GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME
(New Syllabus)

DECEMBER 2019

MODULE 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
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These answers have been written by competent persons and the Institute hope 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

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PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2019

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART I

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

Question 1

(a) Prepare a checklist of documents required for KYC of Proprietorship & Partnership.

(b) The Chairman of ABC Limited, a listed company, seeks your opinion for framing a policy for preservation of documents to avoid stringent penal provisions for non-compliance of the provisions of the Companies Act, 2013 and the Rules made there under. Write a note to the Chairman stating classification of documents under specific period of preservation with specific reference to the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

(c) Who will pre-certify the followings e-forms ? Explain the compliance for certification of followings e-forms by Practicing Professional.

(a) GNL-1

(b) DPT-3

(c) MGT-14

(d) AOC 4

(e) DIR 3 & DIR 3-KYC.

(d) Your client wants to setup Food Processing Unit in the state of Uttarakhand. Describe the details about specific laws applicable to setup Food Processing Unit. *(5 marks each)*

Answer 1(a)

Checklist of documents required for KYC of Proprietorship & Partnership includes:

Sole Proprietorship Firm

- PAN copy / PAN of the Proprietor.
- Latest Colour Photograph of Proprietor and authorised signatory (if any).
- Copy of Identity and Address proof of the Proprietor and authorised signatory (if any)

- Copies of any 2 existence proofs of the firm confirming name and address of firm and name of proprietor;
- FATCA (Foreign Account Tax Compliance) Declaration

Accounts of Partnership Firms

- PAN copy / PAN of the Firm.
- Registration certificate (Only in case of Registered Partnership firms)
- Partnership deed
- Copy of existence proof confirming name and address of firm
- Beneficial Ownership Declaration (with name and address of all the partners)
- FATCA (Foreign Account Tax Compliance) Declaration
- Latest Colour Photograph of all authorized signatories.
- Copy of Identity and Address proof of all authorised signatories.

Answer 1 (b)

To,

The Chairman

ABC Limited

Re: Classification of documents for period of preservation under SEBI (LODR) Regulations, 2015

Dear Sir,

The legal requirements of preservation of documents in accordance with the provisions of the Companies Act, 2013 and Regulation 9 of the SEBI (LODR) Regulations, 2015 are as under:

A. Documents whose preservation shall be permanent in nature:

1. Property records including purchase and sale deeds, licences, copyrights, patents & trademarks
2. Corporate Records including Certificate of Incorporation, Common Seal, Minutes of Board, Committee and Shareholders' Meetings, Register of Members and other Statutory Records
3. Personal files of all live employees
4. Any other record as may be decided by the Chief Executive Officer of the Company from time to time.

B. Documents whose preservation period shall not be less than eight years after completion of the relevant transactions:

1. Books of Account, Bank Statements and vouchers

2. Filings with Stock Exchanges, Registrar of Companies and other statutory authorities.
3. Payroll Records, Employee deduction authorisations, attendance records, employee medical records, leave records, Pension and retrial related Records, etc.
4. Corporate Social Responsibility Records
5. Sponsorship Projects Records
6. Correspondence and Internal Memoranda
7. Any other record as may be decided by the Chief Executive Officer of the Company from time to time.

C. Documents whose preservation shall be for a minimum period of three years after completion of the event:

1. Tender Documents
2. Lease Deeds and Contracts
3. Legal files
4. Insurance Records including policies and claims
5. All e-mail correspondence, internal & external
6. Documents under Secretarial Standards
   - 6.1 Proof of sending Notice of the meetings of the Board / Committee and General meetings and its delivery
   - 6.2 Proof of sending Agenda and Notes on Agenda and their delivery
   - 6.3 Proof of sending and delivery of the draft of the Resolution
   - 6.4 Proof of sending draft Minutes and its delivery
   - 6.5 Proof of sending signed Minutes and its delivery
7. Any other record as may be decided by the Chief Executive Officer of the Company from time to time.

Answer 1(c)

The Rule 8 sub rule-12 (a&b) of Companies (The Registration Offices & Fees), Rules 2014 provides that the following e-forms filed by companies, other than one person companies and small companies, under sub-rule (1) of rule 9, shall be pre-certified in the following manner, namely:-

(a) GNL-I (Form for filing an application seeking approval from Registrar of Companies in e-form GNL-1 for different purposes under Companies Act, 2013) optional pre-certification by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice.

(b) DPT - 3 (Return of deposits) certification by Auditors of the company as attachment and signed by the Authorised person of the company and shall be filed by company on or before the 30th day of June of every year.

(c) MGT-14 pre-certification by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice; shall be filed with Registrar within thirty days of the passing of resolution Pursuant to Section 94(1), 117(1) of the Companies Act, 2013.

(d) AOC-4 (For filing financial statement and other documents with the Registrar) certification by the Chartered Accountant or the Company Secretary or as the case may be by the Cost Accountant, in whole time practice.

(e) E-form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital signature certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company.

E-form DIR-3 KYC: Every individual who holds a Director Identification Number (DIN) as on 31st March of a financial year as per these rules shall, submit e-form DIR-3-KYC for the said financial year to the Central Government on or before 30th, September of immediate next financial year. The DIN holder and a professional (CA/CS/CMA) certifying the form are the two signatories in form DIR-3 KYC.

Answer 1(d)

Illustrative list of the Laws applicable to the food processing sector is as under

- Essential Commodities Act, 1955 (In Relation to Food)
- Export Quality Control and Inspection Act, 1963
- National Food Security Act, 2013
- Food Safety & Standard Act, 2006
- Food Safety and Standards Rules, 2011
- Food Safety and Standards (Packaging and Labelling) Regulations, 2011
- Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011
- Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011
- Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011
- Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011
- The Meat Food Products Order, 1973
- Meat and Meat Product Order, 1992 (MMPO)
- The Fruit Products Order, 1955
- Fruit Products (1st Amendment) Order, 2006

- Vegetables Product Order, 1967 (VPO)
- The Vegetable Oil Products (Control) Order, 1947
- The Edible Oils Packaging (Regulation) Order, 1998
- The Solvent Extracted Oil, De Oiled Meal, And Edible Flour (Control) Order, 1967
- The Milk and Milk Products Order, 1992
- Respective State Food Laws

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

Question 2

(a) Zen Pvt. Limited had a paid up share capital of ₹35 crore in the previous year. The Company Secretary advises the Company that it is mandatory to appoint the auditor as per the requirements of Sec. 139 (2) of the Companies Act, 2013. The company is having public borrowings viz. from banks ₹25 crore, financial institutions ` 20 crore and public deposits of ₹7.5 crore. Examine the requirement of applicability of mandatory term/rotation in the appointment of auditor with reference to the changed scenario since June, 2017.

(b) Describe the difference between C-KYC & E-KYC.

(c) You have been engaged as a Practicing Company Secretary by XYZ Limited, an unlisted company having a turnover of ₹75 crore, for certification of annual return of the company for the year 2018-19. The annual return is signed by the Chief Executive Officer of the Company. State the provisions of the Companies Act, 2013 and the Rules made there under as to signing and certification of annual return. Is it mandatory to file the annual return if the annual general meeting is not held in a particular year ?

(d) Ramesh Kumar has received the certificate of membership as well as certificate of practice from the Institute of Company Secretaries of India on 31st March, 2019 and now he wants to become a Registered Valuer. Give your professional advice on the matter and also explain the qualification & disqualification of Registered Valuer to Ramesh Kumar. (5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Describe Professional Misconduct in relation to members of the ICSI under First Schedule to the Company Secretaries Act, 1980 ?

(ii) You have been appointed as Company Secretary of XYZ Ltd., a listed company, having diversified business and multi-operational branch offices. On joining your office,you observed that under the prevailing scenario a comprehensive compliance management system is necessary. Prepare a checklist that should be considered by you about the desired system. What would be your responsibility as Company Secretary of the Company in due compliance of the desired system?

(iii) XYZ Ltd. is having paid up share capital of ₹10.00 crore as on 31st March, 2019. Whether the company is required to appoint a Company Secretary in the Company ? What would be your answer if the said XYZ is a Private Limited Company ? Explain the relevant provisions regarding the appointment of a Company Secretary in employment by the Company.

(iv) Your client wants to setup a unit in Pharmaceuticals sector in the state of Telangana. Describe in detail about the specific laws applicable for setting up of a unit in the Pharmaceuticals sector. (5 marks each)

Answer 2(a)

Provisions of section 139 (2) of the Companies Act 2013 and Rule 5 of the Companies (Audit and Auditors) Rules, 2014, as amended, deals with applicability of mandatory term / rotation in the appointment of auditor and the said provision is applicable to the following class of companies:

(a) All unlisted public companies having paid up share capital of Rupees 10 crore or more;

(b) All private limited companies having paid up share capital of Rupees 50 crore or more;

(c) All companies having paid up share capital below the threshold limit mentioned in (a) and (b) above but having public borrowings from financial institutions, banks or public deposits of 50 crore or more.

Accordingly, Zen Pvt. Limited will get be covered as per provision (c) above and therefore, it is mandatorily required to rotate the Auditor as per the provisions of Section 139 (2) of the Companies Act, 2013.

Answer 2(b)

C- KYC stands for Central KYC which provide the uniform norms and inter-usability. The central KYC registry across all financial sectors has been set up as a depository for KYC records. This new process, without asking customers to provide multiple KYC undertakings will help banks, mutual funds, brokerage firms and depository participants offer services. After complying with the new CKYC norms, a unified customer identification code is generated, and which is used whenever KYC is required. This initiative has been started for the purpose of centralising and streamlining KYC process and also to avoid the duplication of KYC and less scope of forgery. The government has authorised the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) for performing the functions of Central KYC Records Registry (CKYCR), also the duty of receiving the details and safely storing them and retrieving the KYC records in the digital form of a 'client'.

Earlier customers have to provide KYC documents separately to every financial institution but after the introduction of one-time centralisation process CKYC, customers will only have to complete the process once and it can be used for all different processes like opening savings bank accounts, buying life insurance or investing in mutual fund products.

E-KYC stands for electronic KYC. The service of e-KYC can only be used by those who have Aadhar numbers. Customers by their own consent needs to authorize their Unique Identification Authority of India (UIDAI), to reveal their identity or address information through biometric authentication to their respective bank branches or business correspondent (BC). After this the UIDAI sends the customer's data comprising of customer name, age, gender, and photograph electronically to the bank. It is a valid process for KYC verification and under Prevention of Money Laundering (PML) Rules, information provided under e-KYC process will be considered as a 'Valid Document'.

Answer 2(c)

As per Section 92 (1) of the Companies Act, 2013 read with Rule 11 of the Companies (Management and Administration) Rules, 2014, as amended, every company shall prepare its annual return in Form No. MGT-7 as they stood on the close of the financial year. The Annual Return is required to be signed by a director and the Company Secretary, or where there is no Company Secretary, by a Company Secretary in practice.

As provided in Rule 11 (2), the Annual Return, filed by a listed company or a company having paid up share capital of Rs.10 crore or more or turnover of Rs.50 crore or more, shall be certified by a Company Secretary in Practice and the certificate shall be in Form No. MGT-8.

In the given case, the annual return is signed by the Chief Executive Officer of the Company, which is not in accordance with the legal provisions mentioned above.

As provided in Section 92(4) of the Act, the Annual Return shall be filed within 60 days from the date on which the annual general meeting is held. Where no annual general meeting is held in any year, the annual return shall be filed within 60 days from the date on which the annual general meeting should have been held together with a statement specifying the reasons for not holding the annual general meeting.

Answer 2(d)

A Company Secretary in practice is recognized to be registered valuer for the asset class "Securities or Financial Assets" under Rule 3 of the Companies (Registered Valuer and Valuation) Rules, 2017. So Ramesh Kumar is recognized to be registered valuer for the asset class "Securities or Financial Assets" under the Companies (Registered Valuer and Valuation) Rules, 2017, as amended. However, he can become a registered valuer once he has at least three years of experience in the discipline.

Further, where valuation is required to be made in respect of any stocks, shares, debentures, securities, etc. of a company under the provisions of Companies Act, 2013, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as prescribed under Section 247of the Companies Act, 2013 read with Rule 4 of Companies (Registered Valuers and Valuation) Rules, 2017.

To act as an Registered valuer in the Securities or Financial Assets the person should be the Member of the Institute of Chartered Accountants or the Institute of Cost Accountants of India or the Institute of Company Secretaries of India; or MBA / PGDBM specialization in finance or; post graduate degree in finance and should have at least three years of experience in the discipline. Further, the person needs to complete and

pass the Valuation Specific Education Course as per syllabus specified under rule 5 of the Companies (Registered Valuers and Valuation) Rules, 2017, as amended.

Further, a person is eligible to be a registered valuer if he/she-

a. is a valuer member of a registered valuers organisation;
b. is recommended by the registered valuers organisation of which he is a valuer member for registration as a valuer;
c. has passed the valuation examination under rule 5 within three years preceding the date of making an application for registration under rule 6;
d. possesses the qualifications and experience as specified in rule 4;
e. is not a minor;
f. has not been declared to be of unsound mind;
g. is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt;
h. is a person resident in India;
i. has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:
j. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;
k. has not been levied a penalty under section 271J of Income-tax Act, 1961 and time limit for filing appeal before commissioner of income-tax (appeals) or income-tax appellate tribunal, as the case may be has expired, or such penalty has been confirmed by income-tax appellate tribunal, and five years have not elapsed after levy of such penalty; and
l. is a fit and proper person.

Explanation : - For determining whether an individual is a fit and proper person under these rules, the authority may take account of any relevant consideration, including but not limited to the following criteria-

i. Integrity, reputation and character;
ii. Absence of convictions and restraint orders; and
iii. Competence and financial solvency.

Answer 2A(i)

Professional misconduct in relation to members of the Institute generally (First Schedule to the Company Secretaries Act, 1980)

PART I : Professional misconduct in relation to Company Secretaries in Practice.

A Company Secretary in Practice shall be deemed to be guilty of professional misconduct, if he-

(1) Allows any person to practice in his name as a Company Secretary unless such

person is also a Company Secretary in practice and is in partnership with or employed by him;

(2) pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional business, to any person other than member of the Institute or a partner or a retired partner or the legal representative of a deceased partner, or a member of any other professional body or with such other persons having such qualifications as may be prescribed for the purpose of rendering such professional services from time to time in or outside India.

Explanation. - In this item, "partner" includes a person residing outside India with whom a Company Secretary in practice has entered into partnership which is not in contravention of item (4) of this Part;

(3) accepts or agrees to accept any part of the profits of the professional work of a person who is not a member of the Institute:

Provided that nothing herein contained shall be construed as prohibiting a member from entering into profit sharing or other similar arrangements, including receiving any share commission or brokerage in the fees, with a member of such professional body or other person having qualifications, as is referred to in item (2) of this part;

(4) enters into partnership, in or outside India, with any person other than a Company Secretary in practice or such other person who is a member of any other professional body having such qualifications as may be prescribed, including a resident who but for his residence abroad would be entitled to be registered as a member under clause (e) of sub- section (1) of section 4 or whose qualifications are recognized by the Central Government or the Council for the purpose of permitting such partnerships;

(5) secures, either through the services of a person who is not an employee of such company secretary or who is not his partner or by means which are not open to a Company Secretary, any professional business:

Provided that nothing herein contained shall be construed as prohibiting any arrangement permitted in terms of items (2), (3) and (4) of this Part;

(6) solicits clients or professional work, either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means:

Provided that nothing herein contained shall be construed as preventing or prohibiting

(i) any company secretary from applying or requesting for or inviting or securing professional work from another company secretary in practice; or

(ii) a member from responding to tenders or enquiries issued by various users of professional services or organizations from time to time and securing professional work as a consequence;

(7) advertises his professional attainments or services, or uses any designation or expressions other than Company Secretary on professional documents, visiting cards, letterheads or sign boards, unless it be a degree of a University established

by law in India or recognized by the Central Government or a title indicating membership of the Institute of Company Secretaries of India or of any other institution that has been recognized by the Central Government or may be recognized by the Council:

Provided that a member in practice may advertise through a write up setting out the services provided by him or his firm and particulars of his firm subject to such guidelines as may be issued by the Council;

(8) accepts a position as a Company Secretary in practice previously held by another Company Secretary in practice without first communicating with him in writing;

(9) charges or offers to charge, accepts or offers to accept, in respect of any professional employment, fees which are based on a percentage of profits or which are contingent upon the findings, or result of such employment, except as permitted under any regulation made under this Act;

(10) engages in any business or occupation other than the profession of Company Secretary unless permitted by the Council so to engage:

Provided that nothing contained herein shall disentitle a Company Secretary from being a director of a company except as provided in the Companies Act, 1956;

(11) allows a person not being a member of the Institute in practice, or a member not being his partner to sign on his behalf or on behalf of his firm, anything which he is required to certify as a Company Secretary, or any other statements relating thereto.

PART II - Professional misconduct in relation to members of the Institute in service

A member of the Institute (other than a member in practice) shall be deemed to be guilty of professional misconduct, if he, being an employee of any company, firm or person-

(1) pays or allows or agrees to pay, directly or indirectly, to any person any share in the emoluments of the employment undertaken by him;

(2) accepts or agrees to accept any part of fees, profits or gains from a lawyer, a Company Secretary or broker engaged by such company, firm or person or agent or customer of such company, firm or person by way of commission or gratification.

PART III - Professional misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilt of professional misconduct, if he

(1) not being a Fellow of the Institute, acts as a Fellow of the Institute;

(2) does not supply the information called for, or does not comply with the requirements asked for, by the Institute, Council or any of its Committees, Director (Discipline), Board of Discipline, Disciplinary Committee, Quality Review Board or the Appellate Authority;

(3) while inviting professional work from another Company Secretary or while responding to tenders or enquiries or while advertising through a write up, or anything as provided for in items (6) and (7) of Part I of this Schedule, gives information knowing it to be false.

PART IV - Other misconduct in relation to members of the Institute generally

A member of the Institute, whether in practice or not, shall be deemed to be guilty of other misconduct, if-

(1) he is held guilty by any civil or criminal court for an offence which is punishable with imprisonment for a term not exceeding six months;

(2) in the opinion of the Council, he brings disrepute to the profession or the institute as a result of his action whether or not related to his professional work.

Answer 2A(ii)

The compliance system and processes in a company are dependent mainly on the following factors:

A. Nature of business(es).

B. Geographical domain of its area of operation(s).

C. Size of the company both in terms of operations as well as investments, technology, multiplicity of business activities and manpower employed.

D. Jurisdictions in which it operates.

E. Whether the company is a listed company or not.

F. Regulatory authority (ies) in respect of its business operations.

G. Nature of the company viz., private, public, government company, etc.

A Company Secretary is the 'Compliance Manager' of the company. It is he who ensures that the company is in total compliance with all regulatory provisions. Corporate disclosures, which play a vital role in enhancing corporate valuation, is the forte of a Company Secretary. These disclosures can be classified into statutory disclosures, non- statutory disclosures, specifies disclosures and continuous disclosures.

SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 spells out elaborately on various aspects of disclosures which are to be made by the company such as contingent liabilities, related party transactions, proceeds from initial public offerings, remuneration of directors and various details giving the threats, risks and opportunities under management discussion and analysis in the corporate governance report which is published in the annual accounts duly certified by the professional like company secretaries. A company secretary has to ensure that these disclosures are made to shareholders and other stakeholders in true letter and spirit.

The advisory services of the company secretaries impact to all components and activities of the compliance framework, as the business receives one point specialized support and advice to help manage its compliance risks more effectively. The company secretary plays a proactive advisory role as he advises management, local boards and committees, the compliance executor, and the employees.

The company secretary provide advice on compliance risk, responsibilities, obligations, concerns and other compliance issues that are suitable for the business' practices and operational constraints of the company.

The company secretary is the professional who guides the board and the company in all matters, renders advice in terms of compliance and ensures that the board procedures are duly followed, best global practices are brought in and the organisation is taken forward towards good corporate citizenship.

The function of Company Secretary includes

a. to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;

b. to ensure that the company complies with the applicable secretarial standards;

c. to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

d. to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

e. to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;

f. to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;

g. to assist the Board in the conduct of the affairs of the company;

h. to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices;

i. to discharge such other duties as have been specified under the Act or rules; and

j. such other duties as may be assigned by the Board from time to time.

Answer 2A(iii)

According to Section 203 of the Companies Act, 2013 & Rule 8 of the Companies (Appointment and Remuneration) Rules, 2014, Every listed company and every other public company having paid up share capital of rupees ten crores or more is required to appoint a whole time Company Secretary, Managing Director and CFO.

Further rules 8A of the Companies (Appointment and Remuneration) Rules, 2014 provides that a company other than a company covered under rule 8 which has a paid up share capital of five crore rupees or more shall have a whole-time company secretary .

Hence, XYZ Ltd as a Public Company is required to appoint Whole Time Company Secretary.

Further on 31st March, 2019 if XYZ is a Private Limited Company then it has to appoint Whole time Company Secretary if paid up capital of the Company is Rs.5 Crore

or above as per Rule 8A of the Companies (Appointment and Remuneration) Rules, 2014.

Answer 2A(iv)

Illustrative list of the Laws applicable to the Pharmaceuticals sector is as under

- The Drugs and Cosmetics Act, 1940 & Amendment 2008
- The Drugs and Cosmetics Rules, 1945
- The Pharmacy Act, 1948
- The Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954
- Drugs (Magie Remedies) Objectionable Advertisement Rules, 1955
- The Narcotic Drugs and Psychotropic Substances Act, 1985
- Special Permits and Licences Rules, 1952
- The Medicinal and Toilet Preparations (Excise Duties) Act, 1956
- The Drugs (Prices Control) Order 1995 (under the Essential Commodities Act)
- Essential Commodities Act,1955
- The Clinical Establishments (Registration and Regulation) ACT, 2010
- The Clinical Establishments (Registration and Regulation) Rules, 2010
- Biological Diversity Act, 2002
- Biological Diversity Rules, 2004
- Drug Policy, 2002
- Plant Quarantine Order
- National Pharmaceutical Policy, 2012
- Drugs (Prices Control) Order, 2013
- Rules for the Manufacture/ Use/ Import/ Export and Storage of Hazardous micro-organisms / genetically engineered organisms or cells.

PART II

Question 3

(a) Describe differences between Social audit and Takeover audit.

(b) Explain the due diligence for issue of securities by a Company.

(c) Is there a need to obtain a Management representation letter from the Auditee Company ? Describe. *(5 marks each)*

Answer 3(a)

A social audit is a way of measuring/ understanding/ reporting and ultimately improving an organization's social and ethical performance. A social audit helps to narrow gaps between vision/goal and reality/ between efficiency and effectiveness. It is a technique to understand/measure/ verify/ report on and to improve the social performance of the organization.

Social auditing creates an impact upon governance. It values the voice of stakeholders/

including marginalized/poor groups whose voices are rarely heard. Social auditing is taken up for the purpose of enhancing local governance/ particularly for strengthening accountability and transparency in local bodies.

Social audit is a process of reviewing official records and determining whether the reported expenditures reflect the actual money spent on the ground. A social audit is a formal review of a company's endeavours in social responsibility.

The key difference between development and social audit is that a social audit focuses on the neglected issue of social impacts/ while a development audit has a broader focus including environment and economic issues/ such as the efficiency of a project or programme.

A social audit is an official evaluation of an organization's involvement in social responsibility projects or endeavours. For example, a local family store makes a clothing donation to an NGO that has a homeless shelter for women and children. The store makes a similar donation three times a year. This is something that a social audit might uncover. Factors examined by a social audit include records of charitable contributions, volunteer events and efficient utilization of energy, transparency, work environment and employees wages.

Takeover audit : To provide the desired results to an investor and to ensure that the acquisition is executed in the most effective manner, the concept of the takeover audit has been evolved; the takeover audit provides a cost benefit analysis to suggest a strategic plan for the long term investment strategy. The audit provides for the Acquisition Audit as well as the *inter-se* Transfer performed by the acquirer.

Takeover Audit for merger/acquisition/ takeover could be done as three parts: pre-acquisition, post-acquisition and sell-side. Internal auditors or professionals with this domain expertise can contribute significant value by ensuring that a vibrant due diligence process is in place and operating as intended. A rigorous audit vide due diligence process help companies take advantage of legitimate new business opportunities while at the same time help minimize the risks. A strong audit cum due diligence process is critical to ensure that the acquirer is fully aware of all aspects of the proposed transaction and provides access to vital intelligence that is used to negotiate the final price and integrate the new subsidiary more effectively.

Answer 3(b)

A public company may issue securities to public through prospectus Public offer by complying with the provisions of Part I of chapter III Prospectus and Allotment of Securities; or through private placement by complying with the provisions of Part II of chapter III – Prospectus and Allotment of Securities; or through a rights issue or a bonus issue in accordance with the provisions of the Companies Act, 2013 ('the Act') and in case of a listed company or a company which intends to get its securities listed also with the provisions of the Securities and Exchange Board of India Act,1992 and the rules and regulations made thereunder, the key regulation governing the issue of securities and preparation of financial information are

- SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2018
- SEBI (Listing Obligation and Disclosure Requirement) Regulations, 2015.

SEBI ICDR Regulations provide the guidelines relating to conditions for various kind of issue including public and right issue, the ICDR regulations provide detailed provisions:

1. relating to public issue such as conditions an Initial Public offer (IPO) and Further Public Offer (FPO) conditions
2. relating to pricing in public offering. Conditions governing promoters contribution, restriction on transferability of promoters contributions, minimum offer to public, reservations, manner of disclosures in offer documents etc.

SEBI (LODR) Regulations, 2015 lay down the broad principles for periodic disclosure to be given by the listed entities operating in different segments of capital markets.

A private company may issue securities by way of rights issue or bonus issue in accordance with the provisions of the Act; or through private placement by complying with the provisions of Part II of Chapter III Prospectus and Allotment of Securities & Chapter IV –Share Capital & Debentures of Companies Act, 2013.

The scope and comprehensiveness of the Issue of Securities due diligence is important not only from a legal standpoint to avoid liability but also from a reputational perspective as the reputation of the company and its promoters and other participants may be significantly vanished, if on a later date it appears that the company and other participants are failed to uncover and disclose to prospective investors critical issues relating to the issuer or the Securities.

While the specific requirements in connection with issue of securities are different under the Companies Act, 2013 and SEBI Laws & Regulations made thereunder, any non-compliance in these regulations are generally impose liability if the offering memorandum or prospectus contains a materially incorrect or misleading statement or omits a material fact. However in certain conditions the complete issue of securities stand cancelled. The violation of any applicable liability provisions may result in liability for offering participants, in particular the issuer and the underwriters. These liability provisions emphasize the need for careful preparation of all materials to be used in issue of securities offerings, in particular the offering memorandum or prospectus.

Answer 3(c)

A management representation letter is a form letter written by a company's external auditors, which is signed by senior company management. The letter attests to the accuracy of the financial statements that the company has submitted to the auditors for their analysis.

The auditor may obtain a management representation letter from the auditee company. The letter may be signed by Managing Director/Company Secretary/Senior Management who would normally have authority to issue the same. The Auditor can use this letter of representation as part of his audit evidence.

However, it is advised to exercise all possible care, reasonable skill & due diligence. Adequate enquiries should be made in respect of matters which are capable of direct verification. Mere getting certification from management may defeat the purpose of the audit.

Question 4

(a) What do you mean by an unqualified/unmodified opinion by an auditor ?

(b) What do you understand by a CSR Audit ? Explain its coverage.

(c) What is Forensic Audit Report ? Highlight its major contents.

(d) What is materiality concept in auditing ? Explain.

(e) What are the benefits which a practice unit will obtain in undergoing a peer review ? (3 marks each)

Answer 4(a)

An unqualified opinion is also known as a clean opinion. The auditor reports an unqualified opinion if the affairs of the company are presumed to be free from material misstatements. In addition, an unqualified opinion is given over the internal controls of an entity if management has claimed responsibility for its establishment and maintenance and the auditor has performed fieldwork to test its effectiveness.

An unqualified opinion contains no reservations concerning the company. This is also known as a "clean" opinion meaning that the affairs of the company are presented fairly.

The Auditor should express an unmodified opinion when based on Audit Evidence, the Auditor concludes that:

a. there is due compliance with the applicable law in terms of timelines and process;

b. the records as relevant for the audit verified by him as a whole are free from misstatement and maintained in accordance with applicable laws; and

c. the auditor should express an unmodified opinion when the auditor concludes that the information on the affairs of the company in all material respects, are in accordance with the applicable reporting framework.

Answer 4(b)

Corporate Social Responsibility (CSR) audit help in measuring the actual social performance against the social objectives set by the Company. It also provides that at what level the decision making, mission statement, guiding principles, and business conduct are aligned with social responsibilities. The audit helps meeting the expectations of stakeholder groups relating to social and environmental responsibilities of the company.

The CSR audit cover the CSR activities relating to human rights, fundamental human rights, freedom of association and collective bargaining, non-discrimination, forced labor, child labor, health and safety, career development and training, environmental issues and issues relating to community development and social wellbeing. However, the Schedule VII of the Companies Act, 2013 provides the list of activities which could be taken by the company as their CSR activities and cover the following:

(i) Eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water.

(ii) Promoting education, including special education and employment enhancing

vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects.

(iii) Promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups.

(iv) Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga.

(v) Protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional art and handicrafts;

(vi) Measures for the benefit of armed forces veterans, war widows and their dependents;

(vii) Training to promote rural sports, nationally recognized sports, Paralympic sports and Olympic sports

(viii) Contribution to the prime minister's national relief fund or any other fund set up by the central govt. for socio economic development and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women;

(ix) Contributions or funds provided to technology incubators located within academic institutions which are approved by the central govt.

(x) Rural development projects.

(xi) Slum area development.

(xii) disaster management, including relief, rehabilitation and reconstruction activities."

Explanation.- For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.

Answer 4(c)

Forensic Audit is a dynamic and strategic tool in combating corruption, financial crimes and frauds through investigations and resolving allegations of fraud and embezzlement. It may be conducted to determine negligence. Forensic is the application of science to crime concerns. Forensic science is science which is applied to legal matters especially criminal matters.

"Forensic" means suitable for use in the court of law. The examination a company's financial records to derive evidence which can be used in a court of law is a Forensic Audit. It includes the use of accounting, auditing and investigative skills to assist in the legal matters.

Forensic audits are highly specialized, and the work requires detailed knowledge of fraud investigation techniques and the legal framework. Forensic accountants are trained to look beyond the numbers and have necessary skills and experience to accept the

work. Highly specialized and the work requires detailed knowledge of fraud investigation, techniques and the legal framework (civil, criminal laws and human psychology) and to identify substance over form when dealing with an issue.

A forensic auditor is required to have specialist training so that he can understand the legal framework and also has the knowledge of forensic audit techniques. He should also have the expertise in the use of IT tools and techniques that facilitate data recovery and analysis.

A forensic audit, also known as forensic accounting, refers to the application of accounting methods for detection and gathering evidence of frauds, embezzlement, or any other such white-collar crime. It is the application of accounting skills to legal questions.

Forensic audit is done in two-phases.

1. **Investigation Services** - At first the auditor begins with an investigation; looking into the accounts and statement) and identifying defects in it. It then moves on to find ways to deal with such defects) which is a reactionary function.
2. **Litigation Services** - It is entirely possible the frauds detected be resolved within the company itself. However) there are times when they need to be resolved through legal channels. During such situations) forensic auditors give litigation support to the advocates. Their advice and consultation about the legalities of commercial disputes are very essential. Moreover) they also provide research assistance by giving relevant documents and facts to support a legal claim) and also help decide the extent of damage that is required. They are also called up by the Court as an expert witness for further investigation.

Illustrative table of contents of a Forensic Audit Report include the following points:

1. Executive Summary
2. Origin of the audit
3. Audit Objective
4. Proposed Audit Outputs
5. Audit Implementation approach
6. Risk Analysis
7. Internal Environment Risk: Customers) product and Competitors;
8. Financial Management; Human Resource Management; Information Technology; Business processes
9. External Environment Risk: Economy and market situation; political and legal scenario; Technology in the sector
10. Audit Process
11. Preliminary understanding of scope and incident coverage
12. Collect evidence

13. Conduct Interviews
14. Analyse findings
15. Validate inferences and conclusions
16. Evidence of risk events
17. Conflicts of interest; Bribery; Extortion; Theft; Fraudulent transactions; inventory frauds; misuse of assets; financial statement frauds
18. Audit recommendations
19. Logical framework approach
20. Preconditions and risks
21. Governance on recommendation implementation
22. Stakeholders
23. Budget considerations

Answer 4(d)

Material means important and essential. The disclosure of important matters helps the users in taking business decisions. There should be neither suppression of vital facts nor miss-statements.

- The concept of the materiality draws the whole process of the audit, the user of the audit report does not require the absolute accuracy to make informed decision, accordingly a matter is considered material if its omission or misstatement would reasonably influence the decision of an intended user of the audit report.
- The concept of materiality should be considered by the auditor while determining the nature, timing and extent of audit procedures and evaluating the effect of the misstatements.
- The concept of materiality is used both at the planning stage of the audit, when deciding what and how much work need to be done and in evaluating the result of the audit, which is generally known as planning materiality and reporting materiality.
- The Auditor has to report the errors which he judges to be material, the audit work can be planned in the knowledge that it need to detect errors that are material.

In accessing materiality, the prime consideration is the total value of the error, However, the values is not the sole consideration, the nature of the error or the context in which the transaction occurs are sometimes more important and the auditor must always consider these factors, as well as the value, when deciding whether an error is material.

Materiality consists of both quantitative and qualitative factors. Materiality is often considered in terms of monetary value but the inherent nature or characteristics of an item or group of items may also render a matter material. Materiality is a matter of professional judgment and depends on the auditor's interpretation of the users' needs. A

matter can be judged material if knowledge of it is likely to influence the decisions of the intended users.

Materiality should be considered by auditor while determining the nature, timing and extent of audit procedures and while the evaluating the effect of misstatement.

During the planning process, information is gathered about the entity in order to assess risk and establish materiality levels for designing audit procedures. Issues that may be considered material even if the monetary value is not significant would include the following:

- Material by value
- Material by nature
- Material by context

Answer 4(e)

There are significant benefits which a Practice Unit (PU) will obtain in undergoing a Peer Review. These may be summarised below:

1. A successful peer review will provide comfort to the PU that he has adhered to various statutory, documentary and other regulatory requirements.
2. If deficiencies are noticed and corrective measures suggested, the PU will have an opportunity to correct the deficiencies and thereby enhance his professional competence.
3. If a Peer Review Certificate is issued in favour of the PU it enhances his credibility in the eyes of the general public.
4. Since a Chinese wall exists between the Peer Review Process and the Disciplinary Proceedings, the PU will benefit from peer review without any apprehension of any disciplinary proceedings being initiated against him for any deficiencies noticed on his part.
5. Clients of the PU will benefit from knowing that their PU is periodically reviewed by the ICSI.

Question 5

(a) You are engaged as a retainer in a company for looking after all secretarial compliances. With the advent of introduction of Goods and Services Tax (GST), though the company initially managed to handle this work, subsequently, it finds it very difficult in view of the attrition in the concerned staff managing it and also with reference to the latest amendments and notifications issued frequently. The Company then decided to discuss with you to undertake the work as GST professional. What are the duties and responsibilities that has to be performed as a GST Professional ? Briefly explain.

(b) What do you mean by Environment Audit ? Prepare a process chart for conducting Environment Audit.

(c) Draft the 'confidentiality undertaking' and 'arbitration' clauses of a non-disclosure agreement. (5 marks each)

Answer 5(a)

Company Secretary as GST Professional

Company Secretaries can play an important role in being an advisor and facilitator for due compliances under GST and be an asset to the general business community and corporate world. With their expertise in interpreting laws and skills to tackle and manage regulatory compliances under GST, Company Secretaries render value added services to the trade and industry while acting as extended arms of regulatory mechanism. A person having passed CS final examination is eligible for enrolment as GST Practitioner. Company Secretaries can provide guidance and advisory services to business entities to interpret GST laws and assist in effectively discharging various compliances under GST while undertaking activities like tax planning, maintenance of GST records, drafting legal documents like replying to show cause notices, impact analysis, etc.

Though, the Company Secretaries cannot perform Audit in matters related to GST. But he can provide the following services:

(i) *Advisory services or strategic advisor* : A Company Secretary can comprehensively interpret the law of GST and provide complete guidance and advisory to the business entities. Company Secretaries are more suited for their services because of their knowledge of laws and good communication skills.

(ii) *Tax Planning* : Company Secretaries are competent to understand the impact of laws and its various alternatives and can be helpful in proper tax planning under GST.

(iii) *Procedural Compliances* : Procedural Compliance includes registration, filing of returns, payments of taxes, assessment etc. Since, a Company Secretary is already playing the role of a Compliance Officer under various other laws, he can assist in the same under GST law also.

(iv) *Book/Record Keeping* : Like any other tax laws, introduction of GST would also require proper record keeping and maintaining systematic records of credit of input/input service and its proper utilisation etc.

(v) *Representation* : A Company Secretary can provide the service of representation with confidence because of practical exposure due to appearing before various competent authorities.

(vi) *Appellate work* : Because of their legal bent of mind, a Company Secretary can provide better services in the field of appellate work.

Answer 5(b)

Environmental audit is a general term that can reflect various types of evaluations intended to identify environmental compliance and management system implementation gaps, along with related corrective actions and it has a wide variety of meanings. Environmental Audit refers to verification and assessment of environmental measures in an organisation.

There are generally two different types of environmental audits: compliance audits and management systems audits. These audits are intended to review the site's/

company's legal compliance status in an operational context. Compliance audits generally begin with determining the applicable compliance requirements against which the operations will be assessed. This tends to include Central Law, State Laws, permits and local laws. In some cases, it may also include requirements within legal action.

Need for Environment Audit

- Business can assess the environmental impact of their operations.
- To ensure that the corporate decisions are not spoiling company's market for its products, destroying the source of essential supply, damaging or polluting the very infrastructure.
- It highlights areas of inefficiencies in process e.g. Where the amount of resources used are out of proportion to the amount of saleable items/ services produced.
- It highlights excessive wastages.
- It provides opportunity for business to decrease its wastes output and reduce the cost of waste treatment or waste disposal.

Process of Environment Audit

1. *Understanding the industrial activity and Pre-audit or planning stage*

   Collection of background information about the entity, definition of objectives and scope of audit, formation of audit team and development of audit plan and protocols.

2. *On-site or Field Audit*

   Communicate the objectives of the audit to key faculties and schedule necessary meetings and interviews, identify areas of concern, site / facility inspection, evidence / records / document review, staff interviews, initial review of findings.

3. *Assessing the impact and post-audit*

   Final evaluation of findings, submit preliminary report with type and magnitude of impact on the environment, get approval of management, introduce the findings to the auditees, submit final environment audit report along with short/ long term acceptability.

4. *Follow up or review*

   Verify the action taken on audit findings and recommendations.

Answer 5(c)

Confidentiality Undertaking Clause

The Receiving Party agrees :

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

(ii) to restrict access to the Confidential Information disclosed to it under this

Agreement to those of its employees and officers who need to know the same strictly for the purpose; and

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

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

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

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

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

Arbitration Clause

1. This agreement shall be construed in accordance with and governed by the laws of India.

2. Any dispute arising in connection with or out of the performance or the interpretation of this agreement, which the parties cannot settle, shall be finally settled by arbitration. The place of arbitration shall be at .....The arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 and the rules made thereunder.

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

Question 6

(a) As a Company Secretary, prepare an information chart, to be contained in, for preparing a scheme of amalgamation.

(b) Define Internal Audit. Describe core principles of Internal Audit.

(c) What is Audit Trail and why there is a need of creation of Audit Trails ?

(5 marks each)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) Analyse the differences between the following :

(a) Fraud and Non-compliance

(b) Ethics and Values.

(ii) What are the penal provisions under the Companies Act, 2013 for giving incorrect Secretarial Audit Report or making false statements therein.

(iii) What are the criteria for suspension of the trading in the shares of the listed entities? Describe. (5 marks each)

Answer 6(a)

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

1. Definitions of transferor and transferee as well as the definition of the undertaking of the transferor company.
2. Authorised, issued and subscribed capital of transferor and transferee companies.
3. Basis of scheme should be explained briefly on the recommendation of valuation report, covering transfer of assets/liabilities, specified date, reduction or consolidation of capital, application to financial institutions as lead institution for permission, etc.
4. Change of name, object and accounting year.
5. Protection of employment.
6. Dividend position and prospects.
7. Management structure, indicating the number of directors of the transferee company and the transferor company.
8. Applications under Sections 230 and 232 of the Companies Act, 2013 to obtain approval from the Tribunal.
9. Expenses of amalgamation.
10. Conditions of the scheme to become effective and operative and the effective date of amalgamation.

The basis of the scheme should be framed on the reports of valuers for both the merger partner companies. The underlying idea is to ensure that the scheme is just and equitable to the shareholders and employees of each of the amalgamating companies and to the public at large. It should be ensured that common yardstick is adopted for valuation of shares of each of the amalgamating company for fixing rate of exchange of shares on merger.

A. Information Required by the Professional Generally includes

1. Cross holding of the Directors of the Transferee and Transferor Companies.
2. Relationship between the directors of the transferee and transferor companies under the Companies Act, 2013.
3. Names of the officers of both the transferee and transferor companies who are to be authorised to sign the Application, Affidavit and Petition. (The companies concerned can authorise anyone person to act on behalf of them, who may be from either of the companies).
4. Names of the English and regional language newspapers in which notices are to be published.

5. Names in preferential order as to the chairmen of the meetings of the transferee and transferor companies. (The chairman in this case need not be a director on the board of directors of the company concerned or even a member of the company).

6. List of creditors and their dues. List of individual cases to be given, as well as categorisation in various slabs.

B. Information/Documents that may be required by the Regional Director, Ministry of Corporate Affairs, in connection with Amalgamation.

1. Balance sheets for last five years of the transferee company.

2. Balance sheets for last five years of the transferor company.

3. Two copies of the valuation report of the valuers.

4. List of top shareholders of the transferee company.

5. List of top shareholders of the transferor company.

6. List of directors of the transferor company and their other directorships.

7. List of directors of the transferee company and their other directorships.

8. Number and percentage of NRI and foreign holding in the transferee and transferor companies.

9. Rights/Bonus/Debentures Issues made by the transferee and the transferor companies in the last five years.

C. The Following Information is required to be furnished to the Auditors Appointed by the Official Liquidator.

1. From the transferor company

2. Certified true copy of the scheme of amalgamation along with the petition.

3. Certified true copy of the Memorandum and Articles of Association of the company.

4. List of shareholders of the company with their shareholding. Any changes during the last five years to be indicated.

5. Accounts of the company made upto the appointed day of amalgamation.

6. Address of the registered office of the company.

7. Present authorised and paid-up share capital of the company.

8. Changes in the Board of directors during the last five years along with list of present Board of directors.

9. List of associated concern in which directors are interested.

10. List of various appeals pending under Income tax, GST, Custom Duty, FEMA, etc.

11. Details of loans and advances given to the associated concern/companies under the same management during the last five years.
12. Details of revaluation of assets.
13. Details of any allegations and/or complaints against the company.
14. Details of amount paid to the managing director, directors or any relative of the directors during the last five years.
15. Comparative statement of profit and loss account and balance sheet for the last five years.
16. Details of bad debts written off during the last five years.
17. List of all charges registered with the Registrar of Companies and the amount secured against the same.
18. Copy of the latest annual return filed with the Registrar of Companies along with Annexures.
19. Details of all the subsidiary companies as under:
    (i) Authorised and paid-up share capital of the company.
    (ii) List of present shareholders along with details of changes in the shareholding patterns during the last five years.

The following information of the transferee company is required by the auditor:

1. Names of the existing directors of the company.
2. List of common shareholders of the companies involved in the amalgamation with individual shareholding.
3. Authorised and paid up capital of the company.
4. Copy of latest audited balance sheet.
5. The auditors may also require the following records of the transferor company for examination:
6. Books of account and relevant records for the last five years.
7. Minutes book of Board and General Meetings.

Answer 6(b)

As defined by the Institute of Internal Auditors (IIA), Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization to accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control and governance processes.

Independence is established by the organizational and reporting structure. Objectivity is achieved by an appropriate mind-set. The internal audit activity evaluates risk exposures

relating to the organization's governance, operations and information systems, in relation to:

1. Effectiveness and efficiency of operations.
2. Reliability and integrity of financial and operational information.
3. Safeguarding of assets.
4. Compliance with laws, regulations, and contracts.

Based on the results of the risk assessment, the internal auditors evaluate the adequacy and effectiveness of how risks are identified and managed in the above areas. They also assess other aspects such as ethics and values within the organization, performance management, communication of risk and control information within the organization in order to facilitate a good governance process. An effective internal audit activity is a valuable resource for management and the board and the audit committee due to its understanding of the organization and its culture, operations, and risk profile. The objectivity, skills, and knowledge of competent internal auditors can significantly add value to an organization's internal control, risk management, and governance processes. Similarly an effective internal audit activity can provide assurance to other stakeholders such as regulators, employees, providers of finance, and shareholders.

As per the IIA, core principles of Internal Audit hovers around the performance of effective internal auditing and all of them must be present and working well. How an internal auditor, as well as an internal audit function, demonstrate achievement of the core principles may be quite different from organisation-to-organisation. But, failure to achieve any of the core principles implies that an internal audit activity is not as effective as it could be in achieving internal audit's mission. Core principles of internal audit are:

1. Demonstrates integrity.
2. Demonstrates competence and due professional care.
3. Independent and objective exercise.
4. Aligns with the strategies, objectives, and risks of the organisation.
5. Is appropriately positioned and adequately resourced.
6. Demonstrates quality and continuous improvement.
7. Communicates effectively.
8. Provides risk-based assurance.
9. Insightful, proactive, and future-focused.
10. Promotes organisational improvement.

Answer 6(c)

Audit Trail is a repository of administrative and operational documentation relating to audit process. It is established and maintained to aid in audit planning and to centralize available documentation and information not included in the individual audit files. Information included in the permanent files should only be information that cannot be feasibly included

in the working papers due to volume or format or because the information will be applicable on an on going basis to the current audit or future audits. Permanent files should be filed with all audit and follow-up working papers supporting the audit. The contents of permanent files are dependent on the needs of the audit. An index should be developed and placed in the front of the permanent file indicating the documents contained, date included in file and auditor's initials.

The auditor should prepare and maintain working papers, the form and content of which should be designed to meet the circumstances of a particular engagement. The information contained in working papers constitutes the principal record of the work that the auditor has done and the conclusions that he has reached concerning significant matters. Working papers serve mainly to -

1. Provide the principal support for the auditor's report, including his representation regarding observance of the standards of field work, which is implicit in the reference in his report to generally, accepted auditing standards.

2. Aid the auditor in the conduct and supervision of the audit.

   Working papers are records kept by the auditor of the procedures applied, the tests performed, the information obtained, and the pertinent conclusions reached in the engagement. Examples of working papers are audit programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the auditor. Working papers also may be in the form of data stored on tapes, films, or other media.

The quantity, type, and content of working papers vary with the circumstances, but they should be sufficient to show that the records agree or reconcile with the statements or other information reported on and that the applicable standards of field work have been observed.

Working papers ordinarily should include documentation showing that-

- The work has been adequately planned and supervised, indicating observance of the first standard of field work.

- A sufficient understanding of internal control has been obtained to plan the audit and to determine the nature, timing, and extent of tests to be performed.

- The audit evidence obtained, the auditing procedures applied, and the testing performed have provided sufficient competent evidential matter to afford a reasonable basis for an opinion, indicating observance of the third standard of field work.

Working papers are the property of the auditor. The auditor's rights of ownership, however, are subject to ethical limitations relating to the confidential relationship with clients.

The auditor's working papers may sometimes serve as a useful reference source for his client, but the working papers should not be regarded as a part of, or a substitute for, the client's accounting or other records.

The auditor should adopt reasonable procedures for safe custody of his working papers and should retain them for a period sufficient to meet the needs of his practice and to satisfy any pertinent legal requirements of records retention.

Audit working papers provide evidence of audit coverage and documentation of audit trails, they should be properly filed and stored. In addition, there should be a standardized format for working papers, adequate cross-referencing to identify the audit working papers created as well as a system for filing and retrieving working papers.

Answer 6A(i)

(a) *Fraud V/S Non Compliance*

Fraud : As defined in Explanation to Section 447 of the Companies Act, 2013, the "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

In general the fraud can be defined as act or course of deception, an intentional concealment, omission, or perversion of truth, to

(1) gain unlawful or unfair advantage,

(2) induce another to part with some valuable item or surrender a legal right, or

(3) inflict injury in some manner.

Willful fraud is a criminal offense which calls for severe penalties, and its prosecution and punishment. However, incompetence or negligence in managing a business or even a reckless waste of firm's assets (for example by speculating on the stock market) does not normally constitute a fraud.

Non Compliance : The term non-compliance refers to failure to comply with the laws, rules regulations etc. It is commonly used in regard to a failure to meet the compliance requirements or failure to doing compliance be it the failure in following procedures, filing of information, eligibility conditions, reporting etc.

The relationship between the Fraud and the non-compliance can be constructed as the non- compliance in the company may lead to a fraud however it may also be noted that the fraud can also be made in the compliant company.

(b) *Key Differences between Ethics and Values*

The fundamental differences between ethics and value are described in the given below points:

- Ethics refers to the guidelines for conduct, that address question about morality. Value is defined as the principles and ideals, which helps them in making the judgement of what is more important.

- Ethics is a system of moral principles. In contrast to values, which is the stimuli of our thinking.

- Values strongly influence the emotional state of mind. Therefore, it acts as a motivator. On the other hand, ethics compels to follow a particular course of action.
- Ethics are consistent, whereas values are different for different persons i.e. what is important for one person may not be important for another person.
- Values tell us what we want to do or achieve in our life, whereas ethics helps us in deciding what is morally correct or incorrect in the given situation.
- Ethics determines to what extent our options are right or wrong. As opposed to values, which defines our priorities for life.

To summaries ethics are consistently applied over the period and remains same for all the human beings. Values have an individualistic approach, i.e. it varies from person to person but remains stable relatively unchanging, but they can be changed over time due to a significant emotional event.

Answer 6A(ii)

Section 448 of Companies Act 2013 deals with penalty for false statements. The section provides that if in any return, report certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement-

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

(b) which omits any material fact, knowing it to be material, he shall be liable under section 447.

Penalty for incorrect Secretarial Audit Report

Section 447 deals with punishment for fraud which provides that any person who is found to be guilty of fraud, involving an amount of at least ten lakh rupees or one percent of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. In case, the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

In case where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to Fifty lakh rupees or with both.

In view of this, a company secretary in practice will be attracting the penal provisions of section 448, for any false statement in any material particular or omission of any material fact in the Secretarial Audit Report. However, a person will be penalised under section 448 in case he makes a statement, which is false in any material particular, knowing it to be false, or which omits any material fact knowing it to be material.

It is pertinent to note that section 448 applies to "any person". In view of this, a

company secretary in practice, who is an independent professional, will be attracting the penalty, as prescribed in section 448 in case his observations in the secretarial audit report turns out to be false or he omits any material fact, knowing it to be false or material.

Answer 6A(iii)

If a listed entity is non-compliant with the provisions of the Listing Regulations as per the criteria specified below, the concerned recognized stock exchange(s) shall suspend trading in the shares of such listed entity by following procedure prescribed in the SEBI Circular No. SEBI/HO/CFD/ CMD/CIR/P/2018/77 dated May 3, 2018.

Criteria for suspension of the trading in the shares of the listed entities are as under:

a) Failure to comply with regulation 17(1) with respect to board composition including appointment of woman director for two consecutive quarters;

b) Failure to comply with regulation 18(1) with respect to constitution of audit committee for two consecutive quarters;

c) Failure to comply with regulation 27(2) with respect to submission of corporate governance compliance report for two consecutive quarters;

d) Failure to comply with regulation 31 with respect to submission of shareholding pattern for two consecutive quarters;

e) Failure to comply with regulation 33 with respect to submission of financial results for two consecutive quarters;

f) Failure to comply with regulation 34 with respect to submission of annual report for two consecutive financial years;

g) Failure to submit information on the reconciliation of shares and capital audit report for two consecutive quarters;

h) Receipt of the notice of suspension of trading of that entity by any other recognized stock exchange on any or all of the above grounds.

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CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING-UP

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 – I

Question 1

(a) Elucidate the requirement of registration of offer of schemes involving transfer of shares under the Companies Act, 2013.

(b) The accounting treatment of Mergers and Acquisitions has undergone a drastic change with the introduction of IND-AS 103 — Business Combination. Comment.

(c) It is generally accepted that all mergers and acquisitions have one common goal regardless of their category or structure. Give your opinion indicating the benefits that companies can derive upon by merging.

(d) Draft a checklist for a transferee company in the process of Takeover.

(5 marks each)

Answer 1(a)

Mode of registration of offer of schemes or contract involving the transfer of shares are provided under section 238 (1) of the Companies Act, 2013 (the Act). It states that in relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235 of the Act, - (a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as may be prescribed; (b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and (c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered:

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

Section 238(2) of the Act states that an appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1) of section 238 of the Act.

Section 238(3) of the Act states that the director who issues a circular which has

not been presented for registration and registered under clause (c) of sub-section (1) of section 238 of the Act, shall be liable to a penalty of one lakh rupees.

Answer 1(b)

Accounting treatment of mergers and acquisitions (M&A) have undergone a drastic change with the introduction of IND AS-103 - Business Combination and Companies Act, 2013. Section 232 of the Companies Act, 2013 provides that accounting treatment prescribed in the court approved scheme for merger, demerger, amalgamation or group restructuring should be in accordance with the accounting standards prescribed under section 133 of the Companies Act, 2013.

Certain other developments in M&A accounting are as under:

(a) *Method of Accounting for business combination*

Under AS-14 many companies were able to account for business combination between commonly controlled enterprises using purchase method. As a result of this, tax benefit for goodwill amortisation was available while computing book profit for MAT purpose.

Under IND AS-103 it is mandatory to use pooling of interests method for business combination between commonly controlled enterprises. As a result of this accounting alternatives gets restricted and the consequent tax benefits will also be not available.

(b) *Appointed date v. Effective date*

In court approved merger, demerger and other restructuring accounting was done from the appointed date once the court order became effective. However, with the implementation of IND AS-103 Business combinations this is going to change. As per IND AS-103 accounting for business combination should be done on the date on which the acquirer obtains control.

(c) *Accounting for goodwill*

AS-14 provided an accounting choice to compute the goodwill at the fair value of the assets taken over or at the net asset value of the assets taken over. However, this choice is not available in IND AS-103, as the value of goodwill has to be computed using the fair value of the net assets taken over.

AS-14 provides for amortisation of goodwill over a period of five years. IND AS-103 prohibits amortisation of goodwill and is required to test goodwill for impairment annually. This will result in a volatile profit and loss account.

Goodwill amortisation was available as tax deductible item while computing MAT liability. This is not available in the IND-AS regime.

Answer 1(c)

All mergers and acquisitions have one common goal to create synergy that makes the value of the combined companies greater than the sum of the two parts. Synergy may be in the form of revenue enhancement and cost savings. By merging, the companies hope to benefit from the following:

- *Bigger size* : Many companies use M&A to grow in size and leapfrog their rivals.

While it can take years or decades to double the size of a company through organic growth, this can be achieved much more rapidly through inorganic growth, i.e., mergers or acquisitions.

- *Preempted competition* : This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles.
- *Domination* : Companies also engage in M&A to become a dominant player or market leader in their respective sector or industry. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would come under purview of regulatory authorities.
- *Tax benefits* : Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive.
- *Economies of scale* : Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increase in total output of a product.
- *Acquiring new technology* : To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.
- *Increase in market share* : Merger aids in increasing the market share of the merged company. This rise in the market share is achieved by providing an adequate supply of goods & services as needed by clients. Entering into an agreement with clients for continuous supply of goods and services.

Answer 1(d)

Check-list for a transferee company in the takeover process is given as under:

1. Minutes of Board meeting containing consideration and approval of the offer sent to the transferor company.
2. Offer of a scheme or contract sent to the transferor company.
3. Notice to dissenting shareholders if any, of the transferor company.
4. Notice to the remaining shareholders of the transferor company, who have not assented to the proposed acquisition, if any.
5. Form No: CAA 14 received from the transferor company, which has been circulated to its members by that company.
6. Minutes of general meeting of the company containing approval of the shareholders to the offer of scheme or contract sent to the transferor company.
7. Court order, if any.
8. Register of Investments.
9. Duly filled in and executed instrument(s) of transfer for shares held by the dissenting shareholders.
10. Balance Sheets showing investments in the shares of the transferor company.

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

Question 2

(a) Discuss the provision relating to appeal by a person aggrieved by the orders of National Company Law Tribunal. (5 marks)

(b) Differentiate between Inbound merger and Outbound merger. What are the laws governing Cross-border mergers in India ? (5 marks)

(c) XYZ Ltd. is a company listed on the National Stock Exchange. The latest audited financial position of XYZ Ltd. is as under :

	(Amount in ₹ crore)
Paid up equity capital	*442*
Free Reserves	*20,347*
Total secured and unsecured debts	*1,275*

The company intends to buy-back its fully paid up equity shares of ₹5 each not exceeding 20,585,000 equity shares at ₹950 per equity share payable in cash for aggregate consideration not exceeding ₹1,955.57 crore.

Examine whether the above buy-back offer through tender route can be approved by the Board of Directors, keeping in view the provisions of the relevant SEBI Regulations and Companies Act, 2013. (5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) What is the entitlement of dissenting shareholders in case of amalgamation between banking companies ? What are the information and documents required to be submitted by the banking companies to the Reserve Bank of India for determination of the value of shares by the Reserve Bank of India ? (5 marks)

(ii) "A business valuation involves logical application/analysis of historical/future tangible and intangible attributes of business". Do you agree with this statement? What are the aspects involved in the preliminary study of valuation ? (5 marks)

(iii) You are the Company Secretary of PQR Ltd. The Board of the company is opting for reduction in the share capital of the company without seeking the approval of the Tribunal. How would you advise the Board ? (5 marks)

Answer 2(a)

Provisions relating to appeal from orders of Tribunal given in section 421 of the Companies Act, 2013 are as under:

(1) Any person aggrieved by an order of the Tribunal (NCLT) may prefer an appeal to the Appellate Tribunal (NCLAT).

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) of section 421 shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1) of section 421, the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Answer 2(b)

An inbound merger is one where a foreign company merges with an Indian company resulting in an Indian company being formed. An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed.

The following Acts/laws govern cross border mergers in India:

1. Companies Act, 2013
2. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
3. Foreign Exchange Management (Cross Border Merger) Regulations, 2018
4. Competition Act, 2002
5. Insolvency and Bankruptcy Code, 2016
6. Income Tax Act, 1961
7. Department for Promotion of Industry and Internal Trade (DPIIT)
8. Transfer of Property Act, 1882
9. Indian Stamp Act, 1899
10. Foreign Exchange Management Act, 1999 (FEMA)
11. IFRS 3 Business Combinations

Answer 2(c)

Quantum of Buy-back (Section 68 of the Companies Act, 2013)

(a) Board of directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company and such buy-back has to be authorized by the board by means of a resolution passed at the meeting.

(b) Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company. In respect of any financial year, the shareholders can approve by special resolution up to 25% of total equity capital in that year.

The ratio of the aggregate of secured and unsecured debts owed by the company after buy-back should not be more than twice the paid-up capital and its free reserves i.e. the ratio shall not exceed 2:1.

In the instant case, since the paid-up equity capital and free reserves is Rs.20,789 crore as per the latest audited financials, the Board can authorize through a resolution passed at its meeting the buy-back of shares totaling Rs.1,955.57 crore, which is less than the prescribed 10% limit.

After the buy-back scheme for Rs.1955.57 crore has been fully completed, the company's reserves would drop to Rs.18401.72 crore and its paid-up equity capital would drop by Rs.10.29 crore to Rs.431.71 crore. Hence, its paid up capital and free reserves after buy-back would drop to Rs.18833.43 crore. Thus, the debt-equity ratio after buy-back scheme has been fully completed would be 0.068, which is less than the stipulated 2:1.

Hence, XYZ Ltd. can proceed with the proposed buy-back scheme by passing a resolution passed at the Board meeting.

Answer 2A(i)

Dissenting Shareholders means the holders of the shares who have validly exercised and not effectively withdrawn or lost their rights to dissent from the merger and to receive payment of the fair value of their shares. In terms of Section 44A(3) of the Banking Regulation Act, 1949, a dissenting shareholder is entitled, in the event of the scheme being sanctioned by the Reserve Bank of India, to claim within 3 months from the date of sanction, from the banking company concerned, in respect of the shares held by him in that company, their value as determined by the Reserve Bank of India when sanctioning the scheme and such determination by the Reserve Bank of India as to the value of the shares to be paid to the dissenting shareholders shall be final for all purposes.

To enable the Reserve Bank of India to determine such value, the amalgamating/ amalgamated banking company shall submit the following:

a. A report on the valuation of the shares of the amalgamating / amalgamated company made for this purpose by the valuers appointed for the determination of the swap ratio.
b. Detailed computation of such valuation.
c. Where the shares of the amalgamating / amalgamated company are quoted on the stock exchange -
    i. Details of the monthly high and low of the quotes on the exchange where the shares are most widely traded together with number of shares traded during the six months immediately preceding the date on which the scheme of amalgamation is approved by the Boards.
    ii. The quoted price of the share at close on each of the fourteen days

immediately preceding the date on which the scheme of amalgamation is approved by the Boards.

d. Such other information and documents as the Reserve Bank of India may require.

Answer 2A(ii)

Yes, the statement is true and agreeable.

The preliminary study to valuation involves the following aspects:

1. Purpose of valuation.
2. Goodwill/Brand name in the market.
3. Business environment of the entity to be valued.
4. Estimation/forecast of future cash flows as accurately as possible.
5. Is company listed on any stock exchange?
6. If listed, whether shares of the company are traded frequently?
7. The industry to which the concerned entity belongs to.
8. The industry P/E ratio, past and future growth rate.
9. Who are the competitors locally and globally?
10. Whether any similar valuation has been done recently
11. The technology concerning the enterprise and its probability of obsolescence.
12. The accepted discounting rate.
13. Market capitalization aspects.
14. Identification of hidden liabilities through analysis of material contracts.
15. Last years audited balance sheets.

Answer 2A(iii)

Cases which amount to reduction of share capital but where no approval/confirmation by the Tribunal is necessary:

(a) *Surrender of shares* – 'Surrender of shares' means the surrender of shares already issued, to the company, by the registered holder of shares. Where shares are surrendered to the company, whether by way of settlement of a dispute or for any other reason, it will have the same effect as a transfer in favour of the company and amount to a reduction of capital. But if, under any arrangement, such shares, instead of being surrendered to the company, are transferred to a nominee of the company then there will be no reduction of capital [*Collector of Moradabad* v. *Equity Insurance Co. Ltd., (1948) 18 Com Cases 309: AIR 1948 Oudh 197*]. Surrender may be accepted by the company under the same circumstances where forfeiture is justified. It has the effect of releasing the shareholder whose surrender is accepted for further liability on shares.

The Companies Act, 2013 contains no provision for surrender of shares. Thus, surrender of shares is valid only when Articles of Association provide for the same and:

(i) where forfeiture of such shares is justified; or

(ii) when shares are surrendered in exchange for new shares of same nominal value. Both forfeiture and surrender lead to termination of membership. However, in the case of forfeiture, it is at the initiative of company and in the case of surrender it is at the initiative of member or shareholder.

(b) *Forfeiture of shares* - A company may if authorised by its articles, forfeit shares for non-payment of calls and the same will not require confirmation/approval of the Tribunal.

(c) *Diminution of capital* - Where the company cancels shares which have not been taken or agreed to be taken by any person.

(d) Redemption of redeemable preference shares.

(e) Buy-back of its own shares.

Question 3

(a) What are the details to be disclosed under the explanatory statement of the notice of the meeting in respect of the scheme of compromise or arrangement ?

(b) What are the various stages involved in the merger of a company under the Companies Act, 2013 ?

(c) How goodwill and capital reserve are differentiated as per AS-14 ?

(d) What are the kinds of Takeovers practiced in the business world ?

(e) Define capital assets as per Income Tax Act, 1961. (3 marks each)

Answer 3(a)

Explanatory Statement of the notice of meeting in respect of the scheme of compromise or arrangement include the following:

(a) Parties involved in compromise or arrangement;

(b) Appointed date, effective dale, share exchange ratio (if applicable) and other considerations, if any;

(c) Summary of valuation report (if applicable) including basis of valuation and fairness opinion of the registered valuer, if any, and the declaration that the valuation report is available for inspection at the registered office of the company;

(d) Details of capital or debt restructuring, if any;

(e) Rationale for the compromise or arrangement;

(f) Benefits of the compromise or arrangement as perceived by the Board of directors to the company, members, creditors and others (as applicable);

(g) Amount due to unsecured creditors.

Answer 3(b)

Broad stages involved in merger of a company are listed below:

Stage 1 - Drafting of the Scheme

Stage 2 - Obtaining the approval of the Board of Directors of the companies involved

Stage 3 - Obtaining approval of the stock exchanges in case of listed companies

Stage 4 - Application / Petition for convening the meeting of members/creditors shall be filed with National Company Law Tribunal

Stage 5 - Convening meetings of the shareholders and creditors and obtaining their consent on Scheme

Stage 6 - Approvals or No objection from Regional Director / Official Liquidator

Stage 7 - Filing of final petition with NCLT for approving the Scheme

Stage 8 - Obtaining order for approval for scheme of merger/amalgamation from the National Company Law Tribunal.

Answer 3(c)

As per Accounting Standard – 14, goodwill is the excess of the price paid in a purchase over the fair value of the net identifiable assets acquired.

Capital reserve is the excess of the fair value of the net identifiable assets acquired over the purchase price.

The concept of Goodwill or capital reserve will arise only when amalgamation is in the nature of purchase.

Answer 3(d)

Takeovers may be broadly classified into three kinds:

(i) *Friendly Takeover* : Friendly takeover is with the consent of target company. In friendly takeover, there is an agreement between the management of two companies through negotiations and the takeover bid may be with the consent of majority or all shareholders of the target company.

(ii) *Hostile Takeover* : When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues efforts to gain control against the wishes of existing management.

(iii) *Bailout Takeover* : Takeover of a financially sick company by a profit earning company to bailout the former is known as bailout takeover.

Answer 3(e)

'Capital asset' is defined under section 2(14) of the Income-tax Act, 1961 as,

(a) Property of any kind held by an assessee, whether or not connected with his business or profession;

(b) Any securities held by a Foreign Institutional Investor which has invested in

such securities in accordance with the regulations made under Securities and Exchange Board of India Act, 1992.

But does not include the following:

(1) Any stock in trade (Other than the securities referred to in sub-clause (b)), consumables stores or raw materials held for the purpose of his business or profession

(2) Personal effect

(3) Agricultural land in India, which is not an urban agricultural land. In other words, it must be rural agricultural land.

PART–II

Question 4

(a) What are the contents of the report to be submitted to the Tribunal by the Company Liquidator against the winding up order issued by the Tribunal under section 281(1) of the Companies Act, 2013 ? (5 marks)

(b) Explain the procedure to be followed by the Adjudicating Authority on receipt of an application by the financial creditor for initiation of corporate insolvency resolution process. (5 marks)

(c) The moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor. Do you agree with this ? What is the effect of the order of moratorium ? What are the purposes served by the declaration of moratorium ? (5 marks)

(d) Explain the objective and procedural requirements for issuance of Public Notice under section 102 of the Insolvency and Bankruptcy Code, 2016. (5 marks)

Answer 4(a)

According to section 281(1) of the Companies Act, 2013, Company Liquidator shall submit to the Tribunal, a report containing the following particulars:

(a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

Provided that the valuation of the assets shall be obtained from registered valuers for this purpose;

(b) amount of capital issued, subscribed and paid-up;

(c) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

(d) the debts due to the company and the names, addresses and occupations of

the persons from whom they are due and the amount likely to be realised on account thereof;

(e) guarantees, if any, extended by the company;

(f) list of contributories and dues, if any, payable by them and details of any unpaid call;

(g) details of trademarks and intellectual properties, if any, owned by the company;

(h) details of subsisting contracts, joint ventures and collaborations, if any;

(i) details of holding and subsidiary companies, if any;

(j) details of legal cases filed by or against the company; and

(k) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, is desirable to bring to the notice of the Tribunal. [Section 281(2)].

The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company. [Section 281(3)].

Answer 4(b)

As per sections 7(4), 7(5) and 7(7) of the Insolvency and Bankruptcy Code, 2016, following procedure is to be followed by Adjudicating Authority on receipt of an application by the financial creditor for initiation of Corporate Insolvency Resolution Process:

(i) The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

(ii) Where the Adjudicating Authority is satisfied that-

(a) a default has occurred and the application is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or

(b) default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

(iii) Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

(iv) The Adjudicating Authority shall communicate to the financial creditor and the corporate debtor, within seven days of admission or rejection of such application, as the case may be.

Answer 4(c)

Yes, the moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

Effect of order of moratorium - The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process. Provided that where at any time during the corporate insolvency resolution process period, if the NCLT approves the resolution plan under section 31(1) of the Insolvency and Bankruptcy Code, 2016 (the Code) or passes an order for liquidation of corporate debtor under section 33 of the Code, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be. [Section 14(4)].

Declaration of moratorium serves the following purposes:

- Ensures that multiple proceedings are not taking place simultaneously and thus avoids the possibility of potentially conflicting outcomes of related proceedings.
- Keeps the corporate debtor's assets together during the insolvency resolution process and facilitates orderly completion of the process,
- Ensures that the company may continue as a going concern while the creditors assess the options for resolution of default.
- Prohibition on disposal of the corporate debtor's assets ensure that the corporate debtor/management does not transfer its assets, thereby stripping the corporate debtor of value during the corporate insolvency resolution process.

Answer 4(d)

The objective of section 102 of the Insolvency and Bankruptcy Code, 2016 is to provide an opportunity to all the creditors to be a part of the repayment plan. Section 102 provides for the issuance of a public notice by the Adjudicating Authority inviting claims from the creditors of the debtor.

Issuance of public notice - According to sub-section (1) of section 102 of the Code, the Adjudicating Authority shall issue a public notice within seven days of passing the order under section 100 inviting claims from all creditors within twenty-one days of such issue.

According to sub-section (3) of section 102 of the Code, such notice shall be-

(a) published in at least one English and one vernacular newspaper which is in circulation in the state where the debtor resides;

(b) affixed in the premises of the Adjudicating Authority; and

(c) placed on the website of the Adjudicating Authority.

Inclusion of certain details - According to sub-section (2) of section 102 of the Code, the notice under sub-section (1) shall include-

(a) details of the order admitting the application;

(b) particulars of the resolution professional with whom the claims are to be registered; and

(c) the last date for subrnission of claims.

Question 5

(a) Under what circumstances the Certificate of Registration of an Asset Reconstruction Company issued under SARFAESI Act, 2002 can be cancelled? (3 marks)

(b) Explain the changes brought about in section 30 of Insolvency and Bankruptcy Code, 2016 by the Insolvency and Bankruptcy (Second Amendment) Act, 2018. (3 marks)

(c) Sun Finserve Ltd., a financial-cum-operational creditor to a corporate debtor is aggrieved by the action of the resolution professional. Suggest the measures available to the company under the Insolvency and Bankruptcy Code, 2016. (3 marks)

(d) X Ltd., a corporate debtor owes to Y Ltd. ₹100 lakh on account of unsecured loan @ 10% per annum and ₹35 lakh towards raw material supplied by Y Ltd. Determine status of Y Ltd. in relation to the corporate debtor. Also, state the status under which Y Ltd. can make representation on the committee of creditors? (3 marks)

(e) The liquidator shall ordinarily sell the assets of the corporate debtor through auction method. Opine whether the liquidator can sell assets by a route other than auction method ? (3 marks)

Answer 5(a)

Section 4 of the SARFAESI Act, 2002 dealing with the cancellation of certificate of registration, provides as under:

(1) The Reserve Bank may cancel a certificate of registration granted to asset reconstruction company, if such company -

(a) ceases to carry on the business of securitisation or asset reconstruction; or

(b) ceases to receive or hold any investment from a qualified buyer; or

(c) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or

(d) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or

(e) fails to –

i. comply with any direction issued by the Reserve Bank under the provisions of this Act; or

ii. maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank of India under the provisions of this Act; or

iii. submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or

iv. obtain prior approval of the Reserve Bank required under sub-section (6) of section 3 of the Act.

Answer 5(b)

Changes brought about in section 30 of the Insolvency and Bankruptcy Code, 2016 by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 are as under:

(a) A resolution applicant to file an affidavit stating that it is eligible under section 29A of the Code.

(b) Added an explanation to sub-section (2) of section 30 of the Code to clarify that if any approval of shareholders is required under the Companies Act, 2013 or any other law for the time being in force for the implementation of actions under the resolution plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or law.

(c) Substituted sub-section (4) of section 30 of the Code, inter alia, reducing the threshold for voting from 75% to 66% for approving a resolution plan by committee of creditors.

(d) in sub-section (2), in clauses (a) and (b), for the word "repayment" at both the places where it occurs, the word "payment" shall be substituted;

(e) after the third proviso, the following proviso shall be inserted, namely:— "Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.".

Answer 5(c)

Section 217 of the Insolvency and Bankruptcy Code, 2016 deals with complaints against insolvency professional agency or its member or information utility. It states that,

"Any person aggrieved by the functioning of an insolvency professional agency or insolvency professional or an information utility may file a complaint to the Board in such form, within such time and in such manner as may be specified."

Further, Model Bye Laws of Insolvency Professional Agencies also have Grievance Redressal Mechanism for redressing grievances against the agency or any member of the agency.

Answer 5(d)

Operational Creditors : An operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred. They are suppliers of goods or services to any company or operational debtor.

Financial Creditors : Financial creditor is any person to whom a financial debt is owned and includes a person to whom such debt has been legally assigned or transferred to.

According to the provisions of the Insolvency and Bankruptcy Code, 2016, Y Ltd. will be classified as financial as well as operational creditor in relation to X Ltd., a corporate debtor.

Thus, according to section 21(4) of the Code, Y Ltd. shall be included in the committee of creditors and shall have a voting share proportionate to the extent of financial debts owed to such creditor. In the instant case, to the extent of Rs.100 lakh, Y Ltd. being a financial creditor.

Answer 5(e)

Yes, the liquidator can sell assets by a route other than auction method when:

(a) the asset is perishable;

(b) the asset is likely to deteriorate in value significantly if not sold immediately;

(c) the asset is sold at a price higher than the reserve price of a failed auction; or

(d) the prior permission of the Adjudicating Authority has been obtained for such sale.

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

Question 6

(a) The procedure to be followed for voluntary liquidation proceedings is largely similar to the procedure to be followed for insolvent liquidation. However, there are differences between them. What are such marked differences ?

(b) The Resolution Professional has reported cases of undervalued transactions during resolution process to the Adjudicating Authority. What orders can be passed by the Adjudicating Authority in this regard ?

(c) An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person. How will you judge that a person is independent of the corporate person ? (5 marks each)

OR (Alternate question to Q. No. 6)

Question 6A

(i) As per section 25(2) of the Insolvency and Bankruptcy Code, 2016, the Resolution Professional shall undertake actions in order to preserve and protect the assets of the corporate debtor. Briefly explain the duties of the Resolution Professional.

(ii) Discuss the provisions dealing with cases involving cross-border insolvency under the Insolvency and Bankruptcy Code, 2016.

(iii) You are the liquidator of ABC Ltd. which is currently undergoing liquidation process. As a liquidator, indicate how you will handle the priority of claims for distribution of liquidation proceeds of ABC Ltd. as enumerated in the Insolvency and Bankruptcy Code, 2016. (5 marks each)

Answer 6(a)

Though the procedure to be followed for voluntary liquidation proceedings under Chapter V Part II of the Insolvency and Bankruptcy Code, 2016 is largely similar to the

procedure to be followed for liquidation under Chapter III Part II of the Code yet there are marked differences as mentioned below:

1. To initiate voluntary liquidation proceedings, where the corporate person is registered as a company, the directors have to provide a declaration of solvency and a declaration that the company is not being liquidated to defraud any person.

2. The declarations have to be accompanied by (a) the audited financial statements of the company and (b) a record of its business operations for the previous two years or the period since its incorporation whichever is later.

3. Further, a report of the valuation of the assets of the company prepared by a registered valuer has to be provided.

4. A resolution in favour of the voluntary winding-up of the company and appointment of an insolvency professional as the liquidator has to be passed within four weeks of the declaration under clause (a) of sub-section (3) of section 59 of the Code.

5. Where the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed under clause (c) of sub-section (3) of section 59 of the Code within seven days of such resolution.

Answer 6(b)

Section 48 of the Insolvency and Bankruptcy Code, 2016 lists out the orders that may be passed by the Adjudicating Authority setting aside the transaction at undervalue. According to section 48, the order of the Adjudicating Authority under sub-section (1) of section 45 of the Code may provide for the following:

(a) require any property transferred as part of the transaction, to be vested in the corporate debtor;

(b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;

(c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or

(d) require the payment of such consideration for the transaction as may be determined by an independent expert.

Answer 6(c)

According to Regulation 3 (1) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, a person shall be considered independent of the corporate person, if he -

(a) is eligible to be appointed as an independent director on the Board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner –

(i) of a firm of auditors or secretarial auditors or cost auditors of the corporate person; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, in the last three years.

Answer 6A(i)

Section 25 of the Insolvency and Bankruptcy Code, 2016 sets out the duties of resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor and lays down the functions he may perform for the same. [Section 25(1)]

Section 25(2) of the Code provides that for the purposes of sub-section (1) of section 25, the resolution professional shall undertake the following actions, namely:

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings,

(c) raise interim finances subject to the approval of the committee of creditors under section 28 of the Code,

(d) appoint accountants, legal or other professionals in the manner as specified by Board,

(e) maintain an updated list of claims,

(f) convene and attend all meetings of the committee of creditors,

(g) prepare the information memorandum in accordance with section 29 of the Code,

(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.

(i) present all resolution plans at the meetings of the committee of creditors,

(j) file application for avoidance of transactions in accordance with Chapter III, if any, and

(k) such other actions as may be specified by the Board.

Answer 6(A)(ii)

Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 make provisions to deal with cases involving cross border insolvency. Section 234 empowers the Central Government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency.

Section 235 of the Code lays down that notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding. [Section 235(1)].

The Adjudicating Authority on receipt of an application and, on being satisfied that evidence or action relating to assets is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request. [Section 235(2)].

Answer 6(A)(iii)

Section 53 of the Insolvency and Bankruptcy Code, 2016 has significantly altered the priority of claims for distribution of liquidation proceeds of a corporate debtor. The priority of claims as enumerated in the Insolvency and Bankruptcy Code, 2016 provides for payment to unsecured financial creditors before payment towards Government dues.

Section 53(1) of the Code stipulates that the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority:

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and debts owed to a secured creditor;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) Government dues and remaining secured creditors (any remaining debt if they enforce their collateral);

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

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RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

Time allowed : 3 hours *Maximum marks : 100*

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

Question 1

(a) *"Shareholders democracy means the rule of shareholders, by the shareholders and for the shareholders in the corporate enterprise, to which the shareholders belong". Comment on the above and enumerate any five provisions of the Companies Act, 2013 which demonstrate the same.*

(b) *"National Company Law Tribunal (NCLT) can rectify mistakes in its own orders on suo-moto basis." Comment with reference to the Companies Act, 2013 and Judicial Pronouncements.*

(c) *"A legal compliance program is generally defined as a formal program specifying an organization's policies, procedures, and actions with an intent to prevent and detect violations of laws and regulations". Comment briefly.*

(d) *"A Company and its officers will not be eligible for compounding again for similar offence". Elucidate.* *(5 marks each)*

Answer 1(a)

Democracy means the rule of people, by people and for people. In that context the shareholders democracy means the rule of shareholders, by the shareholders', and for the shareholders' in the corporate enterprise, to which the shareholders belong. Precisely it is rights to speak, congregates, and communicates with co-shareholders and to learn about what is going on in the company.

Recognizing the supreme authority of the shareholders', the Companies Act, 2013 has given authority to them to appoint directors at the Annual General Meetings to direct, control, conduct and manage the business and affairs of the company.

Under the Companies Act, 2013 the powers have been divided between two segments: one is the Board of Directors and the other is of shareholders. The Directors exercise their powers through meetings of Board of directors and shareholders exercise their powers through Annual General Meetings/General Meetings. Although constitutionally all the acts relating to the company can be performed in General Meetings but most of the powers are delegated to the Board by virtue of the constitutional documents of the company viz. the Memorandum and Articles of Association.

The Companies Act, 2013 demarcates between the power of the directors as well as that of shareholders. The shareholders exercise their powers at the general meetings by

way of ordinary/special resolutions. Some of the businesses which can be transacted at meetings of shareholders are as under:

- Alteration of Memorandum of Association and Articles of Association.
- Further issue of share capital.
- To transfer some portions of uncalled capital to reserve capital to be called up only in the event of winding up of the company.
- To reduce the share capital of the company.
- To shift the registered office of the company outside the state in which the registered office is situated at present.
- To decide a place other than the registered office of the company where the statutory books, required to be maintained may be kept.
- To appoint auditors.
- To approach Central Government for investigation into the affairs of the company.
- To allow Related Party Transaction.
- To allow a director, partner or his relative to hold office or place of profit.
- Payment of commission of more than 1% of the net profits of the company to a managing or a whole time director or a manager.
- To make loans, to extend guarantee or provide security to other companies or make investment beyond the limit specified.
- To borrow money and to charge out the assets of the company to secure the borrowed money.
- To appoint directors.
- To remove directors.
- To increase or reduce the number of directors within the limits laid down in Articles of Association.
- To cancel, redeem debentures etc.

Answer 1(b)

As per section 420(2) of the Companies Act, 2013, the National Company Law Tribunal may at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record:

(i) Amend any order passed by it, and

(ii) Shall make such amendment, if the mistake is brought to its notice by the parties.

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred.

Further, pursuant to Rule 11 of National Company Law Tribunal Rules, 2016, Tribunal has inherent power to make such order as may be necessary for meeting the end of justice or to prevent abuse of the process of the tribunal, accordingly, the Tribunal can rectified the order passed by its own.

In *Sree Ayyanar Spinning & Weaving Mills Ltd.* v. *Commissioner of Income Tax , 2008 (301 ITR 434)*, it was held that under first part of the provision, the tribunal is empowered to *suo-moto* rectify any mistakes apparent on record any time within two years from the date of its original order. Under the second part, either the taxpayer or the department may file an application highlighting the mistake apparent on record.

In light of the provision, the Apex Court held that the appellate tribunal took time beyond the stipulated period even though the application was filed well within the period. Thus, in the mentioned event the applicant has filed the application within the stipulated period of two years from the date of original order, it is binding for the appellate tribunal to decide the matter on the basis of merits and not on the ground of limitation.

Thus, Section 420(2) read with Rule 11, 154 and 155 of National Company Law Tribunal Rules, 2016 substantiate that the Tribunal has power to rectify a mistake apparent from the record on its own motion or on an application by a party under the Act.

Answer 1(c)

A legal compliance program is a set of internal policies and procedures of a company to comply with laws, rules, and regulations or to uphold business reputation. A compliance team examines the rules set forth by government bodies, creates a compliance program, implements it throughout the company, and enforces adherence to the program.

Legal Compliance programs need to be tailored to the specific company's needs, there are principles to consider in reviewing a program like:

- There should be a strong "tone at the top" from the board and senior management emphasizing the company's commitment to full compliance with legal and regulatory requirements, as well as internal policies.
- There should be clear reporting systems in place both at the employee level and at the management level so that employees understand when and to whom they should report suspected violations and so that management understands the board's or committee's informational needs for its oversight purposes.

Answer 1(d)

If any offence committed by Company or the officers was compounded under section 441 of the Companies Act, 2013, and an offence similar to what was compounded earlier is committed again by a company or its officers within a period of three years from the date on which the earlier offence was compounded, then the provisions of section 441 of the Companies Act, 2013 will not be applicable and the company and the officers concerned will not be eligible for compounding again. In other words, similar offence can be compounded only once in three years.

Section 451 of the Companies Act, 2013 provides that if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a

period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

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

Question 2

(a) Mr. Naryanan was the Managing Director of ABC India Limited and his wife Mrs. Kaika was also a director of the Company. Proceedings were initiated by Registrar of Companies (ROC) against the Company and its directors. Mr. Narayanan died while the proceedings were pending. Subsequently, Mrs. Kaika was impleaded as an accused in the proceedings after his death. She filed an application in High Court under section 204 of Criminal Procedure Code, 1973, praying for discharge on the ground that notice had not been served upon her by the ROC.

Would High Court grant relief to Mrs. Kaika on this ground ? Answer with reference to Judicial Pronouncement(s).

(b) The Board of Directors of BIJI Private Limited made an application to the Registrar of Companies under section 248(2) of the Companies Act, 2013 for removal of name of the Company. The Board submitted an affidavit that Company has no pending liabilities. However, it was later found that few amounts were still payable to creditors.

What penalties can be levied under the Companies Act, 2013 for such an application ?

(c) Mrs. Meera was the Managing Director of ME India Private Limited. During her tenure, she sold few properties of the Company and cleared all the registered mortgages. She also diverted Company's funds of ` 50 Lakhs to her bank account and diverted another ₹10 Lakhs to pay off and discharge the Housing Loan on her daughter's property. Later, winding up proceedings were initiated against the Company.

Can the Liquidator of the Company commence proceedings against Mrs. Meera and her daughter in these circumstances ?

(d) Mrs. P who holds 500 equity shares of Zeta Limited made an application through instrument of transfer to the Company for transfer of 300 equity shares in favour of Mrs. H. Zeta Limited refused to register the transfer of shares in favour of Mrs. H, stating that she has been declared as a wilful defaulter by the banks. What are the rights available to Mrs. H, under the Companies Act, 2013 for such refusal ? (4 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) XYZ Software Technologies Limited of Bengaluru was engaged in business of software exports. During the past years, it had exported services to its Parent entity in United States of America (USA), but failed to realize and repatriate the

foreign exchange due on its exports to India, within the stipulated time. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999. Being aggrieved by this penalty, the Company seeks your advice to file an appeal. Advise the Company.

(ii) *"Several large companies and financial institutions worldwide no longer exist today as they neglected the basic rules of Corporate Governance, Risk Management and Control".*

Comment in the background of today's business environment.

(iii) *PSU Bank Limited, a public sector bank has detected a fraud being committed by one of its large corporate customers. The alleged fraud seems to have been perpetrated over a period of time, by diverting the funds received from the Bank to offshore tax heavens by the promoter group. A forensic audit was ordered to examine the details of such transactions. Meanwhile, the Central Government has asked the Central Bureau of Investigation (CBI) to investigate the fraud.*

Discuss which division of CBI would investigate this case.

(iv) *Mr. Ze, a Company Secretary has recently set up a Practice. Mr. Almora a businessman reached out to Mr. Ze, to incorporate a Company. Mr. Ze assisted him with the list of information required and also extended his professional services for incorporation of the Company. When Mr. Ze was reviewing the documents provided to him, for uploading the forms, he noticed that the documents contained false information. Mr. Ze was apprehensive to go ahead with the incorporation of the Company. Advise Mr. Ze.* *(4 marks each)*

Answer 2(a)

The Madras High Court in case of K. Seethalakshmi v. Registrar of Companies and Anor. rejected the plea of the petitioner that the ROC has not issued any notice to her. The Managing Director had died when the proceedings were pending. The petitioner, who was also a director and the wife of the deceased Managing Director was impleaded as an accused in the proceedings. As the petitioner was impleaded as an accused, she filed an application under section 204 of Criminal Procedure Code, 1973, praying for her discharge. She claimed she could not be impleaded as an accused because of the below grounds:

- Notice had not been served upon her but on her deceased husband.
- When there were other directors, the Registrar had picked out the petitioner to proceed against.

The High Court refusing to discharge the petitioner by dismissing the petition, held that:

- The petitioner was a director of the Company, when her husband the Managing Director, died during the pendency of proceedings. Hence, for non-compliance with the provisions of Sections 159 and 220, the director was also liable to be proceeded against and punished under the law. It was the duty of the petitioner as the surviving director, to comply with the provisions of the Companies Act.

- The Registrar had impleaded the petitioner, as an accused on the death of her husband, not merely because she was the wife of the deceased managing director but because she was a director of the said company and liable to comply with the mandatory requirements or the Act.

Hence, in the background of aforementioned case law, it can be concluded that the High Court would not award any relief to Mrs. Kaika.

Answer 2(b)

As per section 251(1) of the Companies Act, 2013 where it is found that an application by a company under section 248(2) has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved-

(a) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and

(b) be punishable for fraud in the manner as provided in section 447 of the Companies Act, 2013.

Further, Section 251(2) of the Companies Act, 2013 states that, the Registrar may also recommend prosecution of the persons responsible for the filing of an application under Section 248(2) of the Companies Act, 2013.

Based on above provisions, the Board of Directors of BIJI Private Limited will be liable to penal provisions as per Section 251 of the Companies Act, 2013.

Answer 2(c)

Section 336 of the Companies Act, 2013 also covers the offences which were committed by the officers of the company when the company was not under winding up.

In case where the company is subsequently ordered to be wound up, the offences committed by the officers of the company while the company was a going concern, will still be dealt under section 336, though such offence could be dealt with under other relevant sections had it remain a going concern. Action covered under Section 336(1)(d) are those which were committed within the twelve months immediately before the commencement of the winding up or at any time thereafter.

Further, Section 329 of the Companies Act, 2013 provides that any transfer of property of any kind by a company other than the transfer made in the ordinary course of business or the transfer is made in good faith and for a value consideration made within a period of one year prior to the presentation of the petition for winding up shall be void against the liquidator.

The facts provided are similar to the facts of *Fodare Pty Ltd.* v. *Shearn* [2011] case. Shearn was the sole director of the Company during the relevant period and by sale of a property of the Company, she cleared all registered mortgages and diverted funds to the tune of A$ 383,000 to her bank account and diverted another A$ 251,000 to pay up and discharge a mortgage over a her daughter's property. The company was wound up. Liquidator commenced proceedings seeking a declaration that Shearn was in breach of

fiduciary duties and her daughter was charged on the ground that she falls within the ambit of a constructive trustee as she was aware that she is receiving funds out of proceeds arising from sale of company's property.

It was held that Shearn was liable to the Company for equitable compensation of both the amounts and statutory compensation together with interest and costs. Further, the Supreme Court held that her daughter was also liable to the company for equitable compensation of A$ 251,000 plus interest. The Court found that the daughter might be aware that her mother who was a former bankrupt did not have money and the property that was sold belonged to the company.

The Court said the liability of the mother and the daughter for equitable compensation of A$251,000 plus interest would run concurrently such that both of them will be jointly and severally liable.

Hence it can be concluded that Mrs. Meera and her daughter would be jointly and severally liable for diversion of Company's funds and the Liquidator of the company can commence proceeding against Mrs. Meera and her daughter after following due procedures provided in the Act.

Answer 2(d)

As per section 58(4) of the Companies Act, 2013, if a public company without sufficient cause refuses to register the transfer of securities within a period of 30 days from the date on which the instrument of transfer or the intimation of transmission, as the case may be, is delivered to the company, the transferee may, within a period of 60 days of such refusal or where no intimation has been received from the company, within 90 days of the delivery of the instrument of transfer or intimation of transmission, appeal to the Tribunal.

As per Section 58(5), the Tribunal, while dealing with such an appeal, may, after hearing the parties, either dismiss the appeal, or by order -

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of 10 days of the receipt of the order; or

(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved.

Thus Mrs. H can file an appeal with the Tribunal as mentioned above.

Answer 2A(i)

Sections 17 and 19 of Foreign Exchange Management Act, 1999 provide for appeals against orders of Adjudicating Authority. If the Adjudicating Authority is Assistant Director of Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals).

Further appeal shall lie with Appellate Tribunal for Foreign Exchange. However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall directly be made to the Appellate Tribunal.

Appeal to Special Director (Appeals) : Appeal against order of Assistant Director

of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under Section 17 of the said act within 45 days from the date on which the copy of the order made by the Adjudication Authority is received by the aggrieved person.

Appeal to Appellate Tribunal : Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange under Section 19 of Foreign Exchange Management Act, 1999 within 45 days from the date on which the copy of the order made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. It may be noted that the Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

Hence, XYZ Software Technologies may file an appeal based on the Adjudicating Authority.

Answer 2A(ii)

The importance of corporate governance in risk management is amply supported by the reasoning of the Kumar Mangalam Birla Committee on Corporate Governance to implement corporate governance in India.

Risk Management is an integral component of corporate governance and good management. There is a growing realization that corporate governance has an impact on enterprise risk management. Several large companies and financial institutions worldwide no longer exist or have been taken over precisely because they neglected the basic rules of risk management and control. Some common risk management problems in relation to corporate governance that appeared in many financial institutions before and during the crisis according to the OECD (2009) was because of following reasons :

- Risks were frequently not linked to strategy which is a key issue to ensuring that risk management has a focus on the business context;
- Risk definitions are often poorly expressed. Better risk definitions (context, event. consequence) are contrary to a lot of current thinking in risk management which has shorten risk descriptions to the smallest number of words possible;
- Organizations weren't always in a position to develop intelligent responses to risks;
- Boards didn't take stakeholders and guardians into account in detailing responses to risk;
- Important parts of the value chain were outsourced to others.

Answer 2A(iii)

Central Bureau of Investigation (CBI) has grown into a multidisciplinary investigation agency over a period of time. Today it has the following three divisions for investigation of crime -

i. *Anti-Corruption Division* - for investigation of cases under the Prevention of Corruption Act, 1988 against Public officials and the employees of Central Government, Public Sector Undertakings, Corporations or Bodies owned or

controlled by the Government of India - it is the largest division having presence almost in all the States of India.

ii. *Economic Offences Division* - for investigation of major financial scams and serious economic frauds, including crimes relating to Fake Indian Currency Notes, Bank Frauds and Cyber Crime.

iii. *Special Crimes Division* - for investigation of serious, sensational and organized crime under the Indian Penal Code and other laws on the requests of State Governments or on the orders of the Supreme Court and High Courts.

The laws under which CBI can investigate Crime are notified by the Central Government under section 3 of the Delhi Special Police Establishment Act, 1946. According to Section 3, The Central Government may, by notification in the Official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment.

As the fraud in PSU Bank is a major financial scam. It would be investigated by the Economic Offences division of CBI.

Answer 2A(iv)

Section 7 of the Companies Act, 2013 deals with the documents to be filed with the concerned Registrar of Companies (ROC) for incorporation of a company. While dealing with the requirements, under Section 7(5) of the Companies Act, 2013 it has been stated that if a person furnishes false information or incorrect particulars or suppresses material information then the person is liable for action under Section 447 of the Companies Act, 2013.

Further, Section 7(6) also provides that the promoters, the first directors and the fiduciaries viz, the Chartered Accountant, the Company Secretary in practice or the Cost Accountant or theAdvocate, the Managing Director or the Secretary of the Company who have given a declaration in the prescribed format shall also be liable for action under Section 447 of the Companies Act, 2013. Thus the penal provision extends to the professionals also apart from the officers of the company.

Hence, Mr. Ze should take note of the aforementioned provisions and shall go for incorporation of the company with the correct information only otherwise, he should not go ahead with the incorporation of the Company, knowing that the documents provided contains false information.

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

Question 3

(a) PQ Limited was a Company listed on XYZ Stock Exchange. The Company was making continuous losses and was not performing well. There were also reports of alleged financial irregularities in media. Also, many complaints were received by Securities Board of India (SEBI), regarding its listed securities. Subsequently, SEBI passed an Order to delist the securities of the Company from the said stock exchange.

As a Company Secretary, advise PQ Limited for further course of action.

(b) *Thinking Star Limited, a Public Limited Company was into manufacturing of steel and steel products. The Company wanted to expand its operations and to fund the same, it evaluated various options including bank loan, private placement, etc. However, due to a paucity of time the Company went ahead and funded its operations by issuing shares to a friend of Mr. XY, the Managing Director of the Company on private placement basis. The Company failed to comply with the provisions of the Companies Act, 2013. Mr. XY was not willing to act, unless there was any notice from the regulators. Mr. S, the Corporate Advisor to the Company suggested Mr. XY to compound the offence as it would be in the best interest of the Company.*

Advise Mr. XY.

(c) *Explain the various types of Criminal Courts under the Criminal Procedure Code, 1973 and their powers in brief.*

(d) *Mr. Krish, a resident of Mumbai is a friend of Mr. Parth, who stays in Manali. As Mr. Parth did not have much exposure and information about personal finance and investment options in Manali, he trusted his friend for his investments. As per their agreement, Mr. Parth remitted ` 1 Lakh to Mr. Krish to invest in mutual funds and stock market. Mr. Krish employs the money in his own business ignoring his understanding with Mr. Parth.*

Has Mr. Krish committed criminal breach of trust ? *(4 marks each)*

OR (Alternate question to Q. No. 3)

Question 3A

(i) *During the previous year, Alfa Limited could not conduct its Annual General Meeting (AGM) within the timelines as per the Companies Act, 2013 due to some internal and operational issues. In the current year also, the Company could not conduct its AGM within stipulated time, thereby committing the same default in the current year as well.*

What would be the penal provisions for such default ?

(ii) *Infomatika Limited, a Public Limited Company was incorporated under the Companies Act, 1956 in the year 2010. During the financial year ended March 31, 2019, the Company made a contribution of ` 50 Lakhs to a local political party, which amounts to 9% of its average net profits during three immediately preceding financial years. Is the Company compliant with the provisions of the Companies Act, 2013, if not, what would be the penal provisions for such an act?*

(iii) *Ms. Rekha was working as 'Gram Sachiv' for ten gram panchayats. She was a trusted person of the local villagers and they respected her. Ms. Rekha, collected a sum of ` 5 Lakhs from fifty villagers in the gram panchayats saying she would pay their house tax and issued receipts to them. Later it was found that she did not deposit the money into Government treasury, but utilized it for her personal purposes.*

The villagers wanted to file a case against Ms. Rekha, when they came to know of the misappropriation done by her.

Will the villagers be successful in filing a case against Ms. Rekha ?

(iv) Mr. A sold goods to Mr. B amounting to ₹1 crore. Mr. B was delinquent in payment, after repeated follow-ups, he issued a cheque for the said amount to Mr. A. The cheque was not honoured and Mr. A filed a cheque bouncing case against Mr. B. The Court issued summons to Mr. B. Later, Mr. A wanted to withdraw the case.

Will the Magistrate permit Mr. A to withdraw the case at this stage ?

(4 marks each)

Answer 3(a)

As per Section 15T of the SEBI Act, 1992, any person aggrieved by an order of the Board or by an order made by an adjudicating officer may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the SEBI or the Adjudicating Officer, as the case may be, is received by him.

The Tribunal shall give an opportunity of being heard to the respondent and may pass the order confirming, modifying or setting aside the decision of SEBI.SAT shall also send a copy of its order to every party to appeal and to the concerned adjudicating officer. Further, the matter filed before SAT is dealt with as expeditiously as possible and is endeavoured to be disposed of within 6 months from the date of receipt of the appeal.

Thus, PQ Limited should consider filing an appeal to Securities Appellate Tribunal (SAT).

Alternatively, the company may go for delisting of the securities in accordance with the SEBI (Delisting of Securities) Regulations, 2009.

Answer 3(b)

As provided under section 441 of the Companies Act, 2013 any offence punishable (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by the Tribunal; or where the maximum amount of fine which may be imposed for such offence does not exceed twenty five lakh rupees, by the Regional Director or any officer authorised by the Central Government.

However, As per Section 454 of the Companies Act,2013 provides that the adjudicating officer appointed by the central government may, by an order impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of this Act; and direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

In the given case, the company has made private placement without complying the provisions under section 42 of the Companies Act, 2013. Hence, the promoters and directors of the company be liable for a penalty which may extend to the amount raised

through the private placement or two crore rupees, whichever is lower, and the company shall also refund all monies with interest to subscribers within a period of thirty days of the order imposing the penalty.

Accordingly, the suggestion of Mr. S, Corporate adviser is not correct, as the offence under section 42 of Companies Act, 2013 is subject to the adjudication by the adjudication officer appointed by the Central Government and compounding provisions are not applicable on defaults in private placement.

Answer 3(c)

According to Section 6 of The Code of Criminal Procedure, 1973, besides the High Courts and the Courts constituted under any law, other than CrPC, there shall be, in every State, the following classes of Criminal Courts, namely:--

(i) Courts of Session;

(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates.

Courts of Magistrates are the basic Courts for conducting trial of criminal offences. In metropolitan cities such as Mumbai, Kolkata and Chennai, respectively the capitals of the States of Maharashtra, West Bengal and Tamil Nadu, have special category of Magistrates called Presidency Magistrates / Chief Metropolitan Magistrates. As per section 28 and 29 of Criminal Procedure code, 1973, following are the criminal court and their powers:

Types of court	*Power*
High Court	To award any sentence as authorised by a substantive law
Sessions Judge / Additional Sessions Judge	To award any sentence authorised by a substantive law. Sentence of death should be subject to confirmation by High Court.
Assistant Sessions Judge	To award imprisonment up to 10 years and / or fine. For fine, no upper limit has been prescribed
Chief Judicial/Chief Metropolitan Magistrate	To award imprisonment up to 7 years and / or fine. For fine, no upper limit has been prescribed
Judicial Magistrates of Class I / Metropolitan Magistrates / Sub-divisional Judicial Magistrates	To award imprisonment up to 3 years or fine up to 10,000/- or both
Judicial Magistrates of Class II	To award imprisonment for a term not exceeding one year, or of fine not exceeding five thousand rupees, or of both

Answer 3(d)

According to Section 405 of the Indian Penal Code, 1860, the essential ingredients of the offence of criminal breach of trust are as under:

(a) The accused must be entrusted with the property or with dominion over it,

(b) The person so entrusted must use that property, or;

(c) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation of any:

- direction of law prescribing the mode in which such trust is to be discharged, or
- legal contract made touching the discharge of such trust.

In the given case, there is an express or implied contract between Mr.Parth and Mr.Krish, that the money would be invested by Mr.Krish on behalf of Mr.Parth. But Mr.Krish invests the same in his own business which is violation of section 405 of the Indian Penal Code, 1860.

Hence, he has committed criminal breach of trust.

Answer 3A(i)

As per the provisions of Section 99 of the Act, if the Company has defaulted in holding a meeting in accordance with Section 96 or Section 97, then the Company and every officer would be liable to fine upto Rupees 1 Lakh and further fine upto Rupees 5000 for each day of continuing default.

As per Section 451 of the Companies Act, 2013, if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

Hence. Alfa Limited would be liable to twice the fine as mentioned above, as it has committed the same default within a period of 3 years.

Answer 3A(ii)

As per Section 182 of the Companies Act, 2013, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

Further, such contribution shall be approved by a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors. Every company shall disclose in its profit and loss account the total amount contributed by it as contribution to political parties during the financial year to which the account relates.

Such contribution shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account. However, a company may make contribution through any instrument,

issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.

Section 182(4) states that company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

Infomatika Limited has made a political contribution of Rupees 50 Lakhs to a local political party. To become a compliant company, Infomatika Limited shall be in compliance with the provisions of section 182 of the Companies Act, 2013

Answer 3A(iii)

According to Section 409 of the Indian Penal Code, 1860, when a person in his capacity of a public servant, commits criminal breach of trust as specified under section 405 of the Indian Penal Code, 1860, shall be punished with imprisonment for life, or with imprisonment of either descrip¬tion for a term which may extend to ten years, and shall also be liable to fine.

The facts mentioned are similar to *Bachchu Singh* v. *State of Haryana* case. The appellant was working as 'Gram Sachiv' for eight gram panchayats. He collected a sum of Rupees 648 from thirty villagers towards the house tax and executed receipts for the same. As he was a public servant, and in that capacity he had collected money as house tax but did not remit the same, he was charged under Section 409 of Indian Penal Code, 1860. It was held that the appellant dishonestly misappropriated or converted the said amount for his own use and his conviction under section 409 of Indian Penal Code, 1860 was upheld by the Supreme Court.

Mrs. Rekha was working as a Gram Sachiv and collected money from the villagers. She misappropriated the funds for her personal benefits.

In the background of the aforementioned case law, she can be charged under section 409 of Indian Penal Code, 1860 for breach of trust by public servant as she is a public servant.

Answer 3A(iv)

Section 257 of the Criminal Procedure Code, 1973 (CrPC) lays down the circumstances under which a complaint may be withdrawn with the consent of the Court in a summons case. It permits a complainant at any time before a final order is passed in any case, to withdraw with the permission of the Magistrate, his complaint against the accused, or if there be more than one accused, against all or any of them provided he satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint and the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom complaint is so withdrawn.

On a bare reading of this section, it can be manifested that a complainant has no legal or vested right to withdraw a complaint as and when he wishes. Withdrawal of the complaint under section 257 of CrPC is permissible only if the Magistrate is satisfied that there are sufficient grounds for permitting such withdrawal. This clearly implies that the Magistrate must apply his judicial mind to the reasons, which compel the complainant to withdraw the complaint, before granting permission,

Thus, the Magistrate may permit Mr. A to withdraw the case if he is satisfied that there are sufficient grounds for such withdrawal.

Question 4

(a) In the Annual General Meeting (AGM) of Jollydays Limited, the matter of re-appointment of Mr. Jolly, the Executive Director (ED) came up for voting. During such discussion, allegations of fraud and financial irregularities were levelled against him by some members, which resulted in chaos in the meeting. The situation was normal only after the Chairman promised to initiate an inquiry against Mr. Jolly. The resolution at AGM to reappoint Mr. Jolly as ED, was not passed. The matter was published in the newspapers next day.

Under the Companies Act, 2013, can a Court take cognizance of the matter and suo moto initiate action against Mr. Jolly based on the media reports ? (4 marks)

(b) Greenary Limited, a Public Limited Company was in the business of generation and supply of electricity and had its factory near Krishnapatanam Beach. Mr. Pond, was the Vice-President (Operation), and was authorized by the Board of Directors of the Company to be in charge of the factory operations. As the factory was located on sea-shore, the Company was subject to the provisions of various Environmental Laws. The Company had not complied with the provisions relating to dumping/discharge of its production wastes, etc. Summons were issued against Mr. Pond by the adjudicating authority. Mr. Pond sent an email to you, the Company Secretary stating his designation would not tantamount to officer in default.

Would you agree with Mr. Pond ? (4 marks)

(c) Mr. Raj owned 50 acres of land. He agreed to sell the land to Mr. Sham for ₹5 crore and executed a conveyance for the same. Despite the execution of conveyance, Mr. Raj later mortgages the entire 50 acres to Mr. Rohit. He conceals the fact of previous sale to Mr. Sham and receives money from Mr. Rohit. In the background of decided case law, indicate whether Mr. Raj would be held liable for cheating. (4 marks)

(d) Mr. Mon had employed Ramu as a domestic help for quite sometime. Ramu had intention of robbing the house, so he planned the robbery on a day when most of the family members were out. Ramu was caught off guard, when Ms. Mona, mother of Mr. Mon, caught him committing the crime and tried to alert the police. Unfortunately in the scuffle, Ramu ended up killing Ms. Mona and ran away with the valuables. Investigation was initiated and Ram was caught by the Police. Mr. Mon contended that there are two separate crimes, one of murder and other of burglary and Ramu should be penalized for them separately.

Can offence committed by Ramu be clubbed in a single trial under Criminal Procedure Code, 1898 ? (4 marks)

Answer 4(a)

Section 439 of the Companies Act, 2013 provides that:

(1) Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.

(2) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder or a member of the company, or of a person authorised by the Central Government in that behalf.

Further, the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.

Thus, in the given situation, a Court shall not initiate any suomoto action against Mr.Jolly without receiving any complaint in 'writing of the Registrar of Companies, a shareholder of the company or a members or of a person authorized by the Central Government in this behalf.

Answer 4(b)

According to section 47 of the Water (Prevention and Control of Pollution) Act, 1974, where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to the guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge for that he exercised all due diligence to prevent the commission of such offence.

Where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Mr.Pond, has been authorised by the Board of Directors to be the in charge of factory operations. As per section 47 of Water Act, 1974 he is deemed to the guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Answer 4(c)

Section 415 Indian Penal Code, 1860, provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

In *Chinthaman* vs. *Dyaneshwar and Anr.* [1973] case, the accused sold the property to the complainant. In fact, they said property was already mortgaged to some other person. The accused concealed the mortgage and registered it in favour of the complainant and received full consideration. The High Court held that it was a clear cheating offence.

Yes, in the given case, Mr. Raj would be liable for offence of cheating as he dishonestly mortgaged the land to Mr.Rohit.

Answer 4(d)

Section 220 (1) of Criminal Procedure Code, 1898 provides for single trial for more than one offence. If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial, for every offence. The above section could be used when different offences committed by a single person or same persons and the trial could be a combined and held as a single trial.

The Calcutta High Court in *Madan Gaped Dey and Anor.* v. *Slate and Anor.* held that if several offences are committed in the course of the same transaction, section 235 of Criminal Procedure Code, 1898 would authorize their joinder for the purpose of a single trial.

If a continuous thread runs through the acts complained of, charges arising out of those acts would be liable to be joined together under this section. Continuity of action, therefore, seems to be a very important test in the matter.

Yes, the offences committed by Ramu can be clubbed in single trial.

Question 5

(a) HDF Limited, a listed entity was into real-estate business. Over a period in an attempt to diversify its operations it borrowed heavily from banks and financial institutions. The Company appointed a Merchant Banking firm, to provide strategic inputs for its business operations. On the recommendation of the firm, the Company created complex group structures and business models. Due to financial mismanagement and lack of strategic operations, the Company started making losses and over a period was not able to repay the loans it had taken. The Company also failed to repay the deposits it had raised from public. Gradually, the market capitalization of the Company eroded and now it has been reduced to a penny stock. The shareholders are evaluating the option of filing a case against the Company, the Merchant Banking firm and also the Rating Agency which were involved with the Company during such period.

Evaluate whether the shareholders and depositors be successful in filing a suit in these circumstances. (8 marks)

(b) A notice of investigation was sent to Maina Limited for alleged misappropriation of funds in the Company. As the Company Secretary of the Company, prepare a report touching upon various aspects of the activities of Company which would prove that the allegation in the instant case is not true. (8 marks)

Answer 5(a)

As per the provisions of Section 245(1) of the Companies Act, 2013, the member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section 245(3) 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 to claim damages or compensation or demand any other suitable action from or against:

- the Company or its directors for any fraudulent, unlawful or wrongful act or omission;

- the auditor including audit firm of a Company for any improper or misleading statement of particulars made in the audit report or for any unlawful or fraudulent conduct;
- any expert or advisor or consultant or an incorrect or misleading statement made to the Company.

However, Rule 84 of the National Company Law Tribunal Rules, 2016 provides that:

(1) An application under sub-section (1) of section 245, read with sub-section (3) of section 245 of the Act, shall be filled in Form NCLT-9.

(2) A copy of every application under sub-rule (1) shall be served on the company, other respondents and all such persons as the Tribunal may direct.

(3) In case of a company having a share capital, the requisite number of member or members to file an application under sub-section (1) of section 245 shall be -

(i) (a) at least five per cent. of the total number of members of the company; or

(b) one hundred members of the company, whichever is less; or

(ii) (a) member or members holding not less than five per cent. of the issued share capital of the company, in case of an unlisted company;

(b) member or members holding not less than two per cent. of the issued share capital of the company, in case of a listed company.

(4) The requisite number of depositor or depositors to file an application under sub-section (1) of section 245 shall be -

(i) (a) at least five per cent. of the total number of depositors of the company; or

(b) one hundred depositors of the company, whichever is less; or;

(ii) depositor or depositors to whom the company owes five per cent. of total deposits of the company.

Based on the aforementioned provisions, it can be concluded that shareholders of HDF Limited will be successful in filing Class Action Suit against the company, its directors and consultants including merchant banking firm/rating agencies.

Answer 5(b)

Date:

The Investigation Authority
ABC Building
B Block, New Delhi

Subject : Investigation notice on Misappropriation of Funds in Mania Limited.

Ref : INVIT/ 19-20/520/dated 05-12-2019

We are in receipt of your letter vide No- INVIT/ 19-20/520/dated 05-12-2019 regarding misappropriation of funds in of the Company under section 179 / 180/ 185/ 186 / 188 and other applicable provisions of the Companies Act, 2013.

In this connection, we would like to inform you that the Business operation of the

company *(Basic information about the company: like Name, date of incorporation, registered office, branches, factories and other offices, status of the company, objects, capital structure, voting rights and shareholding pattern of the company.)*

The present Board of the company comprise *(Brief history of past management set up, existing management set up, composition of Board of Directors, terms and conditions of the appointment of managerial personnel, details regarding appointment of directors and their relatives to an office or place of profit.)*

The Business activities of the company comprises *(Nature of existing business, licensed and installed capacities, sources of finance, name of other companies falling within the same group.)*

During the period referenced under the letter the company has complied with the all the procedure and compliance required under the Act read with rules made thereunder. A summary of the transaction and procedure followed by the company is provided as under for your reference please.

- Details of loans taken and loans advanced to Directors, the firms in which they are partners or companies in which they are Directors are in accordance with the provisions of the Act and compliance made by the company in this regard.
- Acquisition/disposal of substantial assets and compliances thereof
- The investments made by the company and limits approved by the company.
- Details of utilisation of loans taken, funds raised by the Company.
- Maintenance of statutory registers including minute's books are being maintained up- to-date.
- Internal checks and internal control system followed by the company.
- Working results and financial position of the company in the context of its working results for the last three years.
- Compliance by the Company and its officers with the provisions of the Companies Act and other Acts, applicable to the Company.
- A scrutiny of abnormal/heavy expenditure items.
- Transactions with Related Parties

As mentioned above, we have complied with the due procedures and compliance requirement as provided in the law therefore request you kindly consider our submission and take on record the same to close the further investigation in to the affairs of the company.

We shall however submit any further information / clarification as may be required by your good selves.

Thanking you.

For, Mania Limited

(Company Secretary)

Question 6

(a) *"Anticipating future risks is a key element of avoiding or mitigating those risks before they escalate into crisis." Explain.*

(b) *"Companies Act, 2013 is mixture of both civil law as well as criminal law." Comment briefly.*

(c) *"Errors and Omissions Insurance is a special type of coverage that protects a Company against claims that a professional service provided, caused client to suffer financial harm due to mistakes on the part of professional or because he may have failed to perform some service."*

Why should professionals opt for such an insurance ?

(d) *A Practicing Company Secretary wants to establish his practice in the field of Mediation and Conciliation. He wants to know whether he would not be eligible to be appointed as a Mediator or Conciliator as per Rule 5 of Companies (Mediation and Conciliation) Rules, 2016. Advise him. (4 marks each)*

Answer 6(a)

The company's risk management structure should include an ongoing effort to assess and analyze the most likely areas of future risk for the company, including how the contours and interrelationships of existing risks may change and how the company's processes for anticipating future risks are developed. This includes understanding risks inherent in the company's strategic plans, risks arising from the competitive landscape and the potential for technology and other developments to impact the company's profitability and prospects for sustainable and long-term value creation. Anticipating future risks is a key element of avoiding or mitigating those risks before they escalate into crises. In reviewing risk management, the board or relevant committees should ask the company's executives to discuss the most likely sources of material future risks and how the company is addressing any significant potential vulnerability.

Answer 6(b)

The Companies Act, 2013 is mixture of both civil as well as criminal provisions with majority being criminal. The civil and criminal provisions under the Companies Act, 2013 can be identified by observing the language used by Act for consequences or non-compliances/contravention of its provisions. The words "liable to penalties" denote civil nature of non-compliances whereas the words "punishable with fine and/or imprisonment and/or both" denote criminal nature of non-compliances.

The Act has clearly laid down the mechanism and the forum for speedy and smooth administration of judicial activities under the Act. The power of adjudication of civil non-compliances (defaults liable for penalties) is being vested with the ROC and the power of adjudication of criminal non-compliances (offences punishable with fine/ imprisonment) is being vested with the special courts with sub-delegation of power of compounding of offences to Regional Director and NCLT.

Thus, the statement given in the question that "Companies Act, 2013 is mixture of both civil law well as criminal law" is correct.

Answer 6(c)

Professional indemnity insurance is also known as professional liability insurance and also as Errors & Omissions (E&O) insurance. It is a type of liability insurance that works to protect businesses and individuals who provide consultation and services with the compensation for full and hefty costs arising from the loss that they have caused to their client. The coverage provided by the insurance company focuses on the alleged failure of the service delivery by the Company, which has led to the financial loss due to errors and omissions in the service or consultation.

Some reasons that might make it necessary to have E&O are as under:

- *High risk of lawsuits* : Not having professional indemnity insurance may put a person at high risks as many companies may take advantage of the professionals since they are not completely secured. Moreover, it can put the Company/ Professional in a financial loss if a case is filed against them.
- *Risk of losing business* : Many clients prefer those companies which has such insurance for doing business, at times they are keen to know if the Company or any of its employees makes a mistake, whether it will be covered or not.

Answer 6(d)

As per Rule 4 of Companies (Mediation and Conciliation) Rules, 2016, a Company Secretary with at least fifteen years of continuous practice is qualified for being empanelled as mediator or conciliator.

However, as per Rule 5of Companies (Mediation and Conciliation) Rules, 2016, a person shall be disqualified for being empanelled as mediator or conciliator, if he-

- is an undischarged insolvent or has applied to be adjudicated as an insolvent and his application is pending;
- has been convicted for an offence which, in the opinion of the Central Government, involves moral turpitude;
- has been removed or dismissed from the service of the Government or the Corporation owned or controlled by the Government;
- has been punished in any disciplinary proceeding, by the appropriate disciplinary authority; or
- has, in the opinion of the Central Government, have such financial or other interest in the subject matter of dispute or is related to any of the parties, as it is likely to affect y the discharge of his professional obligations as a mediator or conciliator.

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