GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2017

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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These answers have been written by competent persons and the Institute hopes that the **GUIDELINE ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

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. Relevant SEBI Regulations.

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, Information Utilities, Voluntary Liquidation Process, etc. are already notified.

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2017

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) Rajesh & Ramesh Co., Chartered Accountants, are the statutory auditor of FDE Textiles Pvt. Ltd. DEF Products Ltd., the holding company of FDE Textiles Pvt. Ltd., is considering to allot assignment of designing of financial information system to Rajesh & Ramesh Co. Comment and advise the Board of directors of DEF Products. Ltd. on the above. (5 marks)

(b) Critically evaluate the following statement :

"The ultimate objective of an IPO is to maximize the wealth of the promoters rather than raising funds." (5 marks)

(c) Board of Directors of Supershine Detergents Ltd., a listed company having accumulated free reserves of rupees five hundred and fifty crores, authorized share capital of rupees seventy five crores and paid up share capital of rupees fifty crores is considering a proposal to capitalize part of the reserves by issue of Bonus shares in the ratio of 1 : 1 to its shareholders. You, being the Secretary of the company, Management seeks your advice on the matter.

Prepare action plan to be submitted to the Board at the next board meeting and for successful implementation of the proposal. (5 marks)

(d) Goodwill Electronics OPC incorporated on 1st July, 2015 as a One Person Company with an authorized and paid up share capital of rupees forty lakhs recorded turnover of rupees forty five lakhs in the first nine months ended 31-3-2016 and Rs. 135 lakhs during the next nine months ended 31-12-2016. Having seen the fast growing potential of his business in the IT-ES sector, Mr. Victor, promoter and sole director of the Company desires to make further investment of Rs. 50 lakhs from his friends. He seeks your advice on the following :

(i) Whether Mr. Victor can issue shares to his friends without changing the constitution of the Company; (1 mark)

(ii) If his friends desire to invest in the share capital of the Company to help Mr. Victor expand the business, how he can make further issue of shares to his friends; (3 marks)

(iii) Whether Mr. Victor can include two or three of his friends as directors of the Company to support him in the management of the Company. (1 mark)

Answer 1(a)

Section 144 of the Companies Act, 2013 provides that an auditor appointed under this Act shall provide to the company only such other services as are approved by the

Board of Directors or the audit committee, as the case may be, but which shall not include specified services, whether those services are rendered directly or indirectly to the company or its holding company or subsidiary company.

Specified services include design and implementation of any financial information system.

Thus, applying the provision into the given case, Rajesh & Ramesh Co., Chartered Accountants, shall not accept the said assignment, if proposed to be given by DEF Products Ltd, holding company of FDE Textiles Pvt. Ltd.

Answer 1(b)

The primary objective for an Initial Public Offer (IPO) is to raise funds for the company. The equity shares of the company get listed on Stock exchange after the IPO. The promoters are required to contribute the initial capital and such shares are issued to the promoters at par. The promoters hold the majority of shares of the company even after the IPO. Over the period of time, the floating stocks of the shares from retail and small shareholders move to large and institutional shareholders. As a result of decrease in the floating stock of the shares in the secondary market of the Company, the market prices of the equity shares appreciate and move up.

The largest beneficiaries after the IPO are the promoters of the company as their initial investment gets multiplied several times. Hence the end result is that promoter's wealth gets maximized.

Answer 1(c)

Facts given in the case:

Authorised share capital of the company: Rs.75 crores

Paid-up share capital (Equity shares): Rs.50 crores

Free Reserves of the company: Rs.550 crores

Proposal for issue of Bonus shares : Rs.50 crores

Authorised share capital to be increased to : Rs.100 crores

Balance Free Reserves of the company: Rs.500 crores

From the above stated facts, it is clear that the proposal of the management to issue Bonus Shares in the ratio of 1:1 is perfectly in order, assuming that it is authorized by articles of association of the company and it is authorized by the General Meeting on the recommendation by the Board. Further, there is no default in payment of interest or repayment of deposits or dues to banks/financial institutions or statutory dues of the employees of the Company such as contribution fund to provident fund, gratuity and bonus [Section 63(2)]. As such, the Company can proceed to declare 1:1 Bonus Shares to the existing shareholders of the company after complying with the following:

1. Authorised share capital of the Company to be increased to Rs.100 crores by passing an ordinary resolution in a general meeting convened by the Board;

2. Capital clause of Memorandum of association and if necessary the relevant portion of the Articles of Association should be amended;

3. If the Article of Association of the Company do not contain a provision for capitalisation of profits by issue of Bonus Shares, Article of Association should also be amended to incorporate such a provision therein;

4. Issue notice alongwith Agendas and notes to it for convening the Board Meeting at least seven days before the date of Board meeting to all the directors entitled to attend the meeting.

5. Send intimation to the stock exchange at least two working days in advance of the date of Board Meeting excluding the date of intimation and the date of the meeting.

6. Hold the Board meeting to convene the Extra-ordinary general meeting for passing the following resolutions(as required):-

   (a) To recommend the bonus issue;

   (b) To approve the resolution to be passed at a general meeting;

      (i) To authorize the Bonus issue

      (ii) To approve requisite resolution for increase of the capital and consequential alteration of the Memorandum of Association/Articles of Association(if necessary)

      (iii) To enable the Articles to authorize the issue, if necessary.

7. Filing of following requisite forms along with fee as specified in Companies (Registration of Offices and Fees), Rules 2014within 30 days of passing of the resolutions in the extra-ordinary general meeting after ensuring that all the shares are fully paid-up and the bonus issue is not in lieu of the payment of dividend :

   (a) Form MGT-14 for filing of the special resolution(s) along with the altered article of association of the company.

   (b) Return of allotment in Form PAS-3

8. After the allotment of the shares the details of it to be provided to the depository immediately. Also, all the share certificates shall be delivered to the shareholders within two months from the date of such allotment.

Answer 1(d)

(i) In the given case, Mr. Victor cannot issue shares to his friends without changing the constitution of the Company. Goodwill Electronics is an OPC and Mr. Victor is the sole member and director of the said OPC. As per provisions of Companies Act, 2013 OPC can't have more than one shareholder. To accept share capital from his friends he has to convert the OPC either into a Private company or Public Company.

As per Rule 3(7) of Companies (Incorporation) Rules, 2014, an OPC cannot convert voluntarily into any kind of company unless two years are expired from the date of incorporation.

However, in case such One Person Company, exceeds its paid up share capital

beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, then in such case it have to get converted to other forms of Company at any time i.e. before the expiry of the two years also.

(ii) Once the OPC gets converted to other form of Company in compliance with Rule 3(7) of the Companies (Incorporation) Rules, 2014 then Mr. Victor can accept the investment in the nature of share capital from his friends by making further issue of shares through private placement by complying with the provisions of section 42 read with relevant rules made thereunder.

(iii) Mr. Victor can include two or three of his friends as directors of the Company so as to support him in the management of the Company subject to the maximum number of directors i.e. 15 as stated in Section 149(1)(b) of the Companies Act or such other larger no. of directors after passing a special resolution in this regard.

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

Question 2

(a) You are a Company Secretary in practice. The would be promoters of a company have asked you about stamping and dating of Memorandum and Articles of Association. Advise them. (4 marks)

(b) (i) Explain the purpose of fixing the record date by a listed company.

(ii) Explain whether the Articles of Association of a company can provide for payment of dividend by a company in proportion to the amount paid up on its equity shares. (4 marks)

(c) (i) Explain the composition of a Nomination and Remuneration Committee constituted by the Board of Directors of a listed company.

(ii) Who shall be the Chairman of the Nomination and Remuneration Committee?

(iii) Can the Nomination and Remuneration Committee recommend to the Board of Directors to extend the term of appointment of Independent Directors ? (4 marks)

(d) Assuming that you are appointed as Scrutinizer for conducting Postal Ballot and for furnishing details of Result of the Postal Ballot to the Chairman of the Company, prepare Scrutinizer's Report for the Chairman of the company to declare result of the ballot.

Assume facts and figures. (4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) In what way does the Companies Act, 2013 regulate the payment to a director towards compensation for loss of his office ? State the circumstances in which the company is not bound to pay any compensation to a director for loss of his office. (4 marks)

(ii) PQR Limited, by amending its Articles of Association, inserts the following clauses :

(a) Members of the company shall be bound by the new clause even though they voted against it.

(b) A resolution has been passed to make the share capital of the company fixed.

(c) A resolution has been passed in the general meeting to give 30 days notice to members for holding general meeting.

Ascertain if the above clauses of the articles are valid as per Companies Act, 2013. (4 marks)

(iii) Should there be any exclusive meeting of independent directors ?

Referring to the provisions of the Companies Act, 2013, examine whether in the following cases, companies are required to appoint Independent Director :

(a) Support Limited has paid-up share capital of ₹ 5 crore. Support Limited is a non-banking non-financial company.

(b) Energies Limited has turnover of ₹ 200 crore.

Both these companies are not listed at any of the Stock Exchanges. (4 marks)

(iv) Xavior Housing Cooperative Society registered under the Societies Registration Act, 1860 has not been functioning for the past few years. Governing council of the society at its council meeting held on 21-2-2017 unanimously decided to dissolve the Society, recording that it has accomplished the objective of providing housing facilities to all its members.

Governing body of the society seeks your advice/guidance for dissolution of the Society and transfer of assets. Advise. (4 marks)

Answer 2(a)

Memorandum and Articles of Association of the company are printed and signed by subscribers to the memorandum. Thereafter, the Memorandum and Articles of Association of the company are duly stamped by the appropriate State Authority (Collector of Stamps) under the Indian Stamp Act, 1899. At present, Stamp duty is payable online along with the filing fees. The Stamp Duty payable on the Memorandum and/or the Articles of Association is determined according to the place of incorporation of the company since stamp duty on MOA & AOA is a subject matter of "State Act " and not a matter of the Central Government.

The memorandum and articles are dated after signing and it must be the date of stamping or any later date than the date of their stamping and not, in any event, a date prior to the date of their stamping.

Answer 2(b)(i)

Record date is the date fixed for taking record of shareholders or debenture holders of the Company. An investor must be a shareholder/ debenture holder on this particular date in order to be eligible to participate in a particular corporate action.

Record date is an alternate for closing the registers. The purpose of closing the registers is to get the registers updated and to fix a cut-off date for the specified purposes which can alternatively be achieved by fixing a record date for a day.

As per the Regulation 42, under Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, a listed entity is mandatorily required to fix a record date for some specified purposes as stated in Regulation 42(1)

such as declaration of dividend, issue of rights or bonus shares, issue of shares for conversion of debentures or any other convertible securities, corporate action like merger, de-mergers etc.

A listed entity is also required to give notice in advance of at least seven working days (excluding the date of intimation and the record date) to stock exchange(s) of record date specifying the purpose of the record date.

Answer 2(b)(ii)

In terms of Section 51 of the Companies Act, 2013, a company may, if so authorised by its articles, pay dividend in proportion to the amount paid- up on each share.

Thus, the Board of Directors of a company may decide to pay dividend proportionately, i.e. in proportion to the amount paid-up on each share when all shares are not uniformly paid up, i.e. pro rata subject to the condition that the company's articles of association expressly authorising the company in this regard.

Answer 2(c)(i)

As stated under the provisions of Section 178 of 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 the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent directors.

The chairperson of the company (whether executive or non-executive) may be appointed as a member of the Nomination and Remuneration Committee but shall not chair such Committee.

Rule 6 of the Companies (Meeting of Board and its Powers) Rules, 2014 provides that the Board of directors of every listed company and a company covered under Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute a Nomination and Remuneration Committee of the Board.

The Composition of a Nomination and Remuneration Committee of every listed Company as stated under Regulation 19 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, shall be as follows:-

1. There must be at least three directors.
2. All the directors of the committee shall be non-executive directors and
3. At least half of the directors shall be independent directors of the company.

Answer 2(c)(ii)

The chairperson of the company, whether executive or non-executive may be appointed as member, but shall not chair the Nomination and Remuneration Committee.

Answer 2(c)(iii)

In terms of provisions of Section 178 of Companies Act, 2013, the Nomination and Remuneration Committee can recommend the Board of Directors of the company to extend the term of appointment of independent directors based on the evaluation of their performance.

Answer 2(d)

SCRUTINIZER'S REPORT TO THE CHAIRMAN ON POSTAL BALLOT

FORM NO. MGT.13

Report of Scrutinizer(s)

[Pursuant to rule section 109 of the Companies Act, 2013 and rule 21(2) of the Companies (Management and Administration) Rules, 2014]

To,

The Chairman
XYZ Limited
C-XXX, ABC Road
MNO-000000

Scrutinizers Report on postal ballot in respect of passing of resolutions contained in Notice dated February 19, 2017 through postal ballot.

Dear Sir,

I, DKY have been appointed as Scrutinizer(s) by the Board of directors of XYZ Limited for scrutinizing postal ballot voting in respect of passing of resolution contained in Notice dated February 19, 2017 through postal ballot.

I, submit my report as under:

1. After the time fixed for closing of the poll by the Chairman, i.e. 5 p.m. on March 18, 2017 ballot boxes kept for polling were locked in my presence with due identification marks placed by me.
2. The locked ballot boxes were subsequently opened in my presence and poll papers were diligently scrutinized. The poll papers were reconciled with the records maintained by the Company/Registrar and Transfer Agents of the Company and the authorizations/ proxies lodged with the Company.
3. The poll papers, which were incomplete and/or which were otherwise found defective have been treated as invalid and kept separately.

   OR

   I did not find any poll papers invalid.
4. The result of the Poll is as under:
   (a) Ordinary Resolution– Item No. 1 - To appoint Shri DFG (DIN: 55555555) as an Independent Director

   (i) Voted **in favour** of the resolution:

Number of members present and voting (in person or by proxy)	*Number of votes cast by them*	*% of total number of valid votes cast*
21071	5115186	0.2272

(ii) Voted **against** the resolution:

Number of members present and voting (in person or by proxy)	*Number of votes cast by them*	*% of total number of valid votes cast*
795	3178437	0.1411

(iii) Invalid votes :

Total number of members (in person or by proxy) whose votes were declared invalid	*Total number of votes cast by them*
99	231821

5. A Compact Disc (CD) containing a list of equity shareholders who voted "FOR", "AGAINST" and those whose votes were declared invalid for each resolution is enclosed.
6. The poll papers and all other relevant records were sealed and handed over to the Company Secretary/ Director authorized by the Board for safe keeping.

Thanking you,

Yours faithfully,

Place : MNO

Dated : 24th March, 2017

[The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof]

Name/s and Signature/s of the Scrutinizer/s

Answer 2A(i)

A company may make payment to a Managing Director or a Whole-time Director or Manager but not to any other director by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement in accordance with the Section 202 of the Companies Act, 2013 other than the following circumstances:-

(a) Where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation and is appointed at such position of the reconstructed company or resulting company;

(b) Where the director resigns from his office;

(c) Where the office of the director is vacated under Section 167(1);

(d) Where the company is being wound up, provided the winding up was due to the negligence or default of the director;

(e) Where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof; and

(f) Where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

Any payment made to a managing or whole-time director or manager in this case shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period.

Answer 2A(ii)

The provisions of 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 of articles shall be filed with the Registrar together with a printed copy of the altered articles within a period of fifteen days in e form MGT-14.

The answers to the sub-questions stated are as follows:

(a) The stated clause is valid, as all the members of a company become bound by any valid alteration made to the Articles of Association whether they voted for or against it [*HariChandana Yoga Deva* v.*Hindustan Co-op. Insurance Society Ltd.*, AIR 1925 Cal.690] Section 14(3) provides that (3) any alteration of the articles registered under sub-section (2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles.

(b) The stated clause is not valid, as any alteration made to the Articles of Association which has the effect of limiting the company's share capital to a fixed amount would have no effect being contrary to the provisions of the Act. [*Muheer Hemant Mafatlal* v. *Mafatlal Industries Ltd.*, (1987) 89 Bom LR 86 (Bom)].

(c) The stated clause is valid, as a company is required to give 21 days' notice for holding general meeting as per the provisions of the Companies Act, 2013. Therefore, in the given case, a company may provide in its articles to give 30 days' notice which is not in contravention to the provisions of the Law and the stringent provisions can be made in the Articles of Association of the company so long as they are not contrary to the provisions of the Act .

Answer 2A(iii)

In terms of provisions of Schedule IV to the Companies Act, 2013 and Regulation 25(3) Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, the independent directors of the company shall hold

at least one meeting without the attendance of non-independent directors and members of management and all the independent directors shall strive to be present at such meeting.

In terms of provisions of Section 149(4) and Rule 4 of Companies (Appointment and Qualifications of Directors) Rules, 2014, every listed public company shall have at least one-third of the total number of directors as independent directors.

Also, the following class or classes of companies shall have at least two directors as independent directors:-

(i) the Public Companies having paid up share capital of Rs. 10 crores or more; or

(ii) the Public Companies having turnover of Rs. 100 crores or more; or

(iii) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crores

In terms of the aforesaid provisions,

(a) In case of Support Limited, since the company is not a listed entity and its paid up capital is less than Rs. 10 crores the question of appointment of independent directors doesn't arise.

(b) In the case of Energies Limited, even if it is not a listed entity but since Energies Limited is a public company, having the turnover of Rs. 200 Crores which attracts the compliance of the provision. Hence, the Energies Ltd. shall appoint at least two directors as independent directors since the turnover of the Company is Rs. 200 crores falls under the category of qualifying limits as stated above.

Answer 2A(iv)

In terms of Section 13 of the Companies Act, 2013, a society can be dissolved if the objects for which it is formed, has been fulfilled. The decision of the Governing Council of the society to dissolve the society can be implemented in the following manner:

For dissolution of a society, alongwith the decision of the Governing Council, a separate resolution is required to be passed at duly convened general meeting of the members and by 3/5th majority of the members present thereat.

Decisions are to be made for the following matters:

(a) Date of dissolution of the society, as whether to dissolve it forthwith or at a later time.

(b) How the disposal of properties and settlement of claims and liabilities is to be made and what actions are to be taken in this regard.

(c) Delegation of authority to the person(s) of the governing body to comply with the decisions accordingly.

In case any Government is a member of the society or has contributed the funds to the society or is otherwise interested therein, then a prior consent of such Government shall also be required for the said purpose.

In case of any difference of opinion or any dispute arises on dissolution of a society relating to adjustment of its affairs, it should be referred to the principal Court of the original civil jurisdiction of the District where the chief building of the society is situated. The District Civil Court has the jurisdiction to decide the dispute of a society.

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

Question 3

(a) The following information are available for Sidhana Ltd. :

	(₹ in Crores)
Paid up Equity Share Capital	*80*
(8 crore equity shares of ₹10 each)	
General Reserve	*60*
Share Premium	*40*
Secured Loans	*65*
(Including cash credit limit of ₹50 Crores from Unity Bank)	

(i) Whether the company is eligible to accept deposit from its members and public ? Calculate the quantum of deposit that can be accepted from its members and public and Deposit Repayment Reserve.

(ii) Can Sidhana Ltd. borrow by way of a term loan of ₹200 Crores from MM Bank ? *(4 marks)*

(b) Prashant is the GM (Secretarial) of Magnificent Housing Finance Ltd. Its paid up capital is ₹51 lakhs. The company took ₹15 lakhs from him under an employment contract.

Prashant is paid a salary of ₹2 lakhs per month. The amount of ₹15 lakhs taken from him is interest bearing. Advise if there is any non-compliance of provisions of Companies Act, 2013. *(4 marks)*

(c) Sona is a director elected by small shareholders of Rupa Ltd. In this matter, with reference to the provisions of Companies Act, 2013 :

(i) Explain whether a director elected by small shareholders is eligible to be appointed as independent director.

(ii) What is the tenure of such director ?

(iii) What is the minimum number of equity shares to be held by Sona ? *(4 marks)*

(d) PQR Textiles Ltd., a listed company covered under the relevant Rules and Section 148 of the Companies Act, 2013 for appointment of Cost Auditors, has appointed CMA Suresh as cost auditor of the company for the financial year 2016-17. Management of the company desires to appoint the same Cost Auditor for the next financial year also. Explain the procedure for reappointment of the same Cost Auditor for the next financial year. *(4 marks)*

OR (Alternate question to Q. No. 3)

Question 3A

Write notes on the following :

(i) NFRA

(ii) Cancellation of share capital

(iii) Deemed prospectus

(iv) Appointment of directors by Tribunal. *(4 marks each)*

Answer 3(a)

As per Section 76 of the Companies Act, 2013 certain public companies can accept the deposits from public i.e. from the persons other than its members subject to compliance with the requirements provided in sub-section (2) of section 73 and subject to such rules as the Central Government may prescribe, in consultation with the Reserve Bank of India.

However, such a company shall be required to obtain the rating (including its net worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency for informing the public the rating given to the company at the time of invitation of deposits from the public which ensures adequate safety and the rating shall be obtained for every year during the tenure of deposits.

So also, every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed.

Rule 13 of the Companies (Acceptance of Deposits) Rules, 2014 provides for the Maintenance of liquid assets and creation of deposit repayment reserve account as follows -

Every company referred to in sub-section (2) of section 73 and every eligible company shall on or before the 30th day of April of each year deposit the sum as specified in clause (c) of the said sub-section with any scheduled bank and the amount so deposited shall not be utilised for any purpose other than for the repayment of deposits:

Provided that the amount remaining deposited shall not at any time fall below fifteen per cent. of the amount of deposits maturing, until the end of the current financial year and the next financial year.

Rule 3(4) (a) of the Companies (Acceptance of Deposits) Rules, 2014 as amended by the Companies (Acceptance of Deposits) Second Amendment Rules, 2015 provides that –

No eligible company shall accept or renew any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds ten per cent of the aggregate of the Paid-up share capital, free reserves and securities premium account of the company.

Rule 3(4) (b) of the Companies (Acceptance of Deposits) Rules, 2014 as amended by the Companies (Acceptance of Deposits) Second Amendment Rules, 2015 provides that –

No eligible company shall accept or renew any other deposit, if the amount of such deposit together with the amount of such other deposits, other than the deposit referred to in clause (a), outstanding on the date of acceptance or renewal exceeds twenty-five per cent. of aggregate of the Paid-up share capital, free reserves and securities premium account of the company.

(i) The company "Sidhana Ltd." is eligible to accept deposit from its members and public since it is a public company having its net worth of Rs. 180 Crores which is more than the qualifying limits as prescribed in section 76 of the Companies Act, 2013.

However, the company can accept the deposit from its members upto the limit of Rs. 18 Crores assuming that no outstanding deposits from the members are in existence as on the date of acceptance of such deposits. So also, the company can accept the deposit from the public upto the limit of Rs. 45 Crores assuming that no outstanding deposits from the public are in existence as on the date of acceptance of such deposits.

The company shall on or before the 30th day of April of each year deposit the sum as specified in clause (c) of the sub-section (2) of section 73 of the Companies Act, 2013 with any scheduled bank and the amount so deposited shall not be utilised for any purpose other than for the repayment of deposits. Also, ensure that the amount remaining deposited shall not at any time fall below fifteen per cent of the amount of deposits maturing, until the end of the current financial year and the next financial year.

(ii) Sidhana Ltd. can borrow by way of term loan upto Rs. 125 Crores from MM Bank by passing a board resolution. However, it can borrow Rs. 200 Crores by way of a term loan from MM Bank subject to the passing of special resolution by the members of the company as required under section 180(1)(c) of the Companies Act, 2013.

Answer 3(b)

In terms of proviso to sub-section (1) of Section 73 of the Companies Act, 2013, the prohibition on acceptance of deposits from public is not applicable to a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf. Further, the Companies (Acceptance of Deposits) Rules, 2014 are also not applicable on a banking company, a non-banking financial company, a housing finance company registered with the National Housing Bank, and a company specified by the Central Govt. under the proviso to sub-section (1) of Section 73 of the Companies Act, 2013.

In the given case, Mr. Prashant is the General Manager (Secretarial) of a Housing Finance company, which is exempt as per the aforesaid provisions. Hence, there is no non-compliance of the provisions of Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014.

Answer 3(c)

Section 151 of the Companies Act, 2013 provides that the Appointment of director elected by small shareholders may be made in a listed company. A listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.

Explanation.—For the purposes of this section 'small shareholders' means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

(i) The Director elected by small shareholders is eligible to be appointed as an independent director. Rule 7(4) of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the director elected by small shareholders shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.

(ii) In terms of Section 151 of the Companies Act, 2013 read with Rule 7(5)(b) of the Companies (Appointments and Qualification of Directors) Rules 2014, director's tenure as small shareholders' director shall not exceed a period of three consecutive years.

(iii) There is no provision in the Companies Act, 2013 which prescribes the minimum number equity shares to be held by the director elected by the small shareholders. Hence, Ms. Sona, need not hold any number of equity shares for being elected as director by the small shareholders. However, she should not hold the shares of nominal value of more than twenty thousand rupees or such other sum as may be prescribed. (Section 151 of the Companies Act, 2013)

Answer 3(d)

Procedure for the re-appointment of the Cost Auditor of PQR Textiles Ltd., a listed company covered under the relevant rule i.e. Rule 3 and 4 of the Companies (Cost Records and Audit) Rules, 2014 and section 148 of the Companies Act, 2013 is as under:-

(1) The company shall within one hundred and eighty days of the commencement of every financial year, appoint a cost auditor.

(2) The audit committee, if constituted by the company shall ensure that the cost auditor is free from any dis- qualifications.

(3) The audit committee shall obtain a certificate from the cost auditor certifying his independence.

(4) Every such company shall inform the cost auditor concerned of his or its appointment as such and file a notice of such appointment with the Central Government within a period of thirty days of the Board meeting in which such appointment is made or within a period of one hundred and eighty days of the commencement of the financial year, whichever is earlier, through electronic mode, in form CRA-2, along with the fee as specified in Companies (Registration Offices and Fees) Rules, 2014.

(5) On filing the application, the same shall be deemed to be approved by the Central Government, unless contrary is heard within 30 days from the date of filing of such application.

(6) If within thirty days from the date of filing of such application, the Central Government directs the company to re-submit the said application with additional information the period of thirty days for deemed approval of the Central Government shall be counted from the date of re-submission by the company.

(7) After the expiry of thirty days, the company shall issue formal letter of appointment to the cost auditor.

(8) The audit committee, if constituted by the company recommends to the Board a suitable remuneration to be paid to the cost auditor. In the case of those companies which are not required to constitute an audit committee, the Board shall consider and approve the remuneration of the Cost Auditor which shall be ratified by shareholders subsequently.

(9) Every cost auditor appointed as such shall continue in such capacity till the expiry of one hundred and eighty days from the closure of the financial year or till he submits the cost audit report, for the financial year for which he has been appointed.

Answer 3A(i)

NFRA

Section 132 empowers the Central Government to constitute a National Financial Reporting Authority to provide for matters relating to accounting and auditing standards under the Companies Act, 2013.

Functions of National Financial Reporting Authority

The National Financial Reporting Authority shall—

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

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

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

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

When NFRA initiates any such investigation, no other institute or body shall initiate or continue any proceedings in such matters of misconduct.

Powers of National Financial Reporting Authority

The National Financial Reporting Authority shall—

(a) have the power to investigate, either suo moto or on a reference made to it by

the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949:

(b) have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(i) discovery and production of books of account and other documents, at such place and at such time as may be specified by the National Financial Reporting Authority;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person referred to in clause (b) at any place;

(iv) issuing commissions for examination of witnesses or documents;

(c) where professional or other misconduct is proved, have the power to make order for—

(A) imposing penalty of—

(I) not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and

(II) not less than ten lakh rupees, but which may extend to ten times of the fees received, in case of firms;

(B) debarring the member or the firm from engaging himself or itself from practice as member of the Institute of Chartered Accountant of India referred to in clause (e) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 for a minimum period of six months or for such higher period not exceeding ten years as may be decided by the National Financial Reporting Authority.

Answer 3A(ii)

Cancellation of share capital

According to Section 61(1)(e) of the Companies Act, 2013, a limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to cancel its shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

In terms of Section 61(2) of the Act such cancellation of shares shall not be deemed to be a reduction of share capital.

Here the cancellation of shares means cancellation of shares of a particular unissued class of shares and not the paid up share capital.

Section 64 of the Act makes it obligatory on the part of a limited company having share capital, which has cancelled any share capital, to give notice thereof to the Registrar, within thirty days of the passing of the resolution, specifying the shares cancelled.

Answer 3A(iii)

Deemed Prospectus

Under section 25(1) of the Companies Act, 2013, when a company allots or agrees to allot any securities of the company with a view to all or any of those securities being offered for sale to the public, any document by which the offer for sale to the public is made, shall, for all purposes, be deemed to be a prospectus issued by the company.

In such cases, all enactments and rules of law as to the contents of prospectus and as to liability in respect of mis-statements, in and omissions from, prospectus, or otherwise relating to prospectus, shall apply with the modifications specified in the sub-sections (3) and (4) shall have effect accordingly, as if the securities had been offered to the public for subscription and as if persons accepting the offer in respect of any securities were subscribers for those securities, but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

Section 25(2) provides that for the purposes of this Act, it shall unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, securities was made with a view to securities being offered for sale to the public if it is shown:

(A) that an offer of securities or of any of them for sale to the public was made within six months after the allotment or agreement to allot, or

(B) that at the date when the offer was made, the whole consideration to be received by the company in respect of the securities had not been received by it.

Answer 3A(iv)

Appointment of Directors by Tribunal

If, on any application made under section 241, the Tribunal is of the opinion—

(a) that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

While giving order on an application made under section 241, i.e., for relief in cases of oppression, the Tribunal may provide order for appointment of such numbers of persons as directors of the company and ask them to report to the Tribunal on matters as the Tribunal may direct. [Section 242(2)(k)]

The directors, so appointed, may or may not be the members of the company.

For the purpose of reckoning two-thirds or any other proportion of the total number of directors of the company, any director or directors appointed by the Tribunal shall not be taken into account.

Such director or directors shall not liable to determination by retirement of directors by rotation.

They can be removed by the Tribunal at any time and other persons can be appointed by it in their place.

Where the directors have been appointed by the Tribunal, it may also issue such directions to the company, as it may consider necessary or appropriate in regard to the affairs.

Question 4

(a) Provisions with reference to Related Party Transactions under SEBI (LODR) Regulations 2015 are wider in scope than Section 188 of the Companies Act, 2013 and the rules prescribed thereunder. Discuss. (8 marks)

(b) Member of a company, after exercising his vote by remote e-voting on all the resolutions included in the Notice of the Annual General Meeting during the permitted e-voting period and after sending a proxy to attend the meeting, attends the meeting himself and demands to vote on the resolutions at the meeting.

As Secretary of the company how will you handle that situation at the meeting? (4 marks)

(c) Draft specimen of a resolution appointing auditor of the company to fill vacancy caused by resignation. (4 marks)

Answer 4(a)

As per the provisions contained in section 188, all types of Related Party Transactions (RPTs) prescribed under clauses (a) to (g) of sub section (1) must be approved by the board of directors of the company.

This provision appeared to enable the management to enter into any RPT with a related party without having to seek any approval but only that of the board of directors of the company.

Further, the section provides the following relaxations:

- nothing in section 188(1) shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.
- the requirement of passing the resolution under first proviso to section 188(1) shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.]

SEBI notified the SEBI (Listing Obligations and disclosure Requirements) regulations 2015 on 2nd September 2015. Provisions of these regulations are applicable to all listed companies from 2.12.2015. Listed companies are bound to comply with the stipulations contained in these regulations.

Regulation 23 of these regulations provides that all RPTs require prior approval of

the Audit committee of the company. It also states that any transaction with a related party should be considered material if the transaction(s) to be entered into individually or taken together with all the previous transactions during a financial year exceeds 10% of the annual consolidated turnover of the listed company as per the last audited financial statements of that company. Any RPT which comes within the 'material' definition should be approved the members of the company.

Resolution seeking the approval of members should make complete disclosure on the impact of the RPT and the details of benefits that would accrue to the directors and their relatives as a consequence of entering into the RPT should be disclosed in the explanatory statement on every resolution seeking members' approval. Regulation 23(4) specifies that related parties should abstain from voting on the resolution for approval of the RPT whether the entity is related party to the particular transaction or not.

As such promoters, directors and their relatives interested in any resolution for approval of RPT should not exercise their votes on such resolutions placed for member's approval.

Regulation 23(3) stipulates that the Audit Committee may grant omnibus approval for RPTs proposed to be entered into by the company, subject to the following conditions:

(1) Audit committee should lay down the criteria for granting the omnibus approval in line with the policy on related party transactions of the listed entity and such approval should be applicable only for transaction of repetitive nature which are on an arm's length basis.

(2) Audit committee should satisfy itself regarding the need for such omnibus approval and that such approval is in the interest of the listed entity;

(3) Omnibus approval should specify the name(s) of the related party, nature of transaction, period of transaction, maximum amount of transactions that shall be entered into, (ii) the indicative base price / current contracted price and the formula for variation in the price if any; and (iii) such other conditions as the audit committee may deem fit.

(4) Audit committee should ensure that where omnibus approval could not be foreseen due to non-availability of the required information, the maximum value of such transactions should not exceed rupees one crore per transaction and in such cases it may grant omnibus approval for such transactions.

(5) The audit committee should review the details of related party transactions once in a every quarter pursuant to each of the omnibus approval given.

(6) Such approvals will be valid for a maximum period of one year and shall require fresh approval after the expiry of such period.

From the above, it could be seen that SEBI regulations are wider in scope in controlling and regulating all the related party transactions so that outside shareholders and other stakeholder's interest are taken care of and the persons from the management do not take any undue advantage of their position.

Answer 4(b)

In terms of 2nd proviso to Rule 20(4)(vii) of Companies (Management and Administration) Rules, 2014 a member may participate in the general meeting even after

exercising his right to vote through remote e-voting but shall not be allowed to vote again;

In case, a member of a company, after exercising his vote by remote e-Voting on all the resolutions included in the notice of the AGM, during the permitted e-voting period and after sending a proxy to attend the meeting, he attends himself and demands to vote on the resolutions at the meeting, I will handle such a situation in the following manner.

As Secretary of the company, I will request the chairman to inform the shareholder that if he has already exercised his voting right by remote e-voting, he will not be entitled to vote again in the AGM. E-Voting portal will not allow the shareholder to cast his vote again or change the votes casted by him already during the period when remote e-voting was permitted even though he may attend and participate in the meeting.

So also, in case if it is required then I would request the Chairman of the company to indicate the note in the advertisement published in this regard which states that a Member may participate in the General Meeting even after exercising his right to vote through Remote e-voting but shall not be entitled to vote again which was mentioned in the said advertisement in accordance with paragraph 8.5.1 (g) (ii).

Answer 4(c)

ORDINARY RESOLUTION FOR APPOINTMENT OF AN AUDITOR TO FILL THE VACANCY CAUSED BY RESIGNATION

"RESOLVED THAT pursuant to sub -section (8) of section 139 of Companies Act, 2013, M/s. ABC & Co, Chartered Accountants, New Delhi, (Firm Registration No. 022222N) be and are hereby appointed as the statutory auditors of the company to fill vacancy caused by resignation of M/s. PSR, Chartered Accountants, Kanpur,(Firm Registration No. 000888C) present auditors of the company, to hold the office from the date of this meeting until the conclusion of the ensuing/ next Annual General Meeting of the Company on such remuneration and out of pocket expenses as may be decided mutually by the Mr._____, Director of the company and the auditors.

RESOLVED FURTHER THAT Mr. Arun director, be and is hereby, authorized to do all such acts, deeds and things which may be deemed necessary and expedient to give effect to the above resolution."

Explanatory statement:

M/s PSR & Co., the existing Auditors have submitted their resignation letter citing personal reasons. Section 139(8) lays down that where vacancy in the office of an auditor is caused by resignation of the existing auditor, the vacancy shall be filled by the Board of directors and the appointment made by the Board of Directors and it shall be approved in a general meeting within 3 months of the recommendation of the Board.

The letter of resignation of M/s. PSR & Co., Chartered Accountants, may be inspected at the registered office of the company at ……..during the business hours on any working day.

None of the directors is concerned or interested in the proposed resolution.

Question 5

(a) Smriti Technologies Ltd. was incorporated before 9 years. It is being observed that the net worth is eroded by its accumulated losses as at 31-03-2017. However, in relation to general meeting of the company, examine the powers of the Chairperson to adjourn the meeting suo moto. Referring to the provisions of the Companies Act, 2013, answer the following :

(i) Whether a fresh notice is required to be given for adjourned meeting ?

(ii) Whether a new business not stated in the original agenda can be transacted at the adjourned meeting ?

(iii) What consequences follow in case the meeting is a requisitioned meeting and the required quorum is not present at the scheduled date and time ? *(4 marks)*

(b) Enumerate the conditions specified under Rule 4 and Rule 5 of the Nidhi Rules 2014 for registration of a Nidhi Company under the provisions of Companies Act, 2013. *(4 marks)*

(c) Tiny Products Ltd. is quoted in Mumbai Stock Exchange. Before 3 years, its name was changed from Small Products Ltd. It proposes to issue 10 lakh sweat equity shares of the company to a non-executive director for providing technical know how. The CFO of the company has approached you, being the Company Secretary, how to determine the issue price. Advise CFO. *(4 marks)*

(d) Identify the companies which cannot be removed by Registrar of Companies from its Register. *(4 marks)*

Answer 5(a)

A duly convened meeting should not be adjourned arbitrarily by the chairperson. The chairperson may adjourn a meeting with the consent of the members and should adjourn a meeting if so decided by the members. The chairperson, therefore cannot suo motu adjourn meeting.

If a meeting is adjourned sine die or for a period of 30 days or more, a notice of the adjourned meeting should be given in accordance with the provisions of the Act. If a meeting is adjourned for a period of less than 30 days, the company should give not less than 3 day's notice specifying day, date, time and venue of the meeting, to the members either individually or by publishing an advertisement in the newspaper which is in circulation at the place where the registered office of the company is situated. (Proviso to section 103(2) of the Companies Act, 2013)

If a meeting, other than a requisitioned meeting stands adjourned for want of Quorum, the adjourned meeting should be held on the same day, in the next week at the same time and place or on such other day and at such other time and place as may be decided by the Board.

(i) Fresh notice, therefore, for the adjourned meeting is not required as the meeting is in continuance of the original scheduled meeting, in accordance with the above provisions. Such a notice is required only when the meeting is adjourned

sine die or for 30 days or more for want of quorum or any other reason like the additional time required for the matters to be transacted at such meeting assuming that the Smriti Technologies Ltd. is an unlisted public company.

(ii) As the adjourned meeting is the continuance of the original meeting for want of unfinished agenda or quorum, no new business can be transacted. For new business proper notice should be given for another meeting.

(iii) If within half an hour from the time appointed for holding a requisitioned meeting, a quorum is not present, the meeting stands cancelled/dissolved. (Section 103(2)(b) of the Companies Act, 2013)

The fact of erosion of net worth by its accumulated losses is of no relevance here.

Answer 5(b)

As per section 406 of the Companies Act, 2013, a company which desires to be incorporated as Nidhi Company should comply with the rules prescribed for that purpose.

Rule 4 and 5 of the Nidhi Rules, 2014 prescribed the conditions for registration of a company as a Nidhi company.

Rule 4 states that a Nidhi Company shall be a public company. It must have a minimum paid up equity share capital of five lakh rupees. The Nidhi Company shall have only one object in its memorandum and that should be cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit. Every Company incorporated as a Nidhi company shall have the last words 'NIDHI LIMITED' as part of its name. .

Rule 5 states that, every Nidhi shall, within a period of one year from the commencement of these rules, ensure the following:

(i) That it has not less than two hundred members.

(ii) Net Owned Funds of ten lakh rupees or more.

(iii) Unencumbered Term Deposits of not less than ten per cent of the outstanding deposits as specified in Rule 14.

(iv) Ratio of Net Owned Funds to deposits of not more than 1:20.

The process of incorporation of a Nidhi company is same as of incorporation of a public company limited by shares.

Answer 5(c)

The Company can issue sweat equity shares to a non-executive director for providing technical knowhow provided that the paid up share capital after issue of 10 lakh sweat equity shares does not exceed the authorized capital of the company. The price of the sweat equity shares to be issued shall not be less than the higher of the following:

(i) The average of the weekly high and low of the closing prices of the equity shares of the company during the last six months preceding the relevant date. Or

(ii) The average of the weekly high and low of the closing prices of the related equity shares of the company during the two weeks preceding the relevant date.

The relevant date for the purpose of issue of sweat equity shares means the date which is 30 days prior to the date on which the general meeting is convened to consider issue of sweat equity shares.

The company shall not issue sweat equity shares more than 15% of the paid up share capital of the company in a year. However, such percentage is subject to the maximum limit of the issue value of Rs. 5 Crores.

So also, the issuance of the sweat equity shares in the Company shall not exceed twenty five percent, of the paid-up capital of the company at any time.

The CFO of Tiny products Ltd. is to be informed accordingly.

The fact of change of name of the company is of no relevance here since it does not impact the pricing of the shares to be issued. So also, the said corporate action was taken before the 3 years which is not an immediate event which can impact or affect the valuation of shares at present.

Answer 5(d)

Following categories of companies shall not be removed from the register of companies under Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 in accordance with the said Rule and Rule 4 of the said rules.

(a) listed companies;

(b) companies delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;

(c) vanishing companies;

(d) companies where inspection or investigation is ordered and being carried out or actions still pending or were completed but prosecutions arising out of such inspection are still pending in the Court;

(e) companies where notices under section 234 of the Companies Act, 1956 or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not been submitted or follow up of instructions on report is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;

(f) companies against which any prosecution for an offence is pending in any court;

(g) companies whose application for compounding is pending before the competent authority for offences committed by the company or any of its officers in default;

(h) companies which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;

(i) companies having charges which are pending for satisfaction; and

(j) companies registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013.

Question 6

(a) What do you mean by Class Action Suit ? Discuss with reference to eligibility criteria for class action, nature of relief and effect of Tribunal's order. (4 marks)

(b) Sarath Enterprises Ltd. having obtained certificate dated 1-5-2015 from the RoC Chennai, granting the status of 'Dormant Company' desires to restore its business. Advise the company to get the dormant status cancelled to restore its business. (4 marks)

(c) Vinodh Ltd. paid the last installment of the term loan with interest on 25th January, 2017 to its bank and requested the bank to issue 'No Dues Certificate' confirming total repayment of the term loan of ₹ 450 lakhs availed from the bank in 2010. However, the bank had to verify the accounts of the company before issuing the letter confirming repayment of all the dues to the bank. In that process the company could get the bank's letter only on 3-3-2017. Bank's letter mentioning 25th January, 2017 as the date on which the company cleared all the dues of the bank and that the charge created to secure the term loan could be treated as satisfied on that date. Since more than 30 days has lapsed after repayment of the term loan, company is required to apply to the Central Government to condone the delay in filing satisfaction of the charge. You, being the practicing Secretary, the company seeks your advice for getting the Central Government's order condoning the delay.

Advise examining the provisions of Companies Act, 2013 and Rules. (4 marks)

(d) Whether the following persons who are qualified company secretaries, can be issued Certificate of Practice ?

(i) An advocate holding certificate of practice issued by Bar Council of Rajasthan.

(ii) An elected member of Lok Sabha from Delhi.

(iii) A person who is blind.

(iv) A farm owner engages in agricultural activities with the help of hired labour. (4 marks)

Answer 6(a)

Section 245 of the Companies Act, 2013 makes provision for class action by investors. The term 'investors' include shareholders, deposit holders and any class of security holders of the company.

Section 245 permits a representative of any class of investors to file a suit before the National Company Law Tribunal for relief.

In terms of section 245 (1), Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) of the section may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the reliefs specified.

Eligibility criteria for class action

Sub-section (3) (i) of Section 245 of the Companies Act, 2013 provides the requisite number of members provided in sub-section (1) shall be as under:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) in the case of a company not having a share capital, not less than one-fifth of the total number of its members.

(ii) The requisite number of depositors provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

Nature of Relief

The order by Tribunal may relate-

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company's memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

Effect

Any order passed by NCLT shall be binding on the company and all its members, depositors, auditors, consultants and advisors or any other person associated with the company. Non-compliance of the order by the company shall be punishable with fine which shall not be less than Rs. 5 Lakhs but which may extend to Rs. 25 Lakhs and every officer of the company who is in default shall be punishable with imprisonment for a term upto 3 years and with fine ranging from Rs. 25,000 to Rs. 1 lakh.

Answer 6(b)

Sarath Enterprises Ltd. should make an application to registrar of companies, Chennai , under section 455 of the companies Act,2013 in form MSC-4 accompanied by a return in Form MSC-3 for the current financial year for obtaining the status of "Active Company' in the same financial year.

On receipt of application, the registrar if satisfied with the information furnished in the application, and in the return in MSC-3 will issue a certificate in form MSC-5 allowing the status of an active company to the applicant.

On receipt of this certificate, the company can restore its business duly complying with all the requirements of law applicable to an active company.

Answer 6(c)

Vinodh Limited,Completed repayment of the entire term loan of Rs. 450 lakhs to its banks and cleared all the dues to the bank on 25.1.2017. However, the bank issued letter on 03.03.2017 confirming repayment of the loan mentioning 25.1.2017 as the date on which charge created to secure the loan could be treated as satisfied.

Since satisfaction of the charge has to be filed within 30 days of repayment of the loan and clearing of the charge, there is delay in filing satisfaction of charge on account of which the company has to get the delay condoned by the Central Government (power of central government delegated to regional director).

The Company shall file e-form CHG-4 with additional fees of delay and on the challan of e-form it shall be mentioned that company has made delay in filing the form. Make an application for condonation of delay to regional director. The form CHG-4 shall be approval only after condonation of delay.

The company should make an application in Form CHG-8 to regional director explaining the cause for delay in getting the bank's letter confirming repayment of the bank's dues in respect of the charge, paying the applicable fees.

Central Government/ regional director on being satisfied that delay is due to bank's procedure to verify the company's loan account details before issuing the No Dues Certificate, and not due to the company's fault, the regional director may pass an order extending the time for filing satisfaction of charge.

The order passed by the Central Government under section 87(1) of the Companies Act, 2013, should be filed with the Registrar in Form INC 28 along with the payment of applicable fees as per the conditions stipulated in the said order.

Answer 6(d)

(i) An advocate holding certificate of practice issued by the Bar Council of Rajasthan is not eligible to get the certificate of practicing company secretary from ICSI.

(ii) A member of ICSI who is holding public elective office as member of parliament from Delhi may be issued the COP as council of ICSI has granted permission generally.

(iii) There is no bar for a qualified company secretary who is blind and/ or disabled to obtain certificate of practice and perform role of a practicing company secretary. Hence, the Certificate of Practice will be issued to such person subject to the fulfilment of other conditions in this regard.

(iv) A member of ICSI who is a farm owner engaged in agricultural activities with the help of hired labour is required to obtain specific and prior approval of the executive committee of the council of ICSI for obtaining the COP.

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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) Mr. Alok Kumar, retired Chairman of South Bank Ltd., is recently appointed as Independent Director of Trans Power Limited, a Listed Company for the period of 3 years. While submitting the declaration under section 149 of the Companies Act, 2013, he asked about the requirements of Secretarial Audit, periodicity of the Secretarial Audit Report and its reporting requirements. Prepare the brief note.

(b) You are recently appointed as Secretarial Auditor of Alloy Tools Limited, an unlisted public company for Secretarial Audit for financial year 2017-18. What are the specific events / actions having major bearing on the company's affairs in pursuance of the applicable laws, rules, regulations, guidelines, standards etc. are required to be reported while preparing Secretarial Audit Report.

(c) During the Secretarial Audit, it was pointed out that Shri S.R. Upadhay, the shareholder of the Company, holds shares as nominee of Bhaumik & Co. LLP, a Limited Liability Partnership Firm. What are the check points to be observed to check the particulars of Beneficial Interest ?

(d) How would you identify, check and verify, the compliance of applicable statutory provisions adherence to good corporate governance during the Secretarial Audit of S.S. Telecom Company Ltd., an unlisted public company.

(e) The Board of Directors of MCM Ltd. has appointed M/s Famine Supply Ltd. as contractor to supply the meal packages to its workers of the Steel Plant, through resolution passed by circulation. The accent of Directors was received within 3 days except Shri S. S. Singh, the non-executive Director. He has given some observations on this appointment. Being a Company Secretary, what would you do to record this resolution? (5 marks each)

OR (Alternative question to Q. No. 1)

Question 1A

(i) Shriram Power Limited has signed a Power Supply Agreement with Government of Maharashtra. While applying for Environment Clearance. the Ministry of Environment and Forest has issued the instruction to expend the fund for Corporate Social Responsibility (CSR). As a Company Secretary, write a brief note on applicability of provisions of CSR and also specify the eligibility criteria for carrying out the CSR activity by an entity. (5 marks)

(ii) With respect to Secretarial Standards on General Meeting (SS 2), prepare the check points of Secretarial Audit for followings

(1) Withdrawal of Resolution

(2) Rescinding of Resolution

(3) Modifications to Resolution. (5 marks)

(iii) While conducting Secretarial Audit, how would you verify that the constitution of Board of Directors is proper and well balanced ? (5 marks)

(iv) The Board of Directors of ABC Ltd., an unlisted public company, has decided to issue and allot the 500000 Equity Shares of Rs. l0 each to XYZ Housing Finance Ltd. at a premium of Rs. 30/- each. What are the check points to be included in the-explanatory statement to be annexed to the notice of General Meeting pursuant to section 102 of the Companies Act, 2013 ? (5 marks)

(v) TMT Lab (lndia) Limited invested Rs. 240 Crore in various mutual funds. Though this investment was made through TMT CPF Trust and the investments are not hold in the name of the Company. Prepare the check list with respect to Register of Investments while conducting the secretarial audit of TMT Lab (India) Limited. (5 mark)

Answer 1(a)

Requirement

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

– Every listed company ;

– Every public company having a paid-up share capital of fifty crore rupees or more; and

– Every public company having a turnover of two hundred fifty crore rupees or more

Periodicity

It is recommendatory that the Secretarial Audit to be performed periodically and report of the Secretarial Audit to be placed before the board at a regular intervals. This helps the company in initiating corrective measures in time and strengthening the compliance mechanism and processes.

The Secretarial Audit report shall be given according to the financial year of the company.

Reporting Requirement

The Secretarial Audit Report shall be in Form No. MR-3 addressed to the members. The qualification / reservation or adverse remarks, if any, should be stated by the Secretarial Auditor at the relevant place in his report in bold type or in italics.

As per Section 204(1) the Secretarial Audit report shall be annexed with the Board's report of the Company made under section 134(3) of the Companies Act, 2013.

The Board of Directors, in their report made in terms of sub-section (3) of Section 134, shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report under sub-section (1) of Section 204 of the Companies Act, 2013.

Answer 1(b)

The Secretarial Audit Report shall include the details of specific events/actions having a major bearing on the company's affairs in pursuance of the applicable laws, rules, regulations, guidelines, standards, etc. These are few points that would be incorporated while preparing the secretarial Audit Report:

(i) Public/Right/Preferential issue of shares/debentures/sweat equity, etc.

(ii) Redemption/buy-back of securities

(iii) Major decisions taken by the members in pursuance to Section 180 of the Companies Act, 2013

(iv) Merger/amalgamation/reconstruction, takeovers etc.

(v) Foreign technical collaborations, joint ventures

(vi) Board Restructuring and changes in top management.

Answer 1(c)

As per Rule (9) of the Companies (Management and Administration) Rules, 2014, the following check points should be observed for checking the particulars of Beneficial Interest:

Check whether

– The registered owner has filed a declaration in Form No.MGT.4, within a period of thirty days from the date on which his name is entered in the register of members of such company:

– The beneficial owner has filed a declaration for disclosing his interest in Form No. MGT.5, within thirty days after acquiring such beneficial interest in the shares of the company:

– The company has made a note of such declaration in the register of members and had filed, within a period of thirty days from the date of receipt of declaration by it, a return in Form No.MGT.6 with the Registrar in respect of such declaration with fee.

Answer 1(d)

Secretarial Audit is a process to check compliance with the provisions of all laws applicable specifically to the company and rules/regulations/procedures; adherence to good governance practices with regard to the systems and processes of seeking and obtaining approvals of the Board and/or shareholders, as may be necessary, for the

business and other activities of the company, carrying out activities in a lawful manner and the maintenance of minutes and records relating to such approvals or decisions and implementation.

Secretarial Auditor shall examine the books, papers, minute books, forms and returns filed and other records maintained by S.S. Telecom Company Ltd. According to the provisions of :

(1) The Companies Act, 2013 and the rules made there under;

(2) The Securities Contracts (Regulation) Act, 1956 and the rules made there under;

(3) The Depositories Act, 1996 and the Regulations and Bye-laws framed there under;

(4) The Foreign Exchange Management Act, 1999 and the Rules and Regulations made there under to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

(5) Other laws as may be applicable specifically to the company, these may be

- TRAI Act,1997, Rules, regulations and Bye-laws framed there under;
- India Telegraph Act
- The Indian Wireless Telegraph Act, 1933 (if applicable)'
- Other applicable laws

(6) Secretarial Standards , issued by ICSI

(7) Constitution of Board of Directors with proper balance of Executive Directors, Non-Executive Directors and Independent Directors.

(8) Recording of the Majority decision is carried through while the dissenting members' views are captured and recorded as part of the minutes.

(9) Reporting on adequate systems and processes in the company.

Answer 1(e)

As per Section 175 of the Companies Act, 2013 read with para 6.4 and 7.2 of Secretarial Standard-1, the following procedure shall be followed to record the Resolution:

The resolutions passed by circulation shall be noted at the next Board meeting and the text thereof with dissent or abstention, if any, shall be recorded in the minutes of such Meeting including the fact that the Interest Director, if any did not vote on the resolution.

Also as per sub para (k) of para 7.2.2.1, contents of minutes shall also include the views of Directors, particularly, the Independent Director, if specifically insisted upon by such director, provided these, in the opinion of the chairman, are not defamatory of any person, not irrelevant or immaterial to the proceedings or not detrimental to the interest of the company.

Answer 1(A)(i)

Applicability

As per section 135 of the Companies Act, 2013, every company having

- net worth of rupees five hundred crore or more, or

– turnover of rupees one thousand crore or more, or

– a net profit of rupees five crore or more

during any financial year shall constitute a Corporate Social Responsibility Committee of the Board. The committee shall consist of three or more directors, out of which at least one director shall be an independent director.

The Board of a company may decide to undertake its CSR activities approved by the CSR Committee, through

(a) a company established under section 8 of the Act or a registered trust or a registered society, established by the company, either singly or along with any other company, or

(b) a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government or any entity established under the Act of Parliament or a State legislature.

Provided that, if, the Board of a company decides to undertake its CSR activities through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified in this sub-rule, such company or trust or society shall have an established track record of three years in undertaking similar programs or projects; and the company has specified the projects or programs to be undertaken, the modalities of utilisation of funds of such projects and programs and the monitoring and reporting mechanism.

Answer 1(A)(ii)

(1) Withdrawal of Resolutions (SS-2 Para 10)

According to the Para 10 of the Secretarial Standard 2 on General Meeting following will be check points for Withdrawal of Resolutions

Check that no Resolution for items of business which were likely to affect the market price of the securities of the company had been withdrawn. However, any resolution proposed for consideration through e-voting shall not be withdrawn.

(2) Rescinding of Resolutions (SS-2 Para 11)

According to the Para 11 of the Secretarial Standard 2 on General Meeting following will be check points for Rescinding of Resolutions

Check that no Resolution passed at a Meeting has been rescinded subsequently without a Resolution passed at a subsequent meeting.

(3) Modifications to Resolutions (SS-2 Para 12)

According to the Para 12 of the Secretarial Standard 2 on General Meeting following will be check points for Modifications to Resolutions

Check that no modification to any proposed text of the Resolution is made if it in any way alters the substance of the Resolution as set out in the Notice. Grammatical, clerical, factual and typographical errors, if any, may be corrected as deemed fit by the Chairman.

Check that no modification is made to any Resolution which has already been put to vote by Remote e-voting before the Meeting

Answer 1(A)(iii)

While conducting the Secretarial Audit, the Constitution of the Board shall be checked whether:

1. Constitution is as per requirement of Section 149 of the Companies Act,2013
2. In case of Listed Company, Constitution of board shall be as per SEBI (LODR) Regulations with an optimum combination of Executive and Non Executive Director, Independent Director.
3. Constitution is as per provisions of Article of Association of the Company
4. Women Director has been inducted, if required
5. Independent Director has been inducted, if required
6. At least one Director of the company is Resident Director as per Section 149 of Companies Act, 2013.
7. Retire by Rotation of Director has been done in correct manner as per Section 152 of Companies Act, 2013)
8. Compliance relating to Nominee Director, Alternate Director and Additional Director has been made as per Section 161 of Companies Act, 2013.

If above conditions are fulfilled, it could be considered that the constitution of the Board of Directors is proper and balanced.

Answer 1(A)(iv)

The company shall make the following disclosures in the explanatory statement to be annexed to the notice of the general meeting pursuant to Section 102 of the Act:

(i) the objects of the issue;

(ii) the total number of shares or other securities to be issued;

(iii) the price or price band at/within which the allotment is proposed;

(iv) basis on which the price has been arrived at along with report of the registered valuer;

(v) relevant date with reference to which the price has been arrived at;

(vi) the class or classes of persons to whom the allotment is proposed to be made;

(vii) intention of promoters, directors or key managerial personnel to subscribe to the offer;

(viii) the proposed time within which the allotment shall be completed;

(ix) the names of the proposed allottees and the percentage of post preferential offer capital that may be held by them;

(x) the change in control, if any, in the company that would occur consequent to the preferential offer;

(xi) the number of persons to whom allotment on preferential basis have already been made during the year, in terms of number of securities as well as price. The pre issue and post issue pattern for shareholding shall be in format prescribed under Rule 12 of the Companies (Share Capital and Debentures) Rules, 2014;

(xii) the justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer;

(xiii) the pre and post issue shareholding pattern of the company.

(xiv) disclosure of interest of the Directors and KMPs

Answer 1(A)(v)

According to Section 187 of the Companies Act, 2013 read with rule 14 of Companies (meeting of board and its power) Rules, 2014

Check whether

(1) A register of investment not held in the name of the company is maintained as per Form MBP-3, in accordance with the Companies (Meetings of Board and its Powers) Rules, 2014.

(2) The entries in the register are made chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name are to be entered.

(3) The company has also recorded the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.

(4) The company has also recorded when such investments are held in a third party's name for the time being or otherwise.

(5) The register is maintained at the registered office of the company and is preserved permanently.

(6) The custody of the register is with company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.

(7) The entries in the register are authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

Part – B

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

Question 2

(a) Elaborate the environmental, economic and social factors, which are to be recognized while setting up an Industry. *(5 marks)*

(b) List out the points to be checked in case of due diligence of delisting of Indian Depository Receipt. (5 marks)

(c) All businesses have a duty to act lawfully, particularly compliance with Competition Law, is the most important aspect for growing economy. In light of this, explain the need for Competition Compliance Programme. (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Super Product Agro Ltd. is proposed to be merged in Geetanjali Ayurved India Ltd. What are the check points to be observed in due diligence with respect to payment of consideration for merger and amalgamation. (5 marks)

(ii) hat are the documents / aspects to be looked into while carrying out legal due diligence with respect to followings :

(1) IPR / Patent / R&D Details

(2) Material Contracts. (5 marks)

(iii) What are the restrictions on allotment of securities under Regulation 86 of the SEBI (ICDR) Regulations, 2009. (5 marks)

Answer 2(a)

Economic and Social factors are recognized and assessed while setting up an industry. Environmental factors must be taken into consideration in industrial setting up. Proximity of water sources, highway, major settlements, markets for products and raw material resources is desired for economy of production, but all the above listed systems must be away for environmental protection. Industries are, therefore, required to be sited, striking a balance between economic and environmental considerations. In such a selected site, the following factors must be recognized:

(1) No forest land shall be converted into non-forest activity for the sustenance of the industry.

(2) No prime agricultural land shall be converted into industrial site.

(3) Within the acquired site the industry must locate itself at the lowest location to remain obscured from general sight.

(4) Land acquired shall be sufficiently large to provide space for appropriate treatment of waste water still left for treatment after maximum possible reuse and recycle. Reclaimed (treated) waste water shall be used to raise green belt and to create water body for aesthetics, recreation and if possible, for aquaculture. The green belt shall be 1/2 km wide around the battery limit of the industry. For industry having odour problem it shall be a kilometer wide.

(5) The green belt between two adjoining large scale industries shall be one kilometer.

(6) Enough space should be provided for storage of solid wastes so that these could be available for possible reuse.

(7) Lay out and form of the industry that may come up in the area must conform to the landscape of the area without affecting the scenic features of that place.

(8) Associated township of the industry must be created at a space having physiographic barrier between the industry and the township.

(9) Each industry is required to maintain three ambient air quality measuring stations within 120 degree angle between stations.

Answer 2(b)

The requirement under provisions of Regulation 80 of SEBI (LODR) Regulations, 2015 should be observed while checking the delisting of Indian Depository Receipts during the secretarial audit. Following check points shall be taken into consideration:

1. Check whether the listed entity, if it decides to delist Indian Depository Receipts, give fair and reasonable treatment to IDR holders.
2. Check whether the listed entity after delisting, has cancelled the Indian Depository Receipts.
3. Check whether the listed entity has complied with the norms and conditions for delisting Indian Depository Receipts as specified by the Board or stock exchange in this regard.

Answer 2(c)

Compliance programmes have following three main purposes:

(i) they strive to prevent violation of law,

(ii) promote a culture of compliance, and

(iii) encourage good corporate citizenship.

As the consequences of infringement can be serious a compliance programme must be capable of meeting the changing requirements of business and must make efforts as part of the regular evaluation process to ensure that the compliance programme continues to be relevant.

Competition Compliance programme help reduce legal costs in the short run by enabling the enterprise to avoid violation of competition laws, while in the long run, they increase corporate competitiveness by raising the value of an enterprise. The prescription of behavioral standards under the compliance programme not only prevents officers and employees of an enterprise from unconsciously violating the competition laws, but at the same time, relieve the employees of the fear that accompanies breach of such laws.

The enterprises also save time and money by securing the following benefits from compliance programme:

– Corporate officers and employees being well aware of the requirements of competition law may maintain legal transparency.

– Corporate officers have advance perception concerning the activity of employees that might violate competition laws.

– Corporate officers and employees can avoid civil and criminal liability resulting from violation of competition laws.

Answer 2(A)(i)

Under the Regulation 21 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, following check points should be observed:

(1) For the amount of consideration payable in cash, the acquirer shall open a special escrow account with a banker to an issue registered with the Board and deposit therein, such sum as would, together with cash transferred under clause (b) of sub-regulation (10) of regulation 17, make up the entire sum due and payable to the shareholders as consideration payable under the open offer, and empower the manager to the offer to operate the special escrow account on behalf of the acquirer for the purposes under these regulations.

(2) Subject to provisos to sub-regulation (11) of regulation 18, the acquirer shall complete payment of consideration whether in the form of cash, or as the case may be, by issue, exchange or transfer of securities, to all shareholders who have tendered shares in acceptance of the open offer, within ten working days of the expiry of the tendering period.

(3) Unclaimed balances, if any, lying to the credit of the special escrow account referred to in sub-regulation (1) at the end of seven years from the date of deposit thereof, shall be transferred to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.

As per Section 236 read with Rule 27 of the Companies (Arrangement and Amalgamations) Rules, 2016, In case of purchase of equity shares of the minority shareholders of the company, , the following point shall also be considered by registered valuer:

(1) In case of a listed company ;

(i) The offer price shall be determined in the manner as may be specified by the Securities And Exchange Board Of India under the relevant regulations framed by it, as may be applicable; and

(ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

(2) In the case of an unlisted company and a private company,

(i) the offer price shall be determined after taking into account the following factors:-

(a) the highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;

(b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and

(ii) the registered valuer shall also provide a valuation report on the basis of valuation

addressed to the board of directors of the company giving justification for such valuation.

Answer 2(A)(ii)

Following documents/aspects to be looked into while carrying out the legal due diligence with respect to:

1. **IPR/Patent/ R&D Details**
   - Schedule of trade marks/copyrights
   - Details of Indian and international patents with the company
   - Details of pending patent applications
   - A schedule and copies of all consulting agreements, agreements regarding inventions, licenses, or assignments of intellectual property to or from the Company
   - Details of threatened claims if any etc.
2. **Material Contracts**
   - A schedule of all subsidiary, partnership, or joint venture relationships and obligations with copies of all related agreements
   - Copies of all contracts between the company and employees, shareholders and other affiliates
   - Loan agreements, letter of credit, promissory notes, etc.
   - Security agreements, mortgages, etc. to which the company is a party
   - Any distribution agreements, sales representative agreements, marketing agreements, etc.
   - All non-disclosure or non-competition agreements
   - Other material contracts.

Answer 2(A)(iii)

Regulation 86 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 stipulates the provisions in respect of Restrictions on allotment as follows:

Allotment under the qualified institutions 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.

If 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 institutions 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 institutions placement shall not withdraw their bids after the closure of the issue.

Question 3

(a) The Equity Shares of Bharat Coal Ltd. are held by Central Government through its concerned ministry, Ministry of Coal. The Joint Secretary of coal, who is the Chairman of the Company also, while reviewing the financial data of the Company, has desired that Company may again declare the dividend even after critical changes in the economy. The Director (Finance) informed that due to inadequacy of profit during the period under consideration, the dividend would be given out of free reserves.

Study the following particulars and ascertain the amount that can be drawn towards dividend applying the Companies (Declaration of Dividend out of Reserves), Rules 2014 :

	Amount in Rs.
35,00,000 Equity Shares of Rs. 10/- each	*3,50,00,000*
87,500,9% Preference Shares of Rs. 100/- each	*87,50,000*
Securities Premium	*17,50,000*
Profit and Loss Account	*3,15,000*
General Reserve	*1,05,00,000*
Net Profit for the year	*17,85,000*
Capital Reserve on revaluation of Factory Premises	*17,50,000*

The rate of dividend for last five years was Nil, 10%, Nil,20% and 10% respectively. *(8 marks)*

(b) Prepare a detailed note on Data Room and advantage of Virtual Data Room.

(7 marks)

Answer 3(a)

Section 123 of the Companies Act, 2013 read with rule 3 of Companies (Declaration and Payment of Dividend) Rules, 2014 provides that in the event of inadequacy or absence of profit in the year, a company may declare the dividend out of free reserve subject to following conditions:

(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:

(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.

Accordingly the following shall be calculated:

S.N.	Particulars	Figures
1.	Average Rate of Dividend of preceding three years in which the dividend was declared.	$\frac{0+20+10}{3}$ = 10%
2.	The Total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up capital and free reserves	1/10 of (3,50,00,000+ 87,50,000+1,05,00,000) = Rs. 54,25,000/-
3.	Total amount to be drawn a. 9% Preference dividend Rs. 787500 b. Permissible Equity Dividend Rs. 3500000	Rs. 42,87,500/-
4.	Total amount to be drawn from General Reserve	4287500 - (1785000 + 315000) = 2187500/-
5.	Balance in General Reserve after dividend	10500000 - 2187500 = 83,12,500
6.	The Balance of reserve after such withdrawal shall not fall below 15% of its paid up share capital (Paid up share capital includes equity share capital + Preference share capital) 15% of the paid up capital amounting to Rs. 6562500	$\frac{8312500}{43750000}$ x 100 = 19%

The Balance in the free reserve are more than the 15% of the paid up capital of the

company Therefore, company can declare the 10% dividend, Re. 1/- each per equity share.

Answer 3(b)

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 the 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.

Provisions are also made to mitigate the risks of data destruction or data stealing. For this purpose the restrictive provisions are made for entry, study, noting and exit from the data room. This includes physical checking of the persons conducting such study in the data room. Installing close circuit camera in the data room and monitoring the activity of the persons on time to time basis is a regular activity. It results in adequate expenditure and prior to that make proper budgeting is required.

Principles are also laid down for copying documents to clearly state about the nature of documents which could be copied in the data room. For this purpose also photocopiers and scanning machines are kept, electronic data similarly also monitored for which copies are required to be made.

Benefits of Data Room

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.

Major Advantages of Virtual Data Room

1. Savings in cost
2. Saving in time
3. More Comfort to buyer and Seller
4. Availability of information at any time of the day
5. Enables multiple prospective bidders to access the Virtual Data Room
6. Easy to Set up
7. More Secured

8. Improved Efficiency
9. Copying/printing of documents may be restricted.
10. Closure of Virtual Data Room may happen at any time

Question 4

(a) Define the Cultural Due Diligence. How would you address the cultural difference during the merger ? (4 marks)

(b) "The objective of Compliance Programme Template is to help the secretarial auditor in evaluating the critical aspects of compliance management." Explain. (6 marks)

(c) Compliance under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 includes event bases/continual disclosures; and opening of an Escrow Account is one of important event. Explain the compliance required to be done for this purpose. (5 marks)

Answer 4(a)

Cultural Due Diligence (CDD) is the process of identifying, assessing, investigating, evaluating and defining the cultures of two or more distinct corporates through a cultural analysis so that the similarities and differences that impact the merged organization are identified and remedial actions are taken well in advance. It should be carried along with M&A due diligence stage itself. The findings of cultural due diligence would be the base for post integration strategies.

How to address Cultural Differences during merger?

1. Formation of strategies for cultural integration.
2. Analyzing the existing cultures.
3. Identifying common aspects and differences.
4. Decide if you want to go on with one of the existing cultures or if you prefer an integration culture.
5. Establish 'bridges' between both companies.
6. Establish a basis and mechanisms for the new culture.
7. Extensive interaction with people.

The following mechanism may help in resolving cultural differences:

1. Newsletters and hotlines.
2. Workshops.
3. Surveys, questionnaires and feedback analysis.
4. Synergy teams.
5. Continuous interactions.

Answer 4(b)

"The objective of Compliance Programme Template is to help the secretarial auditor in evaluating the critical aspects of compliance management." This statement is true

Compliance management through systematic processes helps in achieving 100% compliance with letter and spirit. The objective of Compliance Programme is-

- To establish and maintain centralised mechanism to ensure compliance with all applicable laws (both Indian and International).
- To establish and maintain effective co-ordination of functional units and the compliance department under the overall supervision of the Board.
- To incorporate changes in the existing applicable laws or introduction of new laws, into the compliance process in real time manner.
- Effective communication of the changes in the regulatory mandates to the applicable functional and other units in real time manner.
- To provide training on compliance requirements at regular intervals.
- To introduce and implement ethics programmes for Board, Senior Management and other staff members.
- To establish pro-active compliance risk management culture into the organisation.
- To establish effective monitoring and control systems.
- To adopt fair market practices.
- To establish mechanisms to prevent, detect, report and to respond to non compliances.
- To introduce effective whistle blowing mechanism.
- To establish compliance dashboard.

Answer 4(c)

As Regulation 29 and Regulation 30 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 included event bases/continual disclosures. However, Regulation 17 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 provides for opening of an Escrow Account. The Major provisions under this regulation are as under:

(i) An escrow account has to be opened and the following sum has to be deposited.

(ii) The escrow amount shall be calculated in the following manner, as specified in regulation 17,-

For consideration payable under the public offer,-

– On the first 500 crores	25 per cent; of the consideration
– On the balance consideration	An additional amount equal to 10% of balance consideration.

If, an open offer is made conditional upon minimum level of acceptance, hundred

percent of the consideration payable in respect of minimum level of acceptance or fifty per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.

(2) The consideration payable under the open offer shall be computed as provided for in sub-regulation (2) of regulation 16 and in the event of an upward revision of the offer price or of the offer size, the value of the escrow amount shall be computed on the revised consideration calculated at such revised offer price, and the additional amount shall be brought into the escrow account prior to effecting such revision.

(3) The escrow account referred to in sub-regulation (1) may be in the form of,—

(i) cash deposited with any scheduled commercial bank;

(ii) bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank; or

(iii) deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin:

Provided that securities sought to be provided towards escrow account under clause (c) shall be required to conform to the requirements set out in sub-regulation (2) of regulation 9.

Question 5

(a) Write the short notes on following :

(i) Need of Legal Due Diligence

(ii) When Dominance gets abused

(iii) Scheme of Sponsored ADRs/ GDRs. *(3 marks each)*

(b) Define the following terms :

(i) Corporate Culture

(ii) SME Exchange. *(3 marks each)*

Answer 5(a)(i)

Legal Due Diligence provides complete picture of a company through a methodical investigative process.

Due Diligence investigations are good at finding liabilities in a company and to uncover the hidden risks. These investigations can help to negotiate a lower price in a business transaction negotiation.

Legal Due Diligence is an art of managing a risk of undertaking a major business transaction. It involves maintaining a methodical system for organizing and analyzing the documents, data and information provided by the information provider, and then quantitatively assessing the risks associated with any issues or problems discovered during the process. Only a careful and thorough Legal Due Diligence process will help to avoid legal difficulties, unintended transfer of legal property and other drawbacks.

Legal Due Diligence investigations allow getting the current information that is needed to make good business and financial decisions. These investigations help to avoid costly mistakes and can also help to avoid lawsuits caused by a bad business partnership. Investigations such as these can also be crucial in negotiations – by helping cut through business claims to the actual facts about a corporation, they help to get the proof needed to negotiate better terms.

The need for legal due diligence may occur in the following occasions

- Mergers/Acquisitions
- Corporate Restructuring
- Corporate Governance related matters
- IPOs/FPOs
- Private Equity
- General Compliance requirement.
- Commercial agreements
- Leveraged buy-outs
- Joint Ventures, etc.

Answer 5(a)(ii)

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

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

Answer 5(a)(iii)

The Scheme of Sponsored ADRs/GDRs is a process of disinvestments by the

Indian shareholders of their holdings in overseas markets. The concerned company sponsors the ADRs/GDRs against the shares offered for disinvestments. Such shares are converted into ADRs/GDRs according to a pre-fixed ratio and sold to overseas investors. The proceeds realized are distributed to the shareholders in proportion to the shares sold

Paragraph 4B of Foreign Currency Convertible Bonds and ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 provides that:-

(i) An Indian company may sponsor an issue of ADRs/GDRs with an overseas depository against shares held by its shareholders at a price to be determined by the Lead Manager.

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

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

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

Answer 5(b)(i)

Culture is a complex system with a multitude of interrelated processes and mechanisms based on which the organisation functions. It includes vision/mission of the organisation, work flow process, communication mechanism, formal procedures, informal practices, strategy setting mechanism and so on.

Corporate Culture is embedded deeply in the organization and in the behaviour of the people there. It is not necessarily equal to the image the company gives itself in brochures and on the website. Therefore, it is difficult to determine an organization's culture from the outside.

Corporate culture influences the performance of an organization, since it determines

– Style of tackling problems
– Method or style of communication
– Adaptability of employees
– Organization commitment to strategies and ultimately to vision and mission etc.
– Style of organizational functioning
– Adaptability of people to changes
– The way people interact with each other
– The way the organization interacts with stakeholders
– Level of commitment

Answer 5(b)(ii)

In recognition of the need for making finance available to small and medium enterprises, SEBI has decided to encourage promotion of dedicated exchanges and/or dedicated platforms of the exchanges for listing and trading of securities issued by Small and Medium Enterprises ("SME"). Consequently, SEBI amended SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 by inserting Chapter XB on "Issue of specified securities by small and medium enterprises", with effect from 23.9.2011.

`"SME Exchange" means a trading platform of a recognized stock exchange having nationwide trading terminals by Stock exchange to list the specified securities issued and includes a stock exchange granted recognition for this purpose but does not include the Main Board.

Main board' means a recognized stock exchange having nationwide trading terminals other than SME exchange.

Question 6

(a) What are the areas to be avoided while setting up an industry as per guidelines issued by Ministry of Environment and Forest ? (5 marks)

(b) What is the Search and Status Report. What are the points to be considered while finalizing the Search and Status Report ? (5 marks)

(c) What information should be given in the Public announcement under regulation 15 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. (5 marks)

Answer 6(a)

As per Environmental Guidelines for industries by Ministry of Environment, in setting up industries, care should be taken to minimise the adverse impact of the industries on the immediate neighbourhood as well as distant places. Some of the natural life sustaining systems and some specific land uses are sensitive to industrial impacts because of the nature and extent of fragility. The following are the Areas which shall be avoided while setting up the industry:

- Ecologically and/or otherwise sensitive areas: At least 25 km; depending on the geo-climatic conditions, the requisite distance shall have to be increased by the appropriate agency.
- Ecological and/or otherwise sensitive areas include:

  (1) Religious and Historic Places;

  (2) Archaeological Monuments (e.g. identified zone around Taj Mahal);

  (3) Scenic Areas;

  (4) Hill Resorts;

  (5) Beach Resorts;

(6) Health Resorts;

(7) Coastal Areas rich in Coral, Mangroves, Breeding Grounds of Specific Species;

(8) Estuaries rich in Mangroves, Breeding Ground of Specific Species;

(9) Gulf Areas;

(10) Biosphere Reserves;

(11) National Parks and Sanctuaries;

(12) Natural Lakes, Swamps;

(13) Seismic Zones;

(14) Tribal Settlements;

(15) Areas of Scientific and Geological interest;

(16) Defence Installations, especially those of security importance and sensitive to pollution;

(17) Border Areas (International); and

(18) Airports.

- Coastal areas: at least 1/2 km from High Tide Line.
- Flood Plain of the Riverine Systems: at least 1/2 km from flood plain or modified flood plain affected by dam in the upstream or by flood control systems.
- Transport/Communication System: at least 1/2 km from highway and railway.
- Major settlements (3,00,000 population): distance from settlements is difficult to maintain because of urban sprawl. At the time of setting up of the industry if any major settlement's notified limit is within 50 km, the spatial direction of growth of the settlement for at least a decade must be assessed and the industry shall be sited at least 25 km from the projected growth boundary of the settlement.

Answer 6(b)

A Search and Status Report contains two aspects. The first being 'search' which involves physical inspection of documents and the second activity 'status' which comprises of reporting of the information as made available by the search. Thus a search and status report de facto acts as a 'Progress Report' on the legal aspects and also a ready reckoner of the exact position.

The Search and Status Report enables furnishing of information to the lender as to whether the charges created through various documents are in fact registered with Registrar of Companies and whether such particulars reflect the correct position of charges held by Lenders. As the Report provides information on the charges created in favor of other lenders, it enables the lenders to assess the exact position of the company and to foresee where they would stand, if the company would go into liquidation.

Following have to be considered while finalizing the Search and Status Report:

- The Search and Status Report should give exact details of particulars of charges/ modifications/ satisfactions as effected, filed and registered from time to time.
- Identify those charges and modification of charges, which have been created in favour of a particular lender.
- Take the particulars of the documents creating the charge as specified in CHG-1 and CHG-9.
- Ascertain as to whether the amount secured by the charge as per the documents executed has been duly mentioned.
- Ascertain as to whether 'properties' offered as security are mentioned as per the documents creating the charge and attached with the Forms and verify whether they are as per the terms of Sanction.
- Check whether the terms and conditions governing the charge have been mentioned.
- Ascertain whether the name of the lender is properly mentioned.
- In case of modification of charge ascertain whether the names of documents effecting the modification are mentioned and whether the particulars of modification are clearly mentioned.
- In case of charge, the particulars of documents attached with forms, amount secured by the charge as per the documents and/or sanction ticket, the properties/assets secured by the charge, the terms and conditions governing the charge and the name of the lender is properly mentioned in the relevant columns of Form CHG-1

Answer 6(c)

(1) As per Regulation 15 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, The public announcement shall contain the following information along with such other information as may be specified,-

(a) name and identity of the acquirer and persons acting in concert with him;

(b) name and identity of the sellers, if any;

(c) nature of the proposed acquisition such as purchase of shares or allotment of shares, or any other means of acquisition of shares or voting rights in, or control over the target company;

(d) the consideration for the proposed acquisition that attracted the obligation to make an open offer for acquiring shares, and the price per share, if any;

(e) the offer price, and mode of payment of consideration; and

(f) offer size, and conditions as to minimum level of acceptances, if any.

(2) The detailed public statement pursuant to the public announcement shall contain

such information as may be specified in order to enable shareholders to make an informed decision with reference to the open offer.

(3) The public announcement of the open offer, the detailed public statement, and any other statement, advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares under these regulations shall not omit any relevant information, or contain any misleading information.

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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 significant change in a Company's business model, management team or financial structure to address challenges and increase shareholders' value." Elucidate the statement with relevance to business strategy. (5 marks)

(b) "Restructuring is resorted to in various forms with objectives such as profitability improvement, augmenting more resources, relief from competition and methods take the forms like acquisition, merger, takeover, leveraged buy outs, slump sale, overseas acquisitions etc." Illustrate certain instances that have happened in India setting examples of benefits in Corporate Restructuring. (5 marks)

(c) "Scheme of Reconstruction pursuant to order of competent authority does not trigger open offer under SEBI (SAST) Regulations." Explain the regulation with reference to any event occurred since promulgation of said regulation in 2011. (5 marks)

(d) As a Company Secretary, one should advice the Board regarding compliances under various legislations. Refering the cases of mergers or amalgamations, state the circumstances that warrant compliances under any or all of such legislations. (5 marks)

Answer 1(a)

Corporate Restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value. Restructuring may involve major layoffs or bankruptcy, though restructuring is usually designed to minimize the impact on employees, if possible. Restructuring may involve the company's sale or a merger with another company. Companies use restructuring as a business strategy to ensure their long-term viability. Shareholders or creditors might force a restructuring if they observe the company's current business strategies as insufficient to prevent a loss on their investments. The nature of these threats can vary, but common catalysts for restructuring involve a loss of market share, the reduction of profit margins or declines in the power of their corporate brand. Other motivators of restructuring include the inability to retain talented professionals and major changes to the market place that directly impact the corporation's business model.

Corporate Restructuring is concerned with arranging the business activities of the corporate as a whole so as to achieve certain pre-determined objectives at corporate level. Thus, the objectives of triggering Corporate Restructuring is to orderly direct the activities, deploying surplus cash from one business to finance profitable growth in another, exploiting inter-dependence among present or prospective businesses within the corporate portfolio, risk reduction and development of core competencies.

Answer 1(b)

Corporate restructuring is a process in which a company changes the organizational structure and processes of the business. The most common form of corporate restructuring are mergers/amalgamations, acquisitions/ takeovers, financial restructuring, divestitures/ demergers and buyouts. Corporate Restructuring can also be resorted in any of the forms like slump sale, leveraged buy-out or even circumventing the restriction imposed under statutes or by regulators.

As a case of demerger the Cement division of L&T Ltd. resulted to Ultratech Cement Co. Ltd. that resulted in economies of scale and overall competitiveness, multifunctional synergies, combined resource pool, cross leverage financial strengths and increased capacity. Tata Steel Ltd. acquired overseas Corus Group Plc. that improved the synergies to Tata Steel Ltd. that marshalled the resources for both, utilization of wide retail and distribution network, technology transfer and enhanced R&D capabilities. Transfer of undertaking for a lump sum consideration by Piramal Healthcare Ltd. to Abbott Healthcare Pvt. Ltd. with a non-compete clause is slump sale in terms of the Income-tax Act, 1961. Capital gains arising therefrom is taxed as long term if held for more than 3 years prior to transfer or as short term if held for less than 3 years. Bharti Airtel Ltd. explored the strategy of leveraged buyout in acquiring Zain Africa International BV majorly financed through borrowed funds. For this purpose, special purpose vehicles are formed. Bharti Airtel structured acquisition through special purpose vehicles thus keeping its financials intact. However, as a guarantor for special purpose vehicles, Bharti Airtel assumes full responsibility.

Answer 1(c)

As per Regulation 10(1)(d)(ii) of SEBI (SAST) Regulations, 2011 any acquisition in terms of a scheme of arrangement involving the target company as a transferor or as a transferee company, or for reconstruction of the target company approved or sanctioned by a court of competent jurisdiction, whether Indian or foreign, open offer is not triggered even if the acquisition surpasses the threshold limit for open offer.

Regulation 10(6) of the SEBI (SAST) Regulations, 2011 requires filing of a report by the acquirer, if any exemption from Regulations availed, in a prescribed form within 4 working days from the acquisition date with the concerned stock exchange. The stock exchange shall forthwith disseminate such information to the public. Competent authority is not interpreted to confine to only courts.

In the matter of reacquisition of Spice Jet Ltd. by Mr. Ajay Singh from Thiru Kalanidhi Maran and KAL Airways Pvt. Ltd. raising Mr. Singh's holding from 1.85% to 60.31%, Mr. Singh did not go through the open offer process. They took the plea, as the scheme of reconstruction was as per approval by the Ministry of Civil Aviation as a competent authority. Such a plea that Ministry of Civil Aviation as competent authority is neither questioned by SEBI nor anyone else.

Answer 1(d)

The onus is on the Company Secretary for compliances under various legislations. In case of merger or amalgamations the following legislations are required to be looked into for the purpose of compliances:

1. Companies Act, 2013
2. National Company Law Tribunal Rules, 2016
3. Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
4. Income-tax Act, 1961
5. SEBI (LODR) Regulations, 2015
6. Competition Act, 2002
7. Indian Stamp Act, 1899

Every company registered under the Company Law is required to make necessary compliances under the Companies Act, 2013, National Company Law Tribunal Rules, 2016, Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and Income-tax Act, 1961 regarding capital gains or set-off and carry forward of unabsorbed depreciation or losses.

Compliances are required under SEBI (LODR) Regulations, 2015 only in cases where mergers or amalgamations are between one or more listed companies. Provisions of the Competition Act, 2002 are applicable in case the companies involved in the compromise and arrangements are dominant and large undertakings in accordance with the provisions of the said Act. In case of non-banking financial companies, approval of RBI is required. Applicability of Indian Stamp Act depends on the State governed legislation and notifications.

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

Question 2

(a) "Events taking place outside India but having an effect on competition in India is also subject to jurisdiction of Competition Commission of India." Comment on extra territorial jurisdiction provided under Competition Act, 2002. (5 marks)

(b) State the distinctive features of Ind AS 103 in contrast to existing AS 14 for accounting treatment in cases of amalgamations and combinations. (5 marks)

(c) ABC Bank Ltd. contemplates to merge with PQR Bank Ltd. Accordingly, draft scheme of amalgamation is placed before the Board of Directors of both the banks. The said scheme is aimed to be placed in the shareholders meeting thereafter. Mention the aspects which board of both the companies should consider in approving draft scheme of amalgamation. (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) "A Scheme, even approved by majority, can be rejected by Court but such a

Scheme must be held to be unfair to the meanest intelligence." Analyse the statement citing important judicial pronouncements. (5 marks)

(ii) "In amalgamation of two or more banking companies, Company Law is not applied." Comment, briefly explaining the procedure for amalgamation of banking companies. (5 marks)

(iii) Apart from availing the benefit of set off and carry forward of unabsorbed depreciation and accumulated losses, what are the other tax benefits if the strategy of the acquirer to merge with a loss making company is in the form of a reverse merger ? (5 marks)

Answer 2(a)

Section 32 of the Competition Act, 2002 provides jurisdiction to the Competition Commission of India to inquire into and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India.

Jurisdiction is not vitiated even if (a) the agreement is entered into outside India; or (b) one party to agreement is outside India; or (c) the enterprise abusing the dominant position is outside India; or (d) combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

Thus it is crystal clear that acts taking place outside India but having an effect on competition in India falls within jurisdiction of Commission. It is also evident that the Competition Commission of India can exercise jurisdiction even if both or all the parties to the agreement are outside India. Only in cases of such agreements, dominant position or combination entered into by the parties apparently reveal adverse effect on competition in the relevant market of India. We can observe such instances in e-commerce business that extends globally.

Answer 2(b)

Distinctive features between Ind AS 103 on Business Combinations and existing AS 14 on Accounting for Amalgamations

(i) Ind AS 103 defines business combination which has a wider scope whereas the existing AS 14 deals only with amalgamation.

(ii) Under the existing AS 14 there are two methods of accounting for amalgamation. The pooling of interest method and the purchase method. Ind AS 103 prescribes only the acquisition method for each business combination.

(iii) Under the existing AS 14, the acquired assets and liabilities are recognised at their existing book values or at fair values under the purchase method. Ind AS 103 requires the acquired identifiable assets, liabilities and non-controlling interest to be recognised at fair value under acquisition method.

(iv) Ind AS 103 requires that for each business combination, the acquirer shall measure any non-controlling interest in the acquiree either at fair value or at the non-controlling interest's proportionate share of the acquiree's identifiable net

assets. On other hand, the existing AS 14 states that the minority interest is the amount of equity attributable to minorities at the date on which investment in a subsidiary is made and it is shown outside shareholders' equity.

(v) Under Ind AS 103, the goodwill is not amortised but tested for impairment on annual basis in accordance with Ind AS 36.The existing AS 14 requires that the goodwill arising on amalgamation in the nature of purchase is amortised over a period not exceeding five years.

(vi) Ind AS 103 deals with reverse acquisitions whereas the existing AS 14 does not deal with the same.

(vii) Under Ind AS 103, the consideration the acquirer transfers in exchange for the acquiree includes any asset or liability resulting from a contingent consideration arrangement. The existing AS 14 does not provide specific guidance on this aspect.

Answer 2(c)

Boards of both the companies should give particular attention to the following:

(a) As per paragraph 6 of the master direction issued by RBI, the decision of amalgamation is approved by the Board of the Bank concerned with a two thirds majority and not just those present and voting.

(b) The values at which the assets, liabilities and the reserves of the amalgamated company are proposed to be incorporated into the books of the amalgamating company and whether such incorporation will result in a revaluation of assets upwards or credit being taken for unrealized gains.

(c) Whether due diligence exercise has been undertaken in respect of the amalgamated company.

(d) The nature of the consideration, which, the amalgamating company will pay to the shareholders of the amalgamated company.

(e) Whether the swap ratio has been determined by independent valuers having required competence and experience and whether in the opinion of the Board such swap ratio is fair and proper.

(f) The shareholding pattern in the two banking companies and whether as a result of the amalgamation and the swap ratio, the shareholding of any individual, entity or group in the amalgamating company will be violative of the Reserve Bank guidelines or require its prior approval.

(g) The impact of the amalgamation on the profitability and the capital adequacy ratio of the amalgamating company.

(h) The changes which are proposed to be made in the composition of the Board of Directors of the amalgamating banking company, consequent upon the amalgamation and whether the resultant composition of the Board will be in conformity with the Reserve Bank guidelines in that behalf.

Answer 2A(i)

The function and duties of the court in the matter of sanctioning of schemes are

well-known. Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could be reasonably supported by sensible people to be for the benefit to each class of the members or creditors concerned. In order to merit rejection, a scheme must be obviously and patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent with the highest possible standards of fairness, equity and reason.

In the matter of *Sussex Brick Co. Ltd.*, Re, (1960) 1 All ER 772 : (1960) 30 Com Cases 536 (Ch D) it was held that although it might be possible to find faults in a scheme that would not be sufficient ground to reject unless it is blatantly unfair or unfair to the meanest intelligence. If the court is satisfied that the scheme is fair and reasonable and in the interests of the general body of shareholders, the court will not make any provision in favour of the dissentients.

The Courts have gone further to say that a scheme must be held to be unfair to the meanest intelligence before it can be rejected. It must be affirmatively proved to the satisfaction of the Court that the scheme is unfair before the scheme can be rejected by the Courts as was held in English, Scottish & Australian Chartered Bank, Re (1893) 3 Chancery 385. Section 230 of the Companies Act, 2013 also makes it clear at once that the Tribunal is not merely to go by the *ipse dixit* means unsupported statement.

Answer 2A(ii)

Provisions and procedure required under the Companies Act, 2013 and the rules made thereunder are not applied for the purpose of amalgamation of banking companies.

Instead for amalgamation of banking companies, the directions issued by the RBI as per circulars issued from time to time need to be followed in terms of Banking Regulations Act, 1949. There are certain deviations in the procedures compared to company law. The decision need to be approved by the two-third majority of the Board irrespective of number present in Board meeting. The scheme needs to be approved by the shareholders with two-third majority in value. Sanction of the scheme is with the Reserve Bank of India instead of Court or Tribunal. Reserve Bank is the final authority to determine the entitlement of dissenting shareholders.

Order sanctioning scheme by Reserve Bank of India is final, binding and effective and there is no procedure to file the same with ROC, even if the amalgamating banks are registered under the Companies Act, 2013.

Answer 2A(iii)

One of the modes of corporate restructuring strategy is to merge with a sick or a company with accumulated losses. If the scheme of merger gets approval of the competent authority under section 72A of the Income-tax Act, 1961, the resultant company avails the opportunity of getting losses of sick undertakings offset against profit making undertakings of the transferee company. Even if approval by Competent Authority is not obtained, the merged undertakings of the resultant company still avail other benefits and privileges as detailed below under the Income-tax Act, 1961:

(a) The benefit of amortization of preliminary expenses under section 35D for the balance unexpired period out of 10 or 5 years shall be available to the resultant company.

(b) Capital expenditure on scientific research under section 35 can be availed by the resultant company.

(c) Expenditure for patent or copyrights under section 35A for the balance unexpired period of out of 14 years.

(d) Section 35DD for expenses towards amalgamation or demerger for next 5 years in equal installments.

(e) Similarly benefits under sections 35AB(3) and 35ABB are available to resultant company for the unexpired period if incurred for expenditure on know-how and telecom licenses respectively.

Question 3

(a) "Optimum capitalization is desired to maintain robust financial health of an enterprise." Identify the symptoms of over capitalization or under capitalization. (3 marks)

(b) "Reduction of capital requires the approval of National Company Law Tribunal (NCLT) is a general perception." Elucidate. (3 marks)

(c) What are the key indicators that need to be measured apart from expected financial results such as earnings and cash flow to evaluate extent of success of merger ? (3 marks)

(d) State the salient features of Reconstruction that differs with Demerger. (3 marks)

(e) What is a Voluntary Offer in acquiring shares in another company ? State the restrictions in terms of SEBI (SAST) Regulations, 2011. (3 marks)

Answer 3(a)

A company is said to be over capitalized when its earnings are not sufficient to justify a fair return on the amount of share capital and debentures that have been issued. Over capitalisation does not mean surplus of funds. It is quite possible that a company may have more funds and yet have low earnings. Over capitalisation may take place due to – exorbitant promotion expenses, inflation, shortage of capital, inadequate provision of depreciation, high corporation tax, liberalised dividend policy etc. Over capitalisation shows negative impact on the company, owners, consumers and society.

On the other hand, a company is said to be under capitalised when its actual capitalisation is lower than its proper capitalisation as warranted by its earning capacity. This happens in case of well established companies, which have insufficient capital but large secret reserves in the form of considerable appreciation in the values of fixed assets not brought into books. Under capitalization is prominent when owned capital is far less than borrowed capital and the business is more dependent on borrowed funds discharging higher fixed costs leaving less, no or even negative margin for the shareholders.

Answer 3(b)

As per section 66 of the Companies Act, 2013, sanction of the NCLT is required for effecting resolution for extinguishment or reduction of any paid-up share capital yet

there are circumstances and provisions to reduce paid-up capital without necessity of approval by the Tribunal. Section 61 enables cancelling the unsubscribed shares without leave of the Tribunal. Also, surrender of shares by a shareholder, forfeiture of shares for non-payment of unpaid calls, redemption of preference shares and buy-back of shares in accordance with section 68 of the Act do not require sanction by Tribunal.

Answer 3(c)

The key indicators to measure the post-merger efficiency, extent of achieving strategy may be grouped into:

(i) Financial outcomes.

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

(iii) Organisational indicators such as customers, employees and operations.

All the areas being integrated and both the acquirer and target, or in a merger, both partners, should be brought within the ambit of continuous appraisal with pre-determined benchmarks.

There are broadly four possible reasons for business growth and expansion. These are (1) Operating economies (2) Financial economies (3) Growth and diversification and (4) Managerial effectiveness.

Answer 3(d)

Reconstruction denotes a wider term to revamp the company by change in capital structure, financial restructuring including alienating any undertaking or substantial undertaking to another company in the form of demerger, reverse merger or amalgamating with any other company. In the process of reconstruction, a new company may also be formed to takeover the properties, liabilities, assignments and obligation of the existing company and the existing company is dissolved after the process of liquidation. The transferee new company pays towards consideration of takeover issues shares and other securities instead of cash to the shareholders of existing transferor company.

On the other hand 'demerger' denotes de-linking of an undertaking or substantial part of undertaking of transferor company in favour of transferee company through process of compromise or arrangement in terms of sections 230 to 240 of the Companies Act, 2013 approved by NCLT. All the properties and liabilities attributable to the relevant undertaking are transferred to the resulting transferee company. As such valuation report by a registered valuer is invariably necessary whereas in the case of reconstruction, requirement of valuation report depends on the circumstances. Thus reconstruction includes demerger but demerger is not otherwise.

Answer 3(e)

"Voluntary Open Offer" means Open Offer given by the acquirer voluntarily without triggering the mandatory Open Offer obligations as envisaged under SEBI (SAST) Regulations, 2011. Generally, the purpose of giving Voluntary Open Offer is to consolidate the shareholding. Regulation 6 of SEBI (SAST) Regulations, 2011 deals with the concept of Voluntary Open Offer and provides the eligibility, conditions and restrictions with respect to the same that are detailed below:

Eligibility for making Voluntary Open Offer:

- Acquirer along with PACs should be holding at least 25% or more shares in the Target Company prior to making Voluntary Open Offer.
- The Acquirer or PACs have not acquired any shares of the Target Company in the preceding 52 weeks without attracting the Open Offer obligation.

Restrictions:

The acquirer becomes ineligible to acquire further shares for a period of six months after the completion of Open Offer except by way of:

- Another Voluntary Open Offer;
- Acquisitions by making a competing offer

PART - B

Question 4

(a) In calculating fair value, element of guesswork or arbitrariness is imminent. Comment. *(5 mark)*

(b) Balance Sheet of Smileheavy Ltd as at 31-3-2017 reveals as under :

Liabilities	***Amount in INR***
1,50,000 equity shares of ₹ 10/- each fully paid up	*15,00,000*
2,00,000 equity shares of ₹ 6/- each fully paid up	*12,00,000*
60,000 12% cumulative preference shares of ₹ 10/- each fully paid up	*6,00,000*
Secured Loans	*14,00,000*
Trade Payables	*6,50,000*
Total	***53,50,000***

Assets	***Amount in INR***
Land & Buildings	*23,00,000*
Furniture, Fixture & Fittings	*3,90,000*
Profit & Loss Account Debit Balance	*13,00,000*
Inventories	*8,30,000*
Trade Receivables	*4,10,000*
Balance with Bank	*1,20,000*
Total	***53,50,000***

Current value of Land & Buildings is ₹ 30,00,000/-, Furniture, Fixture & Fittings is ₹ 2,50,000/-. Inventory is valued at ₹ 9,11,000/-. Debtors are expected to realise 90% of their book value. You are informed that preference dividend has not been paid for the last 5 years. Calculate the intrinsic value of per equity shares by Net Assets Method. *(5 marks)*

(c) "Courts and Tribunals do not substitute or impose their opinion on the valuation report unless there are noticeable irregularities." Offer your comments with certain judicial pronouncements. *(5 marks)*

Answer 4(a)

Valuation can be done on the basis of fair value. However, resort to valuation by fair value is appropriate when market value of a company is independent of its profitability. The fair value of shares is arrived at after consideration of different modes of valuation and diverse factors. There is no mathematically accurate formula of valuation. An element of guesswork or arbitrariness is involved in valuation. Capital cover, Yield, Earning capacity, and Marketability are to be calculated or verified to arrive at fair valuation of the shares in question. While valuing shares, the valuer is required to take into consideration any special features, such as, quantum of shares to be acquired as a percentage of total shares, in other words extent of dominance, transferability restrictions, dividend pay-outs, bonus and rights issue made earlier that influences the share value. Over all, funds flow and cash flow analysis is also to be studied for valuation of shares. It is also necessary to follow valuation standards so that uniformity in valuation of various tangible and intangible factors are taken into account.

Answer 4(b)

			Rs.
Current value of Land & Building			30,00,000
Current value of Furniture, Fixtures & Fittings			2,50,000
Valuation of inventories			9,11,000
Debtors 90% of Rs. 4,10,000			3,69,000
Balance with bank			1,20,000
Notional call on 2 lakh equity shares @ Rs.4 per share			8,00,000
Total value of assets			54,50,000
Less:	Long-term loan	14,00,000	
	Trade payables	6,50,000	20,50,000
Net Assets			34,00,000
Less: Preference capital			6,00,000
Intrinsic value of 3,50,000 equity shares			28,00,000

Intrinsic value of each of fully paid-up equity share : 28,00,000/3,50,000 = Rs.8

Intrinsic value of each partly paid-up equity shares : 8 - 4 = Rs.4

Answer 4(c)

Valuations are done by experts based on detailed analysis of circumstances and study of several data. As such Courts and Tribunals do not interfere in valuation exercise. All that the Courts and Tribunals look into is reasonability and that it is free from irregularities, malicious intentions of the valuer in presenting valuation report.

The Supreme Court in the matter of *Miheer H. Mafatlal* vs. *Mafatlal Industries Ltd.* (1996) 87 Comp Cas 792 (SC) held "if share exchange ratio is fixed by Chartered Accountant upon consideration of various factors and approved by majority of shareholders in meeting, the court will not disturb ratio." Similarly, Calcutta High Court observed in *Re Makham Investments Ltd. (1995) Comp L J 330* "Court does not go into the matter of fixing exchange ratio in great detail or to sit in appeal over the expert decision of concerned Chartered Accountant of repute. Court sees only whether there is any manifest unreasonableness or manifest fraud involved in the matter."

In Hindustan Lever Ltd. case "fairness of the valuation is not whether the offer is fair to a particular shareholder….who may have reasons of his own for not agreeing to the valuation of the shares, but for overwhelming majority may have approved of the valuation. The Court should not interfere with such valuation."

Question 5

(a) The net profits earned during the last 5 years of XYZ Ltd. was (in lacs) 42, 47, 45,39 and 47 respectively on the capital employed during all the period was 4 Crores. Market peers in the said industry expect 10% return of capital employed.

You are required to calculate the goodwill of XYZ Ltd. using :

— Capitalization of Average Profit Method and

— Capitalization of Super Profit Method. (5 marks)

(b) What are the preliminary steps that are to be followed for a proper valuation ? (5 marks)

(c) What are the common strategies that warrant valuation of shares, business or even an undertaking ? (5 marks)

Answer 5(a)

(i) Capitalisation of Average Profit Method (Rs. in lakh)

Average Profits for 5 years: (42+47+45+39+47)/5 = Rs.44

(ii) Capitalisation of Super Profit Method

Average profits as calculated above = Rs.44,00,000

Less : 10% of the capital employed i.e. 10% of Rs. 4 crore = Rs.40,00,000

Hence, super profits = Rs.4,00,000

Valuation of goodwill on Average Profit Method is Rs. 44 lakh

Valuation of goodwill on Super Profit method is Rs. 4 lakh

Answer 5(b)

A business or corporate valuation involves analytical and logical application/analysis of historical/future tangible and intangible attributes of business. The preliminary study to valuation involves the following aspects:

(a) Analysis of business history

(b) Profit trends

(c) Goodwill and Brand name in the market

(d) Identifying economic factors directly affecting business

(e) Study of exchange risk involved

(f) Study of employee morale

(g) Study of market capitalization aspects

(h) Identification of hidden liabilities through analysis of material contracts.

In valuation exercise, some strategies are also kept in mind such as:

(a) Determining the consideration for Acquisition

(b) Determining the swap ratio for Merger or Demerger

(c) Sale or purchase of intangible assets including brands, patents, etc.

(d) Determining the Fair value of shares for issuing ESOP

(e) Disinvestment of PSU stocks by the Government

(f) Liquidation or insolvency process of the company

Answer 5(c)

Whether it is a case of merger, amalgamation or takeover, valuation exercise is imminent to have an amicable bargaining situation. Business top management, however, have different strategies to resort for valuation. The common reasons could be:

(a) Either purely financial such as taxation, asset-stripping, financial restructuring involving an attempt to augment the resources base and portfolio-investment;

(b) Business related expansion or diversification; or

(c) The behavioural reasons have more to do with the personal ambitions or objectives of the top management.

The expansion and diversification objectives are achievable either by building capacities on one's own or by buying the existing capacities. In other words 'make' or 'buy' decisions. The decision criteria in such a situation would be the present value of the differential cash flows. These differential cash flows would, therefore, be the limit on the premium which the acquirer would like to pay. On the other hand, if the acquisition is motivated by financial considerations, the expected gains through taxation or asset stripping would form limit on the premium, over and above the price of physical assets.

Cash flow from operations may not be the main consideration in such a situation. A merger with financial restructuring as its objective needs to be valued mainly in terms of financial gains.

PART- C

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

Question 6

(a) What is meant by Principle of Supremacy of International Obligations as enunciated in Article 3 of Model Law. (5 marks)

(b) Who are entitled and who are not eligible to make application to adjudicating authority for corporate insolvency resolution process as per Insolvency & Bankruptcy Code, 2016 ? (5 marks)

(c) "insolvency & Bankruptcy Code, 2016 as on date is an offshoot of reports by several committees established to make Indian economy free from industrial sickness resulting in loss of production and to boost the economy." Explain the evolvement of Insolvency & Bankruptcy Code, 2016 through recommendations from various committees with consequent reforms made in India over a period of time. (5 marks)

(d) What is securitisation and who are the parties involved in securitization ? Briefly explain the action points or steps in securitisation ? (5 marks)

OR (Alternate question to Q. No. 6)

Question 6A

(i) "Liquidator appointed by the Tribunal has unquestionable sole authority to deal and disburse the properties during liquidation process." Elaborate your answer citing circumstances in which a liquidator can be removed. (5 marks)

(ii) What were the reasons that prompted enactment of Insolvency & Bankruptcy Code, 2016 ? How does Corporate Insolvency Resolution Process differ with revival plans under repealed SICA or liquidation under Company Law ? (5 marks)

(iii) State the procedure for serving notice to foreign creditors under UNCITRAL Model Law. (5 marks)

(iv) "Recovery Officer acts in an arbitrary manner." Analyse the statement in the light of the provisions of Recovery of Debts and Bankruptcy Act, 1993 citing judicial pronouncements, if any. (5 marks)

Answer 6(a)

Principle of Supremacy of International Obligations (Article 3)

Article 3 of the Model Law provides that to the extent the Model Law conflicts with an obligation of the State enacting the Model Law arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Answer 6(b)

An application for initiating Corporate Insolvency Resolution Process can be filed (a) by financial creditor, if there is default in payment of installment or interest; or (b) by an operational creditor for failure to pay the dues for supply of goods, providing services or salary or wages to employees in spite of service of 10 days' notice or (c) by corporate debtor itself in case of occurrence of default in repayment of debt.

However, in the following cases no application for Corporate Insolvency Resolution process can be initiated :

(a) A corporate debtor undergoing a corporate insolvency resolution process; or

(b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months preceding the date of making application; or

(d) A corporate debtor in respect of whom a liquidation order has been passed so that finality of the liquidation order is ensured.

Answer 6(c)

Every nation strives to avoid industrial sickness in order to have continuous production, distribution with boosting economy. In order to achieve this noble objective, in India several committees were constituted, out of which, Tiwari Committee, N L Mitra Committee, Justice Eradi Committee, J J Irani Committee and Banking Laws Reforms Committee are worth mentioning.

(a) On recommendation of Tiwari Committee, Sick Companies (Special Provisions) Act, 1986 was framed to bring together creditors for debt restructuring for revival of sick units.

(b) N L Mitra Committee tried to identify the deficiency in Indian laws in respect of cross border insolvency and suggested reforms.

(c) Justice Eradi Committee was formed to examine and to recommend measures for desirable changes in existing law relating to winding-up of companies so as to achieve transparency or fast dissolution.

(d) J J Erani Committee proposed changes in the law to make speedy restructuring and liquidation process that culminated to re-codified Companies Act, 2013.

(e) Bankruptcy Law Reforms Committee headed by Dr. T K Viswanathan had objectives regarding insolvency law with lesser time involved, lesser loss in recovery and higher levels of debt financing across instruments. As on date, Insolvency and Bankruptcy Code, 2016 assures revival as a last chance within 180 or 270 days, failing liquidation in further 12 months.

Answer 6(d)

Securitisation is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. Basically

securitisation is a method of raising funds by way of selling receivables for money. In recent decades, securitization gained prominence in developments in international finance.

Primary parties in securitization are Banks or Financial Institutions that have lent loan against property, SPVs registered as Asset Reconstruction Company and investors, who have acquired security from SPV. Besides above, the obligator being original borrower, a rating agency and appointed administrator are involved in securitization. Steps involved in securitization are (a) Asset Reconstruction Company formed as SPV generally by banks or financial institutions acquires assets from the originator i.e. defaulting borrower; (b) the SPV, with the help of an investment banker, issues security receipts which are distributed to investors; and (c) the SPV pays the originator (original borrower of the loan) for the financial assets purchased with the proceeds from sale of securities.

In the process of securitization methodology the lender bank or financial institution sweeps out non-performing assets that burdens a financial entity a virtual liability generate neither revenue nor leverage for further lending.

Answer 6A(i)

It is erroneous to assume that the liquidator appointed by the Tribunal is sole authority to deal with the entrusted properties in the process of liquidation. Unlike the Official Liquidator appointed under Companies Act, 1956, where he was answerable only to Company Court, the Liquidator appointed under the Companies Act, 2013 read with Insolvency and Bankruptcy Code, 2016 is under monitoring by the Winding-up Committee and to further submit regularly progress reports to the Tribunal.

Further section 276 of the Companies Act, 2013 enumerates the grounds for removal of Liquidator by the Tribunal in the following circumstances:

(a) Misconduct;

(b) Fraud or misfeasance;

(c) Professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;

(d) Inability to act as provisional liquidator or as the case may be, Company Liquidator;

(e) Conflict of interest or lack of independence during the term of his appointment that would justify removal.

Further, in the event of death, resignation or removal of the Liquidator the Tribunal may transfer the work assigned to him or it to another Company Liquidator for reasons to be recorded in writing. It is a new provision not found in Companies Act, 1956.

Answer 6(A)(ii)

There was multiplicity of laws and enactments like Sick Industrial Companies (Special Provisions) Act, 1986, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (since renamed as 'Recovery of Debt and Bankruptcy Act as per section 249 of Insolvency and Bankruptcy Code, 2016), Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 and Companies Act, 2013 in cases of companies or corporate persons and for individuals and partnership firms there were Presidency Towns Insolvency Act, 1909 (applicable to presidency towns – Bombay,

Calcutta and Madras) and Provincial Insolvency Act, 1920 (rest of India). Plethora of legislations and enactments imposed pressure on Courts, Tribunals and other adjudicating authorities such as BFIR, AAFIR. There were no timelines to dispose of litigations resulting in mountainous pendency, if even time limit was fixed, they were twisted to further complicate legislations.

Moreover, there is a conspicuous departure from the earlier SICA, State Relief Undertaking enactments, liquidations under Company Law that were Debtor oriented whereas IBC Code provides Creditor oriented management during insolvency process. Under the Code, Board of Directors is suspended from the date of admission of petition till Liquidation and Resolution Professional does day-to-day management subjected to Committee of Creditors.

Answer 6(A)(iii)

As per Article 14 of the Model Law, laws of the enacting State relating to Insolvency will specify that a notification is to be given to creditors and also other known creditors who do not have address in the enacting State. Court may order to take appropriate steps for notifying any creditor whose address is not yet known. The purpose of notifying foreign creditors is to inform the commencement of the insolvency proceeding and of the time-limit to file their claims.

Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or similar other formality is required. Such notification shall indicate:

(a) Reasonable time period for filing claims and place at which to be filed;

(b) Whether secured creditors need to file their secured claims; and

(c) Any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court ordering Insolvency Process.

Thus corporate persons, partnership firms or individual entrepreneurs having dealings with foreign customers or suppliers are assured of smooth international trade in view of local legislations framed in consonance with UNCITRAL Model Law.

Answer 6(A)(iv)

The Recovery Officer on receipt of the decree from the Presiding Officer is duty bound to make recovery in the manner provided under the Recovery of Debts and Bankruptcy Act, 1993. To enable his duties, section 29 of the Act provides that the provisions of the Second and Third Schedule to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 shall as far as possible apply with necessary modifications.

Provided that any reference under the said provisions and the rules to the 'assesse' shall be construed as a reference to the defendant under the Recovery of Debt and Bankruptcy Act. On a challenge the Apex court in the case of *UOI* vs. *Delhi High Court Bar Association and Others (2002) 4 SCC 275*, observed that "by virtue of section 29 of the Act, the provisions of Second and Third schedule to the Income-tax Act, 1961 and

the Income-tax (Certificate Proceedings) Rules, 1962 have become applicable for the realization of dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income-tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer acts in an arbitrary manner. Hence statement given is denied.

Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any order of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner.

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