of section 92 (Annual Return), 123 (Declaration of Dividend), 127(Punishment for failure to distribute dividend) and section 129 (Financial Statement).

Answer 3(c)

Compliance of the Competition Act, 2002 in relation to merger and amalgamation

Mergers must form part of the business and corporate strategies aimed at creating sustainable competitive advantage for the company. Mergers and amalgamations are important strategic decisions leading to the maximisation of a company's growth.

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

Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted within 30 days of:

(a) approval of the proposal relating to merger or amalgamation, referred to in section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in section 5(a) or acquiring of control referred to in section 5(b).

The thresholds with respect to such requirement is specified under Competition Act.

Answer 3(d)

Sometimes Demerger takes the shape of:

(a) "Spin-off" is a kind of demerger when an existing parent company distributes on a pro rata basis all the shares it owns in a controlled subsidiary to its own shareholders by which it gains effect to making two of the one company or corporation. There is no money transaction, subsidiary's assets are not revalued, transaction is treated as stock dividend and tax free exchange. Both the companies exist and carry on business. It does not alter ownership proportion in any company.

(b) "Split-off" is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of a corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter, or

(c) 'Split-up' is a process of re-organizing a corporate structure where by all the capital stock and assets are exchanged for those of two or more newly established companies, resulting in the liquidation of the parent corporation.

Answer 3(e)

An open offer once made cannot be withdrawn except in the following circumstances:

(i) Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the DPS and the letter of offer;

(ii) Any condition stipulated in the SPA attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, subject to such conditions having been specifically disclosed in the DPS and the letter of offer;

(iii) Sole acquirer being a natural person has died;

(iv) Such circumstances which in the opinion of SEBI merit withdrawal of open offer.

PART B

Question 4

(a) "Brands do not command any value unless they are able to bring cash flows to the company that has adopted the same. In order to sustain the value of the brand, there must a constant effort by the company on various aspects." Comment. (5 marks)

(b) Explain briefly the features which must be taken into consideration for arriving at valuation of equity shares of a company in a particular transaction. (5 marks)

(c) Write a detailed note on discounted cash flows (DCF) valuation method. (5 marks)

Answer 4(a)

With incremental cash flows increasing, value of brand also increases proportionately. Brands have to be constantly associated with good quality goods and services; they require proper show casing and servicing and they should remain active in appropriate markets. In order to sustain the valuation of the brand, there must be a constant attempt from the company on the following aspects:

1. To secure registration of the Brand in all relevant classes.
2. To secure registration of the Brand in all countries where there are opportunities to sell Branded Products of the Company.
3. To set up a "surveillance team" within the Marketing Department of the Company so as to ensure that there is no dilution to the value of the Brand.
4. To ensure that attempts to use fake brands that are similar or deceptively similar are challenged with full force so as to spread the message that the Company is conscious of the value of its brand and it will be aggressive in taking steps not only to put an end to such illegal, dishonest and unauthorized use but also to punish such users and claim exemplary damages from those who had passed off their goods to people and those who are found to be guilty of infringement.
5. To ensure that there is always a budget allocation for promoting the brand and the Company should devise a continuous process for being present in the existing markets and prospective markets.
6. To ensure that there is a conspicuous distinction in the description of the brand when it is used to sell premium products as opposed to use of the same brand for selling goods to the masses.
7. To ensure that the extent of growth in the value of the brand very year is always higher than the depreciation or dent that existing or new competition may cause.
8. To adopt a proper policy with regard to slogans and catchy phrases so that the Company does not knowingly cause any infringement of the industrial and intellectual property rights of any other person in any country or territory.
9. To adopt a proper policy with regard to statements made in advertisements carrying the brand in order to ensure that those statements are not mere attractive words and they would stand the test of the market.
10. To adopt a proper policy to augment IP profile of the Company and constantly update and upgrade the same.

Answer 4(b)

Valuation of equity shares must take note of special features in the company or in a particular transaction. These are briefly stated as under:

Importance of the size of the block of shares : The holder of 75% of the voting power in a company can always alter the provisions of the articles of association; aholder of voting power exceeding 50% and less than 75% can substantially influences the operation of the company even to alter the articles of association of comfortable influences the

operation of the company even to alter the articles of association of comfortable pass a special resolution. A controlling interest therefore, carries a separate substantial value.

Restricted transferability : Along with principal consideration of yield and safety of capital, another important factor is easy exchangeability or liquidity. Holders of shares unquoted public companies or private companies do not enjoy easy marketability; therefore such shares, however good, are discounted for lack of liquidity at rates, which may be determined on the basis of circumstances or an increase in the normal rate of return.

Dividends and valuation : Generally, companies paying dividend at steady rates enjoy greater popularity and the prices of their shares are high while shares of companies with unstable dividends do not enjoy confidence of the investing public as to return they expect to get and, consequently, they suffer in valuation.

Answer 4(c)

Discounted cash flow valuation is based upon expected future cash flows and discount rates. This approach is easiest to use for assets and firms whose cash flows are currently positive and can be estimated with some reliability for future periods.

Discounted cash flow valuation, relates the value of an asset to the present value of expected future cash flows on that asset. In this approach, the cash flows are discounted at a risk-adjusted discount rate to arrive at an estimate of value. The discount rate will be a function of the riskiness of the estimated cash flows, with lower rates for safe projects and higher rate for riskier assets.

The discounted cash flow (DCF) model is applied in the following steps:

— Estimate the future cash flows of the target based on the assumption for its post-acquisition management by the bidder over the forecast horizon.

— Estimate the terminal value of the target at forecast horizon.

— Estimate the cost of capital appropriate for the target.

— Discount the estimated cash flows to give a value of the target.

— Add other cash inflows from sources such as asset disposals or business divestments.

— Subtract debt and other expenses, such as tax on gains from disposals and divestments, and acquisition costs, to give a value for the equity of the target.

— Compare the estimated equity value for the target with its pre-acquisition stand-alone value to determine the added value from the acquisition.

— Decide how much of this added value should be given away to target shareholders as control premium.

Question 5

(a) "Brands belong to a different species. While physical resources could be created easily if augmenting financial resources is not a problem, same is not the case of brands. It is advisable to approach the brand valuation on the basis of premium price method." Comment on the statement highlighting valuation approach for brands. *(5 marks)*

(b) *Gama Pesticide Ltd. (GPL) is taking over Theta Fertilizer Ltd. (TFL). The shareholders of TFL would get 0.8 shares of GPL for each share held by them. The merger is not expected to yield in economies of scale and operating synergy. The relevant data of the two companies are as follows :*

	GPL	*TFL*
Net sales (₹ in crore)	*335*	*118*
Profit after tax (₹ in crore)	*58*	*12*
Number of shares (crore)	*12*	*3*
Earnings per share (₹)	*4.83*	*4.00*
Market value per share (₹)	*30*	*20*
Price-earnings ratio	*6.21*	*5.00*

You are required to calculate the following in respect of the resultant company after merger -

(i) Earnings per share

(ii) Price-earnings ratio

(iii) Market value per share

(iv) Number of shares; and

(v) Total market capitalisation. *(5 marks)*

(c) *Groves Ltd. and Wood Ltd. decided to merge and a new company Groves Wood Ltd. is formed. Following are the extracts from the financial records of Groves Ltd. and Wood Ltd. :*

		(₹ in lakh)
	Groves Ltd.	*Wood Ltd.*
EQUITY AND LIABILITIES		
(1) Shareholders' funds		
(a) Share capital		
Equity shares of ₹10 each	*800*	*1,600*
(b) Reserves and surplus		
Reserve fund	*400*	*600*
Surplus	*600*	*700*
(2) Current liabilities		
Trade payables	*700*	*800*
TOTAL	*2,500*	*3,700*

ASSETS		
(1) Non-current assets		
(a) Land and building	*400*	*600*
(b) Plant and machinery	*900*	*1,500*
(c) Intangible assets (goodwill)	*100*	*200*
(2) Current assets		
(a) Inventories	*300*	*400*
(b) Trade receivables	*400*	*300*
(c) Cash and cash equivalents	*400*	*700*
TOTAL	*2,500*	*3,700*

The assets and liabilities of both t}le companies, excluding the intangible assets are taken over by Groves Wood Ltd. (new company). Compute the total number of shares to be issued to the shareholders of Groves Ltd. and Wood Ltd. of the face value of ₹10 each fully paid-up at a premium of ₹10 per share. (5 marks)

Answer 5(a)

Normally the value of an enterprise could be estimated on a going-concern basis by computing the earning capacity. Net Asset Value method may not be ideal in the cases enterprises with depreciating assets unless the enterprise in question is asset intensive. For instance, in the case of company engaged in real estate sector, the lands in the hands of the company on ownership basis could be a stock in trade and they may be highly valuable. However, in the case of Brands, which form the lifeline of the Company, there has to be a different approach.

Cost Approach for valuation of Brands may not help. The cost incurred in the last three financial years are not very high as all resources have been used up for establishing a good quality over a period of time in order to give customers high quality products for value and to ensure that customers are happy. A look at the competitive force and the predominance of the brand of the company would show that the brands of the company are premium brands. In the next phase, the Company would show that the brands of the company are premium brands. In the next phase, the company would incur expenditure brand, returns would be manifold. This enables the company to introduce its branded products in the new markets very easily as entry barriers could be easily overcome.

Considering the above background, it is advisable to approach the Band Valuation on the basis of Premium Price Method. The commitment of the company to maintain stringent quality gives us confidence in adopting a Premium Price method for valuing the Brand.

Answer 5(b)

Premium paid to Theta's shares shareholders:

Value of each shares in Gama: 0.8* Rs. 30 = Rs. 24

Value of Theta's shares before merger		=	Rs. 20
Premium		=	Rs. 4
Premium Percentage		=	4/20=20%
Numbers of shares paid to Theta's shareholders: 3* 0.8		=	2.4 crore
Number of shares of the combined company		=	12+2.4 =14.4 crore
Combined profit after tax (= Rs. 58 + Rs. 12)		=	Rs. 70 Crore
(i)	Combined EPS (=70/14.4)	=	Rs. 4.86
(ii)	Combined P/E ratio = 6.20*(58/70) + 5*(12/70)	=	6.00
	Combined firm market capitalization		
(iii)	Market value per share = P/E ratio *EPS = 6.00* 4.86 = Rs. 29.16		
(iv)	Number of shares of the combined company	=	12+2.4=14.4 crore
(v)	Capitalisation : MVPs* No. of shares= Rs. 29.16 * 14.4 = Rs. 419.9 crore		

Answer 5(c)

(Rs. in Lakh)

Assets	*Groves Ltd.*	*Wood Ltd.*
(1) Non-current assets		
(a) Land and building	400	600
(b) Plant and machinery	900	1500
(c) Intangible Assets (Goodwill)	-	-
(2) Current assets		
(i) Inventories	300	400
(ii) Trade receivables	400	300
(iii) Cash and cash equivalents	400	700
	2400	3500
Less : Current Liabilities		
Trade Payables	700	800
Rs. In Lakh	1700	2700
	1700/20	2700/20
=	850 Lakh	=1350 Lakh

No. of Rs. 10 Equity Shares to be Issued Fully paid up at a Premium of Rs. 10/- Per Share Groves Ltd. 850 Lakh Equity Shares and Wood Ltd. 1350 Lakh Equity Shares

PART – C

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

Question 6

(a) A liquidator is not a trustee but since he is in a fiduciary position in relation to

any property of the company and is in the position of a trustee, he is sometimes stated as 'statutory trustee'. Discuss the status of liquidator in compulsory winding-up by the court as well as in voluntary winding-up. (5 marks)

(b) Explain the meaning of non-performing assets and their classification. What is the role of Reserve Bank of India in connection with non-performing assets ? (5 marks)

(c) List out the cases where provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not applicable. (5 marks)

(d) Describe the World Bank's Insolvency Law System. (5 marks)

OR (Alternate question to Q.No. 6)

Question 6A

(i) Are 'winding-up' and 'dissolution' synonymous ? Discuss. (5 marks)

(ii) With the help of decided case law, comment on the constitutional validity of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. (5 marks)

(iii) What are the various measures taken by assets reconstruction or securitisation company for the purpose of assets reconstruction ? What are its other functions? (5 marks)

(iv) Discuss the provisions of UNCITRAL Model Law regarding co-ordination of more than one foreign proceeding. (5 marks)

Answer 6(a)

Status of Liquidator

The liquidator in a winding up by the Court or under the supervision of the Court, is an officer of the Court, and as such is required to exercise a high degree of honesty and fairness towards the creditors and the members of the company. he is also the agent of the company and incurs no personal liability when he enters into any contracts as a liquidator.

In a voluntary winding up, the liquidator is more rightly described as the agent of the company. He is not an officer of the Court. As a paid agent of the company he has statutory duties towards the creditors and contributories including the administration of the assets of the company.

Both in a compulsory winding up and voluntary winding up, a liquidator as an agent of the company, must exercise a high degree of care and diligence in discharging his statutory duties. He may be liable in damage to a creditor or contributory for injury caused to him as a result of his breach of statutory duties.

A liquidator is not a trustee. The property of the company is not vested in him. But he is in a fiduciary position in relation to any property of the company and is in the position of a trustee, or what is sometimes stated, he is a “statutory trustee”. Accordingly, if he pays an invalid claim, even without willful default, he is liable to misfeasance proceedings. He is not a trustee for individual creditors or contributories.

Answer 6(b)

As per Section 2(1)(o) of securitisation Act, a Non-Performing Asset means an asset or account of a borrower, which has beenclassified by a bank or financial institution as sub-standard, doubtful or loss asset—

(a) in case such bank or financial institution is administered or regulated by an authority or bodyestablished, constituted or appointed by any law for the time being in force, in accordance with thedirections or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classificationsissued by the Reserve Bank.

Non-performing assets can be further classified into :

(a) *Sub-standard assets* : a sub standard asset is one which has been classified as NPA for a period not exceeding 12 months.

(b) *Doubtful Assets* : a doubtful asset is one which has remained NPA for a period exceeding 12 months.

(c) *Loss assets* : where loss has been identified by the bank, internal or external auditor or central bank inspectors. But the amount has not been written off, wholly or partly.

Answer 6(c)

Section 31 of the Securitization Act mentions certain cases where provisions of the Act are not applicable to:

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

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

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

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

(e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;

(f) any rights of unpaid seller under Section 47 of the Sale of Goods Act, 1930;

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

(h) any security interest for securing repayment of any financial asset not ex¬ceeding one lakh rupees;

(i) any security interest created in agricultural land;

(j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

Answer 6(d)

Commercial Insolvency. The World Bank's Principles for Effective Insolvency and Creditors/Debtors Rights Systems sets out a range of benchmarks, based on international best practices for evaluating the effectiveness of domestic Insolvency and Creditor/Debtor rights (ICR) systems. Though approaches vary, effective insolvency systems have a number of aims and objectives. Systems should aspire to:

(i) integrate with a country's broader legal and commercial systems;

(ii) maximize the value of a firm's assets and recoveries by creditors;

(iii) provide for both efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors and reorganization of viable businesses;

(iv) strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one proceeding to another;

(v) provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;

(vi) provide for timely, efficient and impartial resolution of insolvencies;

(vii) prevent the improper use of the insolvency system;

(viii) prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;

(ix) provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;

(x) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and

(xi) establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation.

The rescue of a business should be promoted through formal and informal procedures. Rehabilitation should permit quick and easy access to the process, protect all those involved, permit the negotiation of a commercial plan, enable a majority of creditors in favor of a plan or other course of action to bind all other creditors (subject to appropriate protections) and provide for supervision to ensure that the process is not subject to abuse.

Answer 6A(i)

The terms "Winding up" and "Dissolution" are sometimes erroneously used to mean the same thing.The legal implications of these two terms are quite different and there are fundamental differences between them as regards the legal procedure involved.

1. The entire procedure for bringing about a lawful end to the life of a company is divided into two stages – 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law.
2. The liquidator appointed by the company or the Court carries out the winding up proceedings but the order for dissolution can be passed by the Court only.
3. According to the Companies Act the liquidator can represent the company in the process of winding up. This can be done till the order of dissolution is passed by the Court. Once the Court passes dissolution orders the liquidator can no longer represent the company.
4. Creditors can prove their debts in the winding up but not on the dissolution of the company.
5. Winding up in all cases does not culminate in dissolution. Even after paying all the creditors there may still be a surplus; company may earn profits during the course of beneficial winding up; Dissolution is an act which puts an end to the life of the company.

Answer 6A(ii)

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was passed by the Parliament of India to provide for the speedy adjudication of matters relating to recovery of debts due to banks and financial institutions. The Act provides a procedure that is distinct from the existing Code of Civil Procedure in order to ensure a speedy adjudication. The Act also provides for the setting up of a separate set of tribunals to hear such matters and these tribunals are termed as Debt Recovery Tribunals (DRTs).

In case of *Union of India* v. *Delhi High Court Bar Association*, (2002) 4 SCC 275, the petitioners have challenged the constitutional validity of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 on the ground that the Act is unreasonable and is violative of Art. 14 of the Constitution and that it is beyond the legislative competence of the Parliament to enact such a law. This Act had been challenged for depriving a person of legal remedies in ordinary civil courts. However, the SupremeCourt held that there is no such right that the dispute should be adjudicated only by a civil court, and the replacement of the jurisdiction of civil courts by independent and specialized tribunals is completely legal and constitutional.

Answer 6A(iii)

Asset Reconstruction Company or Securitisation Company can take the following measures for the purposes of asset reconstruction:

- Proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower.

- Enforcement of security interest in accordance with the provisions of the Act.
- Settlement of dues payable by the borrower.
- Taking possession of secured assets in accordance with the provisions of the Act.
- To convert any portion of debt into share of a borrower company.

Securitisation or Reconstruction Company may do the following functions also in accordance with Section 10 of the Act:

(a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties;

(b) act as a manager referred to in clause (c) of Sub-section (4) of Section 13 on such fee as may be mutually agreed upon between the parties;

(c) act as receiver if appointed by any court or Tribunal..

No securitisation company or Reconstruction Company shall act as a manager if acting as such gives rise to any pecuniary liability.

Securitisation company or re¬construction company which has been granted a certificate of registration cannot commence or carry on any business other than that of securitisation or asset reconstruction without prior approval of the Reserve Bank.

Answer 6A(iv)

Article 30 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in the enacting State. The provision applies whether or not an insolvency proceeding is pending in the enacting State. If, in addition to two or more foreign proceedings, there is a proceeding in the enacting State, the court will have to act pursuant to both Article 29 and Article 30.

In respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under Articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under Article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

The objective of Article 30 is similar to that of Article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Unlike Article 29, which, as a matter of principle, gives primacy to the local proceeding, Article 30 gives preference to the foreign main proceeding if there is one.

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