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CHAPTER-1: AS PER ICSI MODULE

TYPES OF CORPORATE RESTRUCTURING

Q1: “Inorganic growth provides an organisation with an avenue for attaining accelerated growth as compared to the organic growth in general”. Comment on the statement. (5 marks)

PAST YEAR QUESTION JUNE 2018

OR

“Corporate Restructuring is an inorganic growth strategy that significantly changes a company’s business model, management team or financial structure to address challenges and increase shareholders’ value”. Elucidate the statement with different options of Corporate Restructuring. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Growth refers to a positive change in size, often over a period of time. It is a process toward fullness or fulfillment. Every company is working for growth and it can be achieved through corporate restructuring.

There are primarily two ways of growth of business organisation, i.e. organic and inorganic growth.

S. No	Organic growth	Inorganic growth
1.	Organic growth is through internal strategies, which may relate to business or financial restructuring within the organisation that results in enhanced customer base, higher sales, increased revenue, without resulting in change of corporate entity.	Inorganic growth provides an organisation with an avenue for attaining accelerated growth enabling it to skip few steps on the growth ladder. Restructuring through mergers, amalgamations etc., constitute one of the most important methods for securing inorganic growth.
2.	A company is said to be growing organically when the growth is through the internal sources without change in the corporate entity. Organic growth can be through capital restructuring or business restructuring.	Inorganic growth is the rate of growth of business by increasing output and business reach by acquiring new businesses by way of mergers, acquisitions and take-overs and other corporate restructuring strategies that may create a change in the corporate entity

Q2: “Corporate Restructuring is the process of significantly changing a company’s business model, management team or financial structure to address challenges and increase shareholders value. Elucidate the statement indicating need and scope of Corporate Restructuring. (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD, DECEMBER 2017

OR

“Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain pre-determined objectives at corporate level.” Comment on the statement and explain the objectives behind Corporate Restructuring. (5 marks)

PAST YEAR QUESTION DECEMBER 2024 OLD

OR

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

PAST YEAR QUESTION DECEMBER 2016

Answer: ‘Corporate Restructuring’ is a term of wider importance and covers, in its ambit, the restructuring or reorganizing or financial restructuring of any organisation done in order to operate more effectively and efficiently.

In other words, Corporate restructuring is the process of significantly changing a company’s business model, management team or financial structure to address challenges and increase shareholder value. Corporate restructuring is an inorganic growth strategy.

Need and Scope of Corporate Restructuring

Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain **pre-determined objectives** at corporate level. **Objectives** may include the following:

- To enhance shareholders value
- Deploying surplus cash from one business to finance profitable growth in another
- Exploiting inter-dependence among present or prospective businesses
- Risk reduction
- Development of core-competencies
- To obtain tax advantages by merging a loss-making company with a profit-making company
- To become globally competitive
- To increase the market share
- By diversification of business activities, the minimization of business risk is possible and it enables the firm to achieve at least the minimum targeted rate of return.

Alternate Answer,

Corporate Restructuring aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It also aims at exploiting the strategic assets accumulated by a business i.e., monopolies, goodwill, exclusivity through licensing, etc. to enhance the competitiveness advantages. Thus, corporate restructuring helps in bringing an edge over competitors, in highly competitive world, cost cutting and value addition are very important to get highlighted.

Objectives may include the following:

- To enhance shareholders value
- Deploying surplus cash from one business to finance profitable growth in another
- Exploiting inter-dependence among present or prospective businesses
- Risk reduction
- Development of core-competencies
- To obtain tax advantages by merging a loss-making company with a profit-making company
- To become globally competitive
- To increase the market share
- By diversification of business activities, the minimization of business risk is possible and it enables the firm to achieve at least the minimum targeted rate of return.
- With the integration of sick unit into the successful unit, the adjustment of unabsorbed depreciation and write-off of accumulated loss is possible and thereby the successful unit can have strategic tax planning.

Q3: Explain the provisions of the Income-tax Act, 1961 in relation to computation of capital gains arising out of slump sale. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: In comparison to demerger, slump sale is not generally tax efficient as the transfer of assets could be subject to capital gains tax in the hands of the transferor. Where the undertaking being transferred was held for more than 3 years prior to the date of the slump sale, the gains from such a sale would qualify as long-term capital gains, and the effective rate of tax would be 20%. If the undertaking had been held for 3 years or any period lesser than that, prior to the date of slump sale, then the income would be taxable as short-term capital gains, the effective rate of which is currently 30%. Also, any distribution by the company to its shareholders could attract dividend distribution tax.

Q4: "Restructuring is resorted to in various forms with objectives such as profitability improvement, augmenting more resources, relief from competition and methods take the forms like acquisition, merger, takeover, leveraged buy outs, slump sale, overseas acquisitions etc." Illustrate certain instances that have happened in India setting examples of benefits in Corporate Restructuring. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

As a case of demerger the Cement division of L&T Ltd. resulted to Ultratech Cement Co. Ltd. that resulted in economies of scale and overall competitiveness, multifunctional synergies, combined resource pool, cross leverage financial strengths and increased capacity.

Tata Steel Ltd. acquired overseas Corus Group Plc. that improved the synergies to Tata Steel Ltd. that marshalled the resources for both, utilization of wide retail and distribution network, technology transfer and

enhanced R&D capabilities. Transfer of undertaking for a lump sum consideration by Piramal Healthcare Ltd. to Abbot Healthcare Pvt. Ltd. with a non-compete clause is slump sale in terms of the Income-tax Act, 1961. Capital gains arising therefrom is taxed as long term if held for more than 3 years prior to transfer or as short term if held for less than 3 years. Bharti Airtel Ltd. explored the strategy of leveraged buyout in acquiring Zain Africa International BV majorly financed through borrowed funds.

For this purpose, special purpose vehicles are formed. Bharti Airtel structured acquisition through special purpose vehicles thus keeping its finances intact. However, as a guarantor special purpose vehicles, Bharti Airtel assumes full responsibility.

Q5: What are the Motives behind Corporate Restructuring.

Answer: Financial Motives

- To reduce risk
- To increase operating efficiency
- To maximise the value of assets
- To improve access to financial markets to obtain tax benefits
- To eliminate competition

Other Motives than Financial

- To expand marketing and management capabilities
- To allow new products development
- To provide synergistic benefits
- To revive a sick company
- To resolve the bankrupt/insolvent company

Q6: It is said that 'corporate restructuring' always has motives. Elaborate on the 'financial motives' that are prevalent? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Restructuring aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It is aimed at to get an edge over its competitors. Corporate Restructuring may be broadly of two types – Financial and Others.

The Financial objectives aim at reducing risks, increasing operating efficiency, improving access to financial markets or obtaining tax benefits, to eliminate competition and so on.

For a manufacturing unit the operating efficiency is of utmost importance but for lenders like Banks, Financial Institutions and NBFCs, the disbursement risk is the greatest as a wrong judgment shall create a Non performing asset. Risk has many forms and any one can be a cause for concern for the lenders.

For newly set-up companies desiring to expand, modernize and grow, the access to financial markets is essential and for this the generation of ideas is important which in future should be able to generate and sustain revenue. Tax savings is the target for all corporate entities.

Q7: What are the types of Restructuring

Answer: There are 4 types of Restructuring which are as follows:

1. Financial Restructuring

It deals with restructuring of capital base and raising finance for new projects. Financial restructuring helps a firm to revive from the situation of financial distress without going into liquidation.

2. Technological Restructuring

It involves alliances with other companies to exploit technological expertise.

3. Market Restructuring

It involves decisions with respect to the product market segments, where the company plans to operate based on its core competencies.

4. Organizational Restructuring

It involves establishing internal structures and procedures for improving the capability of the personnel in the organization to respond to changes.

Q8: Define Financial Restructuring. What are the key business reasons for undertaking financial restructuring? Also write the types of financial restructuring?

Answer: Financial restructuring deals with restructuring of capital base and raising finance for new projects. Financial restructuring helps a firm to revive from the situation of financial distress without going into liquidation.

Financial restructuring is done for various business reasons:

- Poor financial performance
- External competition
- Erosion or loss of market share
- Emerging market opportunities

It involves **Equity Restructuring** like buy-back, Alteration/Reduction of capital and **Debt Restructuring** like restructuring of the secured long-term borrowing, long-term unsecured borrowings, Short term borrowing which are explained in detail in further later.

Q9: Describe about legal provisions of Corporate Restructuring in India.

Answer: Corporate Restructuring in India is governed by the following Acts, Rules, etc.:

- Chapter XV of The Companies Act, 2013 (the Act) i.e. The Companies (Compromises, Arrangement and Amalgamations) Rules, 2016
- Chapter IV of the Act i.e. the Companies (Share Capital and Debentures) Rules, 2014 - Buy Back of shares/ purchase of own securities

- The National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016 -Reduction of share capital
- The Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016
- Income Tax Act, 1961
- Accounting Standards
- Foreign Exchange Management Act, 1999
- Competition Act, 2002
- Indian Stamp Act, 1899
- State Stamp Acts
- Insolvency and Bankruptcy Code, 2016 and Rules & Regulations thereon
- Intellectual Property Rights.

Q10: "One of the ways of Corporate Restructuring is through market restructuring." Explain with some recent corporate examples as to how this type of restructuring is undertaken. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Corporate restructuring is an action taken by the corporate entity to modify its capital structure or its operations significantly. To improve the operations of a corporate entity, market restructuring is indispensable. Market restructuring involves decisions with respect to the product market segments where company plans to operate on its core competencies.

This type of restructuring usually affects employees, and tends to lead to new training initiatives along with some layoffs as the company improves efficiency.

This type of restructuring also involves alliances with third parties that have technical knowledge and resources, Indian technology major Tata Consultancy Services Ltd., has embarked upon the marketing capacity and on the process of restructuring and focusing on the three core areas like cloud, agile and automation. The restructuring plan focuses on the manufacturing capacity and on the product, technical, financial, employment, organization, processing and management restructuring activities. Disney is another example where market and technological restructuring has been restructured to, that has helped the company reach more long term technology goals.

Similarly, Tata Steel Ltd. acquired overseas Corus Group Plc. that drastically improved the production synergies for Tata Steel Ltd. Through the acquisition, Tata Steel Ltd. could combine its low-cost production with the high quality of Corus. It resulted in utilization of wide retail and distribution network, technology transfer and enhanced R&D capabilities.

Q11: What are the most commonly applied tools of Corporate Restructuring

Answer: Tools of Corporate Restructuring

1. **Merger:** A merger can be defined as the fusion or absorption of one company by another. It may also be understood as an arrangement, whereby the assets of two (or more) companies get transferred to, or come under the control of one company (which may or may not be one of the original two companies).

A merger means absorption of one company by another company, wherein one of the two existing companies loses its legal identity after transferring all its assets, liabilities and other properties to the other company.

2. **Amalgamation:** Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

3. **Reconstruction:** Literally speaking 'RECONSTRUCTION' means the "act of Construct on Again, Repairing, and Restoring to former condition or appearance".

Usually, the term reconstruction means the transfer of an undertaking or business of a company to another company, specially formed for the purpose.

The old company goes into liquidation and its shareholders, instead of being repaid their capital are issued and allotted shares in the new company. Consequently, the same shareholders carry on almost the same undertaking or enterprise in the name of a new company.

It may be noted that under reconstruction, the new company may have a different capital structure from that of old one, or have different objects, but an essential feature of reconstruction is that the new company's membership is substantially the same as that of the old company.

4. **Consolidation:** A consolidation creates a new company. Stockholders of both companies approve the consolidation, and subsequent to the approval, receive common equity shares in the new firm.

5. **Tender Offer:** One company offers to purchase the outstanding stock of the other firm at a specific price. The acquiring company communicates the offer directly to the other company's shareholders.

6. **Acquisition of assets:** In a purchase of assets, one company acquires the assets of another company. The company whose assets are being acquired, obtain approval from its shareholders. The purchase of assets is typical during bankruptcy proceedings, where other companies bid for various assets of the bankrupt company, which is liquidated upon the final transfer of assets to the acquiring firm(s).

7. **Management Buyout:** A management buyout (MBO) is a transaction where a company's management team purchases the assets and operations of the business they manage. MBO is appealing to professional managers because of the greater potential rewards from being owners of the business rather than employees.

8. **Purchase of Company as Resolution Applicant under IBC Law:** The basic objective behind the Insolvency and Bankruptcy Code 2016 is to revive the insolvent company by approving the effective resolution plan and

maximization of assets of the corporate debtor. As per the Code, the company under insolvency can be purchased by the resolution applicant by participating in the bid process by submitting the most effective resolution plan. This way the insolvent company can be revived by some other company/group/individuals.

Q12: Regardless of their category or structure, all mergers and acquisitions have one common goal – ‘they are all meant to create synergy that makes the value of the combined companies greater than the sum of the two parts’. Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

Mergers and acquisitions have one common goal of creating synergy that makes the value of the combined companies greater than the sum of the parts — Analyse briefly to focus on the visible benefits of such combinations. (5 marks)

PAST YEAR QUESTION JUNE 2019

OR

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. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

OR

The success of a merger or acquisition depends on whether synergy is achieved. Synergy takes the form of revenue enhancement and cost savings”. Give your opinion indicating the benefits that companies can derive upon by merging. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Mergers and acquisitions can have multifarious goals however arriving at a synergy that makes the combined value of the merged entity much higher than those of individual entities is always a target. The success of a merger or acquisition depends on whether the planned synergy is achieved or not. Synergy may take the form of revenue enhancement or cost savings or some other form which benefits the companies. By merging, the companies hope to benefit from the following:

- **Becoming bigger:** 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 mergers or acquisitions.
- **Pre-empted competition:** This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles.
- **Dominance:** Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would have to face 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 increased 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.
- **Improved market reach and industry visibility:** Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.

Q13: To classify a merger, one needs to look at the nature of companies involved and the rationale behind the deal. The main types of mergers are Congeneric Merger, Horizontal Merger, Vertical Merger, Conglomerate Merger, and Reverse Merger. Classify the following mergers into the type of merger giving the justification for such classification:

(i) Facebook's acquisition of Instagram. (ii) Combination of a computer system manufacturer with a UPS manufacturer. (iii) Berkshire Hathaway acquired Lubrizol. (5 marks)

PAST YEAR QUESTION JUNE 2025

OR

Can you explain the various types of mergers and their strategic objectives in corporate growth??

Answer:

(i) Horizontal Merger

Horizontal Merger is a merger between companies selling similar products in the same market and in direct competition and share the same product lines and markets. It decreases competition in the market. The main objectives of horizontal merger are to benefit from economies of scale, reduce competition, achieving monopoly status and control of the market.

Facebook's acquisition of Instagram for a reported \$1 billion. Both Facebook and Instagram operated in the same industry and were in similar product stages in regard to their photo-sharing services. Facebook, looking to strengthen its position in the social media and social sharing space, saw the acquisition of Instagram as an opportunity to grow its market share, increase its product line, reduce competition and access potential new markets.

(ii) Congeneric Merger

Congeneric merger is a merger between two or more businesses which are related to each other in terms of customer groups, functions or technology. Combination of a computer system manufacturer with a UPS manufacturer is a Congeneric Merger.

(iii) Conglomerate Merger

Conglomerate merger is a merger between two companies that have no common business areas. It refers to the combination of two firms operating in industries unrelated to each other. The business of the target company is entirely different from the acquiring company.

Berkshire Hathway acquired Lubrizol: Berkshire Hathaway and its subsidiaries engage in diverse business activities including property and casualty insurance and reinsurance, utilities and energy, freight rail transportation, finance, manufacturing, retailing and services. Berkshire's common stock is listed on the New York Stock Exchange. The Lubrizol Corporation is an innovative specialty chemical company that produces and supplies technologies to customers in the global transportation, industrial and consumer markets. These technologies include lubricant additives for engine oils, other transportation-related fluids and industrial lubricants, as well as fuel additives for gasoline and diesel fuel.

Alternate Answer,

Types of Mergers

1. Horizontal Merger

Horizontal Merger is a merger between companies selling similar products in the same market and in direct competition and share the same product lines and markets. It decreases competition in the market. The main objectives of horizontal merger are to benefit from economies of scale, reduce competition, achieving monopoly status and control of the market.

2. Vertical Merger

Vertical Merger is a merger between companies in the same industry, but at different stages of production process. In other words, it occurs between companies where one buys or sells something from or to the other.

3. Conglomerate Merger

Conglomerate merger is a merger between two companies that have no common business areas. It refers to the combination of two firms operating in industries unrelated to each other. The business of the target company is entirely different from the acquiring company. The main objective of a conglomerate merger is to achieve big size e.g., a watch manufacturer acquiring a cement manufacturer, a steel manufacturer acquiring a software company, etc.

4. Congeneric Merger

Congeneric merger is a merger between two or more businesses which are related to each other in terms of customer groups, functions or technology e.g., combination of a computer system manufacturer with a UPS manufacturer.

5. Reverse Merger

A reverse merger is a merger in which a private company becomes a public company by acquiring it. It saves a private company from the complicated process and expensive compliance of becoming a public company. Instead, it acquires a public company as an investment and converts itself into a public company.

Q14: Mango Communications Ltd. is a new company that is willing to take over Telecommunications licenses to operate in 20 telecom circles and get itself listed on stock exchange but present Government Policy does not permit issuing new licences. There is another telecom company by name Tango Telecom Limited having listed with BSE and NSE holding licenses for 22 telecom circles. Later Company is looking for some external reconstruction through merger or acquisition due to its operational ineffectiveness. As a Company Secretary, you are asked to find out the way through which a merger deal can happen so that the Mango Communications Ltd. could resolve the issues relating to listing and licenses. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Strategy adopted in this case is reverse merger in order to achieve the objectives of lower taxes, economies of scale, broadening market network, protecting trademarks, license agreements and avoiding hassles of complying with listing requirements of a stock exchange. Reverse Merger is a simplified process as it minimizes the risk due to less dependence on Market.

Similar Strategies were adopted in the mergers of Vodafone India and Idea Cellular, Kingfisher and Air Deccan, ICICI and ICICI Bank, Godrej Soaps and Gujarat Godrej Innovative Chemicals.

In the given case, if Mango Communications Ltd adopts normal merger to absorb Tango Ltd, it may lose telecom licenses. Hence, reverse merger is suggested because Mango Communications Ltd becomes a listed company and there is no need to acquire fresh licenses.

Q15: Distinguish between merger and an acquisition (any three points). (3 Marks)

PAST YEAR QUESTION JUNE 2019

Answer:

S. No.	Merger	Acquisition
1.	A merger occurs when two separate entities, usually of comparable size, combine forces to create a new, joint organization in which both are equal partners	An acquisition refers to the purchase of one entity by another (usually, a smaller firm by a larger one)
2.	Old company ceases to exist and a new company emerges	A new company does not emerge
3.	It requires two companies to consolidate into a new entity with a new ownership and management structure	It occurs when one company takes over all of the operational management decisions of another
4.	If the takeover is friendly, it is called a merger	If the takeover is hostile, it is called an acquisition
5.	A transaction legally structured as a merger may give each party's shareholders partial ownership and control of combined enterprise.	A transaction legally structured as an acquisition may have the effect of placing one party's business under the indirect ownership of the other party's shareholders. <i>corporate restructuring</i>

Q16: What is amalgamation, and what are the key reasons why companies opt for amalgamation?"

Answer: Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

Reasons for Amalgamation :

- (a) To acquire cash resources
- (b) To eliminate competition
- (c) Tax savings/advantages
- (d) Economies of large scale operations
- (e) To Increase shareholders value
- (f) To reduce the degree of risk by diversification
- (g) Managerial effectiveness
- (h) To achieve growth and financial gain
- (i) Revival of weak or sick or insolvent/bankrupt company
- (j) Survival
- (k) Sustaining growth.

Q17: Define Management Buyout and what are the Factors that makes a successful MBO.

Answer: A management buyout (MBO) is a transaction where a company's management team purchases the assets and operations of the business they manage. MBO is appealing to professional managers because of the greater potential rewards from being owners of the business rather than employees.

Factors that makes a successful MBO:

- A company with a good track record of profitability;
- Good future prospects for the company without high risk factors;
- A strong committed management team with a mixture of skills;
- A vendor who is willing to explore a sale to the management team and who will accept a realistic price;
- A deal structure that can be funded, and supported by the future cash flows of the company.

Q18: Define Demerger. What are the types of Demerger.

OR

Demerger may take the shape of spin-off, split-off or split-up. (3 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: Demerger is an arrangement whereby some part / undertaking of one company is transferred to another company which operates completely separate from the original company. Shareholders of the original company are usually given an equivalent stake of ownership in the new company.

Types of Demerger**1. Divestiture**

Divestiture means selling or disposal of assets of the company or any of its business undertakings/divisions, usually for cash (or for a combination of cash and debt).

2. Spin-offs

A spinoff is the creation of an independent company through the sale or distribution of new shares of an existing business or division of a parent company. The spun-off companies are expected to be worth more as independent entities than as parts of a larger business.

3. Splits/ Divisions

Splits involve dividing the company into two or more parts with an aim to maximize profitability by removing stagnant units from the mainstream business. Splits can be of two types, Split-ups and Split-offs.

Split-ups: It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation.

Split-offs: It is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter.

4. Equity Carve-Outs

Equity carve-outs are referred to a percentage of shares of the subsidiary company being issued to the public. This method leads to a separation of the assets of the parent company and the subsidiary entity. Equity carve outs result in publicly trading the shares of the subsidiary entity.

Q19: Distinguish between 'demerger' and 'slump sale'. (6 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: Demerger is an arrangement whereby some part / undertaking of one company is transferred to another company which operates completely separate from the original company. Shareholders of the original company are usually given an equivalent stake of ownership in the new company.

Section 2 (42C) of the Income Tax Act, 1961, recognizes 'Slump-sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. It is a transfer of one or more undertakings as a result of sale for a lump sum consideration, without values being assigned to the individual assets and liabilities in such sale.

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

- In slump sale values are not being assigned to individual assets and liabilities and the sale of undertaking is for a lump sum consideration called slump price.
- In demerger, valuation of individual assets and liabilities are mandatory.
- In case of demerger, the shareholders of demerged company have to be issued the shares of resulting company and in case of slump sale the issue of shares does not take place.

- Demerger results in reorganization of capital whereas slump sale does not result in reorganization of capital.
- In case of demerger, the resulting company has to continue the business of transferred undertaking of demerged company, whereas in slump sale it is not so.

Q20: What are "Equity Carve-Outs"? Explain with suitable examples. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Equity carve-outs are referred to a percentage of shares of the subsidiary company being issued to the public. This method leads to a separation of the assets of the parent company and the subsidiary entity. Equity carve-outs result in publicly trading the shares of the subsidiary entity. In other words, a company takes out one of the businesses and creates a separate company to handle that part of the business.

1. India's largest engineering and Construction Company Larsen and Tourbo (L&T) adopted "asset-light strategy" by separating business units into independent subsidiaries by selling a stake in business. The Company, which is considered a corporate proxy for the broader economy, divested its assets as a way to generate capital for investing in fresh projects.
2. In 2017, the Government of India divested 10 per cent stake in Coal India Limited through the Offer-For-Sale (OFS) route at Rs.358 per share and brought its holding to 79.65 per cent.

Q21: Comparison Between Spin-off and Split-off

Answer:

Basis for comparison	Spin-Of	Split-Of
Meaning	Spin-off implies a business action, wherein a company disjoins a division and creates new business entity, which is separately listed in the stock exchange and has independent board of directors.	Split-off refers to a corporate divestiture process in which a company's subsidiary turns out as a separate entity, with independent listing of its capital stocks
Shares	Shares of the subsidiary company are distributed to all the shareholders	Holding company's shareholder are required to exchange their shares, to get shares in the subsidiary.
Reason	To create a separate identity of the new firm.	To create a distinction between the core business and the new one

Q22: Spinoff is one type of Demerger wherein the Shares of new entity is being distributed to the shareholders of parent company on a pro-rata basis. Explain in brief the reasons for Spinoff. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: In a spin off, the shares of the new entity are distributed to the shareholders of the parent company on a pro-rata basis. There are two approaches in which Spin off may be conducted.

In the first approach, the company distributes all the shares of the new entity to its existing shareholders on a pro-rata basis. This leads to the creation of two different companies holding the same proportions of equity as compared to the single company existing previously.

The second approach is the flotation of a new entity with its equity being held by the parent company. The parent company later sells the assets of the spun off company to another company.

In both the approaches, the parent company also retains ownership in the spin-off entity.

A spinoff may occur for various reasons, such reasons may include:

- i. A company may conduct a spinoff so it can focus its resources and better manage the division that has more long-term potential.
- ii. Businesses wishing to streamline their operations often sell less productive or unrelated subsidiary as spinoffs. For Example, a company might spin off one of its mature business units that are experiencing little or no growth so it can focus on a product or service with higher growth prospects.
- iii. A portion of the business is headed in a different direction and has different strategic priorities from the parent company, the company may adopt spin off so it can unlock value as an independent operation.

The downside of spin off is that their share price can be more volatile and can tend to underperform in weak markets and outperform in strong markets. Spinoffs can also experience high selling activity and the share price may dip in the short term because of this selling activity, even if the spin off's long term prospects are positive.

Q23: Discuss Split-ups and Split-offs in corporate restructuring. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Splits involve dividing the company into two or more parts with an aim to maximize profitability by removing stagnant units from the mainstream business. Splits can be of two types, Split-ups and Split-offs.

Split-ups : It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation.

Split-offs : It is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter. Some of the shareholders in the parent company are given shares in a division of the parent company which is split off in exchange for their shares in the parent company.

Q24: Write a short note on Slump Sale. What are the main reasons of slump sale are generally undertaken in India.

Answer: Section 2 (42C) of the Income Tax Act, 1961, recognizes 'Slump-sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. It is a transfer of one or more undertakings as a result of sale for a lump sum consideration, without values

being assigned to the individual assets and liabilities in such sale. Sale includes transfer of an asset from one person to another for some consideration, where consideration can be in kind or cash.

‘Undertaking’ shall include any part of an undertaking or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

The main reasons of slump sale are generally undertaken in India due to following:

- It helps the business to improve its poor performance.
- It helps to strengthen financial position of the company.
- It eliminates the negative synergy and facilitates strategic investment.
- It helps to seek tax and regulatory advantage associated with it.

Q25: “Profit on slump sale is a Capital Receipt.” Explain and support the statement through decided Case Laws. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: A slump sale means a sale that has a lump sum price as consideration without attributing values to the individual assets and liabilities disposed. Normally, sale of capital assets results in capital receipt and any profit derived is liable for capital gains in certain case.

The Supreme Court in the case of *CIT vs. West Coast Chemicals and Industries Ltd.* held that a slump sale price paid is an appreciation of capital but not arising out of trading. In the case of *CIT vs. Mungeeram Bangar & others* it was held that mere fact that in the schedule price of land was stated does not lead to conclusion that part of the slump price is attributable to the land sold.

Gujarat High Court also recognized the sale of undertaking as a whole as a going concern creates liability of Capital Gain Tax [*Sarabhai M. Chemicals Pvt. Ltd.* (126 ITR)].

Q26: Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets.

Explain the statement with reasons for Divestitures. Also state one example. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

OR

“Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets”. Comment on the statement highlighting the reasons for Divestitures. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Divestiture means selling or disposal of assets of the company or any of its business undertakings/divisions, usually for cash (or for a combination of cash and debt) and not against equity shares to achieve a desired objective, such as greater liquidity or reduced debt burden. Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets.

For example: XYZ Ltd. is the parent of a food company, a car company, and a clothing company. If XYZ Ltd. wishes to go out of the car business, it may divest the business by selling it to another company, exchanging it for another asset, or closing down the car company.

Reasons for Divestitures

- Huge divisional losses
- Continuous negative cash flows from a particular division
- Difficulty in integrating the business within the company
- Unable to meet the competition
- Better alternatives of investment
- Lack of technological upgrades due to non-affordability
- Lack of integration between the divisions
- Legal pressures.

E.g. Nestle is selling its US chocolate business, which includes brands such as BabyRuth, Butterfinger, and Crunch to Ferrero for US\$2.8 billion. The deal is part of Nestle's strategy to sell underperforming brands and refocus on healthier products and fast-growing markets.

Q27: Write a short note on Joint Venture. What are the types of Joint Venture.

Answer: A joint venture (JV) is a business or contractual arrangement between two or more parties which agree to pool resources for the purpose of accomplishing a specific task may be a new project or any other business activity.

In a joint venture (JV), each of the participants is responsible for profits, losses and costs associated with it. Company enters into a joint venture when it lacks required knowledge, human capital, technology or access to a specific market that is necessary to be successful in pursuing the project on its own.

Types of Joint Ventures

(a) Equity-based joint ventures is a type of joint venture in which two or more parties set-up a separate legal company to act as the vehicle for carrying out the project. This new company would usually be located in the same country as one of the two partner companies, with the purpose of mutually establishing an activity with its own objectives: marketing and distribution, research, manufacturing, etc. It benefits foreign and/or local private interests, or members of the general public through capital.

(b) Non-equity joint ventures also known as cooperative agreements, seek technical service arrangements, franchise, brand use agreements, management contracts, rental agreements, or onetime contracts, e.g., for construction projects, non-equity arrangements in which some companies are in need of technical services or technological expertise than capital. It may be modernizing operations or starting new product operations.

Q28: Discuss “Strategic Alliance” and “Joint Venture” as corporate restructuring strategies. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Corporate restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value. Corporate restructuring is an inorganic growth strategy.

Strategic Alliance is an agreement between two or more parties to collaborate with each other in order to achieve certain objectives while continuing to remain independent organisations. It is an arrangement to share resources to undertake a specific and mutual benefit project. Often, strategic alliances allow involved organisations to pursue opportunities at a faster rate than if they function alone. It provides access to additional knowledge and resources that are held by the other party, which may ease the learning curve for the new pursuit, along with providing set-up time and costs.

Joint Venture is an entity formed by two or more companies to undertake financial activities together. The parties agree to contribute equity to form a new entity and shares the revenues, expenses and capital of the company. It may be project based joint venture or functional based joint venture. The joint venture entered into by the companies in order to achieve a specific task is known as **project based joint venture**. The joint venture entered into by companies in order to achieve mutual benefit is known as **functional based joint venture**. Because the joint venture can access assets, knowledge and funds from both of its partners it can combine the best features of those companies without altering the parent companies.

Q29: Define Reverse Merger. What are the reasons for reverse merger.

Answer: A reverse merger is a merger in which a private company becomes a public company by acquiring it. It saves a private company from the complicated process and expensive compliance of becoming a public company.

Instead, it acquires a public company as an investment and converts itself into a public company.

However, there is another angle to the concept of a reverse merger. When a weaker or smaller company acquires a bigger company, it is a reverse merger. In addition, when a parent company merges into its subsidiary or a loss-making company acquires a profit-making company, it is also termed as a reverse merger.

The reasons for reverse merger are:

- To carry forward tax losses of the smaller firm, this allows the combined entity to pay lower taxes. Tax savings under Income Tax Act, 1961
- Economies of scale of production
- Marketing network
- To protect the trademark rights, licence agreements, assets of small/loss making company.

Q30: “Mergers, Demergers or Reverse Mergers are resorted to enhance, utilise or protect the brand value already earned by an enterprise”. Explain how the reputation and goodwill associated with a brand name of the Company could be advantageously exploited. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: Acquiring a new product is different from acquiring a brand name. Same is the case to get rid of a product that adversely affects the brand name. At times symbols are sold to generate sufficient funds. Citibank sold the umbrella logo symbol. Hotmail, WhatsApp are also one sort of brands that are sold for hefty amounts. In a related field companies think of introducing another product so that reputation and goodwill associated with a brand name could be advantageously exploited. The combination of the ability of the company to take over the manufacturing facility and build the said product with the company's brand name develops a great market for the company.

Brands/marks are a class of assets like human resource, knowledge, etc. They create a value premium for the goods and services. Mergers and acquisitions help utilize or protect the brand value already earned by an enterprise. For example, Tata Motors acquired Jaguar and Land Rover British motor car brands to exploit automobiles market worldwide.

Q31: Define Financial restructuring and its types.

Answer: Corporate financial restructuring is any substantial change in a company's financial structure, or ownership or control, or business portfolio, designed to increase the value of the firm, i.e., debt and equity restructuring.

Internal reconstruction of a company is the simplest form of financial restructuring. Under this, various liabilities are reduced after negotiating with various stakeholders such as banks, financial institutions, creditors, debenture holders and shareholders. It deals with the restructuring of capital base and raising finance for new project.

Debt Restructuring

It involves reduction of debt and an extension of payment terms or change in terms and conditions, which is less expensive. It is nothing but negotiating with bankers, creditors, vendors. It is the process of reorganizing the whole debt capital of the company. It involves the reshuffling of the balance sheet items as it contains the debt obligation of the company.

Debt restructuring can be achieved in the following ways:

- 1) Restructuring of the secured long-term borrowing for improving liquidity and increasing the cash flows for a sick company and reducing the cost of capital for healthy companies. Restructuring of the unsecured long-term borrowings.
- 2) Restructuring of the long-term unsecured borrowings can be in form of public deposits and/or private loans (unsecured) and privately placed, unsecured bonds or debentures.
- 3) Restructuring of other short-term borrowings: the borrowings that are very short in nature are generally not restructured these can indeed be renegotiated with new terms. These types of short-term borrowings include inter-corporate deposits clean bills & clean overdraft.
- 4) Best method for corporate debt restructuring is Debt-equity swap. In the case of a debt-equity swap, specified shareholders have right to exchange stock for a predetermined amount of debt (i.e. bonds) in the same company. In debt-equity swap debt /bonds are exchanged with shares/stock of the company.

Considering the above, debt restructuring is a viable option that the company may pursue.

Equity Restructuring

It is a process of reorganizing the equity capital. It includes a reshuffling of the shareholders capital and the reserves that are appearing on the balance sheet. Restructuring equity means changing how the firm's residual cash flows are divided and distributed among the firm's shareholders, with the goal of increasing the overall market value of the firm's common stock. Restructuring of equity and preference capital becomes complex process involving a process of law and is a highly regulated area.

The following comes under equity restructuring:

- Alteration of share capital
- Reduction of share capital
- Buy-back of shares.

Q32: A Ltd. is engaged in the business of manufacturing designer clothes. Due to lower demand during the COVID-19 period, the company started facing financial difficulties. The company has a consortium of 9 lenders out of which 5 lenders have provided term loan and remaining lenders have provided working capital loan. The operating margin of the company is continuously shrinking and the collections from the debtors are also not within the due dates. The company is facing severe financial crisis and finding it difficult to honour its debt commitments.

Explain the restructuring options available with the company to deal with the situation. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: In the given situation, the company is faced with financial crisis and is looking for options for Corporate Restructuring. Corporate financial restructuring is any substantial change in a company's financial structure, or ownership or control, or business portfolio designed to increase the value of the firm i.e., debt and equity restructuring.

Internal reconstruction of a company is the simplest form of financial restructuring. Under this various liabilities are reduced after negotiating with various stakeholders such as banks, financial institutions, creditors, debenture holders and shareholders. It deals with the restructuring of capital base and raising finance for new projects.

One of the options available with the company is **debt restructuring**.

Debt Restructuring

It involves reduction of debt and an extension of payment terms or change in terms and conditions, which is less expensive. It is nothing but negotiating with bankers, creditors, vendors. It is the process of reorganizing the whole debt capital of the company. It involves the reshuffling of the balance sheet items as it contains the debt obligation of the company.

Debt restructuring can be achieved in the following ways:

- 1) Restructuring of the secured long-term borrowing for improving liquidity and increasing the cash flows for a sick company and reducing the cost of capital for healthy companies. Restructuring of the unsecured long-term borrowings.

- 2) Restructuring of the long-term unsecured borrowings can be in form of public deposits and/or private loans (unsecured) and privately placed, unsecured bonds or debentures.
- 3) Restructuring of other short-term borrowings: the borrowings that are very short in nature are generally not restructured these can indeed be renegotiated with new terms. These types of short-term borrowings include inter-corporate deposits clean bills & clean overdraft.
- 4) Best method for corporate debt restructuring is Debt-equity swap. In the case of a debt-equity swap, specified shareholders have right to exchange stock for a predetermined amount of debt (i.e. bonds) in the same company. In debt-equity swap debt /bonds are exchanged with shares/stock of the company.

Considering the above, debt restructuring is a viable option that the company may pursue.

Q33: Write a short note on Alteration of share capital.

Answer: Alteration of share capital means, increase or decrease in or rearrangement of share capital as permitted in Articles of Association. An increase or decrease in the share capital of a company may be carried out as and when the company requires thus leading to an alteration in the company's share capital.

According to section 61 of the Companies Act, 2013 a limited company having a share capital derives its power to alter its share capital through its articles of association. As per the section the company may, if so authorised by its articles, alter its memorandum in its general meeting to –

1. increase its authorised share capital by such amount as it thinks expedient;
2. consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares;
The proviso to Section 61(1)(b) clarifies that No consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;
3. convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
4. sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
5. cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled;
6. The cancellation of shares shall not be deemed to be a reduction of share capital.

Q34: Write a short note on Reduction of Share Capital. In which situations need of reducing Share capital arise.

Answer: Capital Reduction is the process of decreasing a company's shareholder's equity through share cancellations and share repurchases. The reduction of share capital means reduction of issued, subscribed and paid up share capital of the company. In simple words it can be regarded as 'Cancellation of Uncalled Capital' i.e. part of subscribed share capital.

The need of reducing share capital arise in following situations:

- Returning of surplus to shareholders;
- Eliminating losses, which may be preventing the payment of dividends;
- As part of scheme of compromise or arrangements.

Q35: Write a short note on modes of Reduction of Capital.

Answer: A company limited by shares or a company limited by guarantee and having a share capital may, if authorised by its articles, by special resolution, and subject to its confirmation by the Tribunal on petition, reduce its share capital in any way and in particular:

- (a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or
- (b) either with or without extinguishing or reducing liability on any of its shares;
- (c) cancel any paid-up share capital which is lost or is unrepresented by available assets; or
- (d) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Q36: Examine and explain the following statements citing relevant provisions of law: The reduction of share capital can result in extinguishment of class of shares. (3 marks)

PAST YEAR QUESTION JUNE 2017

Answer: In *Siel Ltd., Re* (2008) 144 Com Cases 469 : (2009) 89 SCL 434 (Del), a scheme of amalgamation and arrangement involved reduction of share capital by extinguishment of shares of a particular class. The reduction was approved by the majority of shareholders and creditors of the transferee company. The court, now NCLT approved the reduction and extinguishment of a portion of share capital was held to be permissible as no one was prejudicially affected.

Q37: 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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q38: XYZ Ltd. is going for reduction of capital, but the Board of directors of the company expects objection from some of the creditors of the company. The Board seeks your opinion as a company secretary with respect to this matter. Express your opinion in light of the provisions of Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: After passing the special resolution for the reduction of capital, XYZ Ltd. has to apply to the National Company Law Tribunal (NCLT) for the confirmation of resolution under section 66 of the Companies Act, 2013.

Where the proposed reduction of share capital involves either

- (i) diminution of liability in respect of unpaid share capital, or
- (ii) the payment to any shareholder of any paid-up share capital, or (iii) in any other case, if the Tribunal so directs, the following provisions shall have effect:

The creditors having a debt or claim admissible in winding-up are entitled to object. To enable them to do so, the Tribunal will settle a list of creditors entitled to object. If any creditor objects, then either his consent to the proposed reduction should be obtained or he should be paid off or his payment be secured. The Tribunal, in deciding whether or not to confirm the reduction will take into consideration the rights of the creditors.

The Tribunal shall give notice of every application made to it to the Central Government, Registrar of Companies and to the Securities and Exchange Board of India, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by Central Government, Registrar, the Securities and Exchange Board and the creditors within a period of three months from the date of receipt of the notice.

If no representation has been received from them within the said period, it shall be presumed that they have no objection to the reduction.

Provided that no application for reduction of share capital shall be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting

standards specified in section 133 of the Companies Act, 2013 or any other provision of the Act and a certificate to that effect by the company's auditor has been filed with the Tribunal.

There is no limitation on the power of the Tribunal to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured [*British and American Trustee and Finance Corporation v. Couper (1894)*].

When exercising its discretion, the Tribunal must ensure that the reduction is fair and equitable.

Q39: "Reduction of capital requires the approval of National Company Law Tribunal (NCLT) is a general perception." Elucidate. (3 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: As per section 66 of the Companies Act, 2013, sanction of the NCLT is required for effecting resolution for extinguishment or reduction of any paid-up share capital yet there are circumstances and provisions to reduce paid-up capital without necessity of approval by the Tribunal. Section 61 enables cancelling the unsubscribed shares without leave of the Tribunal. Also, surrender of shares by a shareholder, forfeiture of shares for non-payment of unpaid calls, redemption of preference shares and buy-back of shares in accordance with section 68 of the Act do not require sanction by Tribunal.

Q40: What are the key steps and legal requirements for the confirmation and registration of the reduction of share capital under Section 66 of the Companies Act, 2013?

Answer: Under Section 66 of the Companies Act, 2013, the reduction of share capital involves the following key steps:

Tribunal Confirmation (Section 66(3)):

The Tribunal confirms the reduction if creditors have consented or their debts are settled. The company must submit a certificate from the auditor confirming compliance with accounting standards.

Publication of Order (Section 66(4)):

The company must publish the Tribunal's confirmation order as directed by the Tribunal.

Filing with Registrar (Section 66(5)):

Within 30 days of receiving the Tribunal's order, the company must deliver a certified copy of the order along with detailed minutes of the reduction to the Registrar which are as follows:

- (a) amount of share capital;
- (b) number of shares into which it is to be divided;
- (c) amount of each share; and
- (d) amount, if any, at the date of registration deemed to be paid-up on each share

The reduction takes effect only after registration by the Registrar, who issues a certificate confirming compliance.

Memorandum Amendment:

The company's Memorandum of Association must be updated to reflect the changes in share capital.

Q41: The National Company Law Tribunal (NCLT) has confirmed the reduction of share capital of MGF Ltd. Explain when the reduction of share capital will take place as per the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: As per sect on 66(5) of the Companies Act, 2013, MGF Ltd. shall deliver a cert f ed copy of the order of the Tribunal and of a Minute approved by the Tribunal showing —

- (a) the amount of share capital;
- (b) the number of shares into which it is to be divided;
- (c) the amount of each share; and
- (d) the amount, if any, at the date of registrat on deemed to be paid-up on each share, to the Registrar of Companies (RoC) within thirty days of the receipt of the copy of the order, who shall register the same and issue a cert f cate to that ef ect.

The reduct on of share capital takes ef ect only on registrat on of the order and Minutes and not before. The RoC will then issue a cert f cate of registrat on which will be conclusive evidence that the requirements of the Companies Act, 2013 have been complied with and that the share capital is now as set out in the Minutes. The Memorandum has to be altered accordingly.

Q42: What is the liability of members in respect of reduced share capital under the Companies Act, 2013, and how does it apply in cases where creditors are not aware of the reduct on?

Answer: Under the Companies Act, 2013, the liability of members in relat on to reduced share capital is as follows:

1. Liability of Members (General Rule):

A member (past or present) is not liable to any call or contribut on for shares exceeding the dif erence between:

- The amount paid on the share (or the reduced amount deemed paid), and
- The amount of the share as f xed af er the reduct on.

2. Case Example – Reckit Benckiser (India) Ltd. (2005):

Shareholders objected to the reduct on, claiming it was unnecessary and discriminatory.

The company of ered to retain the objectors as shareholders, and the Delhi High Court approved the reduct on.

3. Liability in Case of Creditor Default (Insolvency and Bankruptcy Code, 2016):

If a creditor, unaware of the reduct on proceedings, is not listed and the company defaults on their debt:

(a) Members at the t me of the Registrar's registrat on are liable to contribute, up to the amount they would owe if the company were in winding-up on the previous day.

(b) If the company is wound up, the Tribunal may, upon the creditor's applicat on, ident fy liable members and enforce contribut ons as in a winding-up process.

This provision protects creditors while limit ng members' liability in line with the share capital reduct on.

Q43: What is the penalty in respect of reduced share capital under the Companies Act, 2013.

Answer: If any of cer of the company

- (a) Knowingly conceals the name of any creditor ent tled to object to the reduct on;
 - (b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
 - (c) abets or is privy to any such concealment or misrepresentat on as aforesaid,
- he shall be liable under sect on 447.

Q44: Write a short note on Buy-back and what are the modes of Buy-back.

Answer: According to Sect on 68(1) of the Companies Act, 2013, a company whether public or private, may purchase its own shares or other specif ed securit es (hereinaf er referred to as “buy-back”) out of:

- (i) its free reserves; or
- (ii) the securit es premium account; or
- (iii) the proceeds of any shares or other specif ed securit es.

However, no buy-back of any kind of shares or other specif ed securit es can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specif ed securit es.

Modes of Buy-Back**1. Tender Of er**

In tender of er, the company makes an of er to buy a certain number of shares/securit es at a specif c price directly from security holders on proport onate basis. Share buyback ensures all shareholders are treated equally, however small they are.

2. Open Market Purchase

In open market purchase, the company acquires a certain number of shares. Fixes a price cap and buy for any price up to the upper limit. Most companies prefer the open market route. The biggest dif erence between the two - tender of er and open market purchase- is that the price in the tender route is f xed.

Buy-back from open market can be made through:

- Book Building Process
- Stock exchange

Q45: What are the advantages of Buy-back?

Answer:

- It is an alternat ve mode of reduct on in capital without requiring approval of the Nat onal Company Law Tribunal
- To improve the earnings per share
- To improve return on capital, return on net worth and to enhance the long-term shareholders value
- To provide an addit onal exit route to shareholders when shares are undervalued or thinly traded
- To enhance consolidat on of stake in the company
- To prevent unwelcome takeover bids
- To return surplus cash to shareholders
- To achieve opt mum capital structure
- To support share price during periods of sluggish market condit on
- To serve the equity more ef ciently.

Q46: What is the Legal Framework for Buy-back.**Answer:**

- Companies Act, 2013.
- The Companies (Share Capital and Debentures) Rules, 2014.
- Securities and Exchange Board of India (Buy-back of Securities) Regulations, 2018.

Q47: What are the provisions regarding Buy-back as per Companies Act, 2013?**Answer:****Authorisation**

The primary requirement is that the articles of association of the company should authorise buy-back. In case, such a provision is not available, it would be necessary to alter the articles of association to authorise buy-back.

Buy-back can be made with the approval of the Board of directors at a meeting and/or by a special resolution passed by shareholders in a general meeting, depending on the quantum of buy-back. In case of a listed company, approval of shareholders shall be obtained only by postal ballot.

Quantum of Buy-back

(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 buyback 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.

Post buy-back debt-equity ratio

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. However, the Central Government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies;

All the shares or other specified securities for buy-back are to be fully paid-up.

Buy-back by listed/unlisted companies

The buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the Securities and Exchange Board in this behalf; and

The buy-back in respect of shares or other specified securities other than listed securities is in accordance with such rules made under Chapter IV of the Companies Act, 2013.

Time gap

No offer of buy-back under this sub-section shall be made within a period of one year reckoned from the date of the closure of the preceding offer of buy-back, if any.

Explanatory statement [Sect on 68(3) & Rule 17(1)]

The notice of the meeting at which the special resolution is proposed to be passed shall be accompanied by an explanatory statement stating—

- (a) a full and complete disclosure of all material facts;
- (b) the necessity for the buy-back;
- (c) the class of shares or securities intended to be purchased under the buy-back;
- (d) the amount to be invested under the buy-back; and
- (e) the time-limit for completion of buy-back.
- (f) the date of the board meeting at which the proposal for buy-back was approved by the board of directors of the company;
- (g) the objective of the buy-back;
- (h) the number of securities that the company proposes to buy-back;
- (i) the method to be adopted for the buy-back;
- (j) the price at which the buy-back of shares or other securities shall be made;
- (k) the basis of arriving at the buy-back price;
- (l) the maximum amount to be paid for the buy-back and the sources of funds from which the buy-back would be financed;
- (m) (i) the aggregate shareholding of the promoters and of the directors of the promoter, where the promoter is a company and of the directors and key managerial personnel as on the date of the notice convening the general meeting;
- (ii) the aggregate number of equity shares purchased or sold by persons mentioned in sub-clause (i) during a period of twelve months preceding the date of the board meeting at which the buyback was approved and from that date till the date of notice convening the general meeting;
- (iii) the maximum and minimum price at which purchases and sales referred to in sub-clause (ii) were made along with the relevant date.
- (n) if the persons mentioned in point (l) & (m) intend to tender their shares for buy-back –
 - (i) the quantum of shares proposed to be tendered;
 - (ii) the details of their transactions and their holdings for the last twelve months prior to the date of the board meeting at which the buy-back was approved including information of number of shares acquired, the price and the date of acquisition.
- (o) a confirmation that there are no defaults subsisting in repayment of deposits, interest payment thereon, redemption of debentures or payment of interest thereon or redemption of preference shares or payment of dividend due to any shareholder, or repayment of any term loans or interest payable thereon to any financial institution or banking company;
- (p) a confirmation that the Board of directors have made a full enquiry into the affairs and prospects of the company and that they have formed the opinion-
 - (i) that immediately following the date on which the general meeting is convened there shall be no grounds on which the company could be found unable to pay its debts;
 - (ii) as regards its prospects for the year immediately following that date, that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company

shall be able to meet its liabilities as and when they fall due and shall not be rendered insolvent within a period of one year from that

date; and

(iii) the directors have taken into account the liabilities (including prospective and contingent liabilities), as if the company were being wound up under the provisions of the Companies Act, 2013.

(q) a report addressed to the Board of directors by the company's auditors stating that-

(i) they have inquired into the company's state of affairs;

(ii) the amount of the permissible capital payment for the securities in question is in their view properly determined;

(iii) that the audited accounts on the basis of which calculation with reference to buy back is done is not more than six months old from the date of order document; and

Provided that where the audited accounts are more than six months old, the calculations with reference to buy back shall be on the basis of un-audited accounts not older than six months from the date of order document which are subjected to limited review by the auditors of the company.

(iv) the Board of directors have formed the opinion as specified in clause (m) on reasonable grounds and that the company, having regard to its state of affairs, shall not be rendered insolvent within a period of one year from that date.

Q48: No order of buy-back shall be made within a period of 180 days from the date of Board meeting or meeting of shareholders, as the case may be, in respect of the preceding order of buy-back. Comment. (3 marks)

PAST YEAR QUESTION JUNE 2016

Answer: As per Section 68(2) of the Companies Act 2013, no order of buy-back shall be made within a period of one year reckoned from the date of the closure of the preceding order of buy-back, if any.

Q49: Write a short note on Buy-back Procedure for Private & Unlisted Public Companies.

Answer: Rule 17 of the Companies (Share Capital and Debentures) Rules, 2014

According to Rule 17(2) the company which has been authorized by a special resolution shall, before the buyback of shares, file with the Registrar of Companies a letter of order in Form No. SH-8, along with the fee as prescribed. Such letter of order shall be dated and signed on behalf of the Board of directors of the company by not less than two directors of the company, one of whom shall be the managing director, where there is one.

Filing Declaration of Solvency with SEBI/ROC [Rule 17(3)]

When a company proposes to buy-back its own shares or other specified securities under this section in pursuance of a special resolution or board resolution as the case may be, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board (in case of listed companies), a declaration of solvency in Form No. SH-9 signed by at least two directors of the company, one of whom shall be the managing director, if any, in such form as may be prescribed and verified by an affidavit as specified in said form.

Dispatch of Letter of Order [Rule 17(4)]

The letter of offer shall be dispatched to the shareholders or security holders immediately after filing the same with the Registrar of Companies but not later than 21 days from its filing with the Registrar of Companies.

The letter of offer shall contain true, factual and material information and shall not contain any misleading information and must state that the directors of the company accept the responsibility for the information contained in such document; [Rule 17(10)(a)]

Validity [Rule 17(5)]

The offer for buy-back shall remain open for a period of not less than 15 days and not exceeding 30 days from the date of dispatch of the letter of offer.

Provided that where all members of a company agree, the offer for buy-back may remain open for a period less than fifteen days.

Acceptance on proportional basis [Rule 17(6)]

In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on proportionate basis out of the total shares offered for being bought back.

Time limit for verification [Rule 17(7)]

The company shall complete the verifications of the offers received within 15 days from the date of closure of the offer and the shares or other securities lodged shall be deemed to be accepted unless a communication of rejection is made within 21 days from the date of closure of the offer.

Payment of consideration/returning of share certificates

The company shall within seven days of the time limit of verification:

- (a) make payment of consideration in cash to those shareholders or security holders whose securities have been accepted, or
- (b) return the share certificates to the shareholders or security holders whose securities have not been accepted at all or the balance of securities in case of part acceptance.

Separate Account [Rule 17(8)]

The company shall immediately after the date of closure of the offer, open a separate bank account and deposit therein, such sum, as would make-up the entire sum due and payable as consideration for the shares tendered for buy-back.

The company shall confirm in its offer the opening of a separate bank account adequately funded for this purpose and to pay the consideration only by way of cash. [Rule 17(10)(c)]

Other conditions [Rule 17(10)]

The rules further provide that the company shall ensure that—

- (a) the company shall not issue any new shares including by way of bonus shares from the date of passing of special resolution authorizing the buy-back till the date of the closure of the offer under these rules, except those arising out of any outstanding convertible instruments;
- (b) the company shall not withdraw the offer once it has announced the offer to the shareholders;
- (c) the company shall not utilize any money borrowed from banks or financial institutions for the purpose of buying back its shares; and the company shall not utilize the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities for the buy-back.

Time limit for completion of buy-back [Sect on 68(4)]

Every buy-back shall be completed within a period of one year from the date of passing of the special resolution, or as the case may be, the resolution passed by the Board.

Methods of buy-back [Sect on 68(5)]

The buy-back may be —

- (a) from the existing shareholders or security holders on a proportionate basis;
- (b) from the open market;
- (c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

Extinction of securities bought back [Sect on 68(7)]

When a company buys back its own shares or other specified securities, it shall extinguish and physically destroy the shares or securities so bought back within seven days of the last date of completion of buyback.

Prohibition of further issue of shares or securities [Sect on 68(8)]

When a company completes a buy-back of its shares or other specified securities it shall not make a further issue of the same kind of shares or other securities including allotment of new shares under clause (a) of subsection (1) of section 62 or other specified securities within a period of six months except by way of a bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

Register of buy-back [Sect on 68(9)]

When a company buys back its shares or other specified securities, it shall maintain a register of the shares or securities so bought, the consideration paid for the shares or securities bought back, the date of cancellation of shares or securities, the date of extinguishing and physically destroying the shares or securities and such other particulars as may be prescribed.

Register of shares or securities bought back shall be maintained in Form SH-10, at the registered office of the company and shall be kept in the custody of the secretary of the company or any other person authorized by the board in this behalf.

Return of buy back [Sect on 68 (10)]

A company shall, after the completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board (in case of listed companies) a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed.

The company shall file with the Registrar, and in case of a listed company with the Registrar and the SEBI, a return in the Form No. SH-11 along with the 'fee'. There shall be annexed to the return filed with the Registrar in Form No. SH-11, a certificate in Form No. SH-15 signed by two directors of the company including the managing director, if any, certifying that the buy-back of securities has been made in compliance with the provisions of the Act and rules made thereunder. [Rule 17(13) and Rule 17(14)]

Penal Provisions [Sect on 68 (11)]

If a company makes any default in complying with the provisions of this section or any regulation made by the Securities and Exchange Board, in case of listed companies, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

Transfer to and application of Capital Redemption Reserve Account (Sect on 69)

When a company purchases its own shares out of free reserves or securities premium account, a sum equal to the nominal value of the shares so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet. The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

Q50: Buy-back strategy' is nowadays being adopted by leading corporate bodies. Ment on one case that has happened recently specifying the benefits of buyback? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Buy-back of securities is one kind of Internal restructuring that may bring economy in the cost of service towards shareholders, to enhance the future Earnings Per Share (EPS), prevent unwelcome takeover bids and enhance the consolidation of stake in the company.

It is an alternative mode of reduction in capital without requiring approval of the National Company Law Tribunal. Corporate giants like Infosys Ltd, Wipro, TCS etc., also resorted to buy-back of securities.

The Buyback aims at improving the return on equity through distribution of cash thereby leading to long term increase in members' value. Some of the most important advantages of buyback of shares are as follows:

- Companies possessing large free reserves base and are willing to use funds to purchase or acquire shares and other securities under the buyback scheme, can use their funds in a wise and effective manner.
- Buy back of shares and securities helps the promoters to formulate an effective defensive strategy against hostile takeover bids.
- Buyback of shares and securities results in lower capital base, enhances post buy back earning per share and appreciates considerably the price-earnings ratio.

The Buyback is undertaken after taking into account the strategic and operational cash requirements of the Company in the medium term and for returning surplus funds.

Q51: Circumstances which prohibit buy-back of shares or other specified securities under the Companies Act, 2013. Comment. (3 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: Under Sect on 70 of the Companies Act, 2013, No company shall directly or indirectly purchase its own shares or other specified securities—

- (i) through any subsidiary company including its own subsidiary companies;
- (ii) through any investment company or group of investment companies; or
- (iii) if a default, is made by the company, in the repayment of deposits accepted either before or after the commencement of this Act, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company:

However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.

No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provisions of sections 92 (Annual Return), 123 (Declaration of Dividend), 127 (punishment for failure to distribute dividend) and section 129 (Financial Statement) of the Companies Act, 2013.

Q52: Brown Ltd. committed certain defaults in repayment of deposits. Subsequently, the said defaults were remedied and a period of 30 months has lapsed after such defaults ceased to subsist. Brown Ltd. desires to purchase its own shares. Do you think Brown Ltd. is entitled to proceed with the proposed buy-back of shares? Give reasons for your answer quoting the relevant provisions applicable to the issue under consideration. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Under Sect on 70 of the Companies Act, 2013, no company shall directly or indirectly purchase its own shares or other specified securities under Certain circumstances. One of such prohibition is, if a default, is made by the company, in the repayment of deposits accepted either before or after the commencement of this Act, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company: However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist. In this case Brown Ltd. has to wait for 6 more months because from the date the default has made good to now only 30 months has been passed which shall be at least 3 years i.e. 36 months

Q53: Write a short note on treatment of consideration of Buy back as per Income-tax Act, 1961.

Answer: Sect on 46A of the Income-tax Act, 1961 provides that any consideration received by a security holder from any company on buy back shall be chargeable to tax on the difference between the cost of acquisition and the value of consideration received by the security holder as capital gains.

The computation of capital gains shall be in accordance with the provisions of Sect on 48 of the Income-tax Act, 1961.

Q54: Describe about legal provisions of Buy-back for listed Securities.

Answer: A listed company proposing to undertake a buy-back is required to primarily comply with the following provisions:

1. Companies Act, 2013
2. Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 2018
3. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
4. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015
5. Foreign Exchange Management Act, 1999
6. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

Q55: Listed Companies are required to comply with SEBI (Buy Back of Securities) Regulations, 2018, in addition to the provisions of the Companies Act, 2013. Comment.

Answer: All the listed companies are required to comply with SEBI (Buy Back of Securities) Regulations, 2018, in addition to the provisions of the Companies Act, 2013. These regulations broadly cover the following aspects:

1. Special resolution and its additional disclosure requirements.
2. Methods of buy back including buy back through reverse book building, from existing shareholders through tender offer, etc.
3. Filing of offer documents, public announcement requirements.
4. Offer procedure/opening of escrow account, etc.
5. General obligations of company, merchant banker, etc.

Q56: Explain the disclosures required under Schedule I of the Regulations which should be annexed to the notice where the buy-back is pursuant to shareholders' approval.

Answer: An explanatory statement containing full and complete disclosure of all the material facts and the following disclosures prescribed in Schedule I of the Regulations should be annexed to the notice where the buy-back is pursuant to shareholders' approval:

- (i) Date of the Board meeting at which the proposal for buy back was approved by the Board of Directors of the company;
- (ii) Necessity for the buy back;
- (iii) Maximum amount required under the buy back and its percentage of the total paid up capital and free reserves;

- (iv) Maximum price at which the shares or other specified securities are proposed to be bought back and the basis of arriving at the buy back price;
- (v) Maximum number of securities that the company proposes to buy back;
- (vi) Method to be adopted for buy back as referred in sub-regulation (iv) of regulation 4;
- (vii) (a) the aggregate shareholding of the promoter and of the directors of the promoters, where the promoter is a company and of persons who are in control of the company as on the date of the notice convening the General Meeting or the Meeting of the Board of Directors;
- (b) aggregate number of shares or other specified securities purchased or sold by persons including persons mentioned in (a) above from a period of six months preceding the date of the Board Meeting at which the buy back was approved till the date of notice convening the general meeting;
- (c) the maximum and minimum price at which purchases and sales referred to in (b) above were made along with the relevant dates.
- (viii) Intent on of the promoters and persons in control of the company to tender shares or other specified securities for buy-back indicating the number of shares or other specified securities, details of acquisition with dates and price;
- (ix) A confirmation that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institutions or banks;
- (x) A confirmation that the Board of Directors has made a full enquiry into the affairs and prospects of the company and that they have formed the opinion-
 - (a) that immediately following the date on which the General Meeting or the meeting of the Board of Directors is convened there will be no grounds on which the company could be found unable to pay its debts;
 - (b) as regards its prospects for the year immediately following that date that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company will be able to meet its liabilities as and when they fall due and will not be rendered insolvent within a period of one year from that date; and
 - (c) in forming their opinion for the above purposes, the directors shall take into account the liabilities as if the company were being wound up under the provisions of the Companies Act, 1956 or Companies Act or the Insolvency and Bankruptcy Code, 2016 (including prospective and contingent liabilities).
- (xi) A report addressed to the Board of Directors by the company's auditors stating that-
 - (a) they have inquired into the company's state of affairs;
 - (b) the amount of the permissible capital payment for the securities in question is in their view properly determined; and
 - (c) the Board of Directors have formed the opinion as specified in clause(x) on reasonable grounds and that the company will not, having regard to its state of affairs, will not be rendered insolvent within a period of one year from that date.
- (xii) Prior approval obtained from the under of the company in case of a breach of any covenant with such under.

Q57: What are the methods of Buy-back.

Answer: According to Regulation 4 of the Regulations, a company may buy back its own shares or other specified securities by any one of the following methods:

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

(b) from the open market through:

(i) book-building process

(ii) stock exchange.

It may be noted that no offer of buy back for 15% or more of paid up capital and free reserves, shall be made from the open market.

In terms of Regulation 4(vii), a company shall not make any offer of buy-back within a period of one year reckoned from the date of expiry of buy-back period of the preceding offer of buy-back, if any.

Regulation 4(vi) does not permit buy-back through negotiated deals (off and on stock exchange), private arrangement, spot transactions.

Regulation 4(v) prohibits a company to buy-back its shares or other specified securities so as to delist its shares or other specified securities from the stock exchange.

Q58: What are the provisions regarding Buy-back from existing security-holders through tender offer.

Answer: According to Regulation 6 of the Regulations, a company may buy-back its securities from its existing securityholders on a proportionate basis in accordance with the provisions of the Regulations. It may be noted that **forty per cent of the number of securities** which the company proposes to buy back or **number of securities entitled as per their shareholding**, whichever is **higher**, shall be reserved for small shareholders.

Q59: What are the additional disclosure required under Schedule I where buy-back is through tender offer from existing securities holders.

Answer: In addition to disclosure required under Schedule I, where the buy-back is through tender offer from existing securities holders, following additional disclosures are required to be made to the explanatory statement:

(a) the maximum price at which the buy-back of shares or other specified securities shall be made and whether the Board of Directors of the company is being authorized at the general meeting to determine subsequently the specific price at which the buy-back may be made at the appropriate time;

(b) if the promoter intends to offer their shares or other specified securities, the quantum of shares or other specified securities proposed to be tendered, and the details of their transactions and their holdings for the last six months prior to the passing of the special resolution for buy-back including information of number of shares or other specified securities acquired, the price and the date of acquisition.

Q60: Write provisions regarding Public Announcement and Filing of Offer Documents in case of Buy-back.

Answer: The company which has been authorized by a special resolution or a resolution passed by the Board of Directors at its meeting shall make a public announcement within two working days from the date of declaration of results of the postal ballot for special resolution/board of directors resolution in at least one English National Daily, one Hindi National Daily and a Regional language daily all with wide circulation at the

place where the Registered office of the company is situated and shall contain all the material information as specified in Schedule II.

A copy of the public announcement in electronic mode file with the Board and stock exchanges on which its shares/securities are listed.

The company shall within two working days of the public announcement file with the Board a letter of offer, containing disclosures as specified in Schedule III through a merchant banker who is not associated with the company, a declaration of solvency in the prescribed form and in a manner provided in section 68(6) of the Companies Act, 2013.

Q61: Write provisions of Offer procedure under Regulation 9

Answer:

1. A company making a buyback of offer shall announce a record date in the public announcement for the purpose of determining the entitlement and the names of the security holders, who are eligible to participate in the proposed buy-back of offer.
2. The letter of offer along with the tender form shall be dispatched to the security holders who are eligible to participate in the buy-back of offer.

Even if an eligible public shareholder does not receive the tender of offer form, he may participate in the buy-back of offer and tender shares in the manner as provided by the Board.

An unregistered shareholder may also tender his shares for buy-back by submitting the duly executed transfer deed for transfer of shares in his name, along with the offer form and other relevant documents as required for transfer, if any.

3. The **date of the opening of the offer** shall be not later than four working days from the date of dispatch of letter of offer.
4. The **offer for buy back** shall remain open for a period of five working days.
5. The company shall **accept shares or other specified securities** from the security holders on the basis of their entitlement as on record date.
6. The shares proposed to be bought back shall be divided into two categories; (a) reserved category for small shareholders and (b) the general category for other shareholders, and the entitlement of a shareholder in each category shall be calculated accordingly.
7. **Explanation:** Holdings of multiple demat accounts would be clubbed together for identification of small shareholder if sequence of Permanent Account Number for all holders is matching. Similarly, in case of physical shareholders, if the sequence of names of joint holders is matching, holding under such folios should be clubbed together for identification of small shareholder.

After accepting the shares or other specified securities tendered on the basis of entitlement, shares or other specified securities left to be bought back, if any in one category shall first be accepted, in proportion to the shares or other specified securities tendered over and above their entitlement in the offer by security holders in that category and thereafter from security holders who have tendered over and above their entitlement in other category.

Q62: Write a short note on Closure and payment to securities holders.

Answer: Regulation 10 lays down that—

1. The company shall immediately after the date of closure of the offer, open a special account with a SEBI registered banker to an issue and deposit therein, such sum as would, together with ninety percent of the amount lying in the escrow account make up the entire sum due and payable as consideration for the buy-back and for this purpose, may transfer the funds from the escrow account.
2. The company shall complete the verifications of offers received and make payment of consideration to those security holders whose offer has been accepted and return the remaining shares or other specified securities to the security holders within five working days of the closure of the offer.

Q63: Discuss the provisions for Escrow Account for open market Buy Back through Stock Exchange. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: The following are the provisions for Escrow Account for open market buy back through stock exchange:

- a) The company shall, within two working days of the public announcement, as and by way of security for performance of its obligations under the regulations, deposit in an escrow account such sum as specified as below:

(i) For consideration payable under buy back up to Rs. 100 crores	25% of consideration payable
(ii) For consideration payable under buy back exceeding Rs. 100 crores	25% of Rs. 100 Crores and 10% of the balance amount

- b) The escrow account referred to in this regulation shall consist of,

- cash deposited with a scheduled commercial bank, or
- bank guarantee in favour of the merchant banker, or
- deposit of acceptable securities with appropriate margin, with the merchant banker, or
- government securities
- units of mutual funds invested in gilt funds and overnight schemes any combination

Explanation: The cash component of the escrow account may be maintained in an interest-bearing account, provided that the merchant banker ensures that the funds are available at the time of making payment to shareholders.

- c) Where the escrow account consists of deposit with a scheduled commercial bank, the company shall, while opening the account, empower the merchant banker to instruct the bank to make payment the amount lying to the credit of the escrow account, as provided in the regulations.

- d) Where the escrow account consists of deposit with a scheduled commercial bank, the company shall, while opening the account, empower the merchant banker to instruct the bank to make payment the amount lying to the credit of the escrow account, as provided in the regulations.

e) Where the escrow account consists of a bank guarantee, such bank guarantee shall be in favour of the merchant banker and shall be valid until thirty working days after the expiry of buy-back period or until the completion of all obligations under these regulations, whichever is later.

Explanation: The bank guarantee shall not be returned by the merchant banker until the completion of all obligations under these regulations.

f) The company shall, in case the escrow account consists of securities, empower the merchant banker to realise the value of such escrow account by sale or otherwise and if there is any deficit on realisation of the value of the securities, the merchant banker shall be liable to make good any such deficit.

g) In case the escrow account consists of approved securities, these shall not be returned by the merchant banker till completion of all obligations under the regulations.

h) Where part of the escrow account is in a form other than cash, the company shall deposit with a scheduled commercial bank, in cash, a sum of not less than two and half per cent of the total amount earmarked for buyback as specified in the resolution of the Board of Directors or the special resolution, as the case may be, as security for the fulfilment of its obligations under the regulations.

i) On payment of consideration to all the securities holders who have accepted the offer and after completion of all formalities of buy-back, the amount, guarantee and securities in the escrow, if any, shall be released to the company.

j) The Board in the interest of the securities holders may in case of nonfulfilment of obligations under the regulations by the company forfeit the escrow account either in full or in part.

The amount forfeited under clause (j) may be distributed pro rata amongst the securities holders who accepted the offer and balance, if any, shall be utilised for investor protection.

Q64: Write a short note on Extinguishing of bought-back securities

Answer: The company shall extinguish and physically destroy the security certificates so bought back in the presence of a Registrar to issue or the Merchant Banker and the Secretarial Auditor within fifteen days of the date of acceptance of the shares or other specified securities. The company shall also ensure that all the securities bought-back are extinguished within seven working days of expiry of buy-back period. The aforesaid period of fifteen days shall in no case extend beyond seven days of expiry of buy-back period.

The shares or other specified securities offered for buy-back if already dematerialised shall be extinguished and destroyed in the manner specified under the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996, and the bye-laws, the circulars and guidelines framed thereunder.

The company shall, furnish a certificate to the Board certifying compliance as specified above and duly certified and verified by-

(i) the registrar and whenever there is no registrar by the merchant banker;

- (ii) two directors of the company one of whom shall be a managing director where there is one;
- (iii) the Secretarial auditor of the company.

Q65: ETA Motors Ltd. is an Indian automotive company, headquartered and registered in Delhi, incorporated on 12th May, 2002. The company manufactures vans and buses. The technical experts of the company have an opinion that four critical technological disruptions – mobility, autonomous driving, electric vehicles, and connected technologies – are poised to revolutionize the automotive landscape. The Company besides its plan to increase its market share by 20% to 35% by 2025-26, wants to enter the global market through joint ventures or technology transfers. The company decided to chalk out an expansion strategy for the same.

K&G Associates, the official and legal advisors to the Company were asked to deliberate on the expansion strategies. In their presentation to the Board of directors of ETA Motors Ltd., they explained that Mergers and Acquisitions (M&A) and Takeovers are common occurrences in the business world as enterprises aim for inorganic growth and diversification. By merging, the companies hope to reap the benefits by becoming bigger and dominating and also through tax benefits, economies of scale, acquiring new technology and improved market reach and industry visibility. After gaining an insight into the M&A opportunities, ETA Motors Ltd. created a separate (M&A) team to look out for acquisition targets as the Board of Directors felt that strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

(M&A) team was assigned the task to do the investigation effort and to gather all relevant facts and information about the targets that can influence a decision to enter into a transaction or not. M&A team after their detailed due diligence recommended an unlisted company, Daisy Commercial Vehicle Company Ltd. (DCVL) in South India as a potential target to give ETA Motors Ltd. a major breakthrough on the expansion front. The acquisition of DCVL seemed to open up possibilities for strong synergies like expansion of the product line, good R&D capabilities and new markets.

As Merger & Acquisition process is normally proceeded by formulation of strategy, carrying out due diligence, conducting valuation, ensuring all legal compliances and considering the aspects of stamp duty and other applications, K&G Associates was consulted regarding legal procedures and compliances under various acts and also regarding the valuation aspects of shares.

Both the companies deliberated and discussed together at the Board level and came out with a scheme. The scheme received approval of 96% of the shareholders of DCVL but rest 4% dissented from the scheme. K&G Associates advised that Sect on 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Where the scheme has been approved by the holders of not less than nine tenth (90%) in value of the shares of the DCVL whose transfer is involved, ETA Motors Ltd., may give notice to the dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the DCVL (including dissenting shareholders), unless the Tribunal orders otherwise (i.e., that the scheme shall not be binding on all shareholders). Accordingly, the ETA Motors Ltd. shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

Accordingly, the circular along with all informat on as provided in the Act was sent to the dissent ng shareholders in Form No: CAA 14 to the last known address of the dissent ng shareholders. Some of the shareholders held their shares in DEMAT form.

Based on the above facts, answer the following quest ons :

Whether the company has done suf cient compliance for giving Not ce to dissent ng shareholders in accordance with Rule 26 A of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016 which deals with purchase of minority shareholding held in DEMAT form? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Rule 26 A of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016 deals with purchase of minority shareholding held in DEMAT form. According to Rule 26A:

(1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under sect on 236 of the Companies Act, 2013 verify the details of the minority shareholders holding shares in dematerialised form.

(2) Af er verif cat on under sub-rule (1), the company shall send not ce to such minority shareholders by registered post or by speed post or by courier or by email about a cut-of date, which shall not be earlier than one month af er the date of sending of the not ce, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specif ed in such not ce, before the cut-of date.

(3) A copy of the not ce served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered of ce of the company is situated and also be uploaded on the website of the company, if any.

In the part ular case, compliance is not suf cient as not ce in newspaper and on website of the company is also required. Further, some of the shareholders are not holding their shares in dematerialised form.

Q66: PQR Ltd. is a company listed on the Nat onal Stock Exchange. The latest audited f nancial posit on of PQR Ltd. is as under:

Paid up equity Capital	Rs. 780 Crore
Free Reserves	Rs. 39,564 Crore
Share Premium	Rs. 1,456 Crore
Total secured and unsecured debts	Rs. 1,867 Crore

The company intends to buy-back its fully paid-up equity shares of Rs. 10 each not exceeding 21,617,000 equity shares at Rs. 1,945 per equity share payable in cash for aggregate considerat on not exceeding Rs. 4,204.51 crore. Examine whether the above buy-back of er through tender route can be approved by the Board of Directors for all 21,617,000 equity shares, keeping in view the legal framework for buy-back of securit es? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: According to Sect on 68(1) of the Companies Act, 2013, a company whether public or private, may purchase its own shares or other specif ed securit es (hereinaf er referred to as “buy-back”) out of:

- (i) its free reserves; or
- (ii) the securit es premium account; or

(iii) the proceeds of any shares or other specified securities.

The buy-back shall be authorised by its articles.

Quantum of Buy-back

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

(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. Debt equity ratio post buy back should not exceed 2:1.

Provided that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on proportionate basis out of the total shares offered for being bought back.

In the present case, since the paid-up equity capital, share premium and free reserves is Rs. 41,800 crores as per the latest audited financial statement, the Board can authorise through a resolution passed at its meeting the buyback of shares totalling Rs. 4180 crore, which is less than the Rs. 4204.51 crore which company wants to buyback. Shareholders in their meeting can by special resolution approve buyback up to 25% of Paid up capital and free reserves. So, 25% of 41800 crore i.e. Rs. 10450 crore can be bought back.

After the completion of the buyback scheme for Rs. 4204.51 crore, the company's paid up capital and free reserve would drop to Rs 37,595.49 crore (Rs. 41800 crores minus Rs. 4204.51 crore) and total secured and unsecured debts is Rs. 1867 crore. Thus, the debt equity ratio is after buy back scheme has been fully completed would be 0.0496, which is less than the stipulated 2:1. Hence, PQR Limited can proceed with the proposed buy back scheme by passing a special resolution passed at the shareholders meeting.

Q67: "Circumstances or reasons that prompt or motivate Management to resort to Corporate Restructuring" — Briefly analyse the phrase giving or citing certain noted mergers or demergers during the last couple of years. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Broadly speaking, management is prompted to resort to corporate restructuring either for financial or other reasons. Financial reasons could be to reduce risk; increase operating efficiency; improve access to financial market; or to avail tax benefits. Other reasons could be to expand marketing and management capabilities; explore new products for development; avail synergistic benefits; or revive a sick company. Insolvency and Bankruptcy Code, 2016 has created one more window to submit resolution plan in a Corporate Insolvency Resolution Process.

Restructuring aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It also aims at exploiting the strategic assets accumulated by a business i.e., monopolies, goodwill, exclusivity through licensing, etc. to enhance the competitiveness advantages. Thus, restructuring helps in bringing an edge over competitors.

Prominent mergers/ demergers or acquisitions that took place recently are Flipkart acquiring Myntra, Asian Paints acquiring Ess Ess Bathroom products, RIL acquiring Network 18, Merck acquiring Sigma, Sun Pharma

absorbing Ranbaxy; Tata Power acquiring PT Arut min Indonesia, Reliance Industries demerger, Whitbread plc. Demerged Costa Coffee and Sintex demerger.

Q68: XYZ Ltd. is a company listed on the National Stock Exchange. The latest audited financial position of XYZ Ltd. is as under:

	(Amount in Rs. 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 Rs.5 each not exceeding 20,585,000 equity shares at Rs.950 per equity share payable in cash for aggregate consideration not exceeding Rs.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)

PAST YEAR QUESTION DECEMBER 2019

Answer: Quantum of Buy-back (Sect on 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 totalling 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.

Q69: "An unlimited company can reduce the share capital of the company in a manner specified in the Article of Association of the company without confirmation of NCLT." Comment. List out certain situations where no confirmation of Tribunal is necessary for reduction of capital. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: According to Sect on 2(92) of the Companies Act, 2013, unlimited company means a company not having any limit on the liability on the members.

The member's liability is unlimited. The unlimited company can reduce the share capital of the Company in a manner specif ed in the Art cles of Associat on of the Company without conf rmat on of NCLT.

The following are cases which amount to reduct on of share capital but where no conf rmat on of the Tribunal is necessary:

- (a) Surrender of shares.
- (b) Forfeiture of shares.
- (c) Diminut on of capital.
- (d) Redempt on of redeemable preference shares.
- (e) Buy-back of its own shares.

Q70: Discuss the obligat ons of Merchant Banker under SEBI (Buy-back of Securit es) Regulat ons, 2018. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

OR

Elucidate the obligat ons of a merchant banker as per Regulat on 20 of SEBI (Buyback of Securit es) Regulat ons, 1998. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: As per Regulat on 25 of SEBI (Buy-Back of Securit es) Regulat ons, 2018, the obligat ons of Merchant Banker include ensuing the following:

- a. the company is able to implement the of er
- b. the provision relat ng to escrow account has been complied with
- c. f rm arrangements for monies for payment to fulf l the obligat ons under the of er are in place
- d. the public announcement of buy-back is made and the let er of of er has been f led in terms of the Regulat ons.
- e. the merchant banker should furnish to SEBI, a due diligence cert f cate which should accompany the draf let er of of er
- f. the merchant banker should ensure that the contents of the public announcement of of er as well as the let er of of er are true, fair and adequate and quot ng the source wherever necessary
- g. the merchant banker should ensure compliance of Sect on 68, 69 and 70 of the Companies Act, and any other applicable laws or rules in this regard has been made
- h. upon fulf lment of all obligat ons by the company under the Regulat ons, the merchant banker should inform the bank with whom the escrow or special amount has been deposited to release the balance amount to the company and send a f nal report to SEBI in the specif ed form, within 15 days from the date of expiry of the buy-back period.

Q71: PQR Ltd. is a company listed on the Bombay Stock Exchange. The latest audited f nancial posit on of PQR Ltd. is as under:

	Amount (₹ in crore)
Paid up equity capital	884

Free Reserves	40,694
Total secured and unsecured debts	2,550
<i>The company intends to buy-back its fully paid up equity shares of ₹ 10 each not exceeding 20,585,000 equity shares at ₹ 1900 per equity share payable in cash for aggregate consideration not exceeding ₹ 3,911.15 crore. Examine whether the above buy-back of shares through tender route can be approved by the Board of directors, keeping in view the legal framework for buy-back of securities. (5 Marks)</i>	
PAST YEAR QUESTION JUNE 2023	

Answer: 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 buyback has to be authorized by the board by means of a resolution passed at the meeting.

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 present case, since the paid-up equity capital and free reserves is Rs. 41,578 crores as per the latest audited financial statement, the Board can authorize through a resolution passed at a meeting the buyback of shares totalling Rs. 3,911.15 crore, which is less than the prescribed 10% limit (i.e., Rs. 4,157.80 crore).

After the completion of the buyback scheme for Rs. 3,911.15 crore, the company's paid up capital and free reserve would drop to Rs. 37,666.85 crore (Rs. 41,578 crores minus Rs. 3,911.15 crore) and total secured and unsecured debts is Rs. 2,550 crore. Thus, the debt equity ratio is after buy back scheme has been fully completed would be 0.068, which is less than the stipulated 2:1.

Hence, PQR Limited can proceed with the proposed buy back scheme by passing a resolution passed at the meeting of its Board of Directors.

<i>Q72: "Safeguarding the interest of creditors is considered while sanctioning reduction of capital under Section 66 of the Companies Act, 2013". Comment and analyse briefly. (5 Marks)</i>
PAST YEAR QUESTION AUGUST 2021

Answer: In case the proposed reduction of capital involves diminution of liability in respect of unpaid capital or payment of any paid-up capital to any shareholder or in any other case, the Tribunal permits the creditors to object to such proposal.

The Tribunal while granting sanction of the proposed reduction will take into consideration interest of creditors and minority shareholders. In the process, notices will be given to the Government, Registrar of Companies, Securities and Exchange Board of India (in case of listed companies) and the creditors within three months of the application.

There is no limitation on the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured [*British and American Trustee and Finance Corp. v. Couper*, (1894) AC 399, 403 : (1991-4) All ER Rep 667].

Q73: Balance Sheet of XYZ Ltd. as on March 31, 2024 is as follows :

Liabilities	Amount (Rs.)	Assets	Amount (Rs.)
Paid up capital 1,20,000 equity shares of Rs. 10 each	12,00,000	Fixed Assets	36,00,000
Free reserves	18,00,000	Stock	10,00,000
Securities premium	6,00,000	Debtors	8,00,000
Debentures	25,00,000	Cash and bank	18,00,000
		balance	
Creditors	11,00,000	—	—
Total	72,00,000	Total	72,00,000

On the above date shares are brought back by the company to the extent possible, at a premium of Rs. 40 per share. Determine the number of shares to be brought back with necessary workings.

PAST YEAR QUESTION DECEMBER 2024

Answer: The amount of buyback of shares will be the least of the following two amounts:

Paid up capital before buyback Rs.12,00,000

Free reserves Rs.18, 00,000

Total paid up capital & free reserves Rs. 30, 00,000

(1) 25% of free reserves & paid-up capital Rs. 7,50,000

(2) Amount of equity available after satisfying minimum post buyback debt/equity ratio is Rs.18,00,000

Post buyback debt/equity ratio is calculated as follows:

Debt/equity ratio = debt (after buyback) / equity (after buyback)

$2 = (25, 00,000 + 11, 00,000) / \text{equity}$

Equity = $36, 00,000 / 2 = \text{Rs.} 18, 00,000$

Amount of equity available for buyback = equity before buyback - equity required after buyback. = Rs.

$(36,00,000 - 18,00,000) = \text{Rs.} 18,00,000$

Amount of buyback permissible is Rs.7,50,000

(i.e. lower of the two amounts Rs.7, 50,000 & Rs.18, 00,000)

Number of shares to be bought @ Rs.50 = $750000 / 50 = 15,000$ Shares

Q74: Hardnut Ltd. wants to buy-back its equity shares. The company has equity share capital of Rs.100 crore (face value of Rs.10 fully paid-up) and free reserves of 200 crore. Partly paid equity shares are Rs.60 crore. Preference share capital of face value Rs.100 fully paid is Rs.40 crore. The company seeks your opinion about the quantum of shares that can be bought back. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Quantum of Buyback

(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 upto 25% of total equity = capital in that year.

Quantum of buy-back with the approval of Board

Total paid up equity capital is	Rs 100 Crore
Partly paid Equity Capital	Rs 60 crores
Free reserves	Rs 200 crores
10 % total paid up equity capital and free reserves would be 10% of Rs 360 crores i.e Rs 36 crores	

Quantum of buy-back with the approval of shareholders

Total paid up equity capital	Rs 100 Crore
Partly paid Equity Capital	Rs 60 crores
Free reserves	Rs 200 crores
Paid up preference capital	Rs 40 crores

25% of total paid up capital and free reserves would be 25% of 400 crores which is Rs 100 crores. Buy-back in a financial year is 25% of paid up equity capital which is 25% of Rs 100 Crores which is Rs 25 crores.

(Note:- Partly paid shares shall not be bought– Back , only those shares which are fully paid up can be buy-back.)

Q75: National Company Law Tribunal (NCLT) has the powers to entertain and adjudicate upon certain matters under the Companies Act, 2013. Describe at least 10 such sections under which NCLT has adjudication powers under the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: National Company Law Tribunal has the powers to entertain and adjudicate upon matters pertaining to the following sections of the Companies Act, 2013:

- Section 7(7): Incorporation
- Section 55(3): Issue and redemption of preference shares
- Section 58 and 59, remedy for refusal to transfer or transmission of securities.
- Section 61 (1): Approval for consolidation and division of shares which results in changes in the voting percentage of shareholders of the limited company
- Section 62(4) to (6): further issue of share capital
- Sections 71(9) to (11): Debentures issues
- Section 75: Damages for fraud
- Sections 97, 98, & 99: To call meetings of members
- Section 119(4): Inspection of minutes' books
- Sections 130, 131: Reopening of accounts, revision of financial statements
- Sections 140 (4) & (5): Removal of auditors
- Section 169(4): Removal of directors
- Sections 213, 216(2), 214, 221, 222, 224(5): Investigations into company's affairs
- Section 230, 231: Compromise or Arrangement
- Section 231, 232: Merger or Amalgamation
- Sections 241, 242 except (1) (b), (2) (c) and (g) : Relief in cases of oppressions, etc. and powers of Tribunal.
- Sections 243, 244, 245: Oppression and mismanagement and Class Action suits
- Section 252: Revival of strike-off companies
- Section 399 (2): Production of documents

- Sections 419, 425: Powers of NCLT
- Section 441: Compounding.

Q76: What do you understand by 'over-capitalised' company? Discuss the correct measures required to be undertaken by an over-capitalised company. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

OR

What correct measures a Company can take to restructure its internal finance having not shown symptoms of either under capitalization or over capitalization? (3 marks)

PAST YEAR QUESTION JUNE 2018

Answer: A company is said to be over-capitalized, if its earnings are not sufficient to justify fair return on the amount of share capital and debentures that have been issued.

Otherwise, it is said to be over capitalized when total of owned and borrowed capital exceeds its fixed and current assets i.e. when it shows accumulated losses on the assets side of the balance sheet.

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

- (i) Buy-back of own shares.
- (ii) Paying back surplus share capital to shareholders.
- (iii) Repaying loans to financial institutions, banks, etc.
- (iv) Repaying fixed deposits to public, etc.
- (v) Redeeming its debentures, bonds, etc.

Alternative Answer,

On identifying symptoms of under-capitalization, the company should resort to one or more of the following correct measures:

- (a) Injecting more capital either through right/preferential or public issue;
- (b) Issuing bonds and debentures;
- (c) Inviting and accepting deposits from directors, shareholders, relatives, business associates or public;
- (d) Reducing the dividend per share split up at the shares;
- (e) Issuance of bonus share will reduce both the dividend per share and earnings per share.

And in case of over-capitalization, following correct measures may be resorted to:

- (a) Buy-back of own shares;
- (b) Reduction of capital by paying surplus capital to shareholders;
- (c) Repaying loans to financial institutions, banks, etc.;
- (d) Repaying fixed deposits taken from public, etc.;
- (e) Redeeming its debentures, bonds, etc.;
- (f) Preference shares may be redeemed through capital reduction scheme;
- (g) Reducing face value and paid up value of equity shares;
- (h) Initiating merger with well managed profit making companies interested in taking over ailing company.

Q77: "Measuring the shareholders' value" is the object ve of Good Corporate Governance. Comment on the statement, how buy back of shares achieves it. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: It is right to say that good corporate governance calls for measuring the shareholders' value. When a company has surplus funds for which it does not have good avenues for deployment, assuring an average return on capital employed and earnings per share (EPS), the company's financial structure requires balancing.

The Board of directors of the Company has to make a thorough study into the financial structure of the company, the precise reasons for its restructuring and the mode of restructuring which would be suitable to the requirements of the company in the given circumstances.

One of the methods of financial restructuring open to a company is buy-back of its own securities. Buy-back results in the return of the shareholders money to the shareholders and a reduction of the floating stock of the company's securities in the market while at the same time creating value for the remaining equity.

In a reconstruction exercise, the reasons for embarking upon a buy-back are varied and could include:

- (i) Facilitating reduction of share capital without recourse to the lengthy and time consuming process of passing special resolution subject to confirmation by the Tribunal as required under section 66 of the Companies Act, 2013;
- (ii) Creation of liquidity in a company's share capital and providing an exit route, where shares are unlisted, or to encourage investment in an unlisted company by agreeing to purchase shares subscribed for at a later date;
- (iii) Proper and judicious deployment of the company's finances by investing the same in the purchase of its own securities;
- (iv) Maintaining shareholders' value in a situation of poor state of secondary market by a return of surplus cash to the shareholders; and countering hostile takeover.

Q78: "Optimum capitalization is desired to maintain robust financial health of an enterprise." Identify the symptoms of over capitalization or under capitalization. (3 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: A company is said to be over capitalized when its earnings are not sufficient to justify a fair return on the amount of share capital and debentures that have been issued.

Over capitalization does not mean surplus of funds. It is quite possible that a company may have more funds and yet have low earnings. Over capitalization may take place due to – exorbitant promotion expenses, inflation, shortage of capital, inadequate provision of depreciation, high corporation tax, liberalised dividend policy etc. Over capitalization shows negative impact on the company, owners, consumers and society.

On the other hand, a company is said to be under capitalised when its actual capitalization is lower than its proper capitalization as warranted by its earning capacity.

This happens in case of well established companies, which have insufficient capital but large secret reserves in the form of considerable appreciation in the values of fixed assets not brought into books. Under capitalization is prominent when owned capital is far less than borrowed capital and the business is more dependent on borrowed funds discharging higher fixed costs leaving less, no or even negative margin for the shareholders.

Q79: “Global competition drives enterprises to become globally fit to face global challenges prompting them for corporate restructuring”. Elucidate. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: An enterprise considering an exercise for restructuring its activities, has to take a wholesome view of the entire activities so as to exercise a Scheme of Restructuring at all levels. Competition drives technological development. Competition from within a country is different from cross country competition. Cost cutting and value addition are the inputs that get highlighted in a competitive world. Thus, innovations and inventions happen out of necessity to meet challenges of competition.

Globalization leads to increased competition. This competition can be related to product and service cost and price, target market, technological adaptation, quick response, quick production by companies, etc. Monies flow into the stream of production in order to be able to face competition and deliver the best possible goods at the convenience and affordability of the consumers. Global competition drives people to think big and it makes them fit to face global challenges. In order to become a competitive force Corporate Restructuring exercise could be taken-up. Thus to be globally fit and survive in the business with surplus, an enterprise needs to restructure with inventions and innovations.

Q80: Enumerate certain circumstances that necessitate financial restructuring, being part of Internal Corporate Restructuring. (3 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: During the life of a Company, any one or more of the following circumstances prompt for Company's restructuring:

- (i) Injecting more working capital to meet the increased market demand.
- (ii) Scenarios where a company is unable to fulfill its commitments.
- (iii) If there is shortage in obtaining further credit from suppliers of raw materials, consumable stores, components, etc. and from other parties like those doing job work for the Company.
- (iv) Failure to utilize optimum capacity for lack of liquid funds.

Financial restructuring involves rearrangement of its financial structure so as to make the Company's finances more balanced. Every Company targets to strike a balance in ever changing business environment.

CHAPTER-2 AS PER ICSI MODULE

ACQUISITION OF COMPANY BUSINESS

Q1: Mega Motors Ltd., a car manufacturing Company proposes to takeover AXL Automot ves, a component manufacturer. As a professional expert, come out with the objects Mega Motors Ltd. may have conceived to attain by this takeover. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: 'Takeover' the term basically envisages the concept of an acquirer acquiring shares with an intent on of taking over the control or management of the target company. When an acquirer, acquires substantial quantity of shares or voting rights of the target company, it results in the substantial acquisition of shares.

The **objects** of a takeover may inter alia include:

1. To effect **savings** in overheads and other working expenses on the strength of combined resources;
2. To **achieve product development** through acquiring firms with compatible products and technological/manufacturing competence, which can be sold to the acquirer's existing market areas, dealers and end users;
3. To **diversify** through acquiring companies with new product lines as well as new market areas, as one of the entry strategies to reduce some of the risks inherent in stepping out of the acquirer's historical core competence;
4. To **improve productivity and profitability** by joint efforts of technical and other personnel of both companies as a consequence of unified control;
5. To create **shareholder value** and wealth by optimum utilisation of the resources of both companies;
6. To **achieve economies of scale** by mass production at economical costs;
7. To **secure substantial facilities** as available to a large company compared to smaller companies for raising additional capital, increasing market potential, expanding consumer base, buying raw materials at economical rates and for having own combined and improved research and development activities for continuous improvement of the products, so as to ensure a permanent market share in the industry;
8. To **achieve market development** by acquiring one or more companies in new geographical territories or segments, in which the activities of acquirer are absent or do not have a strong presence.

Q2: What are the kinds of Takeovers practiced in the business world? (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: Takeovers may be broadly classified into three kinds:

1. **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. This kind of takeover is done through negotiations between two groups. Therefore, it is also called negotiated takeover.
2. **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.
3. **Bailout Takeover:** Takeover of a financially sick company by a profit earning company to bail out the former is known as bailout takeover. There are several advantages for a profit making company to takeover a sick company. The price would be very attractive as creditors, mostly banks and financial institutions having a charge on the industrial assets, would like to recover to the extent possible.

Q3: Describe about legal aspects of Takeover in India.

Answer: The legislations/regulations that mainly govern takeover are as under:

1. Companies Act, 2013
2. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (The Regulations)
3. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Q4: Describe about legal aspects of Takeover.

Answer: The legislations/regulations that mainly govern takeover are as under:

1. Companies Act, 2013
2. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (The Regulations)
3. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
4. Foreign Exchange Management Act, 1999 if the acquirer is a person resident outside India.
5. Securities Contracts (Regulations) Rules, 1957

Q5: Write the provisions regarding Takeover of Listed Companies under Companies Act, 2013.

Answer: Section 235 of the Companies Act 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

Power to acquire shares of shareholders dissenting from scheme or contract approved by majority

Section 235(1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

Section 236 of the Companies Act contains a compulsory acquisition mode for the transferee company to acquire the shares of minority shareholders of Transferor Company.

Where the scheme has been approved by the holders of **not less than nine tenths (90%) in value of the shares** of the transferor company whose transfer is involved, the transferee company, may, give **notice to any dissenting shareholders** that transferee company desires to acquire their shares within a period of 4 months after making an offer. The scheme shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Tribunal orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

Accordingly, the transferee company shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

Q6: What are the important ingredients of the Sect on 235 route.

Answer: The following are the important ingredients of the Sect on 235 route:

- The Company, which intends to acquire control over another Company by acquiring share, held by shareholders of that another Company is known under Sect on 235 of the Act as the “Transferee Company”.
- The Company whose shares are proposed to be acquired is called the “Transferor Company”.
- The “Transferee Company” and “Transferor Company” deliberate and discuss together at the Board level and come out with a scheme or contract.
- Every of er or every circular containing the terms of the scheme shall be duly approved by the Board of Directors of the companies and every recommendat on to the members of the transferor Company by its directors to accept such of er. It shall be accompanied by such informat on as provided under the said Act. The circular shall be sent to the dissent ng shareholders in **Form No: CAA 14** to the last known address of the dissent ng shareholder.

Rule 26 A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with purchase of minority shareholding held in **DEMAT form**. According to Rule 26A:

(1) The company shall **within two weeks** from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under sect on 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

(2) Af er verif cat on under sub-rule (1), the company shall send not ce to such minority shareholders by registered post or by speed post or by courier or by email about a cut-of date, which shall not be earlier than one month af er the date of sending of the not ce, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specif ed in such not ce, before the cut-of date.

(3) A copy of the not ce served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered of ce of the company is situated and also be uploaded on the website of the company, if any.

(4) The company shall inform the depository immediately af er publicat on of the not ce under subrule (3) regarding the cut-of date and submit the following declarat ons stat ng that:

(a) the corporate act on is being ef ected in pursuance of the provisions of sect on 236 of the Act;
 (b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate act on a copy of the not ce served to such shareholders and published in the newspapers to be at ached;

(c) the minority shareholders shall be paid by the company immediately af er complet on of corporate act on;

(d) any dispute or complaints arising out of such corporate act on shall be the sole responsibility of the company.

(5) For the purposes of effecting transfer of shares through corporate act on, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.

(6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

(7) After receiving the information of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899.

(8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.

(9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996, the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

- Every 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. This condition shall apply if the terms of acquisition as per the scheme or the contract provide for payment of cash in lieu of the shares of the Transferor Company which are proposed to be acquired.
- Any person issuing a circular containing any false statement or giving any false impression or containing any omission shall be punishable with fine.
- After the scheme or contract and the recommendation of the Board of Directors of the transferor Company, if any, shall be circulated and approval of not less than 9/10th in value of "Transferor Company" should be obtained within 4 months from the date of circulation. It is necessary that the Memorandum of Association of the transferee company should contain as one of the objects of the company, a provision to take over the controlling shares in another company. If the memorandum does not have such a provision, the company must alter the objects clause in its memorandum, by convening an extraordinary general meeting. The approval is not required to be necessarily obtained in a general meeting of the shareholders of the Transferor Company.

- Once approval is available, the 'Transferee Company' becomes eligible for the right of compulsory acquisition of minority interest.
- The Transferee Company has to send notice to the shareholders who have not accepted the offer (i.e. dissenting shareholders) intimating them the need to surrender their shares.
- Once the acquisition of shares in value, not less than 90% has been registered in the books of the transferor Company, the transferor Company shall within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee Company.
- The transferee Company having acquired shares in value not less than 90% is under an obligation to acquire the minority stake as stated aforesaid and hence it is required to transfer the amount or other consideration equal to the amount or other consideration required for acquiring the minority stake to the transferor Company. The amount or consideration required to be so transferred by the transferee Company to the transferor Company, shall not in any way, less than the terms of acquisition offered under the scheme or contract.
- Any amount or other consideration received by the Transferor Company in the manner aforesaid shall be paid into a separate bank account. Any such sums and any other consideration so received shall be held by the transferor Company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

Q7: Draft a checklist for a transferor company in the process of Takeover.

Answer: Transferor Company (Documents etc. involved in this process):

1. MOA and AOA
2. Offer of a scheme or contract from the transferee company
3. Minutes of Board meeting containing consideration of the offer and its acceptance or rejection
4. Notice calling general meeting with explanatory statement
5. Form CAA 14 circulated to the members (dissenting)
6. Minutes of general meeting of the company containing approval of the offer by statutory majority in value and in numbers also, if required
7. Court order, if any
8. Register of Members
9. Notice sent by the transferee company to dissenting shareholders for acquiring their shares
10. Duly filled in and executed instrument(s) of transfer of shares held by the dissenting shareholders
11. Bank Passbook or Statement of Account in respect of the amount deposited in the special bank account to be kept in trust for the dissenting shareholders
12. Annual Report.

Q8: Draft a checklist for a transferee company in the process of Takeover. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: Transferee Company (Documents etc. involved in this process):

1. MOA and AOA

2. Minutes of Board meeting containing consideration and approval of the offer sent to the transferor company
3. Offer of a scheme or contract sent to the transferor company
4. Notice to dissenting shareholders if any, of the transferor company
5. Notice to the remaining shareholders of the transferor company, who have not assented to the proposed acquisition, if any
6. Form No: CAA14 received from the transferor company, which has been circulated to its members by that company
7. Minutes of general meeting of the company containing approval of the shareholders to the offer of scheme or contract sent to the transferor company
8. Court order, if any
9. Register of Investments
10. Duly filled in and executed instrument(s) of transfer for shares held by the dissenting shareholders
11. Balance Sheets showing investments in the shares of the transferor company.

Q9: M/s Brite Instruments Pvt. Limited is acquiring M/s Sunshine Pvt. Limited. You are the Company Secretary of M/s Brite Instruments Pvt Limited. Help your management (Board of Directors) to prepare a checklist in this regard. (5 marks) PAST YEAR QUESTION JUNE 2017

Answer: Check-list for M/s Brite Instruments Pvt. Ltd. (the transferee company) while acquiring M/s Sunshine Pvt. Ltd. is as follows :

- (i) Offer made to M/s Sunshine Pvt. Ltd. (transferor company) is made after due diligence.
- (ii) Copy of notice for the general meeting along with a copy of Form No: CAA14 is circulated by the transferor company to its members.
- (iii) Intimation received from the transferor company in respect of approval of the offer by the requisite majority of the shareholders of the transferor company.
- (iv) Notice as prescribed in section 235 of the Companies Act, 2013 given by the company to dissenting shareholders of the transferor company for the purpose of acquiring their shares.
- (v) If there is any Tribunal Order in favour of the dissenting shareholders of the transferor company, terms of the same has been complied with.
- (vi) The company must ensure that the prescribed notice has been sent to those shareholders of the transferor company who have not assented to the transfer of the shares and that such shareholders have agreed to transfer their shares to the company.
- (vii) To ensure that the copy of the notice has been sent to the dissenting shareholders of the transferor company and duly executed instrument(s) of transfer together with the value of the shares have been sent to the transferor company.

Q10: What are the development of Takeover Regulations.

OR

Write a short note on Takeover Regulation Advisory Committee ("TRAC Committee")

Answer: The SEBI Act, 1992 empowered SEBI to make substantial acquisition of shares and takeovers a regulated activity for the first time. SEBI notified the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 in November 1994.

SEBI acquired necessary learnings, expertise and insight into the complexities of a Takeover after implementing the same for 2 years and thereafter formed a Committee under the Chairmanship of Justice Bhagwati. The terms of reference of the Committee were:

- to examine the areas of deficiencies in the existing regulations; and
- to suggest amendments in the Regulations with a view to strengthen the Regulations and make them more fair, transparent and unambiguous and also protect the interest of investors and all parties concerned in the acquisition process.

The Committee submitted its report in January 1997 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 were notified on February 20, 1997. These Regulations primarily dealt with the issues such as consolidation of holdings, conditional offers, change in control, formation of a Takeover Panel, competitive offers and defined substantial quantity for the purpose of making a disclosure and for the purpose of making an offer.

With a view to address all the concerns raised by all concerned, the same committee was reconstituted to review the working of the regulations and to consider suitable suggestions for further refinement of the Regulations in the light of the experience gained so far. The reconstituted Committee submitted its recommendations in 2002 and the Regulations went in for a major amendment in the year 2002.

In 2009, SEBI constituted a Takeover Regulation Advisory Committee ("TRAC Committee") under the Chairmanship of Late Mr. C Achutan to review the Takeover Regulations of 1997. The committee submitted its report in 2010 and the Regulations, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 were notified on September 23, 2011 and became effective from October 22, 2011. The major amendments/changes were:

1. Increase in trigger limit for offer from 15% to 25%
2. Increase in statutory offer size from 20% of share capital to 26% of total share capital of the company
3. Overhaul of exemptions from offer:

Exemptions have been further categorized into the following broad heads:

- (a) Transactions, which trigger a statutory offer due to substantial acquisition of shares/ voting rights, or due to change in control
- (b) Transactions, which trigger a statutory offer due to acquisition of shares/ voting rights exceeding prescribed thresholds, provided that there is no change in control.

4. Offer pricing: The new regulations brought in the concept of Volume Weighted Average Market Price.
5. Creeping acquisition: The New Regulations provided that an acquirer could make a creeping acquisition of 5% annually (between April 1 to March 31 of next year) to reach 75% stake such that the minimum public shareholding of 25% is maintained. The manner of computation of the 5% creeping acquisition limit has also been clarified.

6. Non-Compete Fee: The provision of payment of non compete was done away with.
7. Recommendation of independent directors on the open offer to be published in the newspapers in which the detailed public statement was given.

Q11: Explain the major amendments introduced in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 notified on September 21, 2011. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: The major changes/ amendments introduced vide the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 notified on 23rd September, 2011 were as under:

1. increase in trigger limit for open offer from 15% to 25%.
2. increase in statutory open offer size from 20% of share capital to 26% of total share capital of the company.
3. overhaul of exemptions from open offer.

Exemptions have been further categorized into the following broad heads:

- (a) transactions, which trigger a statutory open offer due to substantial acquisition of shares/ voting rights, or due to change in control.
- (b) transactions which trigger a statutory open offer due to acquisition of shares/ voting rights exceeding prescribed thresholds, provided that there is no change in control.

4. Offer pricing: These regulations brought in the concept of Volume Weighted Average Market Price.

5. Creeping acquisition: These regulations provided that an acquirer could make a creeping acquisition of 5% annually (between April 1 to March 31 of next year) to reach 75% stake such that the minimum public shareholding of 25% is maintained. The manner of computation of the 5% creeping acquisition limit has also been clarified.

6. Non-compete fee: The provision of payment of non-compete was done away with.

7. Recommendation of independent directors on the open offer to be published in the newspapers in which the detailed public statement was given.

The Regulations, further sought to include the various SAT judgments, informal guidance given and the experience gained from implementing the Takeover Regulations since 1994. They further sought to align itself with the Takeover Regulations as they exist in the rest of the world.

Q12: Perform Transformers Ltd is a listed company that contemplates taking over another Listed company. Could you suggest the legislations/regulations need to be looked into indicating briefly, the compliances required in the matter? (5 Marks)

PAST YEAR QUESTION AUGUST 2021

Answer: In cases of takeover exercise involving one or more listed companies one needs to look into Companies Act, 2013, Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST) and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) for proper compliances.

Regulation 31A (8) of LODR requires any public shareholder seeks to re-classify as promoter of other listed company needs to make an open offer as per SAST. However, neither of regulations shall apply to direct and indirect acquisition of shares or voting rights in, or control over a company listed without making a public issue, on the institutional trading platform of a recognised stock exchange.

As regards Companies Act, 2013, Section 186 shall apply to the acquisition of shares in a company for takeover. Legal requirements are detailed in Sections 235 and 236 for the purpose of takeover of unlisted company through transfer of undertaking.

Q13: Write down the provisions regarding takeover of listed Company under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Answer: Takeover of companies whose securities are listed on one or more recognized stock exchanges in India is regulated by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Therefore, before planning a takeover of a listed company, any acquirer should understand the compliance requirements under the Regulations and also the requirements under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR") and the Companies Act, 2013. There could also be some compliance requirements under the Foreign Exchange Management Act, 1999 if the acquirer is a person resident outside India.

As per Regulation 38 of SEBI LODR, the listed entity shall comply with the minimum public shareholding requirements ("MPS") as specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957 in the manner as specified by the Board from time to time. In other words, the listed entity shall ensure that the public shareholding shall be maintained at 25% of the total paid up share capital of the listed company failing which the listed company shall take steps to increase the public shareholding to 25% of the total paid up share capital by the methods as specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957.

This provision shall not apply to entities listed on Innovators Growth Platform without making a public issue.

Q14: Write a short note on Substantial Acquisition of Shares or Voting Rights.

Answer: Regulation 3(1) provides for Substantial acquisition of shares or voting rights. It states that no acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by Persons Acting in Concert (PACs) with him in such target company, entitle them to exercise twenty-five percent or more of the voting rights in such target company unless the acquirer makes a public announcement of an offer for acquiring shares of such target company in accordance with these regulations.

It may be noted that-

"Target Company" means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange. [Regulation 2(1)(z)]

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“Acquirer” means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company. [Regulation 2(1)(a)]

“Shares” means shares in the equity share capital of a target company carrying voting rights, and includes any security which entitles the holder thereof to exercise voting rights.

Regulation 3(2) provides that no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise **twenty-five per cent or more of the voting rights** in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise **more than five per cent of the voting rights**, unless the acquirer makes a public announcement of an offer for acquiring shares of such target company in accordance with these regulations:

Provided that the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company.

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 [No. 31 of 2016] shall be exempt from the obligation under the proviso to the sub-regulation (2) of regulation 3.

Explanation: For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,

(i) gross acquisitions alone shall be taken into account regardless of any intermitting fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

It may be noted that-

“Acquisit on” means, directly or indirectly, acquiring or agreeing to acquire shares or vot ng rights in, or control over, a target company. [Regulat on 2(1)(b)]

“Maximum permissible non-public shareholding” means such percentage shareholding in the target company excluding the minimum public shareholding required under the Securit es Contracts (Regulat on) Rules, 1957.[Regulat on 2(1)(o)]

Regulat on 3(3) provides that for the purposes of sub-regulat on (1) and sub-regulat on (2), acquisit on of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the st pulated thresholds, shall also be at ract ng the obligat on to make an open of er for acquiring shares of the target company irrespect ve of whether there is a change in the aggregate shareholding with persons act ng in concert.

Regulat on 3(4) provides nothing contained in this regulat on shall apply to acquisit on of shares or vot ng rights of a company by the promoters or shareholders in control, in terms of the provisions of Chapter VI-A of Securit es and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulat ons, 2009.

Regulat on 3(5) provides for the purpose of this regulat on, any reference to “twenty-f ve per cent” in case of listed ent ty which has listed its specif ed securit es on Innovators Growth Plat orm shall be read as “forty-nine per cent”.

Q15: Explain the term 'persons act ng in concert' (PACs) with reference to SEBI (Substant al Acquisit on of Shares and Takeovers) Regulat ons, 2011. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Person Act ng in Concert (PACs) are individual(s)/company (ies) or any other legal ent ty (ies) who, with a common object ve or purpose of acquisit on of shares or vot ng rights in, or exercise of control over the target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly cooperate for acquisit on of shares or vot ng rights in, or exercise of control over the target company. SAST Regulat ons, 2011 def ne various categories of persons who are deemed to be act ng in concert with other persons in the same category, unless the contrary is established.

Q16: The Paid up Equity Share Capital of Zumba Ltd. is 1,00,000 shares of Rs. 10 each as on 1st April 2019. The promoters hold 37000 shares as on 1st April 2018, which is 37% of the paid up capital. The promoters are three shareholders, Ram holding 21000 (21%), Shyam holding 12000 shares (12%) and Mohan holding 4000 shares (4%).

The Company makes a preferent al allotment to its directors as follows:

Ram 7000 shares and Mohan 1000 shares.

Def ne creeping acquisit on and evaluate the requirement of public announcement in above case as per Securit es and Exchange Board of India (Substant al Acquisit on of Securit es and Takeover) Regulat ons, 2011. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Creeping acquisition refers to the process through which the acquirer together with "Person Acting in Concert (PAC) holding more than 25% but less than 75%, to gradually increase their stake in the target company by buying up to 5% of the voting rights of the company in one financial year.

In terms of Regulation 3(3) of SEBI (SAST) Regulations, if the individual shareholding of an acquirer after acquisition exceeds 25% or the creeping acquisition limit of 5% in a financial year in the target company, such acquirer needs to make public announcement of an offer.

In the given case, combined Promoters' holding after proposed acquisition is $[(37000+8000)/108000]*100 = 37\% = 4.66\%$ being less than the trigger 5%, there is no need for public announcement.

However, in case of Ram, post-acquisition is $28000/108000 = 25.92\%$ that exceeds 25%. Therefore Ram has triggered the code and under an obligation to make a public announcement.

In case of Mohan, there is no requirement as it does not cross either 5% or 25% of the capital of the target company. However, had there been acquisition by the promoters from dissenting shareholders as per exit offer in terms of Regulation 3(4), there need not be any public announcement.

Q17: How is the maximum permissible non-public shareholding in a listed company defined?

Answer: Maximum permissible non-public shareholding is derived based on the minimum public shareholding requirement under the Securities Contracts (Regulations) Rules 1957 ("SCRR"). Rule 19A of SCRR requires all listed companies (other than public sector companies) to maintain public shareholding of at least 25% of share capital of the company. Thus by deduction, the maximum number of shares which can be held by promoters i.e. Maximum permissible non-public shareholding) in a listed companies (other than public sector companies) is 75% of the share capital.

Q18: What is the basis of computation of the creeping acquisitions limit under Regulation 3(2) of Takeover Regulations 2011?

Answer: For computing acquisitions limits for creeping acquisition specified under regulation 3(2), gross acquisitions/ purchases shall be taken in to account thereby ignoring any intermitted fall in shareholding or voting rights whether owing to disposal of shares or dilution of voting rights on account of fresh issue of shares by the target company.

Q19: Whether for the purpose of the creeping acquisition in terms of the Takeover Regulations, 2011, the Creeping Acquisition made during the period 01.04.2011 to 22.10.2011 will be considered?

Answer: The Takeover Regulations, 2011 have clearly defined the financial year as the period of 12 months commencing on the first day of the month of April. Thus, for the purpose of the creeping acquisitions under Regulation 3(2) of Takeovers Regulations 2011, shares acquired during 1/4/2011 to 22/10/2011 will be taken in to account.

Q20: Write a short note on Acquisition of Control.

Answer: Regulation 4 states that irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the

acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

Q21: What are the typical steps and corresponding timelines, in an open offer process?

Answer:

- Under most scenarios (except in certain types of indirect acquisitions) on the day of the triggering event, the acquirer is required to make a Public Announcement to the stock exchanges where shares of Target Company are listed and to SEBI. Within 5 working days thereafter, the acquirer is required to publish a Detailed Public Statement (DPS) in newspapers and also submit a copy to SEBI, after creation of an escrow account.
- Within 5 working days of publication of DPS, the acquirer through the manager to the offer is required to file a draft letter of offer with SEBI for its observations. The letter of offer is dispatched to the shareholders of the target company, as on the identified date, after duly incorporating the changes indicated by SEBI, if there are any.

The offer shall open not later than 12 working days from the date of receipt of SEBI's observations. The acquirer is required to issue an advertisement announcing the final schedule of the open offer, one working day before opening of the offer. The offer shall remain open for 10 working days

from the date of opening of the offer. Within 10 working days after the closure of the offer, the acquirer shall make payments to the shareholders whose shares have been accepted. A post offer advertisement, giving details of the acquisitions, is required to be published by the acquirer within 5 working days of the completion of payments under the open offer.

Q22: Pysunsmart Fire Protection Limited (PFPL) is a listed company on the Bombay Stock Exchange (BSE). It is engaged in the manufacture of industrial fire extinguishers. The company has seen a steady growth over the past few years and has attained a robust market presence. The company's stock has been gaining momentum due to company's strong pipeline of upcoming new products and expansion into new markets. As a result, the stock price of (PFPL) has been steadily rising.

A and B have been close friends and business partners over years. Over time, they have started investing jointly in several listed company, including PFPL.

C is a majority shareholder of a company "C holdings" and has also expressed his interest to purchase more shares in PFPL through C holdings and has been in talks with A, B, and Z about a potential joint acquisition strategy to gain control over the company.

Z a prominent investor has been closely monitoring the performance of PFPL. He believes that PFPL is undervalued relative to its growth prospects. He has identified that if the company's product pipeline succeeds, it could increase the company's market capitalization significantly. He already holds 20% shares in PFPL and is interested in increasing his stake further.

While all these shareholders have not made any formal agreements with each other but they have had multiple informal meetings where they discussed the possibility of working together.

PFPL had conducted a buy back through an open offer in order to improve its earning per share (EPS) and boost stock prices. Due to this, the total number of shares of PFPL in circulation decreased and as a result the shareholding of one shareholder, Q, increased from 24% to 28%.

PFPL is also considering proposals for merger with Sangam Limited, a manufacturer in same product. PFPL has attained a robust market presence in North India but operating at a much smaller scale in south. Merger with Sangam Limited will open the avenues to increase its market share in South too. The board of directors of PFPL have shown keen interest in doing premerger due diligence as they want to ensure the post-merger success. Though they have not received any red flag from any other department but HR head who is a part of premerger due diligence team has raised a concern. PFPL has a formal corporate culture, with a hierarchical structure whereas the employees of Sangam Limited are young and thrive in a culture that values innovation and informality. Sangam Limited operates in a flat structure where decision making is quick and decentralized. The HR Department of PFPL wants to draw attention to the problems that might come up regarding the cultural integration and human aspects of combining these companies who are having starkly different cultures. A meeting of Board of Directors has been called to discuss the matter.

Based on the above facts, answer the following questions :

(a) As an advisor to A, B, C and Z, guide them about the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, which regulate the acquisitions of large stakes in listed companies. What are the typical steps and corresponding timelines for the process advised by you ? (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Where an acquirer takes over the control of the 'target company', it is termed as takeover. When an acquirer acquires 'substantial quantity of shares or voting rights' of the target company, it results into substantial acquisition of shares.

The transaction relating to the acquisition of shares of a target company (listed company in India), undertaken by an existing shareholder of the company or any other independent acquirer company, is governed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Regulations"). The Regulations' goal is to govern the direct or indirect purchase of shares, voting rights, or the "control" of the target firm and to make sure that such purchases are made in a just and open way. Its objective is to make the transactions relating to acquisition fairer and more transparent.

A, B, C and Z will be required to follow the following regulations, the prescribed procedure and the timelines. Regulation 3(1) of the SAST Regulations provides for Substantial acquisition of shares or voting rights. It states that no acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by Persons Acting in Concert (PACs) with him in such target company, entitle them to exercise twenty-five percent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

Regulation 3(2) of the SAST Regulations provides that no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

The typical steps and corresponding timelines in an open offer process:

- Under most scenarios (except in certain types of indirect acquisitions) on the day of the triggering event, the acquirer is required to make a Public Announcement to the stock exchanges where shares of Target Company are listed and to SEBI. Such public announcement, – in the case of market purchases, shall be made prior to placement of the purchase order with the stock broker to acquire the shares, that would take the entitlement to voting rights beyond the stipulated thresholds.
- A copy of the public announcement shall be sent to the Board and to the target company at its registered office within one working day of the date of the public announcement
- Within 5 working days thereafter, the acquirer is required to publish a Detailed Public Statement (DPS) in newspapers and also submit a copy to SEBI, after creation of an escrow account.
- Not later than two working days prior to the date of the detailed public statement of the opening of offer for acquiring shares, the acquirer shall create an escrow account towards security for performance of his obligations under these regulations, and deposit in escrow account such aggregate amount according to the scale mentioned in the Regulations.
- Simultaneously with publication of such detailed public statement in the newspapers, a copy of the same shall be sent to stock exchanges where shares of the target company are listed (“BSE” in this case).
- Within 5 working days of publication of DPS, the acquirer through the manager to the offer is required to file a draft letter of offer with SEBI for its observations.
- Simultaneously with the filing of the draft letter of offer with the Board, the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address and to all stock exchanges where the shares of the target company are listed.
- The letter of offer is dispatched to the shareholders of the target company, as on the identified date, after duly incorporating the changes indicated by SEBI, if there are any, not later than seven working days from the receipt of comments from the Board.
- The offer shall open not later than 12 working days from the date of receipt of SEBI’s observations. The acquirer is required to issue an advertisement announcing the final schedule of the opening of offer, one working day before opening of the offer. The offer shall remain open for 10 working days from the date of opening of the offer. Within 10 working days after the closure of the offer, the acquirer shall make payments to the shareholders whose shares have been accepted.
- A post offer advertisement, giving details of the acquisitions, is required to be published by the acquirer within 5 working days of the completion of payments under the opening of offer.

Q23: When indirect acquisition is treated as direct acquisition as per SEBI (SAST) Regulations, 2011? (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: As per Regulation 5(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 indirect acquisition will be treated as direct acquisition when:

1. the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;

2. the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
3. the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired;

is **in excess of eighty per cent**, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

Explanation.— For the purposes of computing the percentage referred to in clause (c) of this sub-regulation, the **market capitalisation** of the target company shall be taken into account on the basis of the **volume weighted average market price** of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the offer or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

Q24: How are the thresholds for the requirement of making an open offer in case of an indirect acquisition computed?

Answer: The thresholds for the requirement of making an open offer in case of an indirect acquisition are computed on the basis of the voting rights and/or control acquired in the target company. Further, the quantum of acquisition of the target company in case of an indirect acquisition cannot be computed on a pro rata basis. This is illustrated as below:

If X acquires 40% shares of Y along with majority control of Y which, in turn, holds 70% shares of Z, a listed company along with majority control of Z, then X, in effect, acquires control on 70% shares of Z held by Y. Therefore, X will be required to make an open offer for the shareholders of Z.

Now; If X, which already holds 40% shares of Y and majority control of Y, further acquires additional 10% shares of Y, then X, in effect, does not acquire control on any shares additional to 70% shares of Z held by Y. Therefore, X will not be required to make an open offer for the shareholders of Z. It may be noted that the computation of quantum of additional shares acquired by X in Z as 10% of 70%, i.e., 7% on pro rata basis is not correct. Here, X does not acquire any additional shares of Z either directly or indirectly by acquiring additional 10% shares of Y.

Now; if A and B are in joint control of X which holds majority control of Y which, in turn, holds 70% shares of Z along with its majority control and A acquires sole control of X pursuant to cessation of control of X by B, then A, in effect, acquires sole control of Z indirectly through X and Y. Therefore, X will be required to make an open offer for the shareholders of Z.

Q25: Are there special provisions for determining the offer price in case of open offer arising out of indirect acquisition of a target company?

Answer: Yes. Since indirect acquisitions involve acquiring the target company as a part of a larger business, SAST Regulations, 2011 have prescribed additional parameters to be taken into account for determination of the offer price. If the size of the target company exceeds certain thresholds as compared to the size of the entity or business being acquired then the acquirer is required to compute and disclose in the letter of offer, the per share value of the target company taken into account for the acquisition, along with the methodology. (Kindly refer to Regulation 5). Further, in indirect acquisitions which are not in the nature of deemed direct acquisition, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of 10% per annum for the period between the date on which primary acquisition was contracted and the date of Detailed Public Statement.

Q26: Write a short note on Delisting Offer.

Answer: Regulation 5A states that notwithstanding anything contained in these regulations and the Delisting Regulations, in the event the acquirer makes a public announcement of an open offer for acquiring shares or voting rights or control of a target company in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5, the acquirer may seek the delisting of the target company by making a delisting offer in accordance with this regulation:

Provided that the acquirer shall have declared his intent to so delist the target company at the time of making such public announcement of an open offer as well as at the time of making the detailed public statement. A subsequent declaration of delisting for the purpose of the delisting offer proposed to be made under sub-regulation (1) shall not suffice:

Provided further that if the open offer is for an indirect acquisition that is not a deemed direct acquisition under sub-regulation (2) of regulation 5, the declaration of the intent to so delist shall be made initially only in the detailed public statement.

Explanation 1: The acquirer shall not, in such target company during the preceding two years from the date of the public announcement made under this regulation, be:

- i. a promoter / promoter group / person(s) in control, or
- ii. directly / indirectly associated with the promoter or any person(s) in control, or
- iii. a person(s) holding more than twenty-five percent shares or voting rights.

Explanation 2: The acquirer shall not acquire joint control along with an existing promoter / person in control of the company.

Q27: What are the delisting offer obligations which shall be fulfilled by the acquirer.

Answer: The delisting offer obligations shall be fulfilled by the acquirer in the following manner:

A. the public announcement, the detailed public statement and the letter of offer shall mention the open offer price determined in accordance with regulation 8 of these regulations and the indicative price for delisting:

Provided that if the open offer is for an indirect acquisition that is not a deemed direct acquisition under sub-regulation (2) of regulation 5, the open offer price and indicative price shall be notified by the acquirer at the time of making the detailed public statement and in the letter of offer:

Provided further that the **indicative price** shall include a suitable premium reflecting the price that the acquirer is willing to pay for the delisting of offer with full disclosures of the rationale and justification for the indicative price so determined that can also be revised upwards by the acquirer before the start of the tendering period which shall be duly disclosed to the shareholders.

Explanation: **Indicative price** shall be in accordance with clause (o) of sub-regulation (1) of regulation 2 of the Delisting Regulations and shall not be less than the book value of the company as computed in accordance with the Explanation to sub-regulation (5) of regulation 22 of the Delisting Regulations.

B. In case the response to the offer leads to the delisting threshold as provided under regulation 21 of the Delisting Regulations:

- i. being met, all shareholders who tender their shares shall be paid the indicative price;
- ii. not being met, all shareholders who tender their shares shall be paid the open offer price.

It may be noted that –

“Tendering period” means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares made under these regulations. [Regulation 2(1)(za)]

Q28: What are the situations when Delisting of offer is not successful.

Answer: Delisting of offer made under sub-regulation (1) is said to be not successful when:

- a) on account of the non-receipt of the prior approval of shareholders in terms of regulation 11 of the Delisting Regulations; or
 - b) on account of non-receipt of the prior in-principle approval of the relevant stock exchange in terms of regulation 12 of the Delisting Regulations; or
 - c) the threshold as specified under Regulation 21 of the Delisting Regulations is not achieved;
- the acquirer shall, within two working days in respect of such failure, make an announcement in all the newspapers in which the detailed public statement was made and comply with all the applicable provisions of these regulations in relation to completion of the open offer.

Q29: Can any acquirer proceed to voluntarily delist the company post acquisition? If your answer is affirmative, state the Rules and Regulations applicable to such act on along with main steps involved therein. If not, state the relevant provisions. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: As per regulation 5A(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, any acquirer who is desirous of delisting the company post acquisition due to a variety of reasons, may proceed to voluntarily delist the company under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (Delisting of Equity Shares) Regulations, 2009.

In the event, the acquirer makes a public announcement of an open offer for acquiring shares of a target company in terms of regulations 3, 4 or 5 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, acquirer may delist the company in accordance with the provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009.

However, the acquirer shall have declared upfront his intent on to so delist at the time of making the detailed public statement and a subsequent declaration of delisting for the purpose of the offer proposed to be made will not suffice.

The following main steps are involved: -

1. Acquirer to intimate the Board of Directors.
2. Board to consider the proposal for delisting.
3. Public announcement in case delisting of offer fails.
4. File draft letter of offer with SEBI.
5. Minimum details in the tentative schedule of activity.
6. Competing Offer.
7. Withdrawal of shares tendered.
8. Option to tender shares in open offer.

Q30: What are the obligations and restrictions imposed on an acquirer when a competing offer is made under sub-regulation (1) of Regulation 20 of the Acquisition Regulations?

OR

ABC Ltd. intends to delist its shares from Delhi Stock Exchange (DSE) for which it made required public announcement. Surewin Ltd., a substantial shareholder in the said Company made a counter offer. Advise Board with a short note in accordance with the relevant and applicable regulations of Securities and Exchange Board of India (SEBI). (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: Regulation 5(4) states that where a competing offer is made in terms of sub-regulation (1) of regulation 20 of these regulations:

- a) the acquirer shall not be entitled to delist the target company;
- b) the acquirer shall not be liable to pay interest to the shareholders on account of delay due to the competing offer; and
- c) the acquirer shall comply with all the applicable provisions of these regulations and make an announcement in this regard, within two working days from the date of public announcement made in terms of sub-regulation (1) of regulation 20, in all the newspapers where the detailed public statement was made. The shareholders can withdraw their tendered shares within 5 working days from the announcement date.

Q31: The target company fails to get delisted pursuant to a delisting offer under sub-regulation (1), but which results in the shareholding of the acquirer exceeding the maximum permissible non-public shareholding threshold. Explain.

OR

What are the situations if a target company fails to get delisted pursuant to a delisting offer under sub-regulation (1), but the acquirer's shareholding exceeds the maximum permissible non-public shareholding threshold?

PAST YEAR QUESTION

Answer: Regulation 5(6) deals with situations where the target company fails to get delisted after a delisting offer, but the acquirer's shareholding exceeds the maximum permissible non-public shareholding threshold.

a) **Further Delisting At Empty:** The acquirer can make another delisting at empty within 12 months from the completion of the open offer, if they still exceed the non-public shareholding threshold.

b) **Conditions for Success:** The delisting at empty will be successful if:

- i. The delisting threshold under Regulation 21 of the Delisting Regulations is met; and
- ii. Fifty percent of the residual public shareholding is acquired.

c) **Failure of Further At Empty:** If the delisting at empty fails, the acquirer must comply with the minimum public shareholding requirement within 12 months from the end of the period mentioned in (1).

d) **Floor Price for Delisting:**

The floor price for the further at empty will be the higher of:

- i. the indicative price offered under the first delisting at empty;
- ii. the floor price determined under the Delisting Regulations as on the relevant date of the subsequent at empty; and
- iii. the book value of the company as per the prescribed method.

Q32: What is a "Voluntary Offer" as per Regulation 6 of Takeover Code 2011? (5 marks)

PAST YEAR QUESTION JUNE 2017

OR

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

PAST YEAR QUESTION DECEMBER 2017

Answer: Voluntary Offer (Regulation 6)

A voluntary offer under Regulation 6 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, is an offer made by a person, who himself or through 'persons acting in concert' (PACs), if any, holds 25% or more shares or voting rights in the target company, but less than the maximum permissible non-public shareholding limit, for such number of shares such that the aggregate of the shareholding of the acquirer after the offer shall not exceed the maximum permissible non-public shareholding.

Restrictions on Voluntary Offer

A voluntary offer cannot be made if the acquirer or 'persons acting in concert' (PACs) with him has acquired any shares of the target company in the 52 weeks prior to the voluntary offer without attracting the provisions of the regulations, to make a public announcement. The acquirer is prohibited from acquiring any shares during offer period other than those acquired in the open offer. The acquirer is also not entitled to acquire any share for a period of 6 months, after completion of open offer, except pursuant to another voluntary open offer.

Exceptions:

- Competing offers are allowed if another person makes an open offer.
- Bonus issues or stock splits are not considered for this restriction.
- For companies listed on the Innovators Growth Platform, the 25% threshold is 49%.

Regulation 6A prohibits wilful defaulters from making a public announcement of an open offer or entering into any transaction that would trigger the obligation to make such an announcement.

It may be noted that –

“Wilful Defaulter” means any person who is categorized as a wilful defaulter by any bank or financial institution or consortium thereof, in accordance with the guidelines on wilful defaulters issued by the Reserve Bank of India and includes any person whose director, promoter or partner is categorized as such. **[Regulation 2(1)(ze)]**

Wilful defaulters cannot make an offer or trigger such an obligation, except when making a competing offer under Regulation 20.

Regulation 6B: Fugitive economic offenders cannot make an offer, a competing offer, or any transaction to acquire shares, voting rights, or control of a target company.

Q33: Explain the meaning of ‘Offer Period’ and ‘Tendering Period’ under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. (3 marks)

PAST YEAR QUESTION JUNE 2023

OR

In terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, ‘offer period’ and ‘tendering period’ are one and the same. Comment. (3 marks)

PAST YEAR QUESTION JUNE 2015

Answer: According to Regulation 2(1)(p) of the SEBI (SAST) Regulations, 2011, **Offer Period** means the period between the date of entering into an agreement, formal or informal, to acquire shares, voting rights in, or control over a target company requiring a public announcement, or the date of the public announcement, as the case may be, and the date on which the payment of consideration to shareholders who have accepted the offer is made, or the date on which offer is withdrawn, as the case may be.

According to Regulation 2(1) (za) of the SEBI (SAST) Regulations, 2011, **Tendering Period** means the period within which shareholders may tender their shares in acceptance of an offer to acquire shares made under these regulations.

Q34: Can a person holding less than 25% of the voting rights/ shares in a target company, make an offer?

Answer: Yes, any person holding less than 25% of shares/ voting rights in a target company can make an offer provided the offer is for a minimum of 26% of the share capital of the company.

Q35: What are the restrictions on acquirers making a voluntary offer?

Answer: A voluntary offer cannot be made if the acquirer or PACs with him has acquired any shares of the target company in the 52 weeks prior to the voluntary offer. The acquirer is prohibited from acquiring any shares during the offer period other than those acquired in the offer. The acquirer is also not entitled to acquire any shares for a period of 6 months, after completion of offer except pursuant to another voluntary offer.

Q36: How is the voluntary offer made by a person holding less than 25% of shares/ voting rights in a target company different from the voluntary offer made by a person holding more than 25% of shares/ voting rights of the target company?

Answer:

Voluntary offer by a person holding less than 25%	Voluntary offer by a person holding more than 25%
Minimum offer size of 26%.	Minimum offer size of 10%.
Maximum can be for entire share capital of the target company.	The maximum offer size is linked to maximum permissible non-public shareholding permitted under Securities Contracts (Regulations) Rules 1957.
No such conditions	❑ Acquirer should not have acquired any shares during 52 weeks period prior to Public Announcement. ❑ Acquirer is not entitled to acquire any shares of the target company for a period of 6 months after the completion of the open offer except for a voluntary open offer.

Q37: Write a short note on Offer Size.

Answer: Regulation 7(1) requires the acquirer (with PACs) to make an open offer for at least 26% of the target company's total shares, based on the number of shares as of the 10th working day after the tendering period closes.

- The total number of shares should include any potential increases in shares during the offer period, as considered at the time of the public announcement.
- If the number of shares increases after the announcement, the offer size must be increased proportionately.

Regulation 7(2) requires that a voluntary open offer (under Regulation 6) must:

- Acquire at least enough shares to give the acquirer 10% additional voting rights in the target company.
- Not exceed the number of shares that would cause the acquirer and PACs to go beyond the maximum permissible non-public shareholding limit.

In case of a competing offer:

- The acquirer can increase the offer size within 15 working days of the competing offer's announcement.
- If they don't increase it within this period, they can't raise the offer size. . [Proviso to Reg. 7(2)]. **[Proviso to Reg. 7(2)].**

Regulation 7(3): If the acquirer chooses to increase the offer size under Regulation 7(2), the open offer will be treated as if it was made under **Regulation 3(2)**.

This means that all applicable provisions of the regulations will apply to the increased offer.

Regulation 7(4): If the acquirer (with PACs) ends up holding **more than the allowed non-public shareholding** after the open offer:

1. They must reduce their shareholding to the permitted level within the timeframe set by the Securities Contract (Regulation) Rules, 1957.

2. If the acquirer intended to retain the company's listing (stated in the public announcement), they can proportionately reduce the shares or voting rights acquired.
3. For preferential allotments triggering an open offer, Board and shareholder resolutions must specify the allotment date and number of shares.
4. Allotment of shares after scaling down will occur within 15 days from the end of the open offer period, regardless of other SEBI regulations.

Explanation 1: The acquirer doing a scale-down must not have been:

1. A promoter, promoter group, or in control of the company in the last 2 years.
2. Associated with the promoter or persons in control.
3. A person holding more than 25% shares or voting rights.

Explanation 2: The acquirer cannot acquire joint control with existing promoters or persons in control.

Regulation 7(5): If the acquirer's shareholding exceeds the allowed non-public limit after an open offer, they cannot make a voluntary delisting of the company unless at least 12 months have passed since the open offer ended.

Regulation 7(6): An open offer must be made to all shareholders of the target company, except the acquirer, PACs, and parties to any underlying agreement (including those deemed acting in concert with them).

Q38: What is the stipulated size of an open offer?

Answer: An open offer, other than a voluntary open offer under Regulation 6, must be made for a minimum of 26% of the target company's share capital. The size of voluntary open offer under Regulation 6 must be for at least 10% of the target company's share capital. Further the offer size percentage is calculated on the fully diluted share capital of the target company taking into account potential increase in the number of outstanding shares as on 10th working day from the closure of the open offer.

Q39: Mr. A wants to acquire 25% of equity share capital of T Ltd. He has made a public announcement on 1st October, 2011. The tendering period is from 1st November to 16th November, 2011. T Ltd has 100,000 equity shares outstanding as on 1st October, 2011. The Company also has 10,000 Compulsorily Convertible Debentures outstanding against which 5,000 equity shares will have to be issued. They are due for conversion on 17th November, 2011 and shares will have to be issued immediately. Will Mr. A make an offer? If yes, then what is the minimum size of the open offer.

Answer: Mr. A will have to make an open offer. The minimum size of the open offer shall be 26% total shares of the target company. The 26% shall be calculated on the enhanced no of shares i.e 1,05,000. Hence he will have to make an open offer for 27300 shares.

Q40: What does Regulation 8(2) say about the offer price in case of direct and indirect acquisition of shares or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met?

OR

How is the open offer price for acquisition of shares of a listed target company whose shares are frequently traded determined? (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Regulat on 8(1) The open of er for acquiring shares under regulat on 3, regulat on 4, regulat on 5 or regulat on 6 shall be made at a price not lower than the price determined in accordance with sub-regulat on (2) or sub-regulat on (3), as the case may be.

Regulat on 8(2) states that in the case of direct acquisit on of shares or vot ng rights in, or control over the target company, and indirect acquisit on of shares or vot ng rights in, or control over the target company where the parameters referred to in sub-regulat on (2) of regulat on 5 are met, the of er price shall be the highest of,-

- a) the highest negot ated price per share of the target company for any acquisit on under the agreement at ract ng the obligat on to make a public announcement of an open of er;
- b) the volume-weighted average price paid or payable for acquisit ons, whether by the acquirer or by any person act ng in concert with him, during the ff y-two weeks immediately preceding the date of the public announcement;
- c) the highest price paid or payable for any acquisit on, whether by the acquirer or by any person act ng in concert with him, during the twenty- six weeks immediately preceding the date of the public announcement;
- d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;
- e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open of er taking into account valuat on parameters including, book value, comparable trading mult ples, and such other parameters as are customary for valuat on of shares of such companies; and
- f) the per share value computed under sub-regulat on (5), if applicable.

Alternat ve Answer,

If the target company's shares are frequently traded then the open of er price for acquisit on of shares under the minimum open of er shall be highest of the following:

- Highest negot ated price per share under the share purchase agreement ("SPA") triggering the of er;
- Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");
- Highest price paid for any acquisit on by the acquirer during 26 weeks immediately preceding the PA;
- Volume weighted average market price for sixty trading days preceding the PA.

Q41: Briefly explain methodology for arriving at the of er price under Regulat on 8(2) of SEBI (SAST) Regulat ons, 2011.

Calculate the Of er Price in the case of direct acquisit on of shares from the following informat on (where shares are frequently traded on the stock exchange) :

(i) Negot ated price per share available of the target company are :

Rs. 15, Rs. 13, Rs. 14;

(ii) Volume-weighted average price paid or payable for acquisit ons :

Rs. 14 (26 week); Rs. 16 (52 week)

(iii) Price paid or payable for any acquisit on :

Rs. 17 (26 week); Rs. 15 (52 week)

(iv) Volume-weighted average market price of such shares :

Rs. 18 (30 days), Rs. 15 (60 days). (5 Marks)

PAST YEAR QUESTION JUNE 2025

Answer: As per Regulation 8(2) of SEBI (SAST) Regulations, 2011, If the target company's shares are frequently traded then the offer price for acquisition of shares under the minimum offer shall be highest of the following: -

- (a) the highest negotiated price per share of the target company for any acquisition under the agreement at which the obligation to make a public announcement of an offer;
- (b) the volume-weighted average price paid or payable for acquisitions, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the date of the public announcement;
- (c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the date of the public announcement;
- (d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded.

Thus, the offer price shall be highest of the followings: -

- i) Highest negotiated price is Rs.15
 - ii) Volume weighted average price is Rs.16 (52 week)
 - iii) Highest price paid for any acquisition is Rs. 17 (26 week)
 - iv) Volume weighted average market price is Rs.15(60 days)
- Highest of the above price is offer price i.e. Rs. 17 (option iii).

Q42: What does Regulation 8(3) say about the offer price in case of indirect acquisition of shares or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met?

Answer: Regulation 8(3) states that, in the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of,—

- a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement at which the obligation to make a public announcement of an offer;
- b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;
- c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

- d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement of the opening of offer for shares of the target company made under these regulations;
- e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;
- f) the per share value computed under sub-regulation (5).

Q43: According to Regulation 8(4), how should the offer price be determined if it cannot be established based on the parameters specified in sub-regulation (3)?

Answer: Regulation 8(4) states that, in the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the opening of offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

Q44: What does Regulation 8(5) specify regarding the determination of the offer price in the case of an indirect acquisition and opening of offers under sub-regulation (2) of Regulation 5?

Answer: Regulation 8(5) states that, in the case of an indirect acquisition and opening of offers under sub-regulation (2) of regulation 5 where,

- a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
- b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
- c) the proportionate market capitalization of the target company as a percentage of the enterprise value for the entity or business being acquired;

is in excess of fifteen per cent, on the basis of the most recent audited annual financial statements, the acquirer shall, notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), be required to compute and disclose, in the letter of offer, the per share value of the target company taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

Q45: How is the offer price calculated in case shares are frequently traded on the stock exchange?

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

- Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;

- Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");
- Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;
- Volume weighted average market price for sixty trading days preceding the PA.

Q46: What must be considered in determining the offer price when the acquirer or PAC holds convertible instruments?

Answer: Regulation 8(6) states that for the purposes of sub-regulation (2) and sub-regulation (3), where the acquirer or any person acting in concert with him has any outstanding convertible instruments convertible into shares of the target company at a specific price, the price at which such instruments are to be converted into shares, shall also be considered as a parameter under sub-regulation (2) and sub-regulation (3).

Q47: How is the price paid for shares defined under Regulation 8(7) for the purpose of calculating the offer price?

Answer: Regulation 8(7) states that for the purposes of sub-regulation (2) and sub-regulation (3), the price paid for shares of the target company shall include any price paid or agreed to be paid for the shares or voting rights in, or control over the target company, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise.

Q48: What happens to the offer price if the acquirer purchases shares at a higher price during the offer period?

Answer: Regulation 8(8) states that where the acquirer has acquired or agreed to acquire whether by himself or through or with persons acting in concert with him any shares or voting rights in the target company during the offer period, whether by subscription or purchase, at a price higher than the offer price, the offer price shall stand revised to the highest price paid or payable for any such acquisition: Provided that no such acquisition shall be made after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

Q49: Under what circumstances can the offer price be adjusted for corporate actions?

Answer: Regulation 8(9) states that the price parameters under sub-regulation (2) and sub-regulation (3) may be adjusted by the acquirer in consultation with the manager to the offer, for corporate actions such as issuances pursuant to rights issue, bonus issue, stock consolidations, stock splits, payment of dividend, demergers and reduction of capital, where the record date for effecting such corporate actions falls prior to three working days before the commencement of the tendering period: Provided that no adjustment shall be made for dividend declared with a record date falling during such period except where the dividend per share is more than fifty per cent higher than the average of the dividend per share paid during the three financial years preceding the date of the public announcement

Q50: What is the acquirer's obligation if shares are bought at a higher price within 26 weeks after the offer period?

Answer: Regulation 8(10) states that where the acquirer or persons acting in concert with him acquires shares of the target company during the period of twenty-six weeks after the tendering period at a price higher than the offer price under these regulations, the acquirer and persons acting in concert shall pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the offer, within sixty days from the date of such acquisition:

Provided that this provision shall not be applicable to acquisitions under another offer under these regulations or pursuant to the Delisting Regulations, or open market purchases made in the ordinary course on the stock exchanges, not being negotiated acquisition of shares of the target company whether by way of bulk deals, block deals or in any other form.

Q51: Can an acquirer offer a lower price in a conditional offer if the minimum acceptance level is not met? Explain.

Answer: Regulation 8(11) states that, where the offer is subject to a minimum level of acceptances, the acquirer may, subject to the other provisions of this regulation, indicate a lower price, which will not be less than the price determined under this regulation, for acquiring all the acceptances despite the acceptance falling short of the indicated minimum level of acceptance, in the event the offer does not receive the minimum acceptance.

Q52: When and how must the offer price be enhanced in an indirect acquisition under Regulation 8(12)?

Answer: Regulation 8(12) states that, in the case of any indirect acquisition, other than the indirect acquisition referred in sub-regulation (2) of regulation 5, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the detailed public statement, provided such period is more than five working days.

Q53: How is the offer price determined for partly paid-up shares?

Answer: Regulation 8(13):

Offer price for partly paid-up shares = Offer price – unpaid call amount (including interest).

Q54: What factors must be considered in determining the offer price for shares with differential voting rights?

Answer: Regulation 8(14) states that, the offer price for equity shares carrying differential voting rights shall be determined by the acquirer and the manager to the offer with full disclosure of justification for the price so determined, being set out in the detailed public statement and the letter of offer:

Provided that such price shall not be lower than the amount determined by applying the percentage rate of premium, if any, that the offer price for the equity shares carrying full voting rights represents to the price parameter computed under clause (d) of sub-regulation 2, or as the case may be, clause (e) of sub-regulation 3, to the volume-weighted average market price of the shares carrying differential voting rights for a period of sixty trading days computed on the same terms as specified in the aforesaid provisions, subject to shares carrying full voting rights and the shares carrying differential voting rights, both being frequently traded shares.

Q55: How should price parameters be handled if they are not denominated in Indian Rupees?

Answer: Regulation 8(15) states that, in the event of any of the price parameters contained in this regulation not being available or denominated in Indian rupees, the conversion of such amount into Indian rupees shall be effected at the exchange rate as prevailing on the date preceding the date of public announcement and the acquirer shall set out the source of such exchange rate in the public announcement, the detailed public statement and the letter of offer.

Q56: Who may SEBI appoint to conduct an independent valuation of shares, and who bears the cost?

Answer: Regulation 8(16): SEBI may require a valuation by an independent merchant banker other than the manager to the offer or an independent chartered accountant in practice (10+ years' experience), at the acquirer's expense.

Q57: What does Regulation 9(1) say about the modes of payment for the offer price in an open offer?

Answer: Regulation 9(1) provides the offer price may be paid, —

- a) in cash;
- b) by issue, exchange or transfer of listed shares in the equity share capital of the acquirer or of any person acting in concert;
- c) by issue, exchange or transfer of listed secured debt instruments issued by the acquirer or any person acting in concert with a rating not inferior to investment grade as rated by a credit rating agency registered with the Board;
- d) by issue, exchange or transfer of convertible debt securities entitling the holder thereof to acquire listed shares in the equity share capital of the acquirer or of any person acting in concert; or
- e) a combination of the mode of payment of consideration stated in clause (a), clause (b), clause (c) and clause (d):

If the acquirer (with PACs) has acquired >10% of voting rights in the last 52 weeks and paid in cash, the open offer must provide an option for cash payment to shareholders.

If the offer price is revised, the payment mode can change, but the cash component paid before the revision cannot be reduced. **Proviso Regulation 9(1).**

Q58: What does Regulation 9(2) say about the requirements for shares or securities used to pay the offer price in an open offer?

Answer: Regulation 9(2) provides that, for the purposes of clause (b), clause (d) and clause (e) of sub-regulation (1), the shares sought to be issued or exchanged or transferred or the shares to be issued upon conversion of other securities, towards payment of the offer price, shall conform to the following requirements, —

- (a) such class of shares are listed on a stock exchange and frequently traded at the time of the public announcement;
- (b) such class of shares have been listed for a period of at least two years preceding the date of the public announcement;
- (c) the issuer of such class of shares has redressed at least ninety five per cent. of the complaints received from investors by the end of the calendar quarter immediately preceding the calendar month in which the public announcement is made;
- (d) the issuer of such class of shares has been in material compliance with the listing regulations for a period of at least two years immediately preceding the date of the public announcement:

Provided that in case where the Board is of the view that a company has not been materially compliant with the provisions of the listing regulations, the offer price shall be paid in cash only;

- (e) the impact of auditors' qualifications, if any, on the audited accounts of the issuer of such shares for three immediately preceding financial years does not exceed five per cent. of the net profit or loss after tax of such issuer for the respective years; and
- (f) the Board has not issued any direction against the issuer of such shares not to access the capital market or to issue fresh shares.

Q59: What does Regulation 9(5) say about determining the value of listed securities offered as consideration in an open offer?

Answer: Regulation 9(5) provides that, where listed securities are offered as consideration, the value of such securities shall be higher of:

- i. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the six months preceding the relevant date;
- ii. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the two weeks preceding the relevant date; and
- iii. the volume-weighted average market price for a period of sixty trading days preceding the date of the public announcement, as traded on the stock exchange where the maximum volume of trading in the shares of the company whose securities are being offered as consideration, are recorded during the six-month period prior to relevant date and the ratio of exchange of shares shall be duly certified by an independent merchant banker (other than the manager to the open offer) or an independent chartered accountant having a minimum experience of ten years.

Q60: SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 impose an obligation on the acquirer together with person acting in concert to make public announcement of an open offer in the event of their becoming entitled to exercise 25% or more of the voting rights in the target company.

What are the conditions under which the acquirer is exempt from making such open offer under Regulation 10(1) (a) of the regulations? (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Regulation 10(1)(a) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 following acquisitions shall be exempt from the obligation to make open offer under regulation 3 and regulation 4 subject to the fulfilment of the conditions stipulated therefore, -

- a) Acquisition pursuant to Inter-se transfer of shares amongst qualifying persons, being
 - i. Immediate relatives
 - ii. Persons named as promoters in the share holding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition;
 - iii. A company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty percent of the equity shares of such company, other companies in which such persons holding not less than fifty percent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons.
 - iv. persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to the requirement under the listing regulations or as the case may be, the listing agreement.
 - v. Shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to the requirement under the listing regulations or as the case may be, the listing agreement, and any company in which the entire equity shares is owned by such shareholders in the same proportion as their holdings in the target company without any differential treatment.

Provided that for purposes of availing of the exemption under this clause, —

- a) if the shares, of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub regulation (5), as traded on the Stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty-five per cent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8: and
- b) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

Q61: Which of the following acquisitions are considered to be in the ordinary course of business and are therefore exempt under the SEBI (SAST) Regulations?

Answer: As per Regulation 10(1)(b) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 following acquisitions shall be exempt from the obligation to make open offer under regulation 3 and regulation 4 subject to the fulfilment of the conditions stipulated therefore, -

- a) acquisition in the ordinary course of business by,—
 - i. an underwriter registered with the Board by way of allotment pursuant to an underwriting agreement in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

- ii. a stock broker registered with the Board on behalf of his client in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;
- iii. a merchant banker registered with the Board or a nominated investor in the process of market making or subscrip on to the unsubscribed port on of issue in terms of Chapter XB of the Securit es and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulat ons, 2009;
- iv. any person acquiring shares pursuant to a scheme of safety net in terms of regulat on 44 of the Securit es and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulat ons, 2009;
- v. a merchant banker registered with the Board act ng as a stabilising agent or by the promoter or pre-issue shareholder in terms of regulat on 45 of the Securit es and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulat ons, 2009;
- vi. by a registered market-maker of a stock exchange in respect of shares for which he is the market maker during the course of market making;
- vii. a Scheduled Commercial Bank, act ng as an escrow agent; and
- viii. invocat on of pledge by Scheduled Commercial Banks or Public Financial Inst tut ons as a pledgee.

Q62: According to SEBI (SAST) Regulat ons, acquisit ons at subsequent stages by an acquirer who has made a public announcement pursuant to a disinvestment agreement are exempt, provided certain condit ons are met. What are these condit ons?

Answer: As per Regulat on 10(1)(c) of SEBI (Substant al Acquisit on of Shares and Takeovers) Regulat ons, 2011 following acquisit ons shall be exempt from the obligat on to make open of er under regulat on 3 and regulat on 4 subject to the fulf lment of the condit ons st pulated therefore, -

- c) acquisit ons at subsequent stages, by an acquirer who has made a public announcement of an open of er for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement: Provided that,—
 - i. both the acquirer and the seller are the same at all the stages of acquisit on; and
 - ii. full disclosures of all the subsequent stages of acquisit on, if any, have been made in the public announcement of the open of er and in the let er of of er.

Q63: Under the SEBI (SAST) Regulat ons, what types of acquisit ons made pursuant to a scheme are exempt from open of er obligat ons?

Answer: As per Regulat on 10(1)(d) of SEBI (Substant al Acquisit on of Shares and Takeovers) Regulat ons, 2011 following acquisit ons shall be exempt from the obligat on to make open of er under regulat on 3 and regulat on 4 subject to the fulf lment of the condit ons st pulated therefore, -

- d) acquisit on pursuant to a scheme,—
 - i. made under sect on 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modif cat on or re-enactment thereto;
 - ii. of arrangement involving the target company as a transferor company or as a transferee company, or reconstruct on of the target company, including amalgamat on, merger or demerger;
 - iii. pursuant to an order of a court or a tribunal under any law or regulat on, Indian or foreign; or

iv. of arrangement not directly involving the target company as a transferor company or as a transferee company, or reconstruct on not involving the target company's undertaking, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal or under any law or regulation, Indian or foreign, subject to,—

(a) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

(b) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent of the voting rights in the combined entity are the same as the persons who held the entire voting rights before the implementation of the scheme.

da) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016.

Q64: Scheme of Reconstruct on pursuant to order of competent authority does not trigger, an open of er under SEBI (SAST) Regulations. Discuss the regulation citing the case law. (5 marks)

PAST YEAR QUESTION JUNE 2017

OR

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

(5 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: Regulation 10(1)(d)(ii) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 states that acquisition pursuant to a scheme of arrangement involving the target company as a transferor company or as a transferee company or reconstruction of the company including amalgamation, merger or demerger, pursuant to an order of a court of a competent authority under any law or regulation, Indian or foreign does not trigger open of er as required under Regulation 3 or Regulation 4 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, even if the acquisition crosses the specified threshold limit for open of er.

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

Regulation 10(6) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 provides that in respect of any acquisition made pursuant to exemption provided in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the acquirer should file a report with the stock exchanges where the shares are listed, in the prescribed form and not later than 4 working days from the acquisition and the stock exchange shall forthwith disseminate such information to the public.

Q65: Acquisition pursuant to a scheme made under sect on 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification thereto shall be automatically exempt from the obligation to make an offer under Regulations 3 and 4 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 but not the acquisition made pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. (3 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Under Regulation 10 of SEBI(SAST) Regulations 2011, certain acquisitions shall be exempt from the obligation to make an offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor. One of such exemption is acquisition pursuant to a scheme made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification or re-enactment thereto and acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Q66: The acquisition of shares resulting from invocation of pledge by a public financial institution is exempt from offer obligation. (3 marks)

PAST YEAR QUESTION JUNE 2015

Answer: As per Regulation 10 of SEBI(SAST) Regulations 2011, an acquisition in the ordinary course of business by invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions shall be exempt from the obligation to make an offer under regulation 3 and regulation 4.

Q67: Which types of acquisitions are exempt from the obligation to make an offer under Regulation 3 and Regulation 4 as per Regulation 10(1) of the SEBI (SAST) Regulations?

Answer:

- a) acquisition pursuant to inter se transfer of shares amongst qualifying persons
- b) acquisition in the ordinary course of business
- c) acquisitions at subsequent stages, by an acquirer who has made a public announcement of an offer for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement
- d) acquisition pursuant to a scheme
- da) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;
- e) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- f) acquisition pursuant to the provisions of the Delisting Regulations.
- g) acquisition by way of transmission, succession or inheritance;
- h) acquisition of voting rights or preference shares carrying voting rights arising out of the operation of sub-section (2) of section 47 of the Companies Act, 2013;
- i) Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with the guidelines specified by the Reserve Bank of India:

Provided that the conditions specified under sub-regulation (6) of regulation 158 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 are complied with. j) increase in voting rights arising out of the operation of sub-section (1) of section 106 of the Companies Act, 2013 or pursuant to a forfeiture of shares by the target company, undertaken in compliance with the provisions of the Companies Act, 2013 and its articles of association.

Q68: The voting rights of Vaibhav Pharma Ltd. (VPL) which is one of the promoter company of Poorvi Adhesive Ltd. (PAL) has increased beyond 75% of the total paid-up capital of the company due to the buy-back of shares by PAL pursuant to section 68. The Securities and Exchange Board of India issued a show cause notice to VPL alleging that they had to make a public announcement to acquire shares from the shareholders of the company and by not doing so they have violated provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Keeping in view the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, give your comments. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

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

Q69: As per Rule 6 of Security Interest (Enforcement) Rules, 2002, list down the terms and conditions which are required to be uploaded on the website of the secured creditor by the authorized officer in relation to sale of movable secured assets. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: The authorized officer shall upload the detailed terms and conditions of the sale of the movable secured assets on the web-site of the secured creditor, which shall include:

- 1) Details about the borrower and the secured creditor;
- 2) Complete description of movable secured assets to be sold with identification marks or numbers if any, on them;
- 3) Reserve price of the movable secured assets, if any, and the time and manner of payment;
- 4) Time and place of public auction or the time after which sale by any other mode shall be completed;
- 5) Deposit earnest money as may be stipulated by the secured creditor;
- 6) Any other terms or conditions which the authorised officer considers it necessary for a purchaser to know the nature and value of movable secured assets.

Q70: How is the offer price calculated in case shares are infrequently traded on the stock exchange?

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

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

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

Q71: Pysunsmart Fire Protection Limited (PFPL) is a listed company on the Bombay Stock Exchange (BSE). It is engaged in the manufacture of industrial fire extinguishers. The company has seen a steady growth over the past few years and has attained a robust market presence. The company's stock has been gaining momentum due to company's strong pipeline of upcoming new products and expansion into new markets. As a result, the stock price of (PFPL) has been steadily rising.

A and B have been close friends and business partners over years. Over time, they have started investing jointly in several listed company, including PFPL.

C is a majority shareholder of a company "C holdings" and has also expressed his interest to purchase more shares in PFPL through C holdings and has been in talks with A, B, and Z about a potential joint acquisition strategy to gain control over the company.

Z a prominent investor has been closely monitoring the performance of PFPL. He believes that PFPL is undervalued relative to its growth prospects. He has identified that if the company's product pipeline succeeds, it could increase the company's market capitalization significantly. He already holds 20% shares in PFPL and is interested in increasing his stake further.

While all these shareholders have not made any formal agreements with each other but they have had multiple informal meetings where they discussed the possibility of working together.

PFPL had conducted a buy back through an open offer in order to improve its earning per share (EPS) and boost stock prices. Due to this, the total number of shares of PFPL in circulation decreased and as a result the shareholding of one shareholder, Q, increased from 24% to 28%.

PFPL is also considering proposals for merger with Sangam Limited, a manufacturer in same product. PFPL has attained a robust market presence in North India but operating at a much smaller scale in south. Merger with Sangam Limited will open the avenues to increase its market share in South too. The board of directors of PFPL have shown keen interest in doing premerger due diligence as they want to ensure the post-merger success. Though they have not received any red flag from any other department but HR head who is a part of premerger due diligence team has raised a concern. PFPL has a formal corporate culture, with a hierarchical structure whereas the employees of Sangam Limited are young and thrive in a culture that values innovation and informality. Sangam Limited operates in a flat structure where decision making is quick and decentralized. The HR Department of PFPL wants to draw attention to the problems that might

come up regarding the cultural integrat on and human aspects of combining these companies who are having starkly dif erent cultures. A meet ng of Board of Directors has been called to discuss the mat er.

Based on the above facts, answer the following quest ons :

a) Q has approached you to seek guidance on whether the increase in his vot ng rights in PFPL due to the buyback of shares by the company at ract the obligat ons under sub-regulat on 3 of SEBI (Substant al Acquisit on of Shares and Takeovers) Regulat ons, 2011 and why ?

PAST YEAR QUESTION JUNE 2025

Answer: Under Regulat on 10(3) of the Securit es and Exchange Board of India (Substant al Acquisit on of Shares and Takeovers) Regulat ons, 2011 ("Regulat ons"), an increase in vot ng rights in a target company of any shareholder beyond the limit at ract ng an obligat on to make an open of er under sub-regulat on (1) of regulat on 3, pursuant to buy-back of shares by the target company shall be exempt from the obligat on to make an open of er provided such shareholder reduces his shareholding such that his vot ng rights fall to below the threshold referred to in sub-regulat on (1) of regulat on 3 within ninety days from the date of the closure of the said buy-back of er.

Under Regulat on 10(4) of the SAST Regulat ons, the following acquisit ons shall be exempt from the obligat on to make an open of er under sub-regulat on (2) of regulat on 3, —

c) increase in vot ng rights in a target company of any shareholder pursuant to buy- back of shares:

Provided that, —

- i. such shareholder has not voted in favour of the resolut on authorising the buy-back of securit es under sect on 68 of the Companies Act, 2013;
- ii. in the case of a shareholder resolut on, vot ng is by way of postal ballot;
- iii. where a resolut on of shareholders is not required for the buy- back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolut on of the board of directors of the target company authorizing the buy-back of securit es under sect on 68 of the Companies Act, 2013; and
- iv. the increase in vot ng rights does not result in an acquisit on of control by such shareholder over the target company:

Provided further that where the aforesaid condit ons are not met, in the event such shareholder reduces his shareholding such that his vot ng rights fall below the level at which the obligat on to make an open of er would be at racted under sub-regulat on (2) of regulat on 3, within ninety days from the date of closure of the buy-back of er by the target company, the shareholder shall be exempt from the obligat on to make an open of er.

Hence in this case, Q is not required to make an open of er provided he reduces his holding to below the threshold referred to in sub-regulat on (1) of regulat on 3 within ninety days from the date of the closure of the said buy-back of er.

Q72: Which acquisit ons are exempt from the obligat on to make an open of er under Regulat on 3(2) as per Regulat on 10(4) of the SEBI (SAST) Regulat ons?

Answer: Under Regulat on 10(4), the following acquisit ons shall be exempt from the obligat on to make an open of er under sub-regulat on (2) of regulat on 3, —

a) acquisition of shares by any shareholder of a target company, upto his entitlement, pursuant to a rights issue;

b) acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to a rights issue, subject to fulfilment of the following conditions,—

i. the acquirer has not renounced any of his entitlements in such rights issue; and

ii. the price at which the rights issue is made is not higher than the ex-rights price of the shares of the target company, being the sum of,—

A. the volume weighted average market price of the shares of the target company during a period of sixty trading days ending on the day prior to the date of determination of the rights issue price, multiplied by the number of shares outstanding prior to the rights issue, divided by the total number of shares outstanding after allotment under the rights issue:

Provided that such volume weighted average market price shall be determined on the basis of trading on the stock exchange where the maximum volume of trading in the shares of such target company is recorded during such period; and

B. the price at which the shares are offered in the rights issue, multiplied by the number of shares so offered in the rights issue divided by the total number of shares outstanding after allotment under the rights issue:

c) increase in voting rights in a target company of any shareholder pursuant to buy-back of shares:

Provided that,—

i. such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 68 of the Companies Act, 2013;

ii. in the case of a shareholder resolution, voting is by way of postal ballot;

iii. where a resolution of shareholders is not required for the buy-back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under section 68 of the Companies Act, 2013; and

iv. the increase in voting rights does not result in an acquisition of control by such shareholder over the target company:

Provided further that where the aforesaid conditions are not met, in the event such shareholder reduces his shareholding such that his voting rights fall below the level at which the obligation to make an offer would be attracted under sub-regulation (2) of regulation 3, within ninety days from the date of closure of the buy-back of shares by the target company, the shareholder shall be exempt from the obligation to make an offer.

d) acquisition of shares in a target company by any person in exchange for shares of another target company tendered pursuant to an offer for acquiring shares under these regulations;

e) acquisition of shares in a target company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter;

f) acquisition of shares in a target company from a venture capital fund or category I Alternative Investment Fund or a foreign venture capital investor registered with the Board, by promoters of the target company pursuant to an agreement between such venture capital fund or category I Alternative Investment Fund or foreign venture capital investor and such promoters.

Regulation 10(5): For acquisitions under Regulation 10(1)(a), 10(4)(e), and 10(4)(f), the acquirer must inform the stock exchanges at least 4 working days prior to the acquisition. The stock exchange will disseminate the information to the public.

Regulation 10(6): For any exempt acquisition, the acquirer must report to the stock exchange within 4 working days after the acquisition. The stock exchange will disclose it to the public.

Regulation 10(7): For certain exempt acquisitions (e.g., inter se transfers, inheritance, buy-back, etc.), the acquirer must submit a detailed report to SEBI within 21 working days of acquisition, along with a ₹1.5 lakh non-refundable fee.

Q73: What are the threshold limits for acquisition of shares / voting rights, beyond which an obligation to make an open offer is triggered

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

Acquisition of more than 5% shares or voting rights in a financial year: An acquirer who (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in a target company, can acquire additional shares in the target company as would entitle him to exercise more than 5% of the voting rights in any financial year ending March 31, only after making an open offer.

Q74: Under what circumstances can SEBI grant an exemption or relaxation from the open offer obligations under Regulation 11 of the SEBI (SAST) Regulations? What is the process to seek such exemption or relaxation?

Answer: Regulation 11(1): SEBI may, for reasons recorded in writing, grant an exemption from the obligation to make an open offer for acquiring shares under these regulations. Such exemption may be granted subject to conditions that SEBI considers appropriate in the interest of investors and the securities market.

Regulation 11(2): SEBI may also grant relaxation from strict compliance with procedural requirements under Chapter III and Chapter IV of the regulations, again for reasons recorded in writing.

This relaxation is subject to conditions SEBI considers necessary for protecting investors and the integrity of the market, and may be granted if the following conditions are met:

a) the target company is a company in respect of which the Central Government or State Government or any other regulatory authority has superseded the board of directors of the target company and has appointed new directors under any law for the time being in force, if,—

i. such board of directors has formulated a plan which provides for transparent, open, and competitive process for acquisition of shares or voting rights in, or control over the target company to secure the smooth and continued operation of the target company in the interests of all stakeholders of the target company and such plan does not further the interests of any particular acquirer;

ii. the conditions and requirements of the competitive process are reasonable and fair;

iii. the process adopted by the board of directors of the target company provides for details including the time when the open offer for acquiring shares would be made, completed and the manner in which the change in control would be effected; and

b) the provisions of Chapter III and Chapter IV are likely to act as impediment to implementation of the plan of the target company and exemption from strict compliance with one or more of such provisions is in public interest, the interests of investors in securities and the securities market.

Regulation 11(3):

To seek an exemption under Regulation 11(1), the acquirer must submit an application to SEBI.

To seek a relaxation under Regulation 11(2), the target company must file the application.

The application must be supported by a duly sworn affidavit, detailing the proposed acquisition and the reasons for seeking the exemption or relaxation.

Regulation 11(4):

Along with the application, a non-refundable fee of ₹5 lakh must be paid. The payment can be made via NEFT, RTGS, IMPS, or any RBI-approved method, or through a banker's cheque/demand draft payable in Mumbai in favour of SEBI.

Regulation 11(5):

SEBI will provide the applicant a reasonable opportunity to be heard before making a decision. After reviewing all relevant facts, SEBI will issue a reasoned order, either granting or rejecting the request. If required, SEBI may refer the application to a panel of experts for their recommendation.

Regulation 11(6):

The final order passed by SEBI will be published on its official website for public access.

Q74: 'General exemptions' under regulation 10 and 'Exemption by board' under regulation 11 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 are one and the same. Comment. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: No it is not one and the same.

Exemptions may be:

- Automatic Exemption (under Regulation 10)
- Exemption by SEBI (Regulation 11)

Regulation 10 prescribes the list of Exemption which is automatic. SEBI may for reasons recorded in writing, grant exemption, other than the listed grounds under

Regulation 10, from the obligation to make an offer for acquiring shares under

these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

Q75: According to Regulation 12(1) and 12(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, what are the requirements for appointing a manager to the offer and making the public announcement of the offer?

Answer: Regulation 12(1) states that, prior to making a public announcement, the acquirer shall appoint a merchant banker registered with the Board, who is not an associate of the acquirer, as the manager to the offer.

Regulation 12(2) states that, the public announcement of the offer for acquiring shares required under these regulations shall be made by the acquirer through such manager to the offer.

Q76: What are the timing requirements for making a public announcement of an open offer under Regulation 13(1) and 13(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011?

Answer: As per Regulation 13(1), the public announcement for acquiring shares or voting rights or control over the target company must be made on the date of agreeing to acquire such shares or voting rights, in accordance with Regulation 14 and 15.

Regulation 13(2) specifies the following timing requirements for the public announcement:

Market Purchases: The announcement must be made before placing the purchase order with the stock broker, which would take the voting rights beyond the threshold.

Convertible Securities (No Fixed Conversion Date): The announcement must be made on the same day as the exercise of the option to convert.

Convertible Securities (Fixed Conversion Date): The announcement must be made two working days before the scheduled conversion date.

Disinvestment: The announcement must be made on the same day as executing the acquisition agreement.

Indirect Acquisition (No Parameters in Regulation 5(2)): The announcement can be made within four working days from the earlier of the contracting date or public announcement date of the primary acquisition.

Indirect Acquisition (With Parameters in Regulation 5(2)): The announcement must be made on the earlier of the contracting date or public announcement date of the primary acquisition.

Preferential Issue: The announcement must be made on the date the board authorizes the preferential issue.

Buy-back Increase in Voting Rights: The announcement must be made within ninety days from the closure of the buy-back offer.

Other Acquisitions with Control Beyond Acquirer's Control: The announcement must be made within two working days from receiving notification of the acquisition.

Regulation 13(2A) states that, regardless of the provisions in sub-regulation (2), a public announcement for an acquisition of shares or voting rights in, or control over, the target company through a combination of:

1. An agreement and any one or more modes of acquisition outlined in sub-regulation (2) of Regulation 13, or
2. Any combination of modes of acquisition listed in clauses (a) to (i) of sub-regulation (2) of Regulation 13, must be made on the date of the first such acquisition. Additionally, the acquirer must disclose the details of the proposed subsequent acquisition in the public announcement.

Regulation 13(3) specifies that a public announcement made under Regulation 6 must be made on the same day the acquirer decides to voluntarily make an open offer for acquiring shares in the target company.

Furthermore, according to **Regulation 13(3)**, following the public announcement made under sub-regulations (1) and (3), the acquirer must publish a detailed public statement through the manager to the open offer in compliance with Regulations 14 and 15, no later than five working days after the public announcement.

However, the detailed public statement made under clause (e) of sub-regulation (2) must be published within five working days after the completion of the primary acquisition of shares, voting rights, or control over the target company or the entity holding shares or voting rights in the target company.

Q77: What are the disclosure requirements under Regulation 14 of SEBI (SAST) Regulations regarding the public announcement and detailed public statement in an open offer?

Answer: Under Regulation 14(1), the public announcement shall be sent to all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public.

Under Regulation 14(2), a copy of the public announcement shall be sent to the Board and to the target company at its registered office within one working day of the date of the public announcement.

Under Regulation 14(3), the detailed public statement pursuant to the public announcement referred to in sub-regulation (4) of regulation 13 shall be published in all editions of any one English national daily with wide circulation, any one Hindi national daily with wide circulation, and any one regional language daily with wide circulation at the place where the registered office of the target company is situated and one regional language daily at the place of the stock exchange where the maximum volume of trading in the shares of the target company are recorded during the sixty trading days preceding the date of the public announcement.

Under Regulation 14(4), simultaneously with publication of such detailed public statement in the newspapers, a copy of the same shall be sent to-

- i. the Board through the manager to the open offer,
- ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public,
- iii. the target company at its registered office, and the target company shall forthwith circulate it to the members of its board.

Q78: What are the key disclosure requirements under Regulation 15 of SEBI (SAST) Regulations regarding the contents of a public announcement and detailed public statement in an open offer?

Answer: According to Regulation 15(1), the public announcement shall contain such information as may be specified, including the following,

- a) name and identity of the acquirer and persons acting in concert with him;
- b) name and identity of the sellers, if any;
- c) nature of the proposed acquisition such as purchase of shares or allotment of shares, or any other means of acquisition of shares or voting rights in, or control over the target company;
- d) the consideration for the proposed acquisition that attracted the obligation to make an open offer for acquiring shares, and the price per share, if any;
- e) the offer price, and mode of payment of consideration;
- f) offer size, and conditions as to minimum level of acceptances, if any; and
- g) intention of the acquirer to either delist the target company or retain the listing of the target company. In case of proposed delisting under regulation 5A, the proposed offer price and indicative price as required under regulation 5A shall be disclosed along with an explanation setting out the rationale and basis for justifying the indicative price.

Regulation 15(2): The detailed public statement must include all specified information necessary for shareholders to make an informed decision regarding the open offer.

Regulation 15(3): All communications related to the open offer—such as public announcements, advertisements, or offer letters—must be accurate and complete, without any misleading or omitted relevant information.

Q79: What are the key provisions under Regulation 16 regarding the filing of the letter of offer with SEBI in an open offer process?

Answer: Regulation 16(1) stipulates that within five working days from the date of the detailed public statement issued under Regulation 13(4), the acquirer, through the manager to the open offer, must submit to the Board a draft letter of offer containing the prescribed information. This submission must be accompanied by a non-refundable fee, in accordance with the applicable fee structure. The payment may be made via direct credit to the designated bank account through NEFT, RTGS, IMPS, or any other mode permitted by the RBI, or alternatively, by a banker's cheque or demand draft payable in Mumbai, drawn in favour of the Board:

Sl. No.	Consideration payable under the Open Offer	Fee (Rs.)
a.	Up to ₹10 crore	₹5 lakh
b.	₹10 crore to ₹1000 crore	0.5 per cent of the offer size
c.	Above ₹1000 crore	₹5 crore + 0.125% of amount above ₹1000 crore

Regulation 16(2) states that the consideration payable under the open offer shall be calculated based on the offer price, assuming full acceptance of the offer. In cases where the offer involves differential pricing, the calculation shall be made using the **highest offer price**, regardless of the mode of payment.

Provided further, if the consideration under the open offer increases due to a revision in the offer price or size, the applicable fee shall be revised accordingly and must be paid within five working days from the date of such revision.

Regulation 16(3) requires the manager to the open offer to submit soft copies of the public announcement, detailed public statement, and draft letter of offer as per the specified format. The Board will then upload these documents on its official website.

Regulation 16(4) provides that the Board shall offer its comments on the draft letter of offer as promptly as possible, and in any case, no later than fifteen working days from the date of its receipt. If no comments are issued within this period, it shall be deemed that the Board has no comments to offer.

Provided that, if the Board seeks clarifications or additional information from the manager to the open offer, the time limit for providing comments shall be extended to the fifth working day from the date of receiving a satisfactory response.

Further, if the Board requires any modifications, the manager to the open offer and the acquirer must incorporate the necessary changes into the letter of offer before it is sent to the shareholders.

Regulation 16(5) stipulates that, in the case of competing offers, the Board must provide its comments on the draft letter of offer for each competing bid on the same day.

Regulation 16(6) further provides that, if the disclosures in the draft letter of offer are found to be inadequate, the Board may require the submission of a revised letter of offer. The revised letter shall then be reviewed and processed by the Board in accordance with the procedure laid down in sub-regulation (4).

Q80: What is a letter of offer? What are the disclosures required under the Letter of offer?

Answer: The letter of offer is a document which is dispatched to all shareholders of the target company as on identified date. This is also made available on the website of SEBI. Letter of offer contains details about the

of offer, background of Acquirers/PACS, financial statements of Acquirer/ PACs, escrow arrangement, background of the target company, financial statements of the target company, just fact on for offer price, financial arrangements, terms and conditions of the offer, procedure for acceptance and settlement of the offer. SEBI has prescribed the format for Letter of offer, which enumerates minimum disclosure requirements. The Manager to the offer/ acquirer is free to add any other disclosures which in his opinion are material for the shareholders. The format is available in the SEBI website.

Q81: What are the regulatory requirements regarding the provision of escrow in the context of an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations?

Answer: Regulation 17(1) requires the acquirer to open an escrow account and deposit the prescribed amount as security for fulfilling open offer obligations, no later than two working days before the detailed public statement.

Sl. No.	Consideration payable under the Open Offer	Escrow Amount
a.	On the first five hundred crore rupees	an amount equal to twenty-five per cent of the consideration
b.	On the balance consideration	an additional amount equal to ten per cent of the balance consideration

Provided that, where the open offer is conditional upon a minimum level of acceptance, the acquirer shall deposit in cash the higher of the following in the escrow account:

- (a) 100% of the consideration payable for the minimum level of acceptance, or
- (b) 50% of the total consideration payable under the open offer.

Further, in the case of indirect acquisitions pursuant to Regulation 13(2)(e), the acquirer shall deposit in the escrow account an amount equivalent to 100% of the total offer consideration.

Regulation 17(2) provides that the consideration payable under the open offer shall be calculated in accordance with Regulation 16(2). In the event of an upward revision in the offer price or offer size, the escrow amount must be recalculated based on the revised consideration. The additional amount must be deposited into the escrow account before the revision is made effective.

Regulation 17(3) allows the escrow account to be maintained in the form of:

- a) cash deposited with a scheduled commercial bank;
- b) a bank guarantee issued by a scheduled commercial bank in favour of the manager to the open offer; or
- c) frequently traded, freely transferable equity shares or other securities, subject to an appropriate margin.

Provided that securities deposited under clause (c) must meet the conditions specified in Regulation 9(2). Further, deposit of securities is not permitted in cases of indirect acquisitions under Regulation 13(2)(e).

Regulation 17(4) requires that if the escrow is created through a bank guarantee or securities, the acquirer must also deposit at least 1% of the total offer consideration in cash with a scheduled commercial bank as part of the escrow.

Regulation 17(5) provides that, for the portion of the escrow account held in cash with a scheduled commercial bank, the acquirer must authorize the manager to the open offer to instruct the bank to issue a

banker's cheque, demand draft, or make payments from the escrow account as required under these regulations.

Regulation 17(6) stipulates that, for the portion of the escrow in the form of a bank guarantee, the guarantee must be issued in favour of the manager to the open offer. It must remain valid throughout the offer period and for an additional 30 days after the completion of payment to shareholders who accepted the offer.

Regulation 17(7) provides that, for the portion of the escrow held in securities, the acquirer must authorize the manager to the open offer to realize the value of the securities by sale or other means. If there is any shortfall in the required escrow amount, the manager shall be responsible for making up the difference.

Regulation 17(8) states that the manager to the open offer shall not release the escrow account until 30 days after the completion of payment to shareholders who accepted the offer, except for transfers to the special escrow account as required under Regulation 21.

Regulation 17(9) provides that if the acquirer fails to meet their obligations, the Board may direct the manager to forfeit the escrow account or any amounts in the special escrow account, either fully or partially. The escrow account deposited with the bank in cash shall be released only in the following manner:

- the entire amount to the acquirer upon withdrawal of offer in terms of regulation 23 of the Takeover Regulations as certified by the manager to the open offer;
- for transfer of an amount not exceeding ninety per cent of the escrow account, to the special escrow account in accordance with regulation 21 of the Takeover Regulations;
- to the acquirer, the balance of the escrow account after transfer of cash to the special escrow account on the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer;
- the entire amount to the acquirer upon the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer upon certification by the manager to the open offer, where the open offer is for exchange of shares or other secured instruments;
- the entire amount to the manager to the open offer, in the event of forfeiture for non-fulfilment of any of the obligations under these regulations;
- for distribution in the following manner after deduction of expenses, if any, of registered market intermediaries associated with the open offer-

(a) one third of the escrow account to the target company;

(b) one third of the escrow account to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations; and

(c) one third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open offer.

Accordingly, SEBI may direct the manager to the offer to forfeit the escrow account and the funds may be released in the circumstances mentioned above.

Q82: Compliance under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 includes event bases/contingual disclosures; and opening of an Escrow Account is one of important event. Explain the compliance required to be done for this purpose. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

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

- (i) An escrow account has to be opened and the following sum has to be deposited.
- (ii) The escrow amount shall be calculated in the following manner, as specified in regulation 17,-

For consideration payable under the public offer,-

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

If, an offer is made conditional upon minimum level of acceptance, hundred percent of the consideration payable in respect of minimum level of acceptance or fifty per cent of the consideration payable under the offer, whichever is higher, shall be deposited in cash in the escrow account.

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

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

- (i) cash deposited with any scheduled commercial bank;
- (ii) bank guarantee issued in favour of the manager to the offer by any scheduled commercial bank; or
- (iii) deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin:

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

Q83: Plasma Ltd. is contemplating making an offer to acquire shares of Tic Toc Ltd. Director of Plasma Ltd. has approached you to understand that in the event of non-fulfilment of obligations under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (or Takeover Regulations) by the Company, can SEBI direct the manager to the offer to forfeit the escrow account or any amounts lying in the escrow account, either in full or in part? If yes, whether the amount lying in the escrow account can be released? (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

In case of Takeover, what are the cases in which the amount is released from Escrow Account? (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: As per the provisions of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, the manager to the offer shall not release the escrow account until the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the offer, save and except for transfer of funds to the special escrow account as required under regulation 21 of the Takeover Regulations.

In the event of non-fulfilment of obligations under the Takeover Regulations, by the acquirer SEBI may direct the manager to the open offer to forfeit the escrow account or any amounts lying in the special escrow account either in full or in part.

As per **Regulation 17(10)**, The escrow account deposited with the bank in cash shall be released only in the following manner:

- the entire amount to the acquirer upon withdrawal of offer in terms of regulation 23 of the Takeover Regulations as certified by the manager to the open offer;
- for transfer of an amount not exceeding ninety per cent of the escrow account, to the special escrow account in accordance with regulation 21 of the Takeover Regulations;
- to the acquirer, the balance of the escrow account after transfer of cash to the special escrow account on the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer;
- the entire amount to the acquirer upon the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer upon certification by the manager to the open offer, where the open offer is for exchange of shares or other secured instruments;
- the entire amount to the manager to the open offer, in the event of forfeiture for non-fulfilment of any of the obligations under these regulations;
- for distribution in the following manner after deduction of expenses, if any, of registered market intermediaries associated with the open offer-
 - (a) one third of the escrow account to the target company;
 - (b) one third of the escrow account to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations; and
 - (c) one third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open offer.

Accordingly, SEBI may direct the manager to the offer to forfeit the escrow account and the funds may be released in the circumstances mentioned above.

Q84: In the event of forfeiture of the amount lying in the escrow account, the acquirer shall be paid one-third of the amount forfeited in terms of regulation 17(10) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Comment. (3 Marks)

PAST YEAR QUESTION JUNE 2016

Answer: In the event of forfeiture of amount, the entire amount is distributed in the following manner:

- One third of the Escrow account to Target Company;
- One third of the escrow account to the Investor Protection and Education Fund established under SEBI (Investor Protection and Education Fund) Regulations, 2009;
- Residual one third of the escrow account is to be distributed pro-rata among the shareholders who have tendered their shares in the offer.

Q85: Amount standing in the credit of the Escrow Account created pursuant to the Securities and Exchange Board of India (Substantial Acquisition and Takeover) Regulations, 2011 in case of an open offer, shall not be released in any circumstances". State the exceptions to the statement. (5 Marks)

PAST YEAR QUESTION JUNE 2024 OLD

Answer: Securities and Exchange Board of India (Substantial Acquisition and Takeover) Regulations, 2011 (Takeover Regulations) obliges the Acquirer in case of open offer, to open an escrow account with a scheduled bank and deposit an amount equal to twenty-five per cent of the calculated consideration on the first five hundred crore rupees and on the balance consideration at ten per cent.

Such escrow account cannot be released except in the following manner:

1. The entire amount to the acquirer upon withdrawal of offer in terms of Regulation 23 of SAST Regulations as certified by the manager to the open offer.
2. An amount not exceeding ninety per cent to the special escrow account in terms of Regulation 21.
3. The balance (after transfer of cash to the special escrow account) to the acquirer but after thirty days after completion of payment to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer as certified by the manager to the open offer.
4. The entire amount to acquirer on expiry of thirty days from the completion of payment of consideration to the shareholders who tendered for exchange of other secured instruments.
5. The entire amount to the manager to the open offer, in the event of forfeiture for non-fulfilment of any of the obligations under these regulations

Q86: How do the provisions of Regulation 18 govern the procedures for the dispatch, revision, and settlement of an open offer, including the responsibilities of the acquirer, the manager to the open offer, and the target company, along with the requirements for statutory approvals, disclosures, and timelines?

Answer: Regulation 18(1) provides simultaneously with the filing of the draft letter of offer with the Board under regulation 16(1), the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address and to all stock exchanges where the shares of the target company are listed.

Regulation 18(2) requires the letter of offer to be sent to shareholders within seven working days of receiving the Board's comments or after the expiry of the period under Regulation 16(4), whichever is applicable.

Explanation:

- i. Letter of offer may also be dispatched through electronic mode in accordance with the provisions of Companies Act, 2013.
- ii. On receipt of a request from any shareholder to receive a copy of the letter of offer in physical format, the same shall be provided.
- iii. The aforesaid shall be disclosed in the letter of offer.

Provided that, the acquirer may refrain from sending the letter of offer to jurisdictions outside India where local laws pose a risk of civil, regulatory, or criminal liabilities, provided shareholders in such jurisdictions hold less than 5% of the target company's voting rights. However, all shareholders, regardless of receiving the letter of offer, can still tender their shares in acceptance of the open offer.

Regulation 18(3) requires the acquirer to send the letter of offer to the custodian of shares underlying depository receipts, if applicable, simultaneously with the dispatch of the letter of offer.

Regulation 18(4) allows the acquirer to revise the offer price and the number of shares sought to be acquired at any time before the last working day prior to the tendering period, regardless of a competing offer.

Regulation 18(5) provides that in the event of any revision of the offer, whether by way of an upward revision in offer price, or of the offer size, the acquirer shall,—

- a. make corresponding increases to the amount kept in escrow account under regulation 17 prior to such revision;
- b. make an announcement in respect of such revisions in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and
- c. simultaneously with the issue of such an announcement, inform the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

Regulation 18(6) requires the acquirer and persons acting in concert to disclose any acquisition of the target company's shares during the offer period to all stock exchanges and the target company within 24 hours. The stock exchanges must promptly make this information public.

Provided that no acquisition or sale of shares is allowed during the three working days before the tendering period begins and until it ends.

Additionally, the acquirer must facilitate shareholder participation and settlement through the stock exchange mechanism as specified by SEBI.

Regulation 18(7) requires the acquirer to publish an advertisement, in the prescribed format, at least one working day before the commencement of the tendering period. This advertisement must include:

- The schedule of activities related to the offer,
- The status of statutory and other required approvals (whether for the triggering acquisition or the offer itself),
- Any unfulfilled conditions and their current status,

Provided that such advertisement shall be,—

- a. published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and
- b. simultaneously sent to the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

Regulation 18(8): The tendering period must begin within 12 working days of receiving SEBI's comments and remain open for 10 working days.

Regulation 18(9): Shareholders cannot withdraw shares once tendered during the tendering period.

Regulation 18(10): The acquirer must complete all formalities, including payment to shareholders, within 10 working days from the end of the tendering period.

Regulation 18(11): The acquirer is responsible for obtaining all statutory approvals needed to complete the open offer without delay or default.

If payment is delayed due to non-receipt of such approvals (and not due to the acquirer's fault), SEBI may grant an extension, subject to interest payment to shareholders.

If approvals are pending for only some shareholders, the acquirer may proceed with payment to those not requiring approvals.

Such advertisement shall be,—

- i. published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and
- ii. simultaneously sent to the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

Q87: Revision of offer price can be made by the acquirer upward but that can be exercised only in the event of there being a competing offer. (3 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Revision of offer price [Regulation 18(4&5)]

Irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last three working days before the commencement of the tendering period.

Q88: What are the regulatory provisions and requirements for making a conditional open offer under SEBI regulations, including conditions related to minimum level of acceptance?

Answer: Regulation 19 allows an acquirer to make an open offer conditional upon receiving a minimum level of acceptance.

Provided that, if the open offer is made pursuant to an agreement, the agreement must include a clause stating that if the specified minimum level of acceptance is not achieved, the acquirer will not acquire any shares under the offer, and the agreement triggering the open offer shall be deemed rescinded.

In such cases, where the offer is conditional, the acquirer and persons acting in concert are prohibited from acquiring any shares in the target company during the offer period, except through the open offer or under the underlying agreement that triggered the offer.

Q89: An offer in which the acquirer has stipulated a minimum level of acceptance is known as 'conditional offer'. Comment. (3 marks)

PAST YEAR QUESTION JUNE 2016

Answer: An offer in which the acquirer has stipulated a minimum level of acceptance is known as a 'conditional offer'. 'Minimum level of acceptance' implies minimum number of shares which the acquirer desires under the said conditional offer. If the number of shares validly tendered in the conditional offer, are less than the minimum level of acceptance stipulated by the acquirer, then the acquirer is not bound to accept any shares under the offer. In a conditional offer, if the minimum level of acceptance is not reached, the acquirer shall not acquire any shares in the target company under the open offer or the Share Purchase Agreement which has triggered the open offer.

Q90: What are the key provisions under Regulation 20 of the SEBI (SAST) Regulations regarding competing open offers, and how are such offers regulated to ensure fairness and transparency for shareholders?

Answer: Under Regulation 20, when a public announcement of an open offer is made to acquire shares of a target company, any other person (other than the original acquirer) can also make a public announcement for a competing open offer within **15 working days** from the date of the detailed public statement of the first

acquirer. The competing offer must be for at least the same number of shares as proposed in the original offer, including shares already held, those to be acquired, and any shares under an agreement. Such offers will not be considered voluntary offers under Regulation 6, and all standard regulations will apply to them. Once this 15-day window closes, no new offers or transactions triggering an open offer obligation can be initiated until the end of the offer period. If the first offer is not conditional on a minimum number of shares being accepted, the competing offer also cannot be conditional. In special cases, like government disinvestment or SEBI relaxations, no other offers can be made during the offer period. All competing offers must follow the same timelines, and the final tendering date will be extended to match the last offer made. Acquirers are allowed to revise their competing offers with better terms (like a higher price) up to one working day before the tendering period begins. Except for the special rules mentioned, all general open offer rules apply equally to competing offers.

Q91: In an open offer, the schedule of activities and the timelines of all competing offers shall be identical.

Explain. (4 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Competitive offer is an offer made by a person, other than the acquirer who has made the first public announcement. A competitive offer shall be made within 15 working days of the date of the Detailed Public Statement (DPS) made by the acquirer who has made the first public announcement. If there is a competitive offer, the acquirer who has made the original public announcement can revise the terms of his open offer provided the revised terms are favourable to the shareholders of the target company.

Further, the bidders are entitled to make revision in the offer price up to 3 working days prior to the opening of the offer. The schedule of activities and the offer opening and closing of all competing offers shall be carried out with identical timelines.

Q92: What are the provisions regarding the payment of consideration under Regulation 21 of SEBI regulations?

Answer: Regulation 21 deals with the payment of consideration to shareholders in an open offer. It mandates that the acquirer must open a special escrow account with a SEBI-registered banker to an issue and deposit an amount sufficient to cover the entire consideration payable to shareholders. This amount, along with any cash transferred as per Regulation 17(10)(b), should fully cover the payment obligations under the open offer. The manager to the offer is authorized to operate this escrow account on behalf of the acquirer. As per Regulation 18(11), the acquirer is required to complete the payment to all shareholders who have tendered their shares within ten working days from the expiry of the tendering period, whether the consideration is in the form of cash or securities (issue, exchange, or transfer). Furthermore, any unclaimed amounts remaining in the special escrow account for more than seven years from the date of deposit must be transferred to the Investor Protection and Education Fund established under the SEBI (Investor Protection and Education Fund) Regulations, 2009.

Q93: What are the key provisions under Regulation 22 regarding the completion of acquisition in an open offer?

Answer: Regulation 22 outlines the rules related to the completion of acquisition by an acquirer in an open offer. As per Regulation 22(1), the acquirer is generally not allowed to complete the acquisition of shares, voting rights, or control over the target company until the expiry of the offer period. However, there are certain exceptions. In cases of preferential allotment under Regulation 20(1), the acquisition must be completed within the timeline specified in Regulation 170(1) of the SEBI (ICDR) Regulations, 2018, subject to specific overriding provisions. For delisting offers under Regulation 5A, the acquisition can only be completed after a successful delisting is publicly announced.

Regulation 22(2) provides that, if the acquirer deposits the entire consideration amount (assuming full acceptance of the offer) in an escrow account or provides an unconditional and irrevocable bank guarantee from a scheduled commercial bank rated 'AAA' by a SEBI-registered credit rating agency, the acquisition may be completed after 21 working days from the detailed public statement. This exception allows the parties to act on the agreement even before the offer period ends. Additionally, if the acquisition is subject to proportionate reduction as per Regulation 7(4), only the scaled-down acquisition is to be completed.

Regulation 22(2A) permits the acquirer to buy shares through preferential issue or stock exchange, provided the shares are kept in an escrow account, and no voting rights are exercised over them until regulatory conditions are fulfilled. Lastly, under Regulation 22(3), the acquisition under the agreement must be completed within 26 weeks from the end of the offer period, unless SEBI grants an extension in exceptional circumstances, in the interest of investors and the securities market.

Q94: The acquirer can opt out of the open offer process at any point of time by informing stock exchange wherein the shares of the target company are listed and furnishing a copy of the communication to the target company. (3 marks)

PAST YEAR QUESTION JUNE 2015

OR

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

PAST YEAR QUESTION DECEMBER 2016

Answer: The statement is not correct. As per Regulation 23 an open offer once made cannot be withdrawn except in the following circumstances:

- Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the Detailed Public Statement of the letter of offer;
- Any condition stipulated in the agreement attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, subject to such conditions having been specifically disclosed in the DPS and the letter of offer;
- Sole acquirer being a natural person has died;
- Such circumstances which in the opinion of SEBI merit withdrawal of open offer.

Q95: "An acquirer made an open offer to acquire shares. He subsequently withdrew the offer." Can he do so? If yes, what are the circumstances under which he can do so? What is the procedure to be followed? (3 Marks)

PAST YEAR QUESTION JUNE 2022

Answer: An open offer for acquiring shares once made shall not be withdrawn except under any of the following circumstances: -

- (a) Statutory approvals required for the open offer or for affecting the acquisitions attracting the obligation to make an open offer under these regulations having been finally refused, subject to such requirements having been specifically disclosed in the detailed public statement and the letter of offer;
- (b) The acquirer, being a natural person, has died;
- (c) Any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer; or
- (d) Such circumstances as in the opinion of the board, merit withdrawal. In this case SEBI shall pass a reasoned order permitting withdrawal and such order shall be hosted by the board on its official website.

In the event of withdrawal of any open offer, the acquirer shall through the manager to the open offer, within two working days, make an announcement in the same newspaper in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal. The acquirer shall inform in writing to SEBI, and all the stock exchanges on which the shares of the target company are listed. The stock exchange shall disseminate such information to the public and the target company.

Q96: An open offer for acquiring shares once made shall not be withdrawn except under specified circumstances under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. An open offer made by acquirer was withdrawn. As a Company Secretary, advise the acquirer on further course of action under the aforesaid regulations. (5 Marks)

PAST YEAR QUESTION JUNE 2023

Answer: In the event of withdrawal of the open offer, the acquirer shall through the manager to the open offer, within two working days:

- (a) make an announcement in the same newspapers in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal of the open offer.
- (b) simultaneously with the announcement inform in writing to SEBI, all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public and the target company at its registered office.

Q97: What are the provisions under Regulation 24 regarding the appointment and participation of directors representing the acquirer on the board of the target company during the offer period?

Answer: Regulation 24 lays down strict guidelines regarding the role and appointment of directors representing the acquirer or persons acting in concert with the acquirer on the board of the target company during the offer period. Generally, no such person can be appointed as a director—either to fill a casual vacancy or as an additional director—during the offer period. However, an exception is provided: after the initial 15 working days from the date of the detailed public statement, such appointments may be allowed if

the entire consideration payable under the open offer has been deposited in cash into the escrow account as per Regulation 17.

If the open offer is subject to conditions specified under Regulation 23(1)(c), then no director representing the acquirer can be appointed unless the acquirer has waived or fulfilled those conditions and has also deposited the full consideration in the escrow account. Moreover, if the open offer is conditional upon a minimum level of acceptance, then no director representing the acquirer or persons acting in concert can be appointed during the offer period—regardless of the escrow amount deposited.

During the period of competition of offers, no new director may be inducted to the board of the target company, even if escrow requirements are met. The only exception is in the case of death or incapacitation of a director, in which case the vacancy can be filled but must be approved by the shareholders through postal ballot. Furthermore, if the acquirer or person acting in concert already has a director on the board before the offer, such director must not participate in any discussions or vote on matters related to the open offer.

Q98: What are the key obligations of the acquirer under SEBI regulations before and during the open offer process?

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

In the event the acquirer has not declared an intention in the detailed public statement and the letter of offer to alienate any material assets of the target company or of any of its subsidiaries whether by way of sale, lease, encumbrance or otherwise outside the ordinary course of business, the acquirer, where he has acquired control over the target company, shall be debarred from causing such alienation for a period of two years after the offer period:

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

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

The acquirer and persons acting in concert with him shall-

- i. not sell shares of the target company held by them, during the offer period.
- ii. be jointly and severally responsible for fulfillment of applicable obligations under these regulations.

Q99: Upon public announcement by an Acquirer, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 places certain obligations on the Target Company. Comment. (5 Marks)

PAST YEAR QUESTION JUNE 2024

Answer: As per the SEBI (SAST) Regulations, 2011, where an Acquirer (with PAC), crosses the threshold limits prescribed in the Takeover Regulations, it shall make Public Announcement for the purpose of Open Offer to the shareholders of the Target Company.

Obligations of the target company -

1. When a public announcement of an open offer for acquiring shares of a target company is made, the Board of Directors of the target company shall ensure that during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice:
2. During offer period, (unless shareholders' special resolution by postal ballot) the Board of target company or its subsidiaries shall not:
 - a) alienate any material assets whether by way of sale, lease, or otherwise or enter into any agreement therefore outside the ordinary course of business;
 - b) effect any material borrowings outside the ordinary course of business;
 - c) issue or allot any authorized but unissued securities entitling the holder to voting rights.
 - d) implement any buy-back or effect any other change to capital structure of target company.
 - e) enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party, outside the ordinary course of business, whether such contract is with a related party, within the meaning of the term under applicable accounting principles, or with any other person; and
 - f) accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the target company by way of employee stock options or otherwise
3. In any general meeting of a subsidiary of the target company in respect of the matters referred to in the above point (2), the target company and its subsidiaries, if any, shall vote in a manner consistent with the special resolution passed by the shareholders of the target company.
4. Target Company is prohibited from fixing any record date for any corporate action on or after third working day prior to commencement of tendering period and until the expiry of the tendering period.
5. Target company shall furnish to the acquirer (within 2 working days from identified date), a list of shareholders as per the register of members of the target company containing names, addresses shareholding and folio number, but the acquirer shall reimburse reasonable costs payable by the target company to external agencies in order to furnish such information.
6. The Board of Directors of Target Company shall facilitate the acquirer in verification of shares tendered in acceptance of the open offer.
7. On receiving detailed public statement, the Board of Target Company shall constitute a Committee of Independent Directors to provide recommendations (with reasons) on the open offer. The Committee may seek external professional advice. The Committee shall provide written recommendations on the open offer to the shareholders of the Target Company Also, the recommendations shall be published in newspapers, and sent to stock exchange(s), Board and the Manager.
8. The Board of Directors of the target company shall make available to acquirers making competing offers, any information and co-operation provided to an acquirer who has made a competing offer.
9. Upon fulfillment by the acquirer, of the conditions required under applicable regulations, the board of directors of the target company shall without any delay register the transfer of shares acquired by the acquirer

in physical form, whether under the agreement or from open market purchases, or pursuant to the open of er.

Q100: What is the role of the target company in the open of er process?

Answer: Once a PA is made, the board of directors of the Target Company is expected to ensure that the business of the target company is conducted in the ordinary course. Alienation of material assets, material borrowings, issue of any authorized securities, announcement of a buy-back of er etc. is not permitted, unless authorized by shareholders by way of a special resolution by postal ballot.

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

After closure of the open of er, the target company is required to provide assistance to the acquirer in verification of the shares tendered for acceptance under the open of er, in case of physical shares.

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

Q101: What are the obligations of the Manager to the Open Of er under SEBI regulations during the open of er process?

Answer: Regulation 27 provides for obligations of the manager to the open of er. They are-

- 1) Prior to public announcement being made, the manager to the open of er shall ensure that,—
 - a. the acquirer is able to implement the open of er; and
 - b. firm arrangements for funds through verifiable means have been made by the acquirer to meet the payment obligations under the open of er.
- 2) The manager to the open of er shall ensure that the contents of the public announcement, the detailed public statement and the letter of of er and the post-of er advertisement are true, fair and adequate in all material aspects, not misleading in any material particular, are based on reliable sources, state the source wherever necessary, and are in compliance with the requirements under these regulations.
- 3) The manager to the open of er shall furnish to the Board a due diligence certificate along with the draft letter of of er filed under regulation 16.
- 4) The manager to the open of er shall ensure that market intermediaries engaged for the purposes of the open of er are registered with the Board.
- 5) The manager to the open of er shall exercise diligence, care and professional judgment to ensure compliance with these regulations.
- 6) The manager to the open of er shall not deal on his own account in the shares of the target company during the of er period.

7) The manager to the open offer shall file a report with the Board within fifteen working days from the expiry of the tendering period, in such form as may be specified, confirming status of completion of various open offer requirements.

Q102: How are the terms “Convertible Security” and “Encumbrance” defined under SEBI Regulation 2(1)(f), and for the purposes of the relevant chapter?

Answer: “Convertible Security” means a security which is convertible into or exchangeable with equity shares of the issuer at a later date, with or without the option of the holder of the security, and includes convertible debt instruments and convertible preference shares. [Regulation 2(1)(f)]

For the purposes of this Chapter, the term “encumbrance” shall include,-

- (a) any restriction on the free and marketable title to shares, by whatever name called, whether executed directly or indirectly;
- (b) pledge, lien, negative lien, non-disposal undertaking; or
- (c) any covenant, transaction, condition or arrangement in the nature of encumbrance, by whatever name called, whether executed directly or indirectly.

Q103: What are the disclosure requirements under Regulation 29 for acquisition and disposal of shares or voting rights in a target company?

Answer: Regulation 29 of SEBI regulations outlines the disclosure requirements for acquisition and disposal of shares or voting rights in a target company. Any acquirer, along with persons acting in concert with him, who acquires 5% or more of the shares or voting rights in a target company must disclose their aggregate shareholding and voting rights in the prescribed format. In the case of entities listed on the Innovators Growth Platform, the threshold is increased to 10% instead of 5%.

Further, if a person already holds 5% or more shares or voting rights (10% for Innovators Growth Platform), they must disclose any change in shareholding or voting rights from the last disclosure if the change is greater than 2% (or 5% for Innovators Growth Platform), even if the holding falls below 5%. These disclosures must be made within two working days of the acquisition, disposal, or receipt of intimation of share allotment. The disclosure must be submitted to:

- (a) Every stock exchange where the target company's shares are listed, and
- (b) The target company at its registered office.

Additionally, shares taken as encumbrance are treated as an acquisition, and shares released from encumbrance are treated as a disposal, requiring disclosure in the prescribed format. However, this requirement does not apply to scheduled commercial banks, public financial institutions, housing finance companies, or systemically important NBFCs when acting as pledgees in the ordinary course of business.

Explanation. - For the purpose of this sub-regulation, -

A. a “housing finance company” means a housing finance company registered with the National Housing Bank for carrying on the business of housing finance and is either deposit taking or having asset size worth rupees five hundred crores or more; and

B. a “systemically important non-banking financial company” shall have the same meaning as assigned to it in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Q104: Progression Ltd. is a listed Company with a paid up capital of Rs.200 Crore divided into 20 crore shares of Rs.10 each. R, S, T and U are the promoters of the said company holding 2 crore, 5.40 crore, 0.80 crore and 2.20 crore shares respectively.

The following situations occurred at different times:

Situation 1 : T transfers 0.30 crore shares each to R & U

Situation 2 : S transfers 0.22 crore shares to T

Situation 3 : R transfers 0.20 crore shares each to T and U

As a Company Secretary, you need to advise on the required compliances, if any, under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for the above three situations respectively. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: In the instant case R, S, T and U being promoters are to be considered as Persons Acting in Concert as per the definition in Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. In terms of Regulation 29(1) of the said Regulations any person together with persons acting in concert crosses 5% of shares or voting rights needs to disclose to the Target Company and concerned Stock Exchanges within 2 working days in the prescribed format and in a similar way, Sub-regulation (2) requires such persons holding more than 5% acquires or sells more than 2% require compliance of the same. As per given case R, S, T & U are holding 10%, 27%, 4% and 11% shares rule 25A respectively. In all the 3 situations, disclosures in the prescribed formats need to be made to the company and concerned stock exchanges as per Regulation 29(2) although transfers involve mere 1.5%, 1.1% & 1% respectively.

Q105: Explain the provisions of continual disclosures under regulation 30 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Regulation 30 of SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations states that:

1. Every person, who together with persons acting in concert with him, holds shares or voting rights entitling him to exercise twenty-five per cent or more of the voting rights in a target company, shall disclose their aggregate shareholding and voting rights as of the thirty-first day of March, in such target company in such form as may be specified.
2. The promoter of every target company shall together with persons acting in concert with him, disclose their aggregate shareholding and voting rights as of the thirty-first day of March, in such target company in such form as may be specified.
3. The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the end of each financial year to :
 - (a) every stock exchange where the shares of the target company are listed; and
 - (b) the target company at its registered office.

Q106: What is a takeover bid, what are its types, and under what circumstances is a mandatory takeover bid required under SEBI regulations?

Answer: A takeover bid is an offer made to the shareholders of a company—excluding promoters and existing sellers—to purchase their shares at a specified price within a set timeframe. The objective of such a bid is to acquire a sufficient number of shares to gain voting control over the target company. This technique allows one company to take control over the management and operations of another company by acquiring a controlling stake in it.

Takeover bids can be of different types, including:

Friendly Takeover Bid – where the management of the target company cooperates with the acquirer.

Hostile Takeover Bid – where the bid is made without the consent of the target company's management.

Mandatory or Compulsive Bids – governed by SEBI regulations and often arise due to legal thresholds being crossed.

A **mandatory takeover bid** is required under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, in the following circumstances:

1. When an acquirer intends to acquire 25% or more of the shares or voting rights in a company.
2. When an acquirer who already holds 25% to 75% (or up to 90% in certain cases) of the shares or voting rights wants to acquire additional shares up to 5% or more in a financial year (starting April 1).
3. When a person intends to acquire control over the company, irrespective of shareholding.

In such cases, the acquirer must make a public announcement of the offer to the stock exchanges, followed by a Detailed Public Statement (DPS) in newspapers, as prescribed under SEBI regulations.

Q107: What are the defense strategies to takeover bids.

Answer: **Defense strategies** to takeover bids are measures adopted by the target company to protect itself from hostile takeovers. These strategies are aimed at making the company less attractive or more difficult to acquire, thereby discouraging acquirers from pursuing an offer. These defenses are often put in place when there is early intelligence or signs that an acquirer is accumulating shares, signaling the potential for a hostile bid.

Q108: 'Crown jewel' strategy for prevention of takeover bids is not a successful tool in Indian context. Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

OR

What does the term 'crown jewel' stand for, as a defence strategy in respect of a takeover bid? (5 marks)

PAST YEAR QUESTION JUNE 2016

OR

'Crown jewel' strategy as a defense mechanism for hostile takeover is almost impossible to be used in India. Explain. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: The central theme in this strategy is to divest the most coveted asset by the bidder, commonly known as the “crown jewel”. Consequently, the hostile bidder is deprived of the primary intent on behind the takeover bid. A variation of the crown jewel strategy is the more radical “scorched earth approach”, vide which approach, the target sells off not only the crown jewel, but also properties to diminish its worth. Such a radical step may however be self-destructive and unwise in the company’s interest.

However, as per the Companies Act, 2013, selling of wholly or substantially the whole of its undertaking requires the approval of the shareholders in a general meeting by way of a special resolution and Regulation 26 of the SEBI (SAST) Regulations, 2011, the target company cannot alienate any of its material assets during the offer period (which commences once the public announcement is made) and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the “Crown Jewel” strategy as a defense mechanism in India.

Q109: “It would be almost impossible to use the Pacman Defence in India.” Comment.**PAST YEAR QUESTION DECEMBER 2020**

Answer: The Pac-Man Defence is a defensive mechanism used against the hostile takeover, wherein the target firm turns around the table and acquires the firm that has made the hostile bid or has initiated the takeover.

(ii) Pac-Man defence is a strategy by the promoters of the target company to make a counter offer to existing shareholders that may demoralise the acquirer from the proposal.

(iii) Regulation 26 (2) of SEBI (SAST) Regulations, 2011 prohibits the target company to enter into any agreement other than in ordinary course of business during offer period except with the approval of shareholders through special resolution by way of postal ballot.

(iv) Hence in India with such Regulatory Bodies and regulations, it's almost impossible to resort to Pac-man defence strategy.

Q110: What is the targeted share repurchase or "buy-back" strategy in defense against takeover bids, and why is it difficult to implement in India under the SEBI (SAST) Regulations, 2011?

Answer: This strategy is one in which the management of the target company uses up a part of the assets of the company on the one hand to increase its holding and on their hand it disposes of some of the assets that make the target company unattractive to the raider. The strategy therefore involves a creative use of buyback of shares to reinforce its control and detract a prospective raider. But “Buyback” would involve the use of the free reserves of the company and would be an expensive proposition for the target company. Further as per Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot implement a buy-back during the offer period except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use this defense mechanism also in India.

Q111: Aspire Ltd. is the target company in respect of which an acquirer made an offer for acquisition of shares and the offer has commenced. Dreams Ltd. is the subsidiary of Aspire Ltd.

Dreams Ltd. signed the loan agreements with financial institutions for major capital expenditure for its expansion project and started withdrawing the loan amount during the open offer period. The said borrowings are clearly within the ordinary course of its business.

No approval was taken by Aspire Ltd. from its shareholders nor did Dreams Ltd. obtain the approval from its shareholders. The internal auditors have opined that the target company has violated the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 as no approval was obtained by the shareholders of the target company for the borrowings effected.

The statutory auditors have agreed with the views of the internal auditors and pointed out that the target company Aspire Ltd. has failed in its obligations that are required to be complied with during the offer period in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 as approval of its members by way of special resolution through the mechanism of postal ballot was not obtained. Moreover, they maintained that Dreams Ltd. borrowed money for its expansion programme when the open offer of target company was on and therefore Dreams Ltd. violated the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

State in clear terms whether there is a violation of the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 by Aspire Ltd. or Dreams Ltd. (6 marks)

PAST YEAR QUESTION JUNE 2015

Answer: As per Regulation 26(2)(b), during the offer period, unless the approval of shareholders of the target company by way of a special resolution by postal ballot is obtained, the board of directors of either the target company or any of its subsidiaries shall not effect any material borrowings outside the ordinary course of business. In the given case the borrowings by Dreams Limited, a subsidiary of Aspire Limited, the acquirer, was in the ordinary course of business.

Thus there is no violation of the provisions of SEBI(SAST) Regulations 2011 neither by Aspire Ltd. nor by Dreams Ltd.

Q112: What are golden parachutes in the context of takeover defense strategies, and why are they not an effective defense mechanism in India?

Answer: These are separate clauses of an employment contract that compensate managers who lose their jobs under a change of management scenario. The provision usually calls for a lump-sum payment or payment over a specified period at full and partial rates of normal compensation. Target Companies invoke this provision and pay of a huge compensation to large number of employees so as to make themselves unattractive to the raider.

However section 192 and Section 202 of the Companies Act, 2013 provide for compensation to be paid for loss of office only to a Managing Director, Whole Time Director or a Manager and not the entire senior management, as is the practice in the United States of America. Hence this defense mechanism is of no consequence in India.

Q113: What are the different types of anti-takeover amendments or "shark repellents", and how do they function as defense mechanisms against hostile takeover bids? How effective are they in the Indian legal context?

OR**Briefly explain four major types of anti-takeover amendments. (5 marks)****PAST YEAR QUESTION DECEMBER 2018**

Answer: Anti-takeover amendments or "**shark repellents**" are strategies employed by a company to make itself less attractive or harder to take over by a hostile bidder. These amendments are usually made to the company's Articles of Association or Memorandum of Association to fortify the company's defense against unwanted takeovers. Here are the main types:

1. Supermajority Amendments: This involves requiring **supermajority approval** (typically 2/3rds or up to 90%) from shareholders for transactions that could lead to a change in control. While effective in deterring hostile takeovers, these provisions often include a **board-out clause**, which allows the management to decide when the supermajority provisions will be triggered. The problem is that such supermajority requirements can limit management's flexibility in takeover negotiations. **Effectiveness in India:** In India, any change to the Articles of Association or the Memorandum of Association would require approval from the shareholders. Thus, while the mechanism can be legally implemented, it requires the consent of a significant portion of shareholders, which may not be easy to achieve.

2. Classified Boards: A classified board or staggered board divides the board of directors into different categories, with only a portion of directors standing for election each year. This delays a new majority shareholder's ability to gain control of the board. For instance, if a company has a 9-member board, only 3 members may be elected each year. **Effectiveness in India:** The Companies Act, 2013 requires that one-third of directors retire by rotation, making it difficult to establish a staggered board in the traditional sense. While it is possible to create permanent directors through amendments, any provision making a director irremovable by ordinary resolution would be void under Indian law.

3. Authorization of Preferred Stock: This strategy involves the issuance of preferred stock or other securities with special voting rights to friendly parties, giving them the power to block a takeover. This type of defense aims to prevent hostile bidders from acquiring enough control. **Effectiveness in India:** The issuance of shares with different voting rights is heavily restricted under the Companies Act, 2013 and SEBI (ICDR) Regulations, 2009, making this strategy increasingly unattractive in the Indian context.

4. Poison Pill Defenses: Poison pill defenses involve granting special rights to shareholders that can only be triggered after a specific event, such as a hostile takeover attempt. These rights make it costly and difficult for the acquirer to gain control. Poison pills are usually adopted by the company's board of directors without shareholder approval. The rights can be altered or redeemed by the board after the triggering event, giving them leverage in takeover negotiations. **Effectiveness in India:** While poison pills are a common defensive tactic, their implementation in India is challenging as they typically require shareholder approval and must comply with SEBI regulations. Furthermore, they may not be as flexible or effective in the Indian regulatory environment compared to other jurisdictions like the U.S.

In conclusion, while anti-takeover amendments can be effective in certain contexts, their application in India is restricted by legal and regulatory frameworks such as the Companies Act, 2013 and SEBI regulations, limiting their full effectiveness as defense mechanisms against hostile takeovers.

Q114: Poison pill defense is a strategy against hostile takeover. Comment. (3 marks)

PAST YEAR QUESTION JUNE 2016**Answer: Poison Pills Defenses**

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

There are two types of poison pills:

1. A "flip-in" permits shareholders, except for the acquirer, to purchase additional shares at a discount. This provides investors with instantaneous profits. Using this type of poison pill also dilutes shares held by the acquiring company, making the takeover attempt more expensive and more difficult.
2. A "flip-over" enables stockholders to purchase the acquirer's shares after the merger at a discounted rate. For example, a shareholder may gain the right to buy the stock of its acquirer, in subsequent mergers, at a two-for-one rate.

Q115: Define Cross-border takeover bids.

Answer: Cross-border takeover bids are complex transactions that may involve the handling of a significant number of legal entities, listed or not, and which are often governed by local rules (company law, market regulations, self-regulations, etc.). Not only a foreign bidder might be hindered by a potential lack of information, but also some legal complexities might appear in the merger process resulting in a deadlock, even though the bid would be 'friendly'. This legal uncertainty may result in a significant execution risk and act as a major hurdle to cross-border consolidation.

Q116: ABC Ltd. was incorporated on May 12, 1986, under the Indian Companies Act, having its registered office at Mumbai, Maharashtra. The present capital structure of the petitioner company is as follows : Rs. 1,000 crore Authorised Capital-100 crore equity shares of Rs.10 each. Issued Subscribed Capital and paid-up capital of Rs. 780 crore -78 crore equity shares of Rs. 10 each [includes equity shares represented by GDRs]. The company is having 4 business segments related to manufacturing of products L, M, N and O. Turnover of O product is around Rs.1,300 crore. Asset of ABC Ltd are Rs. 2,700 crore out of which product O related asset are Rs. 1,400 crore.

XYZ Ltd. is a company having its registered office at Surat, Gujarat. Authorised, issued and paid up capital of company is Rs. 750 crore having turnover of Rs. 820 crore. It is engaged in the business of manufacture and sale of product O. Assets of XYZ Ltd. are Rs. 1,500 crore.

XYZ Ltd. already hold 14.98% of the equity shares of the ABC Ltd. acquired at Rs. 267 per share from Six ventures and got two directors in Board of Directors of ABC Ltd. XYZ Ltd. has made an offer to shareholders of ABC Ltd at Rs. 190 per share to acquire controlling stake of ABC Ltd. ABC Ltd. Management opposed the offer citing reasons of low price that was not beneficial to the shareholders of ABC Ltd. but in reality the management of ABC Ltd. had fear of losing control over the company. XYZ Ltd. had an eye on the Product O business of ABC Ltd. for a long time. The offer was a step towards fulfilling the dream. Full control of product O business was ultimate purpose of XYZ Ltd. ABC Ltd. script was trading at Rs. 207.50 on the closing hours of trading at the Bombay Stock Exchange.

After lot of fights and hassles, both companies came to truce. Pursuant to acquisitions through negotiated transactions, a proposal to demerge the ABC Ltd. company's Product O business into company TRM Ltd.

and acquisition of 51% controlling stake in TRM Ltd. was given by XYZ Ltd. and after due deliberation, the Board of Directors of the ABC Ltd company accepted the proposal for demerger of the Product O business into TRM Ltd. and subsequent acquisition of 51% stake in same by XYZ Ltd. After demerger TRM Ltd. will have around 35% market share of product O business on pan India basis.

ABC Ltd. Employees Welfare Foundation is an employee welfare trust established under the Indian Trusts Act, 1882.

Shareholders of ABC Ltd. and XYZ Ltd. call meeting of shareholders, creditors and pass special resolution. They submit copy of resolution to ROC, NCLT and publish in newspaper about successful arrangement. Few members of ABC Ltd. having 1.5% shares of valued Rs. 10 lakh objected to scheme of Acquisition by XYZ Ltd. ABC Ltd. Employee trust also objected to acquisition. NCLT cancelled the scheme citing grounds of unfair, unjust and objections of members having 1.5% shares in company.

Based on above facts, answer the following with reasons quoting relevant provisions:

a) Is it a hostile or friendly acquisition? Is it beneficial to go for taking control of ABC Ltd for gaining access to product O business or is it beneficial to cause demerger of Product O business by ABC Ltd into TRM Ltd and then acquiring of 51% controlling stake in same by XYZ Ltd? Will it result in reduction of capital requiring separate approvals? Explain briefly. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Takeovers that occur without consent of acquired company/ target company are commonly called hostile takeovers. Here earlier attempt by XYZ Ltd. to give open offer for Controlling stake and onboarding two directors in ABC Ltd. can be termed as hostile. But subsequent agreement and steps taken for demerger of Product O business and then taking 51% stake in TRM Ltd. give narrative of agreed/ friendly acquisition. Taking of controlling stake in ABC Ltd. only for product O business seems hostile takeover and unnecessarily being saddled with burden of managing of L, M and N product segments of ABC Ltd. when company XYZ Ltd. is really interested in taking product O business of ABC Ltd. Moreover, complexity of compliances/approvals/cross border issues will also increase. Demerger into TRM Ltd. seems more focused approach.

Pursuant to Section 230 of the Companies Act, 2013, a company may propose for compromise or arrangement with its creditors or its members which may include reduction of share capital of the company and NCLT will permit the same under section 230 and 232 of companies Act, 2013, separate compliance under section 66 is not required.

Q117: Explain the term “trigger point” in reference to takeover code.

Explain whether the public announcement is required in the following case :

The Paid-up Equity Share Capital of A Ltd is 5000 shares as on April 01, 2024. The promoters hold 2000 shares as on April 01, 2024, which is 40% as on April 01, 2024. The promoters comprise of three shareholders :

- A who holds 1100 shares (i.e. 22%)**
- B who holds 750 shares (i.e. 15%) and**
- C who holds 150 shares (i.e. 3%).**

The company makes a preferential allotment of 400 shares to A as a result of which the post issue shareholding of A would be 1500 shares. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: By trigger points, it is meant that the threshold levels upon reaching which, an acquirer, either on its own individual account or along with Persons Acting in Concert (PAC) acquiring shares or voting rights in a target company is required to make a public announcement for an open offer and comply with the other provisions of the Takeover Code with regard to an open offer.

Let us determine whether there would be a trigger using the methods.

$$(2400/5400) \% - (2000/5000) \% = 44.44\% - 40\% = 4.44\%.$$

Since the acquisition by all the promoters together does not exceed 5% in a financial year there is no trigger. However, we need to check what would be the post issue holding of A the allottee, who is currently holding 22% of the paid-up capital of the company, with respect to the fully expanded capital which works out to $1500/5400 = 27.77\%$, by virtue of which he has crossed the initial threshold limit of 25% as stipulated in Regulation 3(1) of the Takeover Regulations. Therefore, A has triggered the Code and is under an obligation to make a public announcement.

Q118: Contracts entered into and in force need to be replaced by fresh contracts after merger or takeovers of entities, pursuant to orders passed by Courts or Tribunals." Do you agree? Give reasons. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Mergers, amalgamations, acquisitions, takeovers or any other kind of corporate restructuring is undertaken for the purpose of expansion, growth or diversification of business.

- However, corporate restructuring is much more than economic synergies, but it covers other intangible factors as well, such as corporate cultures, practices, policies, and environment etc.
- Thus, timely integration of systems, applications and data provide the corporate information needed to achieve the post-merger objectives
- Post-merger reorganization includes the reorganization of each and every aspect of a company's functional area for the purpose of achieving the planned objectives of takeover, amalgamation, merger or demerger.
- Every scheme of merger and amalgamation is sanctioned by the Court or Tribunal. Post-merger, transferor company is dissolved and all its assets and liabilities are transferred to the transferee company. Further, the companies shall also ensure that the contracts entered by the merging entity shall continue to be transferred in the name of merged entity.
- However, other aspects in the contracts with a third party may require company to inform about merger or may give rise to other party to terminate the contract.
- Normally lease agreements, that contain fixed tenure may release the landlord from such restriction in the event of restructure of lessee entity.
- Further, the merged entity would need to check various rights and obligations mentioned in the contracts with third parties and should allocate teams to identify and ensure compliance of those requirements. In short, all existing contracts with its terms shall be reviewed.

CASE LAWS - SEBI ORDERS

1. SEBI Order in the matter of Kesar Petroproducts Limited, SEBI, 9 March 2020

The promoter company of a listed company transferred 48.16% to two children of an individual promoter. Consequently, each child held under 25% in the target. This transfer caused no change in the overall promoter shareholding or effective control of the target. SEBI ruled that since

- (i) the acquirers along with PACs held over 25% in the target; and
- (ii) the acquisition resulted in the children's individual shareholding crossing 5%, Regulation 3(3) read with the Creeping Acquisition Threshold was triggered.

2. SEBI order in the matter of M/s. Patels Airtemp (India) Ltd, July 25, 2018

- In this case, there was an inter-se transfer of 0.30% of shares between two promoters. As a result, the shareholding of one promoter (the purchaser) increased from 24.74% to 25.04%, crossing the 25% threshold under the Takeover Regulations. The promoter group's total shareholding remained at 45%, so the overall control of the company did not change.
- The promoter (Noticee) argued that this increase did not trigger the rules because it was just an internal transfer among promoters and the total group shareholding stayed the same. However, SEBI disagreed, stating that the promoters were not acting in concert, as they had opposite objectives – one was selling and the other was buying shares.
- Because the individual shareholding of the Noticee crossed the 25% threshold, SEBI ruled that an open offer must be made and that the Noticee should pay interest at 10% per annum along with the offer price to the public shareholders.

3. SEBI Order in the matter of Praxis Home Retail Limited, 28 April 2023

Praxis Home Retail Limited ("Praxis") equity shares aggregating to 30 lakh were allotted to one of its promoter entities Future Corporate Resources Pvt Ltd ("FCRL"), following the exercise of the conversion option of 3,180 compulsorily convertible debentures ("CCDs") by FCRL, out of the 7,500 CCDs initially allotted to it. After exercising the conversion option, the shareholding of FCRL in Praxis rose from 47.43 per cent in the quarter ended December 2019 to 53.13 per cent, an increase of 5.71 per cent in shareholding as of February 11, 2020.

SEBI noted that as the increase in shareholding of FCRL in Praxis post-allotment is 5.71 per cent, which is more than five per cent, FCRL along with the other Noticees (PACs) allegedly were required to make a public announcement of the open offer under Takeover Regulation.

4. SEBI order in the matter of Automat ve Axles Ltd ("AAL"), 8 May 2023

The case relates to Cummins indirectly acquiring a 35.52 per cent share in Automat ve Axles Ltd ("AAL"). The acquisition was contracted on February 21, 2022, which triggered the requirement of public announcement of making of an open offer by the applicant under the Takeover Regulations. The open offer announcement was made belatedly with a delay of 227 days. Consequently, a settlement application was filed to settle the matter.

Q119: The unpalatable or inevitable recession can also be a key factor to trigger Mergers/ Takeovers—how far is it proved true? (5 Marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: The year 2008 witnessed the Global Economic Crisis, thereby, bringing the economic growth across the globe to a grinding halt. A survey and study by New Zealand Trade & Enterprise revealed acquisitions and strategic alliances as a key factor to overcome economic recession to strengthen, re-focus and posit on the company for increased growth and profitability. The mentioned research study has also identified that Companies made acquisitions to access new markets, products, technologies, customers and talent at an accelerated pace. There were the examples of organizations that have adopted, survived and prospered during recessionary periods. All the companies studied, achieved dramatic increase in growth and profitability during the period of economic downturn or in the following recovery period.

Q120: What are the obligations of the Committee of the Independent Directors of a target company in connection with providing reasonable recommendation on the offer made by the acquirer? (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: A committee of independent directors shall be constituted by the Board of the target company to provide reasoned recommendations on the offer being made by the acquirer and the target company shall publish such recommendations.

The committee of independent directors (hereafter referred as committee) will be entitled to obtain external professional advice at the cost of the target company. The committee shall provide its reasoned recommendation on the offer to the shareholders of the target company and such recommendation will be published in such form as may be specified, at least two working days before commencement of the tendering period, in the same newspapers where the public announcement of the offer was published. Simultaneously, copies shall be sent to SEBI and the stock exchanges where the shares of the target company are listed and the stock exchanges shall forthwith disseminate such information to public.

The committee shall ensure that the copy containing reasoned recommendations is also sent to the manager for offer and where there are competing offers, to the managers to the offer for every competing offer.

Q121: Identify the factors which make a company a desirable candidate for a takeover from the acquirer's point of view. (3 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: It is possible to identify some characteristics that make a company a desirable candidate for a takeover from the acquirer's point of view. These are:

- Low stock price in relation to the replacement cost of assets of their potential earning power;
- A highly liquid balance sheet with large amounts of excess cash, a valuable securities portfolio, and significantly unused debt capacity;
- Good cash flow in relation to current stock prices;
- Subsidiaries and properties which could be sold off without significantly impairing cash flow; and
- Relatively small stockholdings under the control of an incumbent management.

Q122: Sameer, an acquirer along with persons acting in concert (PACs) is holding 23% shares in Purpleberry Ltd. (a BSE listed company). Now, he intends to acquire 3% additional equity shares in Purpleberry Ltd. through secondary market in the current financial year. He is acquiring less than 5% shares in the financial

year and is of the view that he need not to make open of er to public. Give your opinion regarding the need to make an open of er to the public. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: One of the trigger for open of er is when an acquirer, who (along with PACs, if any) holds less than 25% shares or vot ng rights in a target company and agrees to acquire shares or acquires shares which along with his/PAC's exist ng shareholding would ent tle him to exercise 25% or more shares or vot ng rights in a target company, will need to make an open of er before acquiring such addit onal shares.

In the given case Mr. Sameer is already holding 23% shares and intends to acquire 3% addit onal equity shares that would ent tle him 26% and thus have to comply with open of er requirements.

Q123: "While standard parameters plays a crucial role, funding/borrowing for takeover should be organized in such a way that best suits the facts and circumstances of the specif c case and should also meet the immediate needs and object ves of the management". Elucidate the statement with emphasis on the demerits of borrowing from the f nancial inst tut ons and banks. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: While discussing mode of acquisit on, certainly there would be a planning for organizing the necessary funding for takeover of an enterprise. Funding of a merger or takeover with the help of loan from f nancial inst tut ons, banks, etc. has its own merits and demerits. If borrowing from domest c Banks or Financial Inst tut ons has been ident f ed as a choice, all the f nancial and managerial informat on must be given to the Banks and Financial Inst tut ons for the purpose of get ng necessary f nance.

Just ce P N Bhagawat Commit ee on Takeovers, in its report of 2002 has recommended that Banks and Financial Inst tut ons are to be encouraged to consider for f nancing of takeovers. The advantage of funding through this route is that the period of such funds is def nite. But the f aw is that the interest burden is quite high and the merged or target Company must generate adequate returns to make t mely repayments of interest and installments. There is a risk of acquirer becoming defaulter and it may become case of non-performing assets triggering insolvency proceedings as per Insolvency and Bankruptcy Code, 2016.

Q124: Metal Ltd. (transferee company) fled a pet t on under the provisions of Companies Act, 2013 for approval and sanct on of the scheme of reconstruct on, arrangement and demerger between Metal Ltd. and Brass Ltd. (transferor company). The Regional Director objected that the authorised share capital of the transferee company is not suf f cient to allot new shares to the members of the transferor company and therefore, the transferee company should be directed to increase its authorised share capital af er following the procedure prescribed under the Companies Act, 2013. Will the object on hold good? Explain. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: Sanct on to scheme of amalgamat on cannot be refused on the ground that the transferee company does not have suf f cient authorised capital on the appointed date. If the scheme is sanct oned, the transferee company can thereaf er increase its authorised capital to give ef ect to the scheme [Re: Mahavir Weaves Pvt. Ltd. (1985) 83 Comp. Cas 180] and *In Re: - Mahavir Market ng Surat (Pvt.) Ltd.*

In these cases it was held that Sec 230 to 232 is single window clearance system. So if increasing authorised capital is part of scheme, no further separate procedure is required. Hence object on of Regional Director is not hold good.

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CHAPTER-3 AS PER ICSI MODULE

PLANNING & STRATEGY

Q1: Define Strategy.

Answer: The word 'strategy' is used to describe the direction that the organisation chooses to follow in order to fulfil its mission.

A strategy is a plan or course of action which is of vital, pervasive or continuing importance to the organisation as a whole.

The term 'strategies' has been defined as "means to an end". The end concerns the purpose and objectives of the organisation.

Q2: What are the benefits of Merger & Acquisition.

Answer: Benefits of Merger & Acquisition

- Economies of scale
- Operational synergies and efficiencies
- Access to new markets, new products, new business
- Access to foreign capital

Q3: What are the primary factors requiring consideration before initiating a merger or amalgamation from the economic, commercial and legal perspective.

Answer: A detailed list of the primary factors requiring consideration before initiating a merger or amalgamation from the economic, commercial and legal perspective is explained as follows:

(i) Identification of Parties

Will one or more businesses be transferred to an existing firm or a newly formed entity? Consider drafting heads of terms, do you require a confidentiality agreement? Do you require an exclusivity agreement? Review financial liability of the parties - undertake appropriate searches and enquiries.

(ii) Due Diligence

Carry out legal, commercial, tax and financial due diligence on the parties entering into the transaction. This will help in identifying risk areas along with any necessary consent you will need to obtain.

(iii) Any third-party consents required?

Ascertain if any third-party consents or no object consents would be required such as from banks, business contracts, partner/shareholder consents. These should emerge from due diligence. Consider also regulatory consents/licences that may be required.

(iv) Taxation

It will be necessary to ascertain the most suitable tax structure for the transaction and, in particular, the way in which the consideration should be structured, at an early stage, therefore consider consulting tax advisors.

(v) Risk

Sharing of risk – What kind of indemnities/warranties/representations be considered? Should there be a cap on such indemnities and warranties?

(vi) Will the transaction impact on existing loan/finance arrangements?

Check loan documents and constitution documents to see whether any proposed borrowing would be a breach of any existing funding. What will happen in relation to third party funding of the Seller business? Confirm that there are no restrictions on the disposal of the target business or any of its assets. How will the merged business be funded?

(vii) Existing Charges/Modifications over the assets to be acquired

Are there any mortgages, charges or debentures over any of the business assets? If yes, obtain copies and consider how they are to be satisfied/discharged. If there are floating charges, obtain certificates of non-crystallisation/release. Whether there is any pledge on shares? Obtain a Search Report from a Practising Company Secretary.

(viii) Guarantees and indemnities (bank or other)

Has the Seller given or received any guarantees or indemnities in relation to the business? If yes, then obtain copies (including details of arrangements) and consider in particular, how to ensure the business continues to have the benefit of relevant guarantees.

(ix) Licences

Will the Buyer have all other licences which it needs to operate the business?

(x) Supply contracts

Will supply contracts be transferred or need to be terminated? How will this be done?

(xi) What IP is used in the business?

Obtain a full list of trademarks, service marks, patents, designs, domain names, copyright and other registered and unregistered intellectual property used in the business. Carry out trade mark and patent searches as may be appropriate through an IPR Attorney.

Q4: What is the process of funding in the case of mergers and takeovers.

Answer: The process of funding in the case of mergers and takeovers may be arranged by a company in a number of ways. It may be from its own funds, consisting of further issue of equity and preference share capital, through raising of borrowed funds by way of issuing various financial instruments like Non-Convertible Debentures. A company may borrow funds through the issue of debentures, bonds, external commercial borrowings, issue of securities, loans from Central or State financial institutions, banks, etc. Broadly we can divide them into three categories as described below:

Internal accruals: The retained earnings and free reserves accumulated over a period of time by well-managed companies may be utilized for the purpose of restructuring.

Borrowings: The required funds could be raised from banks and financial institutions or through external commercial borrowings or by issue of debentures.

Issue of securities: Funds may also be raised through issue of equity shares, preference shares and other securities, depending upon the quantum and urgency.

Q5: Difference between Cash deal vs. Stock deal for acquisition

Answer:

S. No.	Cash deal	Stock deal

1.	An all cash, all stock offer is an offer by one company to purchase all of another company's shares from its shareholders for cash. In this type of proposal, one way for the acquiring company to try to get uncertain shareholders to agree to a sale is to offer a premium over the price for which the shares are presently trading. The acquired company's shareholders may earn a capital gain if the combined entity realizes cost savings.	The acquiring company may not have all of the cash on its balance sheet to make an all cash, all stock acquisition. In such a situation, a company can tap into the capital markets or creditors to raise the necessary funds.
2.	The prices of the shares of the company being acquired may rise, particularly if the company was bought at a premium. Premium is offered for making the deal lucrative for the seller company and is beneficial for the acquirer in the long run.	If the acquiring company was not a publicly-traded company already, it could issue an IPO whereby they would issue shares of stock to investors and receive cash in return. Existing public companies could issue additional shares (by way of preferential issue or otherwise) to raise cash for an acquisition as well.

Q6: What are the limitations to All Cash, All Stock Offers.

Answer: Although cash transactions can appear to be an easy, straightforward way of acquiring another company, it is not always the case. All stock offer for shareholders is a taxable event. Even if they sell their shares to the acquirer at a premium, taxes may take a significant chunk of their earnings if the sale price is higher than the acquisition price investors paid when they initially purchased their shares. However, all shares of stock that are made at a price higher than the stock's cost basis constitute a taxable event, so this particular sale is not that different from a tax standpoint from a normal sale on the secondary market.

Another possible acquisition method would be for the acquiring company to offer shareholders an exchange of all the shares they hold in the target company for shares in the acquiring company. These stock-for-stock transactions are not taxable. The acquiring firm could also offer a combination of cash and shares.

The main distinction between cash and stock transactions is that, in cash transactions, acquiring shareholders take on the entire risk that the expected synergy value embedded in the acquisition premium will not materialize.

In stock transactions, that risk is shared and diversified with selling shareholders. More precisely, in stock transactions, the synergy risk is shared in proportion to the percentage of the combined company the acquiring and selling shareholders each will own.

Q7: Pysunsmart Fire Protection Limited (PFPL) is a listed company on the Bombay Stock Exchange (BSE). It is engaged in the manufacture of industrial fire extinguishers. The company has seen a steady growth over the past few years and has attained a robust market presence. The company's stock has been gaining

at ent on due to company's strong pipeline of upcoming new products and expansion into new markets. As a result, the stock price of (PFPL) has been steadily rising.

A and B have been close friends and business partners over years. Over t me, they have started invest ng jointly in several listed company, including PFPL.

C is a majority shareholder of a company "C holdings" and has also expressed his interest to purchase more shares in PFPL through C holdings and has been in talks with A, B, and Z about a potent al joint acquisit on strategy to gain control over the company.

Z a prominent investor has been closely monitoring the performance of PFPL. He believes that PFPL is undervalued relat ve to its growth prospects. He has ident f ed that if the company's product pipeline succeeds, it could increase the company's market capitalizat on signif cantly. He already holds 20% shares in PFPL and is interested in increasing his stake further.

While all these shareholders have not made any formal agreements with each other but they have had mult ple informal meet ngs where they discussed the possibility of working together.

PFPL had conducted a buy back through an open of er in order to improve its earning per share (EPS) and boost stock prices. Due to this, the total number of shares of PFPL in circulat on decreased and as a result the shareholding of one shareholder, Q, increased from 24% to 28%.

PFPL is also considering proposals for merger with Sangam Limited, a manufacturer in same product. PFPL has at ained a robust market presence in North India but operat ng at a much smaller scale in south. Merger with Sangam Limited will open the avenues to increase its market share in South too. The board of directors of PFPL have shown keen interest in doing premerger due diligence as they want to ensure the post-merger success. Though they have not received any red f ag from any other department but HR head who is a part of premerger due diligence team has raised a concern. PFPL has a formal corporate culture, with a hierarchical structure whereas the employees of Sangam Limited are young and thrive in a culture that values innovat on and informality. Sangam Limited operates in a f at structure where decision making is quick and decentralized. The HR Department of PFPL wants to draw at ent on to the problems that might come up regarding the cultural integrat on and human aspects of combining these companies who are having starkly dif erent cultures. A meet ng of Board of Directors has been called to discuss the mat er.

Based on the above facts, answer the following quest ons :

a. The acquiring companies of en use cash deals or stock deals for acquisit on. Dif erent ate between the two, enumerat ng the advantages of cash deals and stock deals. What are the considerat ons to be kept in mind while making a choice between the two ?

PAST YEAR QUESTION JUNE 2025

Answer: Cash deal vs. Stock deal for acquisit on

In a Cash Deal, the acquiring company pays the shareholders of the target company a predetermined amount of cash per share.

Advantages of Cash Deals are:

Certainty of payment: Shareholders receive a f xed amount of cash, providing certainty and liquidity.

Simplif ed valuat on: The valuat on of the target company is straight orward based on the agreed-upon cash amount per share.

Minimal dilut on: Exist ng shareholders of the acquiring company are not diluted by issuing addit onal shares.

In a Stock Deal, the acquiring company offers its own shares to the shareholders of the target company as consideration for the acquisition.

Advantages of a Stock Deal are:

Tax benefits: Depending on the jurisdiction and structure, stock deals may offer tax advantages compared to cash deals.

Flexibility in valuation: Stock deals allow for flexibility in valuation, as the acquiring company's stock price can fluctuate over time.

Potential for synergies: Aligning interests through stock ownership can foster collaboration and integration between the two companies.

Considerations for making a choice:

Market conditions: The choice between cash and stock deals may depend on prevailing market conditions, availability of financing, and the relative valuations of the companies involved.

Shareholder preferences: The preferences of both the acquiring company's shareholders and the target company's shareholders play a significant role in determining the structure of the deal.

Regulatory requirements: Regulatory considerations, including antitrust laws and securities regulations, may influence the choice between cash and stock transactions.

Overall, whether a cash deal or a stock deal is preferable depends on various factors, including the strategic objectives of the acquiring company, the financial position of both parties, and the prevailing market dynamics.

Q8: Write short note on the various sources of funding in the case of merger/takeovers.

Answer: Funding may be made through various types of financial instruments. Funding may be done through any of the following modes:

- Funding through Equity Shares.
- Funding through Preferential Shares.
- Funding through Options or Securities with Different Rights.
- Funding through Swaps or Stock to Stock Mergers.
- Funding through External Commercial Borrowings (ECBs) and Depository Receipts (DRs).
- Funding through Financial Institutions and Banks.
- Funding through Rehabilitation Finance.
- Funding through Leveraged Buyouts.

Q9: Write a short on funding through equity shares.

Answer: Equity share capital- It can be considered as permanent capital of the company. Equity needs no servicing as the company is not required to pay to its equity shareholders the fixed amount return in form of interest which would be the case if a company were to borrow by issue of bonds or other debt instruments. Raising money from the public by issue of shares or bonds or debentures is a time consuming process and involves huge costs. It would require numerous things to be in place and several rounds of discussion would be required to take place between the directors and key promoters having the controlling stake, between the

Board of Directors (BOD) and consultants, analysts, experts, Company Secretaries, Chartered Accountants & lawyers. Furthermore, it requires several legal compliances.

Thus, planning for an acquisition by raising funds through public issue may be complicated and long drawn process.

Q10: Which of the following transactions are regulated by the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (SEBI ICDR) for listed companies in India?

Answer: The Securities and Exchange Board of India (the “SEBI”) is the nodal authority regulating entities that are listed and to be listed on stock exchanges in India. SEBI through SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (“SEBI ICDR”) regulates the issue of securities of such companies.

These regulations apply to:

- (a) a public issue; Section 62(1)(a) of Companies Act 2013
- (b) a rights issue, where the aggregate value of specified securities offered is fifty lakh rupees or more;
- (c) a preferential issue;
- (d) an issue of bonus shares by a listed issuer;
- (e) a qualified institutional placement by a listed issuer;
- (f) an issue of Indian Depository Receipts

Q11: What are the various options of raising further capital for companies under Companies Act, 2013.

Answer: Section 62 of the Act has listed some of the possible options, as explained below:

1. Rights Issue : Section 62(1)(a) of Companies Act 2013

Issue where new shares are offered to existing shareholders proportionately

2. Preferential Offer: Section 62(1)(c) of Companies Act 2013

Preferential allotment, in simple words, is an offer for allotment to a select group of identified persons, and does not include public issue, rights issue, ESOP, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

The provisions of preferential allotment are laid under section 62(1)(c) read with Rule 13 of Chapter IV- The Companies (Share Capital and Debentures) Rules, 2014. This further leads us to follow provisions of Section 42 read with Rule 14 of the Chapter III-Companies (Prospectus and Allotment of Securities) Rules, 2014, which deals with private placement. Hence, for any preferential offer, we need to compulsorily follow the provision of private placement.

Further, listed companies have to comply with the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 for the preferential allotment. Listed companies may also raise funds by way of qualified institutional placement. Qualified institutional placement is the special type of the preferential allotment made only to the qualified institutional buyers (QIB).

Q12: What are the provisions for preferential allotment in case of listed companies provisions of SEBI (ICDR), 2018.

Answer: Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 is applicable for preferential allotment in case of listed companies. Listed companies in addition to Companies Act, 2013 also need to follow these regulations. Some of its important features have been mentioned below:

Sl. No.	Particulars	Description
1.	Definition of preferential issue	It means an issue of specified securities by a listed issuer to any select person or group of persons on a private placement basis. It does not include an offer of specified securities made through a public issue, rights issue, bonus issue, employee stock option scheme, employee stock purchase scheme or qualified institutional placement or an issue of sweat equity shares or depository receipts issued in a country outside India or foreign securities.
2.	Preliminary conditions	A listed company can make preferential issue only if following conditions are satisfied: (a) a special resolution has been passed by its shareholders; (b) all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialised form; (c) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognised stock exchange where the equity shares of the issuer are listed; (d) the issuer has obtained the Permanent Account Number of the proposed allottees.
3.	Restriction	The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date.
4.	Allotment	Allotment pursuant to the special resolution shall be completed within a period of fifteen days from the date of passing of such resolution.

Q13: Write a short note on Funding through Preference shares.

Answer: One more source of funding a merger or the takeover may be through the issue of preference shares, but unlike equity capital, issue of the preference share capital as purchase consideration to the shareholder of merging company mostly includes the payment of fixed preference dividend at a fixed rate.

Thus, before deciding to raise funds for this purpose, by an issue of preference shares, the Board of the company has to ensure that the merged company or Target Company would be able to yield sufficient profits for covering additional liability in respect of the payment of preference dividend. A company that is funding its merger or takeover proposal through an issue of preference shares is required to pay a dividend to such shareholders as per agreed terms.

Q14: What are the features pertaining to issue and redemption of preference shares which have been listed.

Answer: Section 55 of the Act read with Rule 9 and Rule 10 of the Companies (Share Capital and Debentures) Rules, 2014 deals with the procedure involved in issue and redemption of preference shares. SEBI regulations shall be followed, in case a company intends to list its preference shares on a recognized stock exchange.

Some of the features pertaining to issue and redemption of preference shares have been listed in the following table:

Sl. No.	Particulars	Description
1.	Issue of irredeemable preference shares	Not permitted, after the commencement of Companies Act, 2013.
2.	Maximum period of redemption	Preference shares shall be redeemed within a period not exceeding twenty years from the date of their issue. However, a company may issue preference shares for a period exceeding twenty years but not exceeding thirty years, for infrastructure projects, subject to the redemption of a minimum ten percent of such preference shares per year from the twenty first year onwards or earlier, on proportionate basis, at the option of the preference shareholders. The term “infrastructure projects” means the infrastructure projects specified in Schedule VI. [For Schedule VI, refer to Annexure-I, at the end of this chapter]
3.	Authority to issue	Yes, authorization to issue preference shares is required in Articles of Association of Company. Further it also requires the approval of shareholders in general meeting through special resolution.
4.	Particulars of resolution	(a) the priority with respect to payment of dividend or repayment of capital vis-à-vis equity shares; (b) the participation in surplus fund; (c) the participation in surplus assets and profits, on winding-up which may remain after the entire capital has been repaid; (d) the payment of dividend on cumulative or non-cumulative basis. (e) the conversion of preference shares into equity shares.

		(f) the voting rights; (g) the redemption of preference shares.
5.	Explanatory statement	The explanatory statement shall provide complete material facts concerned with the issue of such shares, including- (a) the size of the issue and number of preference shares to be issued and nominal value of each share; (b) the nature of such shares i.e. cumulative or non-cumulative, participating or non-participating, convertible or non-convertible; (c) the objectives of the issue; (d) the manner of issue of shares; (e) the price at which such shares are proposed to be issued; (f) the basis on which the price has been arrived at; (g) the terms of issue, including terms and rate of dividend on each share, etc.; (h) the terms of redemption, including the tenure of redemption, redemption of shares at premium and if the preference shares are convertible, the terms of conversion; (i) the manner and modes of redemption; (j) the current shareholding pattern of the company; (k) the expected dilution in equity share capital upon conversion of preference shares.
6.	Preconditions for issue	Shall not have any subsisting default in the redemption of preference shares issued either before or after the commencement of the Act or in payment of dividend due on any preference shares.
7.	Preconditions For redemption	Such shares shall be fully paid, before redemption.
8.	Manner of redemption	Redemption shall be done out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption. A company may redeem its preference shares only on the terms on which they were issued or as varied after due approval of preference shareholders under section 48 of the Act. Preference shares may be redeemed: (a) at a fixed time or on the happening of a particular event; (b) any time at the company's option; or (c) any time at the shareholder's option.
9.	Inability to redeem or pay dividend	A company if is not in a position to redeem any preference shares or to pay dividend, if any, it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further

		redeemable preference shares equal to the amount due, including the dividend thereon.
10.	Transfer to Capital Redempt on Reserve Account	A sum equal to the nominal amount of the shares to be redeemed shall be transferred to CRR account from profits, if such shares are proposed to be redeemed out of the profits of the company.
11.	Impact on share capital	Issue of further redeemable preference shares or the redempt on of preference shares shall not be deemed to be an increase or a reduction, in the share capital of the company
12.	Register of Members	Register of Members maintained under section 88 shall contain the particulars in respect of such preference shareholder(s).

Q15: Define 'derivative' and 'option' in securities under Securities Contracts (Regulation) Act, 1956.

Answer: The term **derivative** has been defined under section 2(ac) in Securities Contracts (Regulation) Act, 1956 as follows:

- (a) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
- (b) a contract which derives its value from the prices, or index of prices, of underlying securities.
- (c) commodity derivatives; and
- (d) such other instruments as may be declared by the Central Government to be derivatives.

section 2(d) of the Securities Contracts (Regulation) Act, 1956 "**option in securities**" means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a teji, a mandi, a teji mandi, a galli, a put, a call or a put and call in securities

Q16: Write a short note on Funding through options or securities with differential rights.

Answer: Companies can also restructure their capital through derivatives and options as the means of raising funds.

Indian companies are allowed to issue derivatives or options plus the shares and quasi-equity instruments with differential rights as to dividend and/or voting. Companies may also issue non-voting shares or the shares with differential voting rights to shareholders of Transferor Company. Such issue gives companies an additional source of fund without interest cost and without the obligation to repay, as these are other forms of the equity capital.

The promoters of the companies may be interested in such form of consideration as it does not impose any kind of obligation and there is no loss/dilution of control in case of non-voting shares.

Option is a derivative contract: An option gives the holder the right but not the obligation to buy or sell something in the future.

There are two types of Options:

1. Put option- is one which gives holder the right to sell particular number of shares (or any other commodity) at a given price and typically one buys put options, if the price of the stock is expected to decline.

2. Call opt on- gives the holder the right to buy the shares at a predetermined period of time and at a predetermined price. Typically, one buys call opt ons if the price of the underlying stock is expected to rise.

Q17: Define 'derivative' and 'option in securities'

Answer: The term derivative has been defined under section 2(ac) in Securities Contracts (Regulation) Act, 1956 as follows:

- (a) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
- (b) a contract which derives its value from the prices, or index of prices, of underlying securities.
- (c) commodity derivatives; and
- (d) such other instruments as may be declared by the Central Government to be derivatives.

Section 2(d) of the Securities Contracts (Regulation) Act, 1956 "Option in securities" means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a teji, a mandi, a teji mandi, a galli, a put, a call or a put and call in securities.

Q18: Under Section 48 of the Companies Act, 2013, what is the procedure for varying the rights attached to any class of shares in a company?

Answer: Section 48 of the Companies Act, 2013 deals with the variation of shareholders' rights. This section deals with the procedure involved, when a company intends to vary rights attached with any class of shareholders. The features have been explained below:

1. **Approval of class of shareholders** - The rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class —
 - (a) if provision with respect to such variation is contained in the memorandum or articles of the company; or
 - (b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class.
2. **Impact on rights of other class** - The section provides that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.
3. **Cancellation of variation** - Variation may be cancelled if, holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation. They may apply to the Tribunal to cancel the variation, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal. The decision of the Tribunal on any such application shall be binding on the shareholders. The company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

Q19: What are the provisions regarding Equity shares with different rights under Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014.

Answer: Companies may issue equity shares with different rights as to dividend, voting or otherwise in compliance with Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014. Some of its important features are listed below:

Sl. No.	Particulars	Description
1.	Authority to issue	The articles of association of the company authorize the issue of shares with different rights.
2.	Approval of shareholders	The issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders: Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.
3.	Impact on post issue capital	The shares with different rights shall not exceed seventy-four per cent of the total post-issue paid up equity share capital including equity shares with different rights issued at any point of time.
4.	No default in statutory filings	The company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares.
5.	No default in payment of statutory dues	The company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend.
6.	No default in repayment of borrowings	The company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government. Provided that a company may issue equity shares with different rights upon expiry of five years from the end of the financial Year in which such default was made good.
7.	No penalization	The company has not been penalized by Court or Tribunal during the last three years of any offence under the Section 44A of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation

		Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators.
8.	No conversion	The company shall not convert its existing equity share capital with voting rights into equity share capital carrying different voting rights and vice versa
9.	Disclosure in Board report	The holders of the equity shares with different rights shall enjoy all other rights such as bonus shares, rights shares etc., which the holders of equity shares are entitled to, subject to the different rights with which such shares have been issued.
10.	Register of Members	Register of Members shall contain all the relevant particulars of such shares along with details of the shareholders.

Q20: Internal accruals are an important source of funding mergers and takeovers. Comment on the statement with reference to issue of equity instruments with different voting rights. (3 marks)
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Answer: Mergers and takeovers involve payment of consideration for acquiring the properties/shares of the target company. The consideration depends on the target company valuation.

- Funding mergers and takeovers imply the modes of raising finance to service the corporate restructuring strategy
- Funds may be raised through internal sources such as Equity capital Preference Capital, accumulated reserves and profits.
- As per the Companies Act, 2013, an Indian company is permitted to issue equity instruments with different rights as to dividend and or voting. Companies may issue non-voting shares
- Expansion of market. Such issue gives companies an additional source of fund without dividend cost and without the obligation to repay, as these are other forms of the equity capital. Generally, promoters prefer such securities since there is no loss of control.

A company limited by shares may issue equity shares with different rights subject to the following conditions:

1. There must be an authority in the Articles of Association of the company,
2. Obtain shareholders' approval through ordinary resolution in general meeting. Provided that where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.
3. The equity capital with different rights shall not exceed 74% of the total voting power, No default in filing annual accounts and annual returns for three years; immediately preceding the financial year in which it is decided to issue such shares;
4. No subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend
5. The company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become

repayable or interest payable thereon or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund of the Central Government. Provided that a company may issue equity shares with different rights upon expiry of five years from the end of the financial Year in which such default was made good.

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

7. A company shall not convert its existing equity share capital with normal voting rights into equity shares with different voting rights and vice versa.

Q21: "In addition to the normal event risks, stock swap mergers involve risks associated with fluctuations in the stock prices of the two companies". Comment on the statement in view of the funding through swaps or stock to stock mergers. (5 marks)

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Answer: Funding through stock swaps is a very common method. Under this method of funding, the holders of the target company's stock receive shares of the acquiring company's stock in lieu of the merger.

The share exchange ratio is mutually determined by the Board of Directors of both the companies on the basis of the valuation report prepared by the professionals.

Stock swap mergers might involve risk. Along with the normal risks, stock swap mergers consist of the risks associated with the fluctuations in the stock prices of two companies. The terms of deal involve an exchange of shares and are predicted on prices of the two companies' stock at the time of the announcement, drastic changes in shares prices of one or both of companies can cause an entire deal to be re-evaluated.

Q22: "ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling etc. The parameters apply in totality and not on a standalone basis."

Ment on the three tracks for raising loans through ECB, also various types of ECBs that can be raised.

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Answer: ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB comprises the following three tracks:

Track I: Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.

Track II: Long term foreign currency denominated ECB with minimum average maturity of 10 years.

Track III: Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

Various types of ECB: ECBs can be raised as:

1. Loans, e.g., bank loans, loans from equity holder, etc.

2. Capital market instruments, e.g.

(a) Securitised instruments (e.g. floating rate notes / fixed rate bonds / non-convertible, optionally convertible or partially convertible preference shares/debentures)

(b) FCCB

(c) FCEB

3. Buyers' credit / suppliers' credit.

4. Financial lease.

However, ECB framework is not applicable in respect of the investment in non-convertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

Q23: What are the available routes for raising ECB.

Answer: Under the ECB framework, ECBs can be raised either under the automatic route or under the approval route.

For the automatic route, the cases are examined by the Authorised Dealer Category-I (AD Category-I) banks. Under the approval route, the prospective borrowers are required to send their requests to the RBI through their ADs for examination.

While the regulatory provisions are mostly similar, there are some differences in the form of amount of borrowing, eligibility of borrowers, permissible end-uses, etc. under the two routes. Except FCEBs which can be issued only under the approval route, all other forms of borrowings mentioned above can be raised both under automatic and approval routes.

Q24: What are the eligible Borrowers to raise ECB.

Answer:

Track I	Track II	Track III
(i) Companies in manufacturing and software development sectors. (ii) Shipping and airlines companies. (iii) Small Industries Development Bank of India (SIDBI). (iv) Units in Special Economic Zones (SEZs). (v) Export Import Bank of India (Exim Bank) (only under the approval route). (vi) Companies in infrastructure sector, Non Banking Financial Companies - Infrastructure Finance Companies (NBFCIFCs), NBFCs-Asset	(i) All entities listed under Track I. (ii) Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the Securities and Exchange Board of India (SEBI).	(i) All entities listed under Track II. (ii) All Non-Banking Financial Companies (NBFCs) coming under the regulatory purview of the Reserve Bank. (iii) NBFCs-Micro Finance Institutions (NBFCs-MFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and cooperatives (registered under the Societies Registration Act, 1860, Indian Trust Act, 1882 and State-level Cooperative Acts/ Multi-level Cooperative Act/State-level mutually aided Cooperative Acts respectively), Non-Government Organisations

Finance Companies (NBFC - A F Cs), Holding Companies and Core Investment Companies (CICs). Also, Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908.		(NGOs) which are engaged in micro finance activities. (iv) Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services. (v) Developers of Special Economic Zones (SEZs)/ National Manufacturing and Investment Zones (NMIZs).

Q25: What are the features of the revised ECB guidelines.

Answer: It has been decided, in consultation with the Government of India, to rationalise the extant framework for ECB and Rupee Denominated Bonds in light of the experience gained to improve the ease of doing business. The new framework is instrument neutral and would further strengthen the AML/CFT framework.

Salient features of the revised ECB guidelines are as under:

- (i) **Merging of Tracks:** Merging of Tracks I and II as “Foreign Currency denominated ECB” and merging of Track III and Rupee Denominated Bonds framework as “Rupee Denominated ECB”.
- (ii) **Eligible Borrowers:** This has been expanded to include all entities eligible to receive FDI. Additionally, Port Trusts, Units in SEZ, SIDBI, EXIM Bank, registered entities engaged in micro-finance activities, viz., registered not for profit companies, registered societies/trusts/cooperatives and non-government organisations can also borrow under this framework.
- (iii) **Recognised Lender:** The lender should be resident of FATF or IOSCO compliant country. Multilateral and Regional Financial Institutions, Individuals and Foreign branches/subsidiaries of Indian banks can also be lenders.
- (iv) **Minimum Average Maturity Period (MAMP):** MAMP will be 3 years for all ECBs. However, for ECB raised from foreign equity holder and utilised for specific purposes, as detailed in the Annex, the MAMP would be 5 years. Similarly, for ECB up to USD 50 million per financial year raised by manufacturing sector, which has been given a special dispensation, the MAMP would be 1 year.
- (v) **Late Submission Fee (LSF) for delay in Reporting:** Any borrower, who is otherwise in compliance of ECB guidelines, except for delay in reporting drawdown of ECB proceeds before obtaining LRN or Form ECB 2 returns, can regularize the delay by payment of LSF as per the laid down procedure.

Q26: Zoom Ltd. engaged in the business of software development is contemplating raising finance through ECB route. Explain different variants of ECB and the tenure for which the ECB can be raised to the Company Secretary of the Company. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: ECBs are commercial loans raised by eligible resident entities from recognised non resident entities and should conform to parameters such as minimum maturity etc.

Minimum Average Maturity Period of ECB are as under:

- ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year-1 year
- ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans- 5 Years
- ECB raised for Working capital purposes or general corporate purposes and on lending by NBFCs for working capital purposes or general corporate purposes- 10 years
- ECB raised for repayment of Rupee loans availed domestically for capital expenditure and on-lending by NBFCs for the same purpose-7 years

ECBs can be raised as:

1. Loans. e.g., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g.
 - (a) Securitised instruments (e.g. floating rate notes / fixed rate bonds / nonconvertible. optionally convertible or partially convertible preference shares/ debentures)
 - (b) FCCB
 - (c) FCEB
3. Buyers' credit / suppliers' credit.
4. Financial lease.

However, ECB framework is not applicable in respect of the investment in nonconvertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

Q27: ABCD Manufacturing and Exporting Ltd desires to use Masala Bonds for further Augmentation of funds. Would you guide the Company as to the concept and exceptions that bars raising funds through such bonds? (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Masala bonds are rupee denominated bonds sold to offshore investors, who assumes foreign exchange risk to earn higher interest rates compared with dollar based overseas bond. In 2017, Reserve Bank of India (RBI) revised the norms for masala bonds. The proceeds of these bonds can be used for all purposes except for the following:

- (a) Real estate activities other than for development of integrated township/affordable housing projects;
- (b) Investing in capital market and using the proceeds for equity investment domestically;
- (c) Activities prohibited as per the Foreign Direct Investment (FDI) guidelines;
- (d) On-lending to other entities for any of the above objectives; and
- (e) Purchase of land.

HDFC was the first to issue such bonds, followed by National Highways Authority of India and National Thermal Power Corporation. Thus, the raising of funds through Masala Bonds is to tap overseas cheap funds.

Q28: For funding of restructuring, various foreign currency denominated instruments are available". In this context explain in brief the concept of Depository receipts and eligibility conditions for issuance of the same. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: 'Depository Receipt' means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.

Here, **Permissible Securities** means equity shares and debt securities, which are in dematerialized form and rank pari passu with the securities issued and listed on a Recognized Stock Exchange.

'Depository Receipt' includes '**Global Depository Receipt**' as defined in section 2(44) of the Companies Act, 2013 'as any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts'.

Eligibility:

1. The following persons are eligible to issue or transfer permissible securities to a foreign depository for the purpose of issue of depository receipts:

- (a) any Indian company listed or unlisted, private or public;
- (b) any other issuer of permissible securities;
- (c) any person holding permissible securities; which has not been specifically prohibited from accessing the capital market or dealing in securities.

2. Un-sponsored depository receipts on the back of listed permissible securities can be issued only if such depository receipts:

- (a) give the holder the right to issue voting instructions; and
- (b) are listed on an international exchange.

A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations.

Q29: What is the procedure for the issue of depository receipts.

Answer: Issue: The following is the procedure for the issue of depository receipts:

- A foreign depository may issue depository receipts by way of a public offering or private placement or in any other manner prevalent in a permissible jurisdiction;
- An issuer may issue permissible securities to a foreign depository for the purpose of issue of depository receipts by any mode permissible for issue of such permissible securities to investors;
- The holders of permissible securities may transfer permissible securities to a foreign depository for the purpose of the issue of depository receipt, with or without the approval of issue of such permissible securities through transactions on a recognized stock exchange, bilateral transactions or by tendering through a public platform.

Q30: What are the limits and pricing to issue depository receipts.

Answer: Limits: The aggregate of permissible securities which may be issued or transferred to foreign depositories for issue of depository receipts, along with permissible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such permissible securities under the Foreign Exchange Management Act, 1999.

Pricing: The permissible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under the applicable laws.

Q31: Write a short note on Funding through Financial Institutions and Banks.

Answer: Banks and Financial Institutions may provide end-to-end advisory services to the client in mergers and acquisitions involving target search, analysis of the target and potential synergies for the client, value analysis, pricing strategy, review of the transaction documents, negotiation support, documentation and closure of the transaction.

Funding of a merger or takeover with the help of loans from financial institutions, banks, etc. has its own merits and demerits. Takeover of a company could be achieved in several ways and while deciding the takeover of a going concern, there are matters such as the capital gains tax, stamp duty on immovable properties and the facility for carrying forward of accumulated losses. With parameters playing a critical role, the takeover should be organized in such a way that best suits the facts and circumstances of the specific case and also it should meet the immediate needs and objectives of the management. While discussing modes of acquisition, certainly there would be a planning for organizing the necessary funding for the acquisition. If borrowings from domestic banks and financial institutions have been identified as the inevitable choice, all the financial and managerial information must be placed before the banks and financial institutions for the purpose of getting the necessary resources.

Q32: What are the pros and cons of Funding through Financial Institutions and Banks.

Answer: The advantage of funding is that the period of such funds is definite which is fixed at the time of taking such loans. Therefore, the Board of the company is assured about continued availability of such funds for the predetermined period.

On the negative side, the interest burden on such loans is quite high which must be kept in mind by the Board while deciding to use borrowed funds from financial institution. Such funding should be thought of and resorted to only when the Board is sure that the merged company or the target company will give adequate returns i.e., timely payment of periodical interest on such loans and re-payment of the loans at the end of the term for which such loans have been taken.

Q33: What is the purpose of the Insolvency and Bankruptcy Code, 2016 (IBC), and how did it impact the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)?

Answer: The Insolvency and Bankruptcy Code, 2016 (IBC) aims to consolidate existing laws into a single framework for the insolvency and bankruptcy of corporates, individuals, partnerships, and other entities. It came into force in December 2016, replacing the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), which was repealed by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. Under Section 252 of the IBC, all pending appeals, references, or inquiries before the Board for Industrial and Financial Reconstruction (BIFR) or Appellate Authority for Industrial and Financial Reconstruction (AAIFR) were abated. Companies affected could file references to the National Company Law Tribunal (NCLT) within 180 days without paying additional fees. The IBC has also become a key driver for mergers and acquisitions.

by facilitating stressed asset acquisitions and enabling rehabilitation of financing through borrowings or internal accruals.

Q34: Define Leveraged Buyout (LBO). Also write an example of Leverage buy-out. (3 Marks)

PAST YEAR QUESTION JUNE 2019

Answer: When one refers to something (a company, a property or an investment) as 'highly leveraged' it means that item has more debt than equity.

A **Leveraged Buyout (LBO)** is the acquisition of a company in which the buyer puts up only a small amount of money and borrows the rest. The buyer can achieve this desirable result because the targeted acquisition is profitable and throws off ample cash used to repay the debt. The expectation with leveraged buyouts is that the return generated on the acquisition will more than outweigh the interest paid on the debt, hence making it a very good way to experience high returns whilst only risking a small amount of capital.

In 2000, a landmark deal was witnessed in the Indian corporate history, when Tata Tea acquired the UK brand Tetley for 271 million pounds. This deal was the largest cross border acquisition by any India Company. Apart from the size of the deal, what made it particularly special was the fact that it was the first ever leveraged buyout by any Indian company.

Q35: What Companies Make Good LBO Targets?

Answer: Considering that the buyer will put a large amount of debt on the company, it is critical that the company be stable and able to pay off its future debts otherwise it will likely default and go into bankruptcy. With that in mind, below are some types of companies that make good targets:

- Stable, strong cash flow business.
- Company with low debt levels.
- Non-cyclical businesses.
- Companies with large economic moats.
- Companies with good existing management teams.
- Companies with a large asset base that can be used for collateral.
- Distressed companies in good industries.

Q36: What are the provisions where minority interest is recognised.

Answer: The term "minority" and "minority interest" are not clearly defined in the Companies Act, 2013 or rules made thereunder. However, in various provisions of the Act, members are given various collective statutory rights which can be exercised even if they are not in majority (i.e. holding more than 50% of the numbers/shares/voting rights). In another way, minority can be identified as those members who are not in the control or management of the affairs of the company.

The following are some of the provisions where minority interest is recognised in the Act:

1. At present as per Section 244 of the Companies Act, 2013, in case of a company having share capital, not less than 100 members or not less than 1/10th of total number of members, whichever is less or any member or members holding not less than 1/10th of issued share capital have the right to apply to NCLT in case of

oppression and mismanagement. In case of companies not having share capital, not less than 1/5th of total number of members has the right to apply.

2. To reflect the interest of the "Minority", 10% criteria in case of companies having share capital and 20% criteria in the case of other companies is provided for in the Act. To help the Minority shareholders, proviso to Section 244(1) of the Companies Act, 2013 empowers NCLT to allow application by shareholders who are not otherwise eligible (i.e. holding less than 10%-20% as aforesaid). This really opens up possibility of minority actions in deserving cases of oppression and mismanagement.

Q37: Write a short note on Oppression and Mismanagement

Answer: Although Companies Act, 2013 gives power to the voting decision made by the majority shareholders in general meetings but at the same time it also empowers the minority shareholders by protecting their interests and rights. Section 241 - 246 of the Act has laid down such provisions which will be discussed in detail in the following paras.

Oppression: Remedy against oppression is available in section 241(1)(a) of the Act. Oppression may be defined as conducting the company's affairs in a manner prejudicial to public interest or in a manner oppressive to any member or members or prejudicial to the interests of the company.

Mismanagement: Remedy against mismanagement is available in Section 241(1)(b) of the Act. Mismanagement may be defined as any change which takes place in the management or control of the Company, which will not be in the interests of members.

Few more points relevant in this context are:

1. If an application is made to the Tribunal, then it may waive all or any of the requirements specified in the aforementioned table for an eligible member.
2. Any share or shares held by two or more persons jointly, shall be counted only as one member.
3. Any one or more members may make the application on behalf of other members.

Q38: What are the powers of Tribunal under Section 241 of the Companies Act' 2013?

Answer: If an application is made under Section 241 of the Act to the Tribunal and it is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company and that winding-up the company would unfairly prejudice such member or members, then the Tribunal may pass relevant order to resolve the complaint. Orders may provide for the following:

- regulation of conduct of affairs of the company in future
- purchase of shares or interests of any members of the company by other members thereof or by the company
- In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital
- restrictions on the transfer or allotment of the shares of the company
- the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case

- the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e)

Q39: Write a short note on class act on suit. How the remedies sought under class act on is different from oppression and mismanagement.

Answer: A class act on suit is one where the shareholders or depositors of a company collectively institute a suit against the company in Tribunal.

Class act on suits will safeguard the interests of shareholders, whenever the company or its directors participate in any fraudulent, unlawful act, or commit an act which is against the interest of the shareholders. In fact, such suits would be the most effective remedy for raising the voice of the company's shareholders. The provisions of class act on come under the head of oppression and mismanagement but there are some differences between the remedies sought under class act on under Section 245 and under the general provisions of oppression and mismanagement under Section 242. While under Section 242 the NCLT can order acquisition of the company's shares, restrict transferability or allotment of shares, removal of managing director and other directors of the company, in class act on, the orders will mainly be restraining orders. An added advantage of the provisions on class act on suit is that they cover depositors also.

Q40: What are the rights of minority shareholders during mergers/ amalgamations/ takeovers.

Answer: Power to compromise or make arrangements with creditors and members

1. Approval of Tribunal is required in case of corporate restructuring (which, inter-alia, includes, mergers/ amalgamations, etc.) by a company. Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

The Scheme is also required to be approved by shareholders, before it is filed with the NCLT. The scheme is circulated to all shareholders along with statutory notice (Form No. CAA-2) of the Tribunal convened meetings and the explanatory statement under section 230(3) of the Act read with Rule 6 of Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 for approving the scheme by shareholders.

2. As per proviso to Section 230(4) of the Act, it is provided that any objection to the compromise or arrangement shall be made by persons holding 10% or more of the shareholding or having 5% or more of the total outstanding debt as per latest audited financial statement. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right.

The notice convening the meetings and also the notice of hearing of the petition (in Form CAA- 2) is required to be published in the newspaper as per the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. The notice is also required to be given to various statutory authorities, sectoral regulators, etc. Though there may not be any express protection to any dissenting minority shareholders to file their objections as a matter of right on this issue, the Tribunal, while approving the scheme, may follow judicious

approach more particularly in view of the publication of the public notices about the proposed scheme in the newspapers. Any interested person (including a minority shareholder) may appear before the NCLT. There have been, however, occasions when shareholders holding miniscule shareholdings, have made frivolous objections against the scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections. In view of this, proviso to Section 230(4) of the Act has put some limit for the objectors.

3. In case of Takeovers, as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI has powers to appoint investigating officer to undertake investigation, in case complaints are received from the investors, intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers. SEBI may also carry out such investigation suo moto upon its own knowledge or information about any breach of these regulations.

Under section 235 of the Act, a transferee company, which has acquired 90% shares of a transferor company through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders.

Dissenting shareholders have been provided with an opportunity to approach Tribunal. For this purpose, there is no threshold applicable i.e. even a single dissentient shareholding holding one share may also approach Tribunal. In such case, further acquisition of shares by the transferee company will be subject to the outcome of the decision of the NCLT.

Section 230(12) provides that an aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover of or of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Q41: “There may be no express protection to any dissenting minority shareholder to file his objections as a matter of right, yet the Courts/Tribunals, while approving the Scheme, follow judicious approach by inviting objections through Public Notice in Newspapers.” Elucidate. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: As per section 230(4) of the Companies Act, 2013 it is provided that in a scheme of arrangement any person or persons holding at least 10% of the shareholding or 5% of the total outstanding debt can put objection to the proposed scheme. But this does not mean that others are disabled. There exists inbuilt safeguard in the form of serving notices to every individual shareholder and creditor, so also to various statutory authorities and sectoral regulators. Stakeholders with lesser than specified percentage of shareholding may utilize such forums. Public notices issued in Newspapers also open a forum to raise objections that are just and genuine but not frivolous. Securities and Exchange Board of India (SEBI) has powers to undertake investigation, if a complaint is received from an investor or otherwise against substantial acquisitions.

Q42: How the rights of the minority shareholders are protected during merger/ amalgamation/takeover? (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Minority shareholders rights are protected in following manner during merger/ amalgamation/takeover:

The scheme is required to be approved by the shareholders, before it is filed with the NCLT (previously court) for its approval. The scheme is circulated to all the shareholders along with the statutory note of NCLT (previously court) convened meeting and the explanatory statement under section 230(3) of the Companies Act, 2013 approving the scheme of shareholders.

The NCLT (previously court) while approving the scheme seeks objections, if any, against the scheme from the shareholders, etc. Any interested person (including minority shareholders) may appear before the NCLT following the due process.

Under section 235 of the Act, a transferee company, which has acquired 90% shares of a transferor company through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders. Such acquisition of 10% shares should be as per directions of NCLT.

Under section 235, 236 and section 237(4) read with section 230(3) of the Companies Act, 2013, dissenting shareholders have been provided with an opportunity to approach NCLT.

In case of takeover as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI has got power to appoint investigating officer to undertake investigation, in case complaints are received from investors, intermediaries or any other person.

Q43: ABC Ltd. was incorporated on May 12, 1986, under the Indian Companies Act, having its registered office at Mumbai, Maharashtra. The present capital structure of the petitioner company is as follows : Rs. 1,000 crore Authorised Capital-100 crore equity shares of Rs.10 each. Issued Subscribed Capital and paid-up capital of Rs. 780 crore -78 crore equity shares of Rs. 10 each [includes equity shares represented by GDRs]. The company is having 4 business segments related to manufacturing of products L, M, N and O. Turnover of O product is around Rs.1,300 crore. Asset of ABC Ltd are Rs. 2,700 crore out of which product O related asset are Rs. 1,400 crore.

XYZ Ltd. is a company having its registered office at Surat, Gujarat. Authorised, issued and paid up capital of company is Rs. 750 crore having turnover of ` Rs. 820 crore. It is engaged in the business of manufacture and sale of product O. Assets of XYZ Ltd. are Rs. 1,500 crore.

XYZ Ltd. already hold 14.98% of the equity shares of the ABC Ltd. acquired at Rs. 267 per share from Six ventures and got two directors in Board of Directors of ABC Ltd. XYZ Ltd. has made an offer to shareholders of ABC Ltd at Rs. 190 per share to acquire controlling stake of ABC Ltd. ABC Ltd. Management opposed the offer citing reasons of low price that was not beneficial to the shareholders of ABC Ltd. but in reality the management of ABC Ltd. had fear of losing control over the company. XYZ Ltd. had an eye on the Product O business of ABC Ltd. for a long time. The offer was a step towards fulfilling the dream. Full control of product O business was ultimate purpose of XYZ Ltd. ABC Ltd. script was trading at Rs. 207.50 on the closing hours of trading at the Bombay Stock Exchange.

After lot of fights and hassles, both companies came to truce. Pursuant to acquisitions through negotiated transactions, a proposal to demerge the ABC Ltd. company's Product O business into company TRM Ltd. and acquisition of 51% controlling stake in TRM Ltd. was given by XYZ Ltd. and after due deliberation, the Board of Directors of the ABC Ltd company accepted the proposal for demerger of the Product O business into TRM Ltd. and subsequent acquisition of 51% stake in same by XYZ Ltd. After demerger TRM Ltd. will have around 35% market share of product O business on pan India basis.

ABC Ltd. Employees Welfare Foundation is an employee welfare trust established under the Indian Trusts Act, 1882.

Shareholders of ABC Ltd. and XYZ Ltd. call meeting of shareholders, creditors and pass special resolution. They submit copy of resolution to ROC, NCLT and publish in newspaper about successful arrangement. Few members of ABC Ltd. having 1.5% shares of valued Rs. 10 lakh objected to scheme of Acquisition by XYZ Ltd. ABC Ltd. Employee trust also objected to acquisition. NCLT cancelled the scheme citing grounds of unfair, unjust and objections of members having 1.5% shares in company.

Based on above facts, answer the following with reasons quoting relevant provisions:

Analyse whether NCLT will approve the draft scheme keeping in view the objection raised by shareholders of ABC Ltd? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: As per proviso to Section 230(4) of the Companies Act, 2013, any objection to the compromise or arrangement shall be made by persons holding 10% or more of the shareholding or having 5% or more of the total outstanding debt as per latest audited financial statement. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right.

There are other built-in safeguards in the matter of approval of the scheme of compromise and arrangements. The notice convening the meetings and also the notice of hearing of the petition (in Form CAA- 2) is required to be published in the newspaper as per the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. The notice is also required to be given to various statutory authorities, sectoral regulators, etc. Though there may not be any express protection to any dissenting minority shareholders to file their objections as a matter of right on this issue, the Tribunal, while approving the scheme, may follow judicious approach more particularly in view of the publication of the public notices about the proposed scheme in the newspapers. Any interested person (including a minority shareholder) may appear before the NCLT. There have been, however, occasions when shareholders holding minuscule shareholdings, have made frivolous objections against the scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right.

Q44: Ludhiana Berry Ltd. has proposed merger of Jalandhar Berry Ltd. with itself. The merger scheme has been approved by 76% shareholders of Ludhiana Berry Ltd. and 98% shareholders of Jalandhar Berry Ltd. (in value terms). Explain with the help of relevant provisions and decided cases, whether this will be binding on all the shareholders (including dissenting shareholders). (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Section 230(6) of Companies Act, 2013 provides that when the court directs the convening, holding and conducting of a meeting of creditors or members or a class of them, a particular majority of the creditors or members or a class of them should agree to the scheme of compromise or arrangement. As per the aforesaid sub-section, the majority required is the majority in number representing three-fourths in value of the creditors or members or a class of them, as the case may be, present and voting in the meeting so convened either in person, or by proxy. After the said meeting agrees with such majority, if the scheme is

sanctioned, by the court, it shall be binding upon the creditors or members or a class of them, as the case may be.

In the case of Punjab and Haryana High Court in Hind Lever Chemicals Limited and Another [2005] 58SCL 211(Punj. & Har.) court held that in our view, the language of

Section 230(6) of the Act is totally unambiguous and a plain reading of this provision clearly shows that the majority in number by which a compromise or arrangement is approved should represent three-fourth in value of the creditors/ shareholders who are 'present and voting' and not of the total value of the shareholders or creditors of the company.

Q45: A Ltd. was a listed Company with Kanpur Stock Exchange but got delisted in 2012. In the year 2017, the Board passed a resolution approving a scheme of arrangement and petitioned before the National Company Law Tribunal (NCLT). Subsequent to that, scheme was placed before the members which the NCLT ordered. Two (2) shareholders holding 80% shares opposed the scheme.

As a Company Secretary, advise the Board on the next course of action(s) pursuant to the provisions of the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: As per section 230(6) of the Companies Act, 2013 read with Rules made thereunder, compromise or arrangement would require approval by a majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be.

Since the proposed scheme was opposed by two shareholders holding 80% shares, hence it does not fulfil requirement of section 230(6) and will not be approved by the Tribunal based upon the reports received from Scrutinizer and Chairman of the meeting.

Moreover, it is given that A Ltd. was delisted in 2012 and hence it was not required to submit the scheme with SEBI, so observations, if any, from SEBI or stock exchanges were not required.

Q46: A meeting of members of Jwala International Ltd. was held as per the Orders of the Tribunal for considering a scheme of compromise and arrangement in which 300 members holding 10,00,000 shares were present. 130 members holding 6,00,000 shares voted in favour, 120 members holding 1,00,000 shares voted against and remaining 50 members with 3,00,000 shares abstained. Examine with reference to provisions of the Companies Act, 2013 as to whether the scheme is approved? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Section 230(6) of the Companies Act, 2013 requires the approval by members, creditors (separately for each class) of the company to a scheme of compromise or arrangement.

The required majority need to be three-fourth in value present in person or through proxy or by postal ballot. The Tribunal may dispense with conducting a meeting; if affidavits of consent are given by the persons concerned having stake more than 90% of total stake in each class.

While counting for approval the persons who did not attend and those who do not wish to vote shall be excluded so also in invalid votes.

In the given case, as each share is considered as a vote, 6 lakh votes are in favor and 1 lakh votes are against, thus more than 3 times and hence the resolution is considered passed. Counting of Members present to vote or not to vote is only for statistical purpose only.

Q47: A Ltd. was a listed company with Kanpur Stock Exchange but delisted in 2012. In the year 2017, the Board passed a resolution approving a scheme of arrangement and petitioned before the National Company Law Tribunal (NCLT). Subsequent to that, scheme was placed before the members. Two (2) shareholders holding 80% shares opposed the scheme. As a Company Secretary, what would you advise to the Board next course of action(s) pursuant to the provisions of the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer:

- As per section 230 of the Companies Act, 2013, an application shall be made to Tribunal for sanctioning a scheme of amalgamation.
- The Tribunal has the power to sanction the scheme u/s 231 of the Companies Act, subject to approval in the shareholders meeting(s) and creditors' meeting(s). The resolution shall be passed in the respective meeting through dual majority as given under section 230(6).
- As per section 230(6) of the Companies Act, 2013, compromise or arrangement would require approval by a majority of persons representing three fourths (75%) in value of the creditors, or class of creditors or members or class of members, as the case may be.
- Once the required approval is received in the members and creditors meeting, the scheme of compromise or arrangement shall be sanctioned by the Tribunal. Once the scheme is approved by the Tribunal the same is binding on the company, all the creditors and members.
- In the given case, the proposed scheme was opposed by two shareholders holding 80% shares. Hence, it does not fulfill requirement of Section 230(6) and will not be approved by the Tribunal based upon the reports received from Scrutinizer and Chairman of the meeting.
- Moreover, it is given that A Ltd. was delisted in 2012 and hence it was not required to submit the scheme with SEBI, so observations, if any, from SEBI or stock exchanges were not required.
- The Board of A Ltd. may review the said scheme of arrangement and prepare a revised scheme of arrangement considering the observations of shareholders, if any, and present it for shareholder's approval.

Q48: ABC Ltd. is planning for merger with RST Ltd. As a Company Secretary you have advised your management that all shareholders of transferor and transferee can give consent for the merger and thereby the shareholders meeting can be dispensed to save the time. However, CFO of your Company has raised a doubt on your view. Hence, the matter was put before a practicing Company Secretary, who will advise on the matter to the Company. As a practicing Company Secretary referring relevant provision and a case law give your opinion on the matter. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Section 230(9) of the Companies Act, 2013, the National Company Law Tribunal (NCLT) may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors,

having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

In the matter of Scheme of Amalgamation between Jupiter Alloys & Steel (India) Limited vs. Jupiter Wagon Limited, the question of 'whether tribunal can grant dispensation of shareholders meeting regarding proposed scheme of amalgamation in case where all the shareholders have given consent and Companies Act provides only for dispensation of meetings of creditors having 90% value agreed and confirmed by way of affidavit?', was laid before the Court.

The two member Hon'ble NCLT Kolkata Bench held that the word "may" as provided in section 230(9) of the Companies Act, 2013 introduces an element or essence of discretion, and thus vests in the NCLT an inherent power to dispense with the meeting of the member and/or creditors. Finally, the bench, noting that NCLT has inherent power under Rule 11 of National Company Law Tribunal Rules, 2016 read with Rule 24(2) of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (CAA Rules) allowed dispensation of the meeting of the shareholders, whilst observing the following:

"It cannot be ignored that almost all the High Courts have exercised this discretion since long and dispensed with the calling of the meetings in appropriate situations. The precedents created by the High Courts to dispense with the requirement of convening the meetings are worth and continuation of such precedents are virtue in the era of ease of doing businesses as well as future course of corporate actions. A settled issue should not be unsettled without proper reasons. Thus, the notion that calling of meetings is mandatory does not stand.

Based on the above-mentioned case law where all shareholders have given their consent and post-merger there shall be positive net worth and the creditors are not compromised, it is advised to the management to get the written consent of all shareholders of transferor and transferee so that the requirement of shareholders meeting can be dispensed with.

Q49: What are the provisions regarding Purchase of Minority Shareholding under Companies Act, 2013.

Answer: Section 236 of the Companies Act, 2013 states that:

- (1) In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming ninety per cent. majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.
- (2) The acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.
- (3) Without prejudice to the provisions of sub-sections (1) and (2), the minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with such rules as may be prescribed under sub-section (2).
- (4) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by

company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.

(5) In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under subsection (4) by the majority in advance to the minority by despatch of such payment.

(7) In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

(8) Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiated or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

(9) When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

(a) the shares of the company of the residual minority equity shareholder had been delisted; and

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

Q50: How could the rights of dissenting shareholders to a scheme of merger be resolved? (3 marks) PAST YEAR QUESTION DECEMBER 2020

Answer: (i) The rights of dissenting shareholders can be resolved by resorting to Section 235 of the Companies Act, 2013 in the manner provided under Rule 26 of Companies (Compromise, Arrangement, and Amalgamation) Rules, 2016.

(ii) If nine-tenths of the shareholders are agreeable to the merger, then the acquiring company can, after serving notice, duly acquire the shares of the dissenting group.

(iii) The dissenting shareholders need to be served notice in the manner prescribed under the Rule 26.

Q51: What are the provisions of Purchase of minority shareholding held in demat form.

Answer: Rule 26A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that:

(1) The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.

(2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.

(3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.

(4) The company shall inform the depository immediately after publication of the notice under sub-rule (3) regarding the cut-off date and submit the following declarations stating that:

(a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act; It may be noted that Corporate Action means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fractional shares and right issue to the acquirer.

(b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action on a copy of the notice served to such shareholders and published in the newspapers to be attached;

(c) the minority shareholders shall be paid by the company immediately after completion of corporate action;

(d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.

(5) For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.

(6) Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

(7) After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899.

(8) Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer.

(9) In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 (22 of 1996), the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

Q52: ETA Motors Ltd. is an Indian automotive company, headquartered and registered in Delhi, incorporated on 12th May, 2002. The company manufactures vans and buses. The technical experts of the company have an opinion that four critical technological disruptions – mobility, autonomous driving, electric vehicles, and connected technologies – are poised to revolutionize the automotive landscape. The Company besides its plan to increase its market share by 20% to 35% by 2025-26, wants to enter the global market through joint ventures or technology transfers. The company decided to chalk out an expansion strategy for the same.

K&G Associates, the official and legal advisors to the Company were asked to deliberate on the expansion strategies. In their presentation to the Board of directors of ETA Motors Ltd., they explained that Mergers and Acquisitions (M&A) and Takeovers are common occurrences in the business world as entities aim for inorganic growth and diversification. By merging, the companies hope to reap the benefits by becoming bigger and dominating and also through tax benefits, economies of scale, acquiring new technology and improved market reach and industry visibility. After gaining an insight into the M&A opportunities, ETA Motors Ltd. created a separate (M&A) team to look out for acquisition targets as the Board of Directors felt that strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

(M&A) team was assigned the task to do the investigation effort and to gather all relevant facts and information about the targets that can influence a decision to enter into a transaction or not. M&A team after their detailed due diligence recommended an unlisted company, Daisy Commercial Vehicle Company Ltd. (DCVL) in South India as a potential target to give ETA Motors Ltd. a major breakthrough on the expansion front. The acquisition offer seemed to open up possibilities for strong synergies like expansion of the product line, good R&D capabilities and new markets.

As Merger & Acquisition process is normally proceeded by formulation of strategy, carrying out due diligence, conducting valuation, ensuring all legal compliances and considering the aspects of stamp duty and other applications, K&G Associates was consulted regarding legal procedures and compliances under various acts and also regarding the valuation aspects of shares.

Both the companies deliberated and discussed together at the Board level and came out with a scheme. The scheme received approval of 96% of the shareholders of DCVL but rest 4% dissented from the scheme. K&G Associates advised that Section 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Where the scheme has been approved by the holders of not less than nine-tenths (90%) in value of the shares of the DCVL whose transfer is involved, ETA Motors Ltd., may give notice to the dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the DCVL (including dissenting shareholders), unless the Tribunal orders otherwise (i.e., that the scheme shall not be binding on all shareholders). Accordingly, the ETA Motors Ltd. shall be entitled

and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

Accordingly, the circular along with all informat on as provided in the Act was sent to the dissent ng shareholders in Form No: CAA 14 to the last known address of the dissent ng shareholders. Some of the shareholders held their shares in DEMAT form.

Based on the above facts, answer the following quest ons:

As the legal advisor of the company, guide the company regarding determinat on of the price to be paid by acquirer for purchase of equity shares of the minority shareholders of DCVL under the provisions of Rule 27 of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Rule 27 of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016 provides that for the purposes of sub-sect on (2) of sect on 236 of the Act, the registered valuer shall determine the price (hereinaf er called as of er price) to be paid by acquirer, person or group of persons referred to in sub-sect on (1) of sect on 236 of the Act for purchase of equity shares of the minority shareholders of the company, in accordance with the following rules:

(1) In case of a listed company;

- (i) The of er price shall be determined in the manner as may be specif ed by the Securit es and Exchange Board of India under the relevant regulat ons framed by it, as may be applicable; and
- (ii) The registered valuer shall also provide a valuat on report on the basis of valuat on addressed to the board of directors of the company giving just f cat on for such valuat on.

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

- (i) the of er price shall be determined af er taking into account the following factors:-
 - (a) the highest price paid by the acquirer, person or group of persons for acquisit on during last twelve months;
 - (b) the fair price of shares of the company to be determined by the registered valuer af er taking into account valuat on parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuat on of shares of such companies; and
- (ii) the registered valuer shall also provide a valuat on report on the basis of valuat on addressed to the board of directors of the company giving just f cat on for such valuat on.

Q53: What powers does Sect on 231 of the Companies Act, 2013 confer to the Tribunal regarding the enforcement of compromises or arrangements, and how is the phrase "at the t me of making such order or at any t me thereof er" interpreted?

Answer: Sect on 231 of the Companies Act, 2013 empowers the Tribunal to enforce compromises or arrangements with creditors and members as ordered under Sect on 230. If the Tribunal f nds that such an arrangement cannot be sat sfactorily implemented, with or without modif cat ons, and the company is unable to pay its debts as per the scheme, it may order the winding-up of the company. The phrase "at the t me of making such order or at any t me thereof er" in Sect on 231(1)(b) is interpreted to mean that the Tribunal can exercise its powers both before and af er the order is passed. This means the Tribunal has the authority to

act at the time the order is being made (before it is signed) and can continue to exercise these powers even after the order has been signed, providing flexibility in the enforcement process.

Q54: What are the provisions to acquire shares of shareholders dissenting from scheme or contract approved by majority.

Answer: (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary companies, the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall send a notice to the dissenting shareholder(s) of the transferor company, in **Form No.CAA.14** at the last intimated address of such shareholder for acquiring the shares of such dissenting shareholders.

(2) Where a notice under sub-section (1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

(3) Where a notice has been given by the transferee company under sub-section (1) and the Tribunal has not, on an application made by the dissenting shareholder, made an order to the contrary, the transferee company shall, on the expiry of one month from the date on which the notice has been given, or, if an application to the Tribunal by the dissenting shareholder is then pending, after that application has been disposed of, send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which, by virtue of this section, that company is entitled to acquire, and the transferor company shall—

(a) thereupon register the transferee company as the holder of those shares; and

(b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

(4) Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

(5) In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely: —

(a) in sub-section (1), for the words “the shares whose transfer is involved other than shares already held at the date of the order by, or by a nominee of, the transferee company or its subsidiaries,”, the words “the shares affected” shall be substituted; and

(b) in sub-section (3), the words “together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company” shall be omitted.

Explanation.—For the purposes of this section, “dissenting shareholder” includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

Q55: Alps (Pvt.) Ltd. is taking over an unlisted company Mountain Ltd., through the route stipulated under section 395 of the Companies Act, 1956. Alps (Pvt.) Ltd. wants to compulsorily acquire the shares of minority shareholders of Mountain Ltd. A group of minority shareholders objected to the compulsory acquisition of their shares by Alps (Pvt.) Ltd.

(i) Will their objections stand good as per the provisions under section 395 of the Companies Act, 1956 ?

(ii) Will Alps (Pvt.) Ltd. be entitled to carry forward unabsorbed depreciation and accumulated losses of Mountain Ltd ? (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Section 395 of the Companies Act contains a compulsory acquisition mode for the transferee company to acquire the shares of minority shareholders of Transferor Company. Where the scheme has been approved by the holders of not less than nine-tenths (90%) in value of the shares of the transferor company whose transfer is involved, the transferee company, may, give notice to any dissenting shareholders that the transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Court orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

Case Law 1 : Power of Acquisition of Shares of dissenting minority shareholders is not ultra vires the constitution of India. *S Viswanathan v. East India Distilleries & Sugar Factories Limited* (1957) 27 Com Cases 175; AIR 1957 Mad 341.

Case Law 2 : Where the scheme or contract has been approved by 90% of the shareholders, the order of the transferee company will be treated as prima-facie a fair one and the onus will be on the dissenting shareholders to show the contrary. *Benarasi Das Saraf v. Dalmia Dadri Cement Ltd* (1958) 28 Com cases 435 (Punj).

The objections of minority shareholders may not hold good.

Q56: Compulsory acquisition of shares of minority shareholders of unlisted companies. (3 marks each)

PAST YEAR QUESTION DECEMBER 2015

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

Where the scheme has been approved by the holders of not less than nine-tenths (90%) in value of the shares of the transferor company whose transfer is involved, the transferee company, may, give notice to any dissenting shareholders that the transferee company desires to acquire their shares. The scheme shall be binding

on all the shareholders of the transferor company (including dissenting shareholders), unless the Court Orders otherwise (i.e. that the scheme shall not be binding on all shareholders).

Q57: What does Sect on 236 of the Companies Act, 2013 deal with, and what is the procedure it prescribes for the purchase of minority shareholding?

Answer: Sect on 236 of the Companies Act, 2013, which came into force on 15th December 2016, deals with the purchase of minority shareholding. It corresponds to Sect on 395 of the Companies Act, 1956. This section provides that if a registered holder holds at least 90% of the shares of a company, they must notify the company of their intent to acquire the remaining equity shares held by minority shareholders. This can occur through mechanisms like amalgamation, share exchange, or conversion of securities. The section outlines the procedure to be followed for acquiring shares from minority shareholders, ensuring a structured process for such acquisitions.

Q58: What does Sect on 237 of the Companies Act, 2013 deal with, and what was the key ruling in the case of Moons Technologies Ltd. v. Union of India?

PAST YEAR QUESTION

Answer: Sect on 237 of the Companies Act, 2013, which came into force on 15th December 2016, empowers the Central Government to provide for the amalgamation of two or more companies in the public interest. This power is exercised through an order notified in the Official Gazette. In the case of Moons Technologies Ltd. v. Union of India, the Bombay High Court upheld the Central Government's final amalgamation order under Sect on 396 (corresponding to Sect on 237). The court ruled that the order was not in violation of the principles of natural justice and fair play. It was considered a balanced and proportionate decision made by the Central Government in the public interest.

Q59: What does Sect on 238 of the Companies Act, 2013 deal with, and what are the key requirements for the registration of schemes involving the transfer of shares?

Answer: Sect on 238 of the Companies Act, 2013, which came into force on 15th December 2016, deals with the registration of offers of schemes involving the transfer of shares. It requires that any circular containing such an offer or recommendation, along with a statement of relevant information, must be registered with the Registrar of Companies (ROC) before it is issued. Additionally, the prescribed fee for filing an appeal under the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 is Rs. 2,000. This ensures transparency and regulatory oversight in schemes or contracts related to the transfer of shares.

Q60: Elucidate the requirement of registration of offers of schemes involving transfer of shares under the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: Mode of registration of offers 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 sect on 235 of the Act, - (a) every circular containing such of er and recommendat on to the members of the transferor company by its directors to accept such of er shall be accompanied by such informat on and in such manner as may be prescribed; (b) every such of er 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 registrat on and no such circular shall be issued unt l it is so registered:

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

Sect on 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-sect on (1) of sect on 238 of the Act.

Sect on 238(3) of the Act states that the director who issues a circular which has not been presented for registrat on and registered under clause (c) of sub-sect on (1) of sect on 238 of the Act, shall be liable to a penalty of one lakh rupees.

Q61: What does Sect on 239 of the Companies Act, 2013 deal with regarding the preservat on of books and papers of amalgamated companies?

Answer: **Sect on 239** of the Companies Act, 2013, which came into force on 15th December 2016 and corresponds to Sect on 396A of the Companies Act, 1956, deals with the preservat on of books and papers of amalgamated companies. It mandates that the books and papers of a company that has been amalgamated with, or whose shares have been acquired by, another company cannot be disposed of without the prior permission of the Central Government.

Before grant ng such permission, the Central Government may appoint a person to examine the books and papers to determine whether they contain evidence of any of ence related to the promot on, format on, management of the af airs of the transferor company, or its amalgamat on or share acquisit on. This provision ensures accountability and facilitates the invest gat on of any potent al irregularit es.

Q62: “There have been occasions when shareholders holding miniscule shareholdings have made frivolous object ons against the restructuring scheme, just with the object ve of stalling or deferring the implementat on of the scheme. The courts have, on a number of occasions, overruled their object ons.”
Comment on the statement with relevant case law. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: A scheme of merger and amalgamat on is approved by majority shareholders, in a meet ng, duly convened and conducted under the supervision of the Tribunal. The Tribunal shall sanct on the scheme only if the same is approved by the required shareholders’ majority.

Every shareholder has the freedom to voice his opinion in the meet ng or through an af davit submit ed to the Tribunal. Dissent ng shareholders represent those members who do not agree with the resolut on, i.e., they vote against the resolut on. Such dissent ng members are given opportunity to express their opinions during the decision-making process.

However, there have been some occasions where shareholders holding a small number of shares, have made frivolous objections against the scheme, just to defer the implementation of scheme.

On various such instances, the Courts have overruled their objections, but companies had to bear the consequences in the form of time and cost over-runs.

In 2003, Parke-Davis India Ltd. and Pfizer Ltd. were considering implementation of a scheme of merger. The minority shareholders of Parke-Davis India Ltd. objected to the scheme on the grounds that approval from requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed a petition before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme. Later, the dissenting shareholders filed a Special Leave Petition with the Supreme Court. Finally, the Supreme Court dismissed the petition filed by the shareholders. Parke-Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

«Similarly, in the case of the merger of Tomco with HLL, the minority shareholders put forward an argument that, as a result of the amalgamation, a large share of the market would be captured by HLL.

However, the Court turned down the argument and observed that there was nothing unlawful or illegal about it.

To curb such practice of frivolous objections, Section 230(4) of the Companies Act, 2013 provides that in a scheme of arrangement any person or persons holding at least 10% of the shareholding or 5% of the total outstanding debt can put objection to the proposed scheme.

Q63: “Courts look into fair and reasonableness of any scheme of Compromise or arrangement made in good faith and mere complaint of minority Oppression does not suffice”. Justify the statement supported by judicial pronouncements. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: A scheme of compromise or arrangement, that leads to either amalgamation, merger or demerger needs to be fair and reasonable and made in good faith, is fit for sanction by the Tribunal.

It was held in the case of *Sussex Brick Co Ltd* that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it. In order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence.

It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies with the basic requirements to the extent of 100 per cent. It is consistent view of the Courts that no scheme can be said to be fool proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal petition for sanction of the scheme.

In the case of *Re Kami Cement & Industrial Co Ltd*, it was held that if the Court is satisfied of the scheme is fair and reasonable and in the interest of the general body of shareholders, there could be no scope for any provision favouring dissenters. For such a provision is not a sine qua non to sanctioning a fair and reasonable scheme, unless any special case is made out which warrants the exercise of court's discretion in favour of the dissenters.

Q64: What are the key principles of minority protection in corporate law, and under what circumstances can minority shareholders file a suit despite the majority rule?

OR

Could you explain with certain citations indicating exceptions to the Majority Rule Held in *Foss Vs Harbot le (1843) 2 Hare 461 (Ch.)*?

PAST YEAR QUESTION AUGUST 2021

Answer: Minority protection in corporate law is guided by the majority rule, where actions to redress wrongs or recover damages are generally brought by the company itself, as established in ***Foss v. Harbot le (1843)***. However, there are exceptions allowing minority shareholders to sue in specific circumstances:

1. **Ultra Vires Acts:** If the majority controls the wrongdoers, minority shareholders can sue if the acts are fraudulent or beyond the company's powers, without needing the majority's consent (e.g., ***Dhaneswari Cotton Mills Ltd. v. Nilkamal Chakravathy, 1937***).
2. **Fraud on Minority:** A suit can be pursued by minority shareholders even if the majority has approved the transaction, especially in cases of fraud (***Cook v. Deeks, 1916***).
3. **Wrongdoer in Control:** If the majority are the wrongdoers and misappropriate company property, individual shareholders have the right to file a suit (***Menier v. Hooper's Telegraph Works, 1874***).
4. **Policy Against Minority Litigation:** A minority in control cannot pursue litigation against the majority's interest, as held in ***Life Insurance Corp of India v. Escorts Ltd, 1986***.

These principles ensure that minority shareholders have recourse in cases of abuse of power or fraudulent activities by the majority.

Alternative Answer,

No need to take the views of majority if there is allegation of ultra vires acts by the Management held in *Dhaneswari Cotton Mills Ltd. v. Nilkamal Chakravathy [1937] 7 Comp. Cas. 417 (Cal)*.

Similarly, the allegation of fraud is an exception as was held in *Cook v. Deeks (1916) 1AC 554 (PC)*. Where majority is wrongdoer and pocket property of company, an individual shareholder has right to file a suit. *Menier v. Hooper's Telegraph Works (1874) 9 Ch. App. 350 (CA)*.

A minority of shareholder in saddle of power cannot be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. *Life Insurance Corp of India v. Escorts Ltd (1986) 59 Comp Cas. 548 (SC)*.

Nevertheless, the principle of Majority Rule prevails normally as held in *Foss Vs. Harbot le [1843] 2 Hare 461 (Ch.)* until and unless proved beyond doubt the exceptions.

Q65: What constitutes oppression under corporate law, and under what circumstances can minority shareholders initiate proceedings under Section 397?

Answer: Oppression in corporate law refers to unfair treatment of minority shareholders by the majority in the management of a company's affairs. The following key points outline the concept:

1. **Lack of Confidence Is Not Enough:** Mere lack of confidence between majority and minority shareholders is insufficient unless it stems from oppression by the majority (***Shant Prasad Jain v. Kainga Tubes Ltd., 1965***).
2. **Series of Illegal Acts:** A series of illegal acts can collectively be considered oppressive if they form part of the same transaction (***Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd., 1981***).
3. **Extraordinary Situations for Section 397 Proceedings:** Proceedings under Section 397 are maintainable only when an extraordinary situation is presented, requiring clear and precise evidence of the alleged

illegality in the majority's conduct. This is necessary due to the wide powers of the court in managing company affairs (**Sangramsingh P. Gaekwad v. Shantadevi P. Gaekwad, 2005**).

In summary, oppression involves unfair treatment or abuse of power by the majority, and legal action can be taken when this abuse significantly harms the minority shareholders' interests.

Q66: What are the various forms filed in the process of merger/amalgamation?

Answer: Various forms filed in the process of merger/amalgamation are appended below:

Form No.	Relevant Section	Rule*	Particulars
CAA 1	Section 230(2) (c)(i)	Rule 4	Creditor's Responsibility Statement
CAA 2	Section 230 (3)	Rule 6 and 7	Notice and Advertisement of notice of the meeting of creditors or members
CAA 3	Section 230 (5)	Rule 8	Notice to Central Government and other Regulatory Authorities
CAA 4		Rule 13(2) and Rule 14	Report of result of meeting by Chairperson
CAA 5	Section 230	Rule 15(1)	Petition to sanction compromise or arrangement
CAA 6	Section 230 (7)	Rule 17(3)	Order on petition
CAA 7	Section 232	Rule 20	Order under section 232
CAA 8	Section 232 (7)	Rule 21	Statement to be filed with Registrar of Companies
CAA 9	Section 233(1)	Rule 25(1)	Notice of the scheme inviting objections or suggestions
CAA 10	Section 233(1)(c)	Rule 25(2)	Declaration of solvency
CAA 11	Section 233 (2)	Rule 25(4)	Notice of approval of the scheme of merger
CAA 12	Section 233 (5)	Rule 25(5)	Confirmation order of scheme of merger or amalgamation
CAA 13	Section 233(5)(6)	Rule 25(6)	Application by the Central Government to the Tribunal
CAA 14	Section 235(1)	Rule 26	Notice to dissenting shareholders
CAA 15	Section 238(1)	Rule 28	Information to be furnished along with circular in relation to any scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company
CAA 16	Section 230	Rule 25A(4)	Declaration on compromise or arrangement or merger or demerger between an Indian company and a company or body incorporated which has been incorporated in a country which shares Land border with India.

Q67: ABC Ltd., a company registered under the Companies Act, 2013, providing Information Technology & allied services, wants to merge with its USA based wholly owned holding company, Silicon Valley Inc.

Managing Director of ABC Ltd. seeks your advice on the matter relating to the recent amendments etc. if any. (5 Marks)

PAST YEAR QUESTION JUNE 2025

Answer: In exercise of the powers conferred under section 469 read with sections 233 and 234 of the Companies Act, 2013, the Central Government has notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2024 which shall come into effect from 17th day of September, 2024.

In the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, in rule 25A, after sub-rule (4), the following sub-rule shall be inserted, namely:

Where the transferor foreign company incorporated outside India being a holding company and the transferee Indian company being a wholly owned subsidiary company incorporated in India, enter into merger or amalgamation, –

- (i) both the companies shall obtain the prior approval of the Reserve Bank of India;
- (ii) the transferee Indian company shall comply with the provisions of section 233;
- (iii) the application shall be made by the transferee Indian company to the Central Government under section 233 of the Act and provisions of rule 25 shall apply to such application; and
- (iv) the declaration referred to in sub-rule (4) shall be made at the stage of making application under section 233 of the Act.”

The Ministry of Corporate Affairs (MCA) has introduced a sub-rule to fast-track the approval process for the merger of a startup incorporated outside India into its wholly owned Indian subsidiary. The foreign holding company and its wholly owned Indian subsidiary will only need to obtain approval from the Reserve Bank of India (RBI) for such mergers or amalgamations, eliminating the need for clearance from the National Company Law Tribunal (NCLT).

Q68: Constitution of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) has provided various new opportunities for Practising Company Secretaries (PCS) which were not available earlier. Briefly enumerate the scope of services for PCS under NCLT and NCLAT regime. (3 marks)

PAST YEAR QUESTION JUNE 2022

OR

NCLT and NCLAT have opened a plethora of opportunities for Company Secretary in practice. Comment. (3 marks)

PAST YEAR QUESTION JUNE 2024

Answer: With establishment of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) opportunities for Company Secretaries has increased. Under section 432 of the Companies Act, 2013, Company Secretaries have been authorized to appear before the Tribunal/ Appellate Tribunal. Before setting up of the Tribunal, the matters dealt by the Tribunal were dealt by the High Court and so the appearances were taken by only advocates.

Areas of increased scope are as under:

1. Merger/Amalgamation/Compromise - A whole new area of practice opened up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and arrangements. The role of CS starts from the conceptual to implementation level.

Company Secretaries in Practice will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post-merger formalities.

2. Revival of Companies - Where a Registrar of Companies (ROC) has struck off the name of a company u/s 248, a practicing company secretary may assist in revival of such company.

3. Winding up - National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore, Practicing Company Secretaries may represent the winding-up case before the Tribunal. Now Practicing Company Secretaries have been permitted to act as Liquidator in case of winding-up by the Tribunal.

4. Reduction of Capital-As per Section 66 of the Companies Act, 2013, subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital can reduce its share capital. Practicing Company Secretaries will be able to represent cases of reduction of capital before the Tribunal.

5. Oppression and mismanagement- Sections 241 and 244 of the Companies Act, 2013 deals with the cases of Oppression and Mismanagement. Section 241 deals with making an application to Tribunal for relief in cases of Oppression, etc. and section 244 describes the Right to apply under section 241.

6. Insolvency and Bankruptcy cases- Insolvency practice is a new field of activity for professionals while improving the quality of intervention at all levels during rehabilitation/winding-up liquidation proceedings. Law has recognized the Insolvency Practitioners as Administrators, Liquidators, Turn around Specialists, Valuers, etc. Greater responsibility and authority have been given to Insolvency Practitioners under the supervision of the Tribunal to maximize resource use and application of skills.

7. Company Secretary in Practice as Member of NCLT- A Practicing Company Secretary can be appointed as a Technical Member of NCLT, provided he has 15 years working experience as secretary in whole-time practice.

Q69: Briefly state the effect of non-receipt of approvals or conditions enumerated in the scheme of amalgamation. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: In the event of any approvals or conditions enumerated in the Scheme not being obtained or complied with, or for any other reason, the Scheme cannot be implemented, the Board of Directors of the Transferee Company and the Transferor company shall mutually waive such conditions as they consider appropriate to give effect, as far as possible, to this Scheme and failing such mutual agreement or in case the Scheme not being sanctioned by the Hon'ble NCLT, the Scheme shall become null and void and each party shall bear and pay their respective costs, charges and expenses in connection with the Scheme.

Q70: Success of a merger depends upon various factors. What are the factors relevant in evaluating the effectiveness of a merger? (5 marks)

PAST YEAR QUESTION DECEMBER 2015

OR

Approval of the National Company Law Tribunal in relation to a scheme of arrangement involving merger is a conclusive proof that the merger has become successful and will yield desired results. Examine the statement. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Approval of National Company Law Tribunal (NCLT) is a pre requisite for schemes of Mergers. However, a Merger cannot be said to be completely successful only upon approval of the scheme of arrangement by NCLT. The factors which are required to measure the success of any merger are briefly discussed below:

a) The earning performance of the merged company can be measured by return on total assets and return on net worth. It has been found that the probability of success or failure in economic benefits was very high among concentric mergers.

Simple vertical and horizontal mergers were found successful whereas the performance of concentric mergers was in between these two extremes i.e. failure and success.

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

c) The capitalisation of the merged company determines its success or failure.

Similarly, dividend rate and pay-outs also determines its success or failure.

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

e) Comparison of the performance of the merged company with the performance of similar sized company in the same business in respect of (i) sales, (ii) assets, (iii) net profit, (iv) earnings per share and (v) market price of share. In general, growth in profit, dividend pay outs, company's history, and increase in size provides base for future growth and are also the factors which help in determining the success or failure of a merged company.

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

g) In valuing the whole enterprise, one must seek financial data of comparable companies in order to determine ratios that can be used to give an indication of the company position. The data is analyzed to estimate reasonable future earnings for the subject company. The following information must be made available and analyzed for post-merger valuation:

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

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

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

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

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

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

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

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

Accordingly, the statement is does not appear to be correct.

Q71: Discuss the provision relating to appeal by a person aggrieved by the orders of National Company Law Tribunal. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

OR

Explain the provisions relating to appeal from Orders of Tribunal as per section 421 of the Companies Act, 2013. (3 marks)

PAST YEAR QUESTION DECEMBER 2024 OLD

Answer: 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.

Q72: Explain the powers and functions of registrar under Rule 16 of National Company Law Appellate Tribunal Rules, 2016. (3 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Powers and functions of the Registrar (Rule 16) of NCLAT Rules, 2016

The Registrar shall have the following powers and functions, namely:-

(a) registration of appeals, petitions and applications:

(b) receive applications for amendment of appeal or the petition or application or subsequent proceedings:

- (c) receive applications for fresh summons or notices and regarding services thereof.
- (d) receive applications for fresh summons or notices and for short date summons and notices;
- (e) receive applications for substituted service of summons or notices;
- (f) receive applications for seeking orders concerning the admission and inspection of documents;
- (g) transmission of a direct order to the civil court as directed by Appellate Tribunal with the prescribed certificate for execution. etc; and
- (h) such other incidental or matters as the Chairperson may direct from time to time.

Q73: Woodland Telecommunications Ltd., listed with National Stock Exchange, is willing to acquire the business of Iron Finance Ltd., a Non-banking Financial Company listed with BSE through a scheme of arrangement in terms of Companies Act, 2013. Woodland Telecommunications Ltd. has an outstanding loan of Rs. 2,000 crore from ICICI Bank. Combined assets post merger would be Rs.10,000 crore. Suggest the list of approvals required for getting the scheme of merger considered by the Tribunal. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) For a scheme of compromise or arrangement to be approved by the Tribunal need to be accompanied by the approvals obtained from different Regulatory Authorities in terms of the prescribed rules.

(ii) Approval by the Board of Directors, shareholders different classes so also creditors of different classes in separate meetings.

(iii) If the shares in the company whether transferor or transferee are listed any stock exchange, observation letter from the concerned Stock Exchange.

(iv) Approvals from Competition Commission of India since there exceed threshold limits in the given case.

(v) Regulators' approvals specific to the business of the concerned companies may also be required, if the circumstances demand.

Q74: ABC and Co. (P) Ltd. and XYZ Ltd. have finalized a scheme of arrangement. The registered offices of both the companies are located in Delhi. A joint-petition is proposed to be filed before the Tribunal for sanction of the scheme.

Give your brief opinion in the light of the provisions of the Companies Act, 2013 and the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 whether such a joint-petition can be filed? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: According to Rule 3(2) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, where more than one company is involved in a scheme in relation to which an application under sub-rule (1) is being filed, such application may, at the discretion of such companies, be filed as a joint-application. Where more than one company is involved in a scheme, such application may, at the discretion of such companies, be filed as a joint-application. In case, the registered office of the companies involved is in different states, there will be two Tribunals having the jurisdiction over those. Both the companies shall have to file separate petition with the respective Tribunals. However, as a matter of practice and smoother the process, first registered office of companies may be shifted as per section 12 of the Companies Act, 2013 to a single jurisdiction.

In case of merger application of Dhanrashi Dealcomm Private Limited, Subhshiv Commotrade Private Limited, Touchwin Dealer Private Limited, Trideva Vinimay Private Limited, Dhanganga Commotrade Private Limited, Quality Retailers Private Limited, being the Applicant No. 2, 3, 4, 5, 6, 7 ("Transferor Companies") with Karni Plaza Makers Private Limited transferee company joint application was admitted by NCLT. The same saves lot of time/cost and provide convenience. Similarly in case of M/s Sun Pharma Medisales Pvt. Ltd. & Others (Joint Application) NCLT Bench: Ahmedabad allowed joint petition.

Q75: X Ltd. acquired Y Ltd. under the scheme of merger sanctioned by the Tribunal, Y Ltd. ceases to exist. Consideration is discharged by way of issue of equity shares of X Ltd. to the shareholders of Y Ltd. in the ratio of 1 : 1 X Ltd. already held 5% in Y Ltd. as an investment prior to the effective date of merger i.e., 1st October 2022. 86% of the shareholders (by face value) of Y Ltd. excluding X Ltd. agreed to become shareholders of X Ltd. Examine critically whether the above case will qualify to be classified as merger as per AS-14. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: An amalgamation should be considered to be an amalgamation in the nature of merger when Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

Even if we exclude the shares of Y Ltd. already held by X Ltd., consequent to the allotment of shares pursuant to merger, 90% criteria for amalgamation to be classified as merger is being met. Since 90% of the remaining shares i.e., 95% comes out to 85.5% shareholders. Thus, the threshold is being met. Hence the above case will qualify as merger.

Q76: What are the key benefits of using a trust structure for succession planning in family-owned businesses?

Answer: The following are some of the key benefits of succession planning under a trust structure for continuing business legacy and smooth transition of the business from the hands of one generation to another:

Continuity planning: Consolidation of ownership and control under a trust allows the founder/owner and the family to set a clear vision and ensure commitment from the next generation of family members.

This results in continued planning from one generation to another, resulting in harmony between goals, objectives, targets, etc., between generations, thereby reducing conflicting objectives/interests between family members.

Generational change: Family-owned firms can struggle to keep pace with global mega trends like demographic shifts and digital technology without the involvement of the new generation. At the same time, the current generation may not always have confidence in the ability of the new generation to take over the business, and may also have limitations relating to their ideas of change and growth. This calls for professionalization of the family firm by introducing external talent, leading to better governance and a more rigorous decision-making process in areas like finance, wealth management and personal expenses.

Conflict management: A trust would lay out specific protocols governing decision making and, in the case of any difference of opinion or deadlock, the process to manage the conflict. This ensures that the business does not suffer even during a phase where family members are not aligned.

Security of family/personal assets: A trust structure can also facilitate ring-fencing of family assets, protecting them from a creditor's claims as well as providing safeguards against claims from family members upon disability, divorce/ partition, etc.

Pooling and simplicity: A trust also serves as a means for pooling of assets and funds under a common control. This can provide heirs the benefit of property without loss of control and helps to avoid the probate or court process in the event of death. It can also simplify asset holding for legal heirs in multiple jurisdictions.

Q77: Why is a two-tier trust structure recommended for family-owned businesses with multiple family constituents?

Answer: A two-tier trust structure is recommended for family-owned businesses with multiple family constituents because it enables consolidation of family wealth and control under a master trust, ensures inclusive governance and consensus among family members, manages conflicts effectively, prevents unilateral decisions on common assets, and allows customization through discretionary sub-trusts to address individual family needs.

Q78: "A Scheme, even approved by majority, can be rejected by Tribunal but such a Scheme must be held to be unfair to the meanest intelligence." Analyse the statement citing important judicial pronouncements. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

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

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

Q79: Narrate the conditions precedent and subsequent to Tribunal's order sanctioning a scheme of arrangement. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: The Tribunal shall not sanction a scheme of arrangement for amalgamation, merger etc. of a company which is being wound up with any other company or companies unless it has received a report from the Registrar of Companies to the effect that the affairs of the company have not been conducted in a manner prejudicial to public interest.

When an order has been passed by the Tribunal for dissolution of the transferor company, the transferor company is required to deliver to the Registrar a certified copy of the order for registration within thirty days and the order takes effect from the date on which it is so delivered.

Copies of the order of Tribunal are required to be affixed to all copies of Memorandum and Articles of Association of the transferee company issued after certified copy has been filed as aforesaid.

The transferor company or companies will continue in existence till such time the Tribunal passes an order for dissolution without winding up, prior to which it must receive a report from the official liquidator to the effect that the affairs of the company have not been conducted in a manner prejudicial to the interest of the members or to public interest.

The practice in India is that in certain Tribunal the Order on amalgamation is passed only after the Report of the Official Liquidator is received, whereas in certain cases the order of dissolution is passed after which amalgamation is approved by the concerned Tribunal.

The law requires approval of the shareholders both in majority in number and three fourth in value, it has to be ensured that adequate number of shareholders, whether in person or by proxy attend the meeting so that the resolution can be passed by the requisite majority.

Q80: Enumerate the common mistakes made by the corporate leading to pitfalls in mergers and acquisition? (5 marks)

PAST YEAR QUESTION JUNE 2017

OR

Corporates encounter pitfalls in post-merger statutory approval due to certain common errors, that need to be taken care of. Try to point out certain errors that need to be taken care of. (3 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Corporate make following common mistakes leading to pitfalls in mergers and acquisitions:

- (i) Ego problems on both sides – buyer and seller – crop up very frequently and resulting clashes make bad situations worse. Trying to have two chiefs is a formula for disaster.
- (ii) Attempt to hasten the integration between both the parties' raises the likelihood of making serious errors. Sudden and radical changes such as relocating the company's entire production operations should be carefully considered before implementation.
- (iii) Many buyers assert their ownership by moving quickly to convert the acquired company. This does not always work in the right direction and spirit.
- (iv) A cautious approach should be applied to competitor end runs. While the company is focussed on integration, it furnishes an ideal time for competitors to make a run on the market.
- (v) Unless the acquired business is in the exact same field, different dynamics need to apply for smooth operation and integration.

(vi) One of the most common and damaging mistake is to lay off crucial employees from the acquired company. This is a very complicated, delicate matter and even the seller might not have an accurate idea as job titles can be misleading from the functions that are entwined with them.

Q81: As a Company Secretary, one should advise the Board regarding compliances under various legislations. Referring the cases of mergers or amalgamations, state the circumstances that warrant compliances under any or all of such legislations. (5 marks).

PAST YEAR QUESTION DECEMBER 2017

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

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

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

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

Applicability of Indian Stamp Act depends on the State governed legislation and not functions.

Q82: Is it possible for a shareholder to seek an amendment to exchange ratio embodied in the scheme while considering the resolution, put forth for approval. Support your answer with decided case law(s). (3 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: A shareholder attending the meeting either can assent or dissent the resolution but cannot suggest any alteration in the scheme. It was held by Mumbai High Court in the matter of Dinesh Veajlal Lakhani v. Parke Davis (India) Ltd [2005] 66 CLA 91 (Bom) that the swap ratio forms integral part of scheme of amalgamation and the procedural provisions are embodied in the relevant rules. The exchange ratio is a matter of expert determination.

Since it constitutes the foundation of the scheme of amalgamation any amendment to it will nullify that basis. Thus, the shareholder has no other right beyond assenting or dissenting the resolution put for voting.

CHAPTER- 4 AS PER ICSI MODULE

PROCESS OF M&A TRANSACTIONS

Q1: What are the Prerequisites of Merger and Acquisition

Answer: Prerequisites of Merger and Acquisition

1. **Due Diligence:** It refers to the investigation effort made to gather all relevant facts and information that can influence a decision to enter into a transaction or not. Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. For instance, while purchasing a food item, a buyer must act with due diligence by checking the expiry date, the price, the packaging condition, etc. before paying for the product. It is not the duty of the seller to ask every buyer every time to check the necessary details. M&A due diligence helps to avoid legal hassles due to insufficient knowledge of important information.
2. **Business Valuation:** Business valuation or assessment is the first step of merger and acquisition. This step includes examination and evaluation of both the present and future market value of the target company. A thorough research is done on the history of the company with regards to capital gains, organizational structure, market share, distribution channel, corporate culture, specific business strengths, and credibility in the market. There are many other aspects that should be considered to ensure if a proposed company is right or not for a successful merger.
3. **Planning Exit:** When a company decides to sell its operations, it has to undergo the stage of exit planning. The company has to take a firm decision as to when and how to make the exit in an organized and profitable manner. In the process the management has to evaluate all financial and other business issues like taking a decision of full sale or partial sale along with evaluation on various options of reinvestments.
4. **Structuring Business Deal:** After finalizing the merger and the exit plans, the new entity or the take-over company or target company has to take initiatives for marketing and creating innovative strategies to enhance business and its credibility. The entire phase emphasizes on structuring of the business deal.
5. **Stage of Integration:** This stage includes both the company coming together with their own parameters. It includes the entire process of preparing the document, signing the agreement, and negotiating the deal. It also defines the parameters of the future relationship between the two.

Q2: Define Corporate Culture. (3 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: Culture is a complex system with a multitude of interrelated processes and mechanisms based on which the organization functions. It includes vision/mission of the organization, workflow process, communication mechanism, formal procedures, informal practices, strategy setting mechanism and so on. Corporate Culture is embedded deeply in the organization and in the behaviour of the people there. It is not necessarily equal to the image the company gives itself in brochures and on the website. Therefore, it is difficult to determine an organization's culture from the outside.

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

- Style of tackling problems
- Method or style of communication
- Adaptability of employees
- Organization commitment to strategies and ultimately to vision and mission etc.
- Style of organizational functioning

- Adaptability of people to changes
- The way people interact with each other
- The way the organization interacts with stakeholders
- Level of commitment

Q3: What are the key highlights of Companies Act, 2013 impact on merger and amalgamation.

Answer: Some of the key highlights of Companies Act, 2013 impact on merger and amalgamation

- Creation of treasury shares i.e. holding the share in its own name or in the name of the trust, whether on its own behalf or on behalf of any of its subsidiary or associated company is no longer permissible.
- Objections to the scheme can be raised only by shareholders holding at least 10% stake or creditors holding at least 5% of total outstanding debts as per the latest audited financial statements thereby avoiding unnecessary delays.
- Regulators to make representation within 30 days regarding scheme, else deemed 'no objections' or no representation on the proposal of such merger/amalgamation.
- No approval of Tribunal is required in case of merger between holding company and its 100% subsidiary or merger between small companies (based on prescribed capital/turnover).
- Merger of Indian company with foreign company located in certain jurisdictions is allowed subject to RBI Regulations/FDI Guidelines.
- Shareholders would have an option to vote for the scheme through postal ballot, e-voting in addition to voting physically at a meeting.

Q4: Define due diligence.

Answer: Due diligence is an investigation of a business or person prior to signing a contract, or an act with a standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations.

Q5: "Due Diligence starts much before the process of restructuring and helps in better negotiation of deals, to handle taxation and stamp duty aspects in better manner, to minimise and resolve the human and cultural issues that may arise out of mergers/ amalgamation etc". Discuss the statement in view of the fact that Due Diligence is considered as 'background check'. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Due diligence is the process by which confidential, legal, financial and other material information is exchanged, reviewed and appraised by the parties to a business transaction, which is conducted prior to the transaction. It is the analysis and risk assessment of an impending business transaction. It is the careful and methodological investigation of a business or persons, or the performance of an act with a certain standard of care to ensure that information is accurate and to uncover information that may affect the outcome of the transaction. It is basically a "background check" to make sure that the parties to the transaction have the required information that is needed to proceed with the transaction.

Due diligence report should provide information and insight on aspects such as the risks of a transaction, the value at which a transaction should be undertaken, the warranties and indemnities that need to be obtained from the vendor, etc.

Q6: Due Diligence is an important exercise for any potential investment proposal. Discuss the importance of due diligence for a proposed Merger. Also enumerate the types of due diligence which may be taken for such a proposal. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: The due diligence is an investigation or audit of a potential investment. It seeks to confirm all material facts in regard to a sale. It is a way of preventing unnecessary harm/hassles to either party involved in a transaction. It refers to the investigation effort made to gather all relevant facts and information that can influence a decision to enter into a transaction or not.

Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. The due diligence exercise is a crucial task.

In this process the financial and non-financial information of the target company is to be collected and analysed in order to derive profitability after acquiring the target company.

Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. Due diligence is integral to business and the same is exercised in all transactions whether a simple over-the-counter transaction or a complicated merger and acquisition transaction. While acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, product and brand involved, position in the debt market, status of legal and statutory compliances, past performance, etc. It is also essential to study the previous financial reports to analyse the company's performance, to check the company background, its promoters, general reputation, and return to the existing shareholders.

Different type of Due-Diligence which can be undertaken for any proposed merger are as follows:

1. Financial Due Diligence: The target company's financial performance is one of the most critical elements one must review.
2. Legal Due Diligence: Litigation is one of the most expensive risks a company can undertake. This makes the legal aspects one of the most critical types of due diligence in mergers and acquisitions. It helps to determine the risk level for these and other legal factors.
3. Operational Due Diligence: Operational due diligence examines various aspects of production and workflow.
4. Human Resources Due Diligence: HR due diligence examines employment agreements, compensation packages, labor relations, and salary structure.
5. Intellectual Property Due Diligence: IP due diligence is crucial if the target company has unique products or services that give it a competitive advantage.
6. Environmental Due Diligence: It helps to assess the target company's environmental impact and sustainability practices along with compliance with environmental laws and regulations.
7. IT Environmental Due Diligence: IT environmental due diligence is crucial for any company in today's digital world.

Q7: ETA Motors Ltd. is an Indian automotive company, headquartered and registered in Delhi, incorporated on 12th May, 2002. The company manufactures vans and buses. The technical experts of the company have an opinion that four critical technological disruptions – mobility, autonomous driving, electric vehicles, and connected technologies – are poised to revolutionize the automotive landscape. The Company besides its plan to increase its market share by 20% to 35% by 2025-26, wants to enter the global market through joint ventures or technology transfers. The company decided to chalk out an expansion strategy for the same. K&G Associates, the official and legal advisors to the Company were asked to deliberate on the expansion strategies. In their presentation to the Board of directors of ETA Motors Ltd., they explained that Mergers and Acquisitions (M&A) and Takeovers are common occurrences in the business world as enterprises aim for inorganic growth and diversification. By merging, the companies hope to reap the benefits by becoming bigger and dominating and also through tax benefits, economies of scale, acquiring new technology and improved market reach and industry visibility. After gaining an insight into the M&A opportunities, ETA Motors Ltd. created a separate (M&A) team to look out for acquisition targets as the Board of Directors felt that strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

(M&A) team was assigned the task to do the investigating effort and to gather all relevant facts and information about the targets that can influence a decision to enter into a transaction or not. M&A team after their detailed due diligence recommended an unlisted company, Daisy Commercial Vehicle Company Ltd. (DCVL) in South India as a potential target to give ETA Motors Ltd. a major breakthrough on the expansion front. The acquisition offer seemed to open up possibilities for strong synergies like expansion of the product line, good R&D capabilities and new markets.

As Merger & Acquisition process is normally proceeded by formulation of strategy, carrying out due diligence, conducting valuation, ensuring all legal compliances and considering the aspects of stamp duty and other applications, K&G Associates was consulted regarding legal procedures and compliances under various acts and also regarding the valuation aspects of shares.

Both the companies deliberated and discussed together at the Board level and came out with a scheme. The scheme received approval of 96% of the shareholders of DCVL but rest 4% dissented from the scheme. K&G Associates advised that Sect on 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Where the scheme has been approved by the holders of not less than nine tenths (90%) in value of the shares of the DCVL whose transfer is involved, ETA Motors Ltd., may give notice to the dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the DCVL (including dissenting shareholders), unless the Tribunal orders otherwise (i.e., that the scheme shall not be binding on all shareholders). Accordingly, the ETA Motors Ltd. shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

Accordingly, the circular along with all information as provided in the Act was sent to the dissenting shareholders in Form No: CAA 14 to the last known address of the dissenting shareholders. Some of the shareholders held their shares in DEMAT form.

Based on the above facts, answer the following questions:

Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. Explain the various types of Due diligence which could be conducted by M&A team while finalising a potential company for takeover. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The different types of Due Diligence to be conducted by M & A team may be as follows:

Legal Due Diligence: Legal Due Diligence is used to ensure that there are no legal issues in buying a business or investing in it. In this, the potential purchaser will review the important legal documents of the target firm such as employment contracts, board meeting minutes, Articles and Memorandum of Association and Patents and Copyrights or any other property related documents compliance status of the applicable laws etc.

Tax Due Diligence: This is aimed at ensuring that there are no past tax liabilities in the seller firm that might have materialized due to mistakes or deception and could hold the acquirer liable for it.

IP Due Diligence: IP due diligence is focused on establishing what rights the company may have in various intellectual property and where it might rely on the intellectual property of another entity. Typical areas of interest are Patent, Copyright and Trademark filings; descriptions of the company's IP protection processes; licensing agreements, [IP Assignment document, etc.

Operational Due Diligence: Operational due diligence (ODD) is the process by which a potential purchaser reviews the operational aspects of a target company during mergers and acquisitions. The ODD review looks at the main operations of the target company and attempts to confirm (or not) that the business plan that has been provided is achievable with the existing operational facilities plus the capital expenditure that is outlined in the business plan.

Commercial Due Diligence: This aims at understanding the market the target business is operating in. This looks at the current market status and the forecast of the market growth in future and the target's position in the market with relation to its competitors. This also involves interaction with the significant customers of the business to understand their opinion about the business.

Information Technology (IT) Due Diligence: This aims at identifying if there are any IT issues in the target business. This involves into matters such as scalability of systems, robustness of the processes, availability of ERP, IT base and infrastructure, capacity of server, the level of documentation of processes, compliance with the legislation and ability to integrate various systems.

HR Due Diligence: This aims at understanding the impact of human capital on the proposed deal. This involves review of number and type of manpower, skills, employment records, compensation schemes, HR processes, ongoing HR litigations, effectiveness of the sales force and cultural factors.

Q8: Write the short notes on Need of Legal Due Diligence. (3 marks)

PAST YEAR QUESTION DECEMBER 2017

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

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

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

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

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

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

Q9: Distinguish between the following :

(i) 'Operational due diligence' and 'strategic due diligence'.

(ii) 'Financial due diligence' and 'tax due diligence'. (3 marks)

PAST YEAR QUESTION JUNE 2016

Answer(i): Operational due diligence

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

Strategic due diligence

Strategic due diligence tests the strategic rationale behind a proposed transaction and analyses whether the deal is commercially viable, whether the targeted value would be realized. It considers factors such as value creation opportunities, Competitive Position, Critical Capabilities.

Answer (ii) Financial due diligence provides peace of mind to both corporate and financial buyers, by analysing and validating all the financial, commercial, operational and strategic assumptions being made.

Financial Due Diligence includes review of accounting policies, review of internal audit procedures, quality and sustainability of earnings and cash flow, condition and value of assets, potential liabilities, tax implications

of deal structures, examination of information systems to establish the reliability of financial information, internal control systems etc.

The tax due diligence comprises an analysis of:

- tax compliance
- tax contingencies and aggressive positions
- transfer pricing
- identification of risk areas
- tax planning and opportunities.

Q10: Define the Cultural Due Diligence. How would you address the cultural difference during the merger? (4 marks)

PAST YEAR QUESTION DECEMBER 2017

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

How to address Cultural Differences during merger?

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

The following mechanism may help in resolving cultural differences:

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

Q11: Due diligence is an investigation or audit of a potential investment. It seeks to confirm all material facts in regard to a sale. It is a way of preventing unnecessary harm/ hassles to either party involved in a transaction." Explain the statement. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

Due diligence is an investigation of a business or person prior to signing a contract, or an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations.

A common example of due diligence in various industries is the process through which a potential acquirer/investor evaluates a target company including its assets for an acquisition.

The theory behind due diligence holds that performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available to decision makers and by ensuring that this information is systematically used to deliberate in a reflexive manner on the decision at hand and all its costs, benefits, and risks.

Due diligence is integral to business. It is exercised in a simple over-the-counter transaction or a complicated merger and acquisition transaction. For instance, while acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, product and brand involved, position in the debt market, status of legal and statutory compliances, past performance, etc. It is also essential to study the previous financial reports to analyse the company's performance, to check the company background, its promoters, general reputation, and return to the existing shareholders.

Q12: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Industry?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to Industry aspect, I would consider the following matters: -

- Competition
- Growth Rate
- Future projects
- Barriers to entry / exit
- Mergers and acquisitions in industry and results
- Brand evaluation.

Q13: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Management? (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to managerial aspect, I would consider the following matters: -

1. Company's HR Policies
2. Assessment of Senior Level Management, resumes of key employees their qualifications and work exposures, previous background, etc.
3. Summary Plan descriptions of qualified and non-qualified retirement plans

4. Business Experience
5. Union Contract, copies of collective bargaining agreements, description of all employees' problems within last five years including the alleged wrongful termination, harassment discrimination, etc.
6. Strike History
7. Labour Relations/ Agreements, grievance procedures, labour disputes currently pending or settled within last five years.
8. Workman's compensation claim history / unemployment claim history
9. Personnel Schemes, description of benefits of all employees' health and welfare insurance policies
10. Profile of permanent employees
11. Labour dues and settlement history
12. Status of labour law compliances.

Q14: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Financial?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to **Financial** aspect, I would consider the following matters: -

1. Audited Financial Statements along with auditor's reports for at least past five years or since inception.
 2. Auditor's letters and replies for the past five years or since inception
 3. The most recent unaudited statements, with comparable statements to the prior year.
 4. The company's credit report, if available
 5. Analyst reports, if available
 6. Budgets and forecasts and strategic plans
 7. Significant ratio analysis
 8. Revenue versus cost comparison.
 9. A description of depreciation and amortization methods and changes in accounting methods since inception
- Schedules of:
- All indebtedness and contingent liabilities
 - Stock
 - Accounts receivable
 - Non-current investment
 - Cash in hand/Cash Equivalent
 - Type of ownership rights
 - Tax Liabilities
 - Accounts payable
 - Fixed Assets and its locations (including the land holdings, real estate leases, deeds, mortgages, titled deeds etc)
 - All leases of equipment
 - Sale and purchases of major capital equipments made during the last five years.

10. Financial ratios

- Return on Assets
- Return on Net worth
- Gross Profit to Net Profit Ratio
- Debt Equity Ratio
- Expense Ratio
- Debt-Service Coverage Ratio.

11. Analysis of

- Fixed and variable expenses
- Gross margins

12. The company's general ledger

13. Replacement cost data

14. Valuation of Assets / Liabilities

15. A description of the company's internal control procedures

16. Internal audit/control reports for last five years

17. Insurance coverage of all assets.

Q15: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Intellectual Property Rights?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to **Intellectual Property Rights** aspect, I would consider the following matters: -

1. A list of domestic and foreign patents and patent applications
2. A list of trademark and trade names
3. A list of copyrights
4. A description of important technical know-how
5. A description of methods used to protect trade secrets and know-how
6. Any work for hire agreements
7. A list of and copies of all consulting agreements, agreements regarding inventions, licences, or assignments of intellectual property to or from the company
8. Any patent clearance documents
9. A list of and summary of any claims or threatened claims by or against the company regarding intellectual property.

Q16: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Taxes?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to **Tax** aspect, I would consider the following matters: -

1. Income-tax returns for the last five years or since inception
2. States sales/VAT returns /GST returns
3. Assessment orders
4. Tax audit, where applicable
5. Any tax settlement documents
6. Other tax filing statements (State and Central Excise).
7. Number of current tax litigations, if any.

Q17: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Marketing?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to **Marketing** aspect, I would consider the following matters: -

1. Data on Past Sales and future trend
2. Customer base and profile
3. Major sales agreements, warranty agreements, distributorship/franchisee agreements, product development agreements.
5. Trends
6. Distribution channels
7. Product Profile
8. Development / Disclosure.

Q18: In order to assess the integrity of the transactions of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a practicing company secretary, what various aspects would you consider while carrying out due diligence with regard to Manufacturing?

Answer: Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. In order to carry out due diligence with regard to **Manufacturing** aspect, I would consider the following matters: -

1. Location
2. Technology
3. Manufacturing process
4. Quality
5. Research & Development
6. Sourcing of Raw Material.

Q19: In order to assess the nit y-grit y of the transact ons of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a pract cing company secretary, what various aspects would you consider while carrying out due diligence with regard to Compliance Status of various laws ?

Answer: Due diligence is a meaningful analysis of the collected informat on to arrive at some decision about the potent al transact on. In order to carry out due diligence with regard to **Compliance Status of various laws** aspect, I would consider the following mat ers: -

1. Companies Act 2013
2. Stock Exchange Compliances, SEBI/RBI Regulat ons
3. Labour Laws
4. Compet t on laws
5. Environmental Protect on laws.

Q20: In order to assess the nit y-grit y of the transact ons of the takeover and to opt for or opt out of the takeover deal, due diligence is carried out. As a pract cing company secretary, what various aspects would you consider while carrying out due diligence with regard to Lit gat on?

Answer: Due diligence is a meaningful analysis of the collected informat on to arrive at some decision about the potent al transact on. In order to carry out due diligence with regard to **Lit gat on** aspect, I would consider the following mat ers:-

1. A schedule of all pending lit gat ons
2. A descript on of any threatened lit gat ons
3. Copies of insurance policies providing coverage as to pending or threatened lit gat on
4. Documents relat ng to any injunct ons, consent decrees, or set lements to which the company is a party
5. A list of unsat sf ed judgments.

Q21: Due diligence is wholesome exercise that require specialized knowledge, expert se & experience to complete the task in t me bound & ef ect ve manner. Which of the points to be considered during the due diligence process.

Answer: As due diligence is wholesome exercise that require specialized knowledge, expert se & experience to complete the task in t me bound & ef ect ve manner, therefore during the due diligence process the following points are worth considerat on:

1. Const tute a due diligence team comprising of technical, legal, f nancial and taxat on experts, etc.
2. Assign the task to each of the member and the co-ordinat on among the members be supervised by a senior level of cer.
3. Collect the data of the target company with reference to the:
 - Corporate records
 - Promoter's holding
 - Stockholder informat on
 - Important contracts including IP, Sales, Purchase, IT, etc.
 - Compliance record
 - HR record

- Finance record including access of softwares/ERP, etc.
 - History of litigation
 - Insurance information
 - Financials and leases.
4. Analyse the above information/statistics, assess the future prospects and the benefit in acquiring with reference to the market size and cutting of the competition.
5. If the proposal, found feasible, follow the regulatory requirements as mentioned in the Companies Act, 2013 and the SEBI Regulations, RBI regulations, FDI guidelines & competition laws as applicable.

Q22: What are the main contents of a Due Diligence Report in the context of a Merger and Acquisition process?

Answer: The contents of a due diligence report should more or less include certain points which would draw the attention of the intending buyer, viz:

1. Comments on the management and organisation,
2. Details of key managerial/ technical personnel,
3. Details of marketing efforts undertaken,
4. Details of financial liabilities and commitments that the intending buyer would have to meet after takeover and which are not disclosed in the audited accounts,
5. Deviations from the generally accepted accounting policies/ practices,
6. Analysis of major expenditure/costs, details of major/critical customers and suppliers,
7. Compliance of taxation and other statutory laws as well as status and impact of all litigation in this respect,
8. Benefits enjoyed by the intending seller which the intending buyer may lose on takeover and vice versa,
9. List of adjustments to the latest financial statements compiled on the basis of all findings, which have an impact on the "price" of the target acquisition to be considered by the intending buyer.
10. Number and type of litigations,
11. Details of key assets and customers takeaways.

Q23: What are the due diligence checks which may help in carrying out the due diligence process by Acquiring Company in terms of Financial aspects.

Answer: The acquiring company is always interested in the financial aspects, human aspects, assets and liabilities of the target company. The following due diligence checks may help in carrying out the process:

Financial Aspects:

- Read the auditor's report and qualifying remarks, if any and director's responsibility statement.
- Whether the company is profit making, dividend paying company
- Calculate financial ratios and compare it with the previous year(s) figures of the company and also compare with the industry trend.
- Whether the Balance sheet have any fictitious assets?
- Whether any assets have been re-valued (particularly of real estates) in current year or in past.
- Calculate Net worth and its components and compare it with the previous year(s) figures.

- Compare the cash flow statements of current year with that of the previous year(s).
- Whether the borrowing from banks/FI is classified as Standard Assets in the books of the bank.
- Whether clear demarcation is made between the capital and revenue income and expenditure.
- Whether any penalty from Revenue Authorities, Stock Exchanges/ SEBI/ CCI/ FEMA levied in the current / past years?
- Whether any litigation against the company, is pending before any court of law?
- Amount of contingent liabilities.

Q24: What are the due diligence checks which may help in carrying out the due diligence process by Acquiring Company in terms of Assets and Liabilities aspects.

Answer: The acquiring company is always interested in the financial aspects, human aspects, assets and liabilities of the target company. The following due diligence checks may help in carrying out the process:

Debtor's Aspects:

- Study the demographic profile of the customer.
- Study the type of customer base.
- Whether sales are made in concentration / very few buyers are available in the market.
- What is the debt realization cycle?
- What are the terms and conditions for sales on credit?
- How the sales campaign is made in order to lead the others in the market.

Creditor's Aspects:

- Who are the suppliers?
- What are the terms and conditions for purchase on credit?
- Whether the supplier is unique or diversified or no single supplier can mis-match the supply?

Material Control Aspect:

- Make a review of all material contracts and commitments of the target company.
- Study various issues pertaining to guarantees, loans, and credit agreements.
- Study the Customer and supplier contracts, Equipment leases, Indemnification agreements, License agreements, Franchise agreements, Equity finance agreements, Distribution, dealer, sales agency, or advertising agreements, Non-competition agreements, Union contracts and collective bargaining agreements, Contracts the termination of which would result in a material adverse effect on the company.

Q25: What are the due diligence checks which may help in carrying out the due diligence process by Acquiring Company in terms of Human aspects.

Answer: The acquiring company is always interested in the financial aspects, human aspects, assets and liabilities of the target company. The following due diligence checks may help in carrying out the process:

Human Aspect:

- Study the organization chart and biographical information,
- Type of workforce and expertise involved.

- Summary of any labour disputes, information concerning any previous, pending, or threatened labour stoppage,
- Employment and consulting agreements, loan agreements, and documents relating to other transactions with officers, directors, key employees, and related parties,
- Schedule of compensation paid to officers, directors, and key employees for the three most recent fiscal years showing separately salary, bonuses, and non-cash compensation (e.g., use of cars, property, etc.)
- Employee benefits and copies of any pension, profit sharing, deferred compensation, and retirement plans, management incentive or bonus plans not included in above as well as other forms of non-cash compensation, Employment manuals and policies, involvement of key employees and of officers in criminal proceedings or significant civil litigation, Actuarial reports for past three years for gratuity valuations.

Q26: What are the due diligence checks which may help in carrying out the due diligence process by Acquiring Company in terms of Regulatory aspects.

Answer: The acquiring company is always interested in the financial aspects, human aspects, assets and liabilities, regulatory aspects of the target company. The following due diligence checks may help in carrying out the process:

Regulatory Aspects:

- Study the revenue returns filed by the company and its assessment orders.
- Whether any penalty has been imposed for contraventions of the provisions of the law and such penalty is still due.
- Whether the company is abiding with the company law compliances. Check the various returns filed with the RoC.
- Is there any specific laws applicable and compliance of such laws are regular.

Q27: Describe about regulatory framework for merger/ amalgamation.

Answer: The Regulatory framework of Mergers and Amalgamations covers:

1. The Companies Act, 2013
2. National Company Law Tribunal Rules, 2016
3. Companies (Compromise, Arrangements and Amalgamations) Rules, 2016
4. Income Tax Act, 1961
5. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
6. Competition Act, 2002
7. Approval from industry specific regulators, wherever required.

Q28: What are the provisions of Merger/ Amalgamation under the Companies Act, 2013.

Answer: Sect on 230 - Power to compromise or make arrangements with creditors and members

Sub-section (1)–Applicat on to the Tribunal for convening meetings of members/creditors

Where a company or a creditor or a member of the company proposes a compromise or arrangement between it and its creditors or between it and its members or with any class of the creditors or any class of members, the company or the creditor or member, or where the company is being wound-up, the liquidator

may make an application to the Tribunal. On such application, the Tribunal may order a meeting of the creditors or members or any class of them as the case may be and such meetings shall be called, held and conducted in such manner as the Tribunal may direct.

Sub-section (2)– Disclosures to the Tribunal by applicant under sub-section 1

Sub-section (2) provides that the company or any other person, who makes an application as provided under sub-section (1) shall disclose by affidavit to the Tribunal:

(a) all material facts relating to the company, such as the latest financial position of the company, latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five percent of the secured creditors in value, including—

(i) a creditor's responsibility statement in the prescribed form;

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

Sub-section (3) – Notice of the meeting

Notice of the meeting called in pursuance of the order of the tribunal shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by

1. a statement disclosing the details of the compromise or arrangement,
2. a copy of the valuation report, if any, and
3. explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture holders and
4. the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
5. such other matters as may be prescribed:

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed.

Sub-section (4) – Notice to provide for voting by themselves or through proxy or through postal ballot

Sub-section (4) states that a notice under sub-section (3) shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice.

Provided that any object on to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.

Sub-section (5) – Notice to be sent to the regulators seeking their representations

Section 230 (5) states that a notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

Sub-section (6): Approval and sanction of the scheme

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

Sub-section (7): Order of the tribunal sanctioning the scheme to provide for the certain matters

An order made by the Tribunal shall provide for all or any of the following matters, namely:

- (a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
- (b) the protection of any class of creditors;
- (c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
- (d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
- (e) such other matters including exit of dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Sub-Section (8)

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

Sub-section (9): The Tribunal may dispense with calling of meeting of creditors

Sect on 230 (9) states that the Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety percent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

Sub-Sect on (10)

Compromise in respect of buy back is to be in compliance with sect on 68. As per Sect on 230 (10), no compromise or arrangement in respect of any buy-back of securities under this sect on shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of sect on 68.

Sub-Sect on (11)

Sect on 230(11) states that any compromise or arrangement may include takeover of or made in such manner as may be prescribed. In case of listed companies, takeover of or shall be as per the regulations framed by the Securities and Exchange Board.

Q29: As per Rule 3 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, what are the provisions related to making an application under sub-sect on (1) of Sect on 230 of the Companies Act, 2013?

Answer: Rule 3 provides that an application under sub-sect on

(1) of sect on 230 of the Act may be submitted in Form no. NCLT-1 (appended in the National Company Law Tribunal Rules, 2016) along with:—

- (i) a notice of admission in Form No. NCLT-2 (appended in the National Company Law Tribunal Rules, 2016);
- (ii) an affidavit in Form No. NCLT-6 (appended in the National Company Law Tribunal Rules, 2016);
- (iii) a copy of scheme of compromise or arrangement, which should include disclosures as per subsect on (2) of sect on 230 of the Act and certified true copies of all the enclosures; and
- (iv) fee as prescribed in the Schedule of Fees.

(2) Where more than one company is involved in a scheme in relation to which an application under sub-rule (1) is being filed, such application may, at the discretion of such companies, be filed as a joint-application.

(3) Where the company is not the applicant, a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator, not less than fourteen days before the date fixed for the hearing of the notice of admission.

(4) The applicant shall also disclose to the Tribunal in the application under sub-rule (1), the basis on which each class of members or creditors has been identified for the purposes of approval of the scheme.

(5) A member of the company shall make an application for arrangement, for the purpose of takeover of or in terms of sub-sect on (11) of sect on 230, when such member along with any other member holds not less than three-fourths of the shares in the company, and such application has been filed for acquiring any part of the remaining shares of the company.

(6) An application of arrangement for takeover of or shall contain:

(a) the report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member after taking into account the following factors:

- (i) the highest price paid by any person or group of persons for acquisition of shares during last twelve months;
- (ii) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning

multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.

(b) details of a bank account, to be opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover of the company is deposited.

Q30: As per Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, what are the provisions regarding the mode and timeline for sending notices of meetings to creditors or members as directed by the Tribunal under Section 230(3) of the Companies Act, 2013?

Answer: Rule 6 provides that

(1) Where a meeting of any class or classes of creditors or members has been directed to be convened, the notice of the meeting pursuant to the order of the Tribunal to be given in the manner provided in sub-section (3) of section 230 of the Act shall be in Form No. CAA.2 and shall be sent individually to each of the creditors or members.

(2) The notice shall be sent by the Chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting.

Q31: Explain the provisions of Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 regarding the contents of notice to be sent for meetings of creditors or members as directed by the Tribunal under Section 230 of the Companies Act, 2013.

Answer: The notice of the meeting to the creditors and members shall be accompanied by a copy of the scheme of compromise or arrangement and a statement disclosing the following details of the compromise or arrangement, if such details are not already included in the said scheme:

(i) details of the order of the Tribunal directing the calling, convening and conducting of the meeting:

(a) date of the Order;

(b) date, time and venue of the meeting.

(ii) details of the company including:

(a) Corporate Identification Number (CIN) or Global Location Number (GLN) of the company;

(b) Permanent Account Number (PAN);

(c) name of the company;

(d) date of incorporation;

(e) type of the company (whether public or private or one-person company);

(f) registered office address and e-mail address;

(g) summary of main object as per the memorandum of association; and main business carried on by the company;

(h) details of change of name, registered office and objects of the company during the last five years;

(i) name of the stock exchange (s) where securities of the company are listed, if applicable;

(j) details of the capital structure of the company including authorised, issued, subscribed and paid up share capital; and

(k) names of the promoters and directors along with their addresses.

- (iii) if the scheme of compromise or arrangement relates to more than one company, the fact and details of any relationship subsisting between such companies who are parties to such scheme of compromise or arrangement, including holding, subsidiary or of associate companies;
- (iv) the date of the board meeting at which the scheme was approved by the board of directors including the name of the directors who voted in favour of the resolution, who voted against the resolution and who did not vote or participate on such resolution;
- (v) explanatory statement disclosing details of the scheme of compromise or arrangement
- (vi) disclosure about the effect of the compromise or arrangement on:
 - (a) key managerial personnel;
 - (b) directors;
 - (c) promoters;
 - (d) non-promoter members;
 - (e) depositors;
 - (f) creditors;
 - (g) debenture holders;
 - (h) deposit trustee and debenture trustee;
 - (i) employees of the company;
- (vii) Disclosure about effect of compromise or arrangement on material interests of directors, Key Managerial Personnel (KMP) and debenture trustee.
- (viii) investigation or proceedings, if any, pending against the company under the Act.
- (ix) details of the availability of the following documents for obtaining extract from or for making or obtaining copies of or for inspection by the members and creditors.
- (x) details of approvals, sanctions or no-object order(s), if any, from regulatory or any other governmental authorities required, received or pending for the proposed scheme of compromise or arrangement.
- (xi) a statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by voting through electronic means.

Q32: 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? (3 marks)

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Answer: 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 date, 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) Ratios 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.

Q33: As per Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, what details must be provided in the notice regarding the availability of documents for inspection or obtaining copies by members and creditors?

Answer: Details of the availability of the following documents for obtaining extract from or for making or obtaining copies of or for inspection by the members and creditors, namely:

- (a) latest audited financial statements of the company including consolidated financial statements;
- (b) copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with;
- (c) copy of scheme of compromise or arrangement;
- (d) contracts or agreements material to the compromise or arrangement;
- (e) the certificate issued by Auditor of the company to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the Accounting Standards prescribed under section 133 of the Companies Act, 2013; and
- (f) such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme;

Q34: What are the advertising requirements under Rule 7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 for notices of meetings held under Section 230(3) of the Companies Act, 2013, and what provision is made for joint advertisements?

Answer:

- The notice of the meeting (under Section 230(3)) must be published in Form CAA.2.
- It should be published in: One English newspaper, and One local (vernacular) newspaper that has wide circulation in the state where the company's registered office is located.
- The notice must also be placed: On the company's website (if it has one), and for listed companies, on the SEBI website and the stock exchange where the company's shares are listed.
- The advertisement should be published at least 30 days before the meeting.
- If there are separate meetings for different groups (creditors or members), one joint advertisement is allowed.

Q35: What does Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provide regarding notice to regulatory authorities under Section 230(5) of the Companies Act, 2013?

Answer: Rule 8 states that a notice in **Form No. CAA.3**, along with the scheme of arrangement, explanatory statement, and disclosures (as per Rule 6), must be sent to:

1. Mandatory authorities:

- Central Government
- Registrar of Companies (ROC)
- Income Tax Department

2. As applicable:

o RBI, SEBI, CCI, and stock exchanges

3. Other sectoral regulators, if directed by the Tribunal.

- The notice must be sent immediately after sending it to members or creditors, by registered post, speed post, courier, or hand delivery.
- These authorities must send their representations within 30 days to the Tribunal and also send a copy to the company.
- If no response is received in 30 days, it is assumed that they have no objections.

Q36: What powers are given to the Tribunal under Sect on 231 of the Companies Act, 2013 regarding the enforcement of a compromise or arrangement?

Answer: Sect on 231(1): The Tribunal has the power to supervise the implementation of a compromise or arrangement sanctioned under Sect on 230. It can also give directions or make modifications to the scheme if needed for proper implementation.

Sect on 231(2): If the Tribunal finds that the scheme cannot be implemented satisfactorily, and the company is unable to pay its debts, it may order winding-up of the company. Such an order is treated as one made under Sect on 273 of the Act.

Q37: What does Sect on 232(1) of the Companies Act, 2013 provide regarding the Tribunal's role in merger and amalgamation schemes?

Answer: Sect on 232(1) states that when a scheme of merger or amalgamation is proposed as a compromise or arrangement under Sect on 230, and involves:

- Reconstruction of one or more companies, and
- The transfer or division of the undertaking, assets, or liabilities of the transferor company to the transferee company (or multiple companies),

Then, the Tribunal may:

- Order a meeting of creditors or members (or any class of them) to consider the scheme.
- Such meetings must be conducted in the manner directed by the Tribunal.
- The provisions of Sect on 230(3) to (6) will apply mutatis mutandis (with necessary changes).

Q38: What documents are required to be circulated to members and creditors as per Sect on 232(2) of the Companies Act, 2013 before the meeting ordered by the Tribunal for a merger or division scheme?

Answer: As per Sect on 232(2), after the Tribunal orders a meeting under sub-sect on (1), the merging or dividing companies must circulate the following documents to the members or creditors:

- (a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
- (b) confirmation that a copy of the draft scheme has been filed with the Registrar;
- (c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
- (d) the report of the expert with regard to valuation, if any;

(e) a supplementary account ng statement if the last annual accounts of any of the merging company relate to a f nancial year ending more than six months before the f rst meet ng of the company summoned for the purposes of approving the scheme.

Q39: What mat ers can the Tribunal sanct on under Sect on 232(3) of the Companies Act, 2013 when approving a scheme for merger or amalgamat on?

Answer: Under Sect on 232(3), af er ensuring compliance with the procedures in sub-sect ons (1) and (2), the Tribunal may sanct on the scheme and make provisions for the following mat ers:

1. **Transfer of assets and liabilit es:** Transfer the whole or part of the property, liabilit es, or undertaking of the transferor company to the transferee company from a specif ed date.
2. **Allotment of shares:** The transferee company may allot shares, debentures, or other instruments to any person as part of the arrangement, with the condit on that it cannot hold shares in its own name or under a trust.
3. **Cont nuat on of legal proceedings:** Legal proceedings involving the transferor company can cont nue against the transferee company.
4. **Dissolut on of transferor company:** The transferor company can be dissolved without winding up.
5. **Provision for dissent ng persons:** The Tribunal can make provisions for people who dissent from the arrangement.
6. **Allotment of shares for non-resident shareholders:** Shares allot ed to non-resident shareholders under foreign investment norms must comply with specif ed guidelines.
7. **Transfer of employees:** Employees of the transferor company may be transferred to the transferee company.
8. **Listed and unlisted companies:** If the transferor is listed and the transferee is unlisted, the transferee remains unlisted unt l it becomes listed. Dissent ng shareholders are paid based on a pre-determined price formula.
9. **Set-of of fees:** Fees paid by the transferor company for authorized capital can be set of against fees payable by the transferee company.
10. **Incidental mat ers:** Any other mat ers necessary to ef ect vely carry out the merger or amalgamat on. Addit onally, the Tribunal will only sanct on the compromise or arrangement if a cert f cate from the auditor is f led, conf rming that the account ng treatment is in line with the prescribed account ng standards.

Q40: What happens to the property and liabilit es in a merger or amalgamat on under Sect on 232(4) of the Companies Act, 2013?

Answer: Under Sect on 232(4), when the Tribunal's order provides for the transfer of property or liabilit es as part of a merger or amalgamat on:

1. **Property Transfer:** The property of the transferor company is transferred to the transferee company by virtue of the Tribunal's order.
2. **Liabilit es Transfer:** The liabilit es of the transferor company become the liabilit es of the transferee company.
3. **Charges on Property:** If directed by the Tribunal, any property transferred may be freed from charges (like mortgages) that will cease to have ef ect as a result of the compromise or arrangement.

Q41: Company ABC purchased 51% equity interest in Company XYZ. The consideration is paid in cash. The relevant dates are as under:

Date of agreement with shareholders – 1st December, 2022 Appointed date as per agreement – 1st April, 2022 Date of obtaining TRAI Permission – 1st July, 2022 Date of payment of consideration – 15th July, 2022

What will be the acquisition date?

Whether the 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control. Discuss. (5 marks)

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Answer: In this case the control over financial and operating policies are acquired through obtaining TRAI permission. This was obtained on 1st July, 2022. Since, TRAI approval is a substantive issue 1st July 2022 is considered as the acquisition date. It may be noted that the appointed date as per the agreement is not considered as the acquisition date, because the Company ABC did not have control over Company XYZ as at that date due to non-approval by TRAI.

Section 232(6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

In view of the above, it was clarified vide MCA Circular in 2019 that:

(a) The provision of section 232(6) of the Companies Act, 2013 enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme.

(b) The 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control for the purpose of conforming to accounting standards including Ind AS 103 Business Combinations.

(c) where the "appointed date" is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/amalgamation in NCLT. However, if the 'appointed date' is significantly antecedent beyond a year from the date of filing, the **32**

justification for the same would have to be specifically brought out in the scheme and it should not be against public interest.

(d) The scheme may identify the 'appointed date' based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective.

However, in case of such event-based date being a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force.

Q42: Examine and explain the following statements citing relevant provisions of law:

(i) The amalgamated company has to issue new shares to Non-resident Indians in amalgamation and for that it has to obtain permission of Reserve Bank of India under the provisions of the Foreign Exchange Management (FEMA) Act, 1998. (3 marks)

(ii) M/s Happy Exports Limited was merged with M/s Smart Exports Limited. The order passed by High Court was filed with the Registrar of Companies (ROC). But the same was not taken on record by ROC. Will the scheme still be effective? (3 marks)

(iii) The Tribunal can modify transfer date proposed in a scheme of amalgamation. (3 marks)

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Answer:

(i) When a scheme of amalgamation envisages issue of shares/cash option to non-resident Indians, the amalgamated company is required to obtain the permission of Reserve Bank of India, subject to conditions prescribed under the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

(ii) Filing of Tribunal (earlier court) Order with Registrar of Companies (ROC)

The order made in the Tribunal (earlier court) under section 230(8) of the Companies Act, 2013 should be filed with the Registrar of Companies. If the order is not filed with the Registrar, it will not have any effect. The requirement under this section is filing of the order of the Tribunal (previously court) and it does not specify the need for Registrar to register it.

The section 230(8) of the Companies Act, 2013 only mandates the company to file the order of the Tribunal with ROC to give effect to the scheme of merger. The Registrar of Companies is bound to register the Certified Order copy of the Tribunal which is filed with the ROC by the company. Therefore, if the company files the Order of the Tribunal sanctioning the scheme of amalgamation or merger with the Registrar of Companies then the scheme becomes effective. (Note: Tribunal here refers to the National Company Law Tribunal.)

(iii) Amongst others, the foremost requirement is the determination of cut-off date from which all properties, movable as well as immovable and rights attached thereto, etc., are required to be transferred from amalgamating company to the amalgamated company.

The date may be called transfer date or appointed date. The scheme becomes effective only after a certified copy of the order of the Tribunal is filed with the concerned office of Registrar of Companies.

As per section 232(6), the scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

The Supreme Court in *Marshall Sons & Co. [India] Ltd. v. Income Tax Officer* (1977) observed that it is true that while sanctioning the scheme, it is open to the National Company Law Tribunal (NCLT) previously court, to modify the transfer date, if there is little doubt that such date would be the date of amalgamation or date of transfer, but when the NCLT (previously court) does not prescribe any specific date, but merely sanctions the scheme, presented to it, the date specified in the scheme is the transfer date. It cannot be otherwise. Income-tax Act, 1961

Q43: What are the requirements for filing annual statements during the scheme process under Sect on 232(7), and what are the penalties for non-compliance under Sect on 232(8)?

Answer: Filing Annual Statements (Sect on 232(7)):

- Every company involved in a scheme under Sect on 232 must file an annual statement with the Registrar until the scheme is completed.
- The statement must be certified by a Chartered Accountant (CA), Cost Accountant (CWA), or Company Secretary (CS).
- The statement should confirm whether the scheme is being followed according to the Tribunal's order and must be filed in a prescribed form and within the prescribed time.

2. Penal Consequences for Non-Compliance (Sect on 232(8)):

- If a company fails to comply with Sect on 232(7), both the company and any officers in default are liable to:
 - A penalty of ₹20,000.
 - A further penalty of ₹1,000 per day for each day the failure continues, with a maximum penalty of ₹3 lakh.

Q44: What is the simplified procedure for mergers or amalgamations under Sect on 233 of the Companies Act, and which companies are eligible to use it?

Answer: Sect on 233 provides a simplified procedure for mergers or amalgamations involving:

1. **Small Companies:** Two or more small companies can merge or amalgamate.
2. **Holding and Wholly-Owned Subsidiary:** A holding company can merge with its wholly-owned subsidiary.
3. **Other Eligible Classes of Companies:** Other classes of companies, as prescribed by the rules.

According to **Rule 25(1)(1A)** of the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021, a scheme of merger or amalgamation under Sect on 233 can be entered into by:

- Two or more start-up companies, or
- One or more start-up companies with one or more small companies.

Q45: What are the conditions to be fulfilled under Sect on 233(1) of the Companies Act, 2013 for a simplified merger or amalgamation of certain companies?

Answer: Under **Sect on 233(1)**, a simplified merger or amalgamation can be carried out between:

- Two or more small companies, or
- A holding company and its wholly-owned subsidiary, or
- Other prescribed classes of companies,

subject to the following conditions:

1. **Notice of Scheme:** The transferor and transferee companies must issue a notice inviting objections/suggestions from: The Registrar of Companies (ROC), The Official Liquidator, and Persons affected by the scheme, within 30 days.
2. **Approval by Members:** The scheme must be approved in the general meeting by members holding at least 90% of the total shares of each company.
3. **Declaration of Solvency:** Each company must file a declaration of solvency with the Registrar, confirming they can meet their liabilities.

4. **Approval by Creditors:** The scheme must be approved by creditors holding at least 90% in value, either in a meeting (with 21 days' notice) or by written consent.

Q46: What is the procedure for approval, objections, and final effect of a merger under Section 233(2) to (8) of the Companies Act, 2013?

Answer: Under **Section 233(2) to (8)**, the procedure for simplified mergers includes the following steps:

1. **Filing of Approved Scheme (Sub-section 2):** The transferee company must file the approved scheme with the Central Government, Registrar, and Official Liquidator.
2. **Confirmation by Central Government (Sub-section 3):** If no objections are raised by the Registrar or Official Liquidator within 30 days, the Central Government will register and confirm the scheme.
3. **Objections (Sub-section 4):** If any objection or suggestion is raised, it must be sent in writing to the Central Government within 30 days.
4. **Referral to Tribunal (Sub-section 5):** If the Central Government believes the scheme is not in public or creditor interest, it can refer the matter to the Tribunal within 60 days of receiving the scheme.
5. **Tribunal's Decision (Sub-section 6):** The Tribunal may:
 - Direct the scheme to be considered under Section 232, or
 - Confirm the scheme as appropriate. If no application is made by the Central Government, it's assumed there is no objection.
6. **Communication of Order (Sub-section 7):** A copy of the Tribunal's order confirming the scheme is sent to the Registrar of the transferee company and all concerned Registrars.
7. **Effect of Scheme (Sub-section 8):** Once registered, the scheme results in the automatic dissolution of the transferor company, without winding up.

Q47: What are the legal effects of registration of a merger or amalgamation scheme under Section 233(9) of the Companies Act, 2013?

Answer: Under **Section 233(9)**, once the scheme of merger or amalgamation is registered, it results in the following effects:

- (a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;
- (b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;
- (c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and
- (d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

Q48: What are the post-merger requirements for the transferee company under Section 233(10) and (11) of the Companies Act, 2013?

Answer: Under **Sect on 233(10) and (11)**, the transferee company must comply with the following:

1. **Cancellation of Shares (Sub-sect on 10):** The transferee company cannot hold any of its own shares (received as part of the merger) in its name, or in the name of any trust, subsidiary, or associate. All such shares must be cancelled or extinguished after the merger or amalgamation.

2. **Filing with Registrar (Sub-sect on 11):** The transferee company must file an application with the Registrar:

- Along with the registered scheme,
- Indicating the revised authorised share capital, and
- Pay the prescribed fees for the revised capital.

However, the fee already paid by the transferor company on its authorised capital is adjusted (set off) against the fee payable by the transferee company.

Q49: What are the powers of the Central Government under Sect on 237 regarding amalgamation of companies in the public interest?

Answer: Under Sect on 237, the Central Government has the authority to order the amalgamation of two or more companies in the public interest. Key provisions include:

Sect on 237(1): The Central Government may, by notification in the Official Gazette, order the amalgamation of companies into a single entity, specifying its structure, assets, rights, duties, etc.

Sect on 237(2): The order may provide for **continuance of legal proceedings** by or against the transferee company.

Sect on 237(3): Members, creditors, and debenture holders must retain equal rights and interests in the new company. If their rights are reduced, compensation must be provided, assessed by a prescribed authority and published in the Official Gazette.

Sect on 237(4): Aggrieved persons may appeal to the Tribunal within 30 days of the compensation assessment.

Sect on 237(5): No amalgamation order shall be made unless:

- Draft order is sent to the affected companies.
- Time for appeal has expired or appeals are resolved.
- Central Government considers and modifies the draft based on objections received within at least two months.

Sect on 237(6): A copy of the final order must be laid before both Houses of Parliament.

Q50: What does Sect on 238 of the Companies Act, 2013 provide for regarding the registration of schemes involving transfer of shares?

Answer: **Sect on 238** deals with the registration of offers related to schemes involving transfer of shares from a transferor company to a transferee company under Sect on 235. The key provisions are:

Sect on 238(1):

- Every circular recommending shareholders to accept an offer must contain prescribed information.
- It must also include a statement by the transferee company confirming that adequate cash is available for the deal.
- The circular must be registered with the Registrar before being issued.

○ The Registrar can refuse registration if the circular is misleading or incomplete and must communicate the refusal within 30 days.

Sect on 238(2):

If the Registrar refuses to register the circular, an appeal can be made to the Tribunal.

Sect on 238(3):

If a director issues an unregistered circular, they are liable for a penalty of ₹1,00,000.

Q51: What does Sect on 239 of the Companies Act, 2013 state about the preservation of books and papers of amalgamated companies?

Answer: As per Sect on 239, the books and papers of a company that has been amalgamated or whose shares have been acquired by another company cannot be disposed of without the prior approval of the Central Government. Before granting such approval, the government may appoint a person to examine those records to check for any evidence of offences related to the company's formation, management, or amalgamation.

Q52: ABC Ltd. was incorporated on May 12, 1986, under the Indian Companies Act, having its registered office at Mumbai, Maharashtra. The present capital structure of the parent company is as follows : Rs. 1,000 crore Authorised Capital-100 crore equity shares of Rs. 10 each. Issued Subscribed Capital and paid-up capital of Rs. 780 crore -78 crore equity shares of Rs. 10 each [includes equity shares represented by GDRs]. The company is having 4 business segments related to manufacturing of products L, M, N and O. Turnover of O product is around Rs. 1,300 crore. Assets of ABC Ltd are Rs. 2,700 crore out of which product O related assets are Rs. 1,400 crore. XYZ Ltd. is a company having its registered office at Surat, Gujarat. Authorised, issued and paid up capital of company is Rs. 750 crore having turnover of Rs. 820 crore. It is engaged in the business of manufacture and sale of product O. Assets of XYZ Ltd. are Rs. 1,500 crore.

XYZ Ltd. already holds 14.98% of the equity shares of the ABC Ltd. acquired at Rs. 267 per share from Six ventures and got two directors in Board of Directors of ABC Ltd. XYZ Ltd. has made an offer to shareholders of ABC Ltd at Rs. 190 per share to acquire controlling stake of ABC Ltd. ABC Ltd. Management opposed the offer citing reasons of low price that was not beneficial to the shareholders of ABC Ltd. but in reality the management of ABC Ltd. had fear of losing control over the company. XYZ Ltd. had an eye on the Product O business of ABC Ltd. for a long time. The offer was a step towards fulfilling the dream. Full control of product O business was ultimate purpose of XYZ Ltd. ABC Ltd. stock was trading at Rs. 207.50 on the closing hours of trading at the Bombay Stock Exchange.

After lot of fights and hassles, both companies came to truce. Pursuant to acquisitions through negotiated transactions, a proposal to demerge the ABC Ltd. company's Product O business into company TRM Ltd. and acquisition of 51% controlling stake in TRM Ltd. was given by XYZ Ltd. and after due deliberation, the Board of Directors of the ABC Ltd company accepted the proposal for demerger of the Product O business into TRM Ltd. and subsequent acquisition of 51% stake in same by XYZ Ltd. After demerger TRM Ltd. will have around 35% market share of product O business on pan India basis.

ABC Ltd. Employees Welfare Foundation is an employee welfare trust established under the Indian Trusts Act, 1882. Shareholders of ABC Ltd. and XYZ Ltd. call meeting of shareholders, creditors and pass special resolution. They submit copy of resolution to ROC, NCLT and publish in newspaper about successful arrangement. Few members of ABC Ltd. having 1.5% shares of valued Rs. 10 lakh objected to scheme of

Acquisit on by XYZ Ltd. ABC Ltd. Employee trust also objected to acquisit on. NCLT cancelled the scheme cit ng grounds of unfair, unjust and object ons of members having 1.5% shares in company.

Based on above facts, answer the following with reasons quot ng relevant provisions:

Whether the compliance approvals given by the shareholders is suf cient for successful acquisit on of product O business of ABC Ltd. Examine crit cally. (5 Marks)

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Answer: In the present case reduct on of share capital, demerger, acquisit on, not ce to Compet t on Commission of India (CCI) for crossing threshold of asset/turnover, depository receipts at ract ng Reserve Bank of India (RBI) /Foreign Exchange Management Act (FEMA) & SEBI (SAST) Regulat ons, 2011 alongwith other sector regulator specif c compliance issues are involved. Here both companies i.e., transferor and transferee will have to comply provisions of sect on 230 to 232 of Companies Act, 2013, SEBI(SAST) Regulat ons 2011, FEMA, Compet t on Act, approval of sector regulators (if product L, M, N and O need specif c compliance issues to be ensured).

Hence, mere submission of copy of resolut on to ROC, NCLT and publishing in newspaper about successful arrangement will not suf ce. NCLT will reject such applicat on.

Merger or amalgamat on of companies involves various issues including the regulatory approvals. These regulatory approvals are to be obtained not only from the sector in which the company is operat ng (for example in case of merger of two banks, RBI's approval is needed) but also from other departments like Income Tax, SEBI, ROC, etc. The companies are required to obtain following approvals in respect of the scheme of amalgamat on:

(i) Authorisat on

- Pre-approval authorisat on about appointment of intermediaries, advisors, etc.
- Approval of Valuat on Report by Audit Commit ee.

(ii) Approval of Board of Directors

- Approval of scheme of amalgamat on by the Board of both the companies.
- Board resolut on should, besides approving the scheme, authorise a Director/Company Secretary/ other of cer to make applicat on to Tribunal, to sign the applicat on and other documents and to do everything necessary or expedient in connect on therewith, including changes in the scheme.

(iii) Approval of Shareholders/Creditors, etc.

Members' and creditors' approval to the scheme of amalgamat on is sine qua non for Tribunal's sanct on. This approval is to be obtained at specially convened meet ngs held as per Tribunal's direct ons [Sect on 230(1)]. However, the Tribunal may dispense with meet ngs of members/creditors [Sect on 230(9)].

(iv) Approval of the Stock Exchanges

A listed ent ty desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall f le the draf scheme of arrangement, proposed to be f led before Tribunal with the stock exchange(s).

(v) Approval of Financial Inst tut ons

The approval of the Financial Inst tut ons, trustees to the debenture holders and banks, investment corporat ons would be required if the Company has borrowed funds either as term loans, working capital requirements and/ or have issued debentures to the public and have appointed any one of them as trustees to the debenture holders.

(vi) Approval from the Land Holders

If the land on which the factory is situated is the lease-hold land and the terms of the lease deed so specifies, the approval from the lessor will be needed.

(vii) Approval of the Tribunal

- Both companies (amalgamating as well as amalgamated) involved in a scheme of compromise or arrangement or reconstruction or amalgamation is required to seek approval of the respective Tribunal for sanctioning the scheme.
- Every amalgamation, except those, which involve sick industrial companies, requires sanction of Tribunal which has jurisdiction over the State/area where the registered office of a company is situated.
- If transferor and transferee companies are under the jurisdiction of different Tribunals, separate approvals are necessary.
- The notice of every application filed with the Tribunal has to be given to the Central Government (Regional Director, having jurisdiction of the State concerned).

(viii) Approval of Reserve Bank of India

Where the scheme of amalgamation envisages issue of shares/cash option to Non-Resident Indians, the amalgamated company is required to obtain the permission of Reserve Bank of India subject to conditions prescribed under the Regulations issued by RBI.

The provisions relating to regulation of combination as provided under Sections 5 and 6 of the Competition Act, 2002 would also be required to be complied with by companies, if applicable.

Q53: What are the filing requirements during the process of merger or amalgamation with the Registrar of Companies, SEBI, and Stock Exchanges?

Answer: Filing with Registrar of Companies (ROC) – Special Resolutions:

If the company passes special resolutions to:

- Change its object clause for merger,
- Increase share capital,
- Issue shares to transferor company's shareholders,
- Start the business of the transferor company after merger,

Then, the company must file a prescribed e-form with ROC within 30 days.

Attachments required:

- Certified copies of resolutions.
- Certified copy of explanatory statement (used in the meeting notice).

The form must be digitally signed by a director or authorized person and certified by a Company Secretary, Chartered Accountant, or Cost Accountant in practice.

2. Stock Exchange Intimations – Before Merger:

Inform the stock exchange in advance when a Board Meeting is scheduled to discuss the merger.

3. Stock Exchange Intimations – After Board Approval:

Notify the stock exchange after the Board approves the merger and share swap ratio (before informing shareholders or media).

4. Filing Tribunal Order (Form INC-28):

After the Tribunal allows meetings of shareholders or creditors, file Form INC-28 with ROC along with a certified copy of the order.

Also, submit the original certified order at the ROC office.

The form must be digitally signed by an authorized company official.

5. **Stock Exchange – Shareholder Communications:**

Send the stock exchange copies of notices, explanatory statements, and meeting minutes related to the shareholder meeting for merger approval.

6. **Notice to Central Government:**

Inform the Central Government whenever an application is made to the Tribunal for merger/amalgamation (Sections 230–240).

No need to inform again when the Tribunal passes the final order.

7. **Return of Share Allotment:**

After issuing shares to the transferor company's shareholders (based on the swap ratio), file the return of allotment with ROC within 30 days.

This form must also be digitally signed and certified by a Company Secretary, Chartered Accountant, or Cost Accountant in practice.

Q54: What are the steps involved in the process of merger or amalgamation?

Answer: STEP – 1

Holding of Board Meeting

- To consider the proposal for Merger of the Company. It must be ensured that the companies under the consolidation must have a strong clause in the Memorandum of Association of their organization to merge although their absence will not be an obstacle, but this will make things work smoothly.
- In-Principle approval for Merger
- Decide on jurisdiction of NCLT Benches
- Appointment of Registered Valuer
- Appointment of professionals such as chartered accountant in practice, consultants, lawyers etc
- Consultants to structure the Roadmap and draft the restructuring Scheme.

STEP – 2

Holding of Independent Directors Committee Meeting

Report from the Committee of Independent Directors recommending the draft Scheme, taking into consideration, inter alia, that the scheme is not detrimental to the shareholders of the listed entity.

Holding of Audit Committee Meeting

- Valuation Report to be placed before Audit Committee.
- Audit Committee to give its recommendation on Draft scheme/ Share Entitlement Ratio, taking into consideration the Valuation Report.
- The Audit Committee report shall also comment on the following:
 - Need for the merger/demerger/amalgamation/arrangement Ratification of the scheme
 - Synergies of business of the entities involved in the scheme
 - Impact of the scheme on the shareholders
 - Cost benefit analysis of the scheme.

Holding of Second Board Meeting

- Approval of Exchange Ratio
- Approval of Valuation Report
- Approval of Scheme of Arrangement
- Public Co. to file copy of Board Resolution with ROC [Sect on 117(3) (g) read with Sect on 179(3) (i)]
- Authorisations to sign documents, make representation and enter appearances
- File copy of scheme with ROC [Sect on 232(2)(b)]
- In-Principle approval of Stock Exchange
- Consider the Fairness Opinion of the Merchant Banker
- Accept the recommendation of Audit Committee
- Choose one of the Stock Exchange having national-wide trading terminals as the Designated Stock Exchange.

STEP 3 – Filings, Interventions and Website Updates

- Intervention to Stock Exchange on the decision of the Board within 24 hours of the meeting
- Filing of Form No. MGT-14 to ROC in accordance with Sect on 179 of the Companies Act, 2013 within 30 days
- Company to submit the Draft Scheme along with documents to Stock Exchange in accordance with Regulation 37 of SEBI (LODR) Regulations, 2015, Simultaneously, the company shall upload all the following documents filed with Stock Exchange on its website;
 - (a) Draft Scheme of arrangement/ amalgamation/ merger/ reconstruction/ reduction of capital, etc.;
 - (b) Valuation Report;
 - (c) Report from the Audit Committee recommending the Draft Scheme, taking into consideration, inter alia, the Valuation Report. The Valuation Report is required to be placed before the Audit Committee of the listed entity;
 - (d) Fairness opinion by a SEBI Registered merchant banker on valuation of assets / shares done by the valuer for the listed entity and unlisted entity;
 - (e) Pre and post amalgamation shareholding pattern of unlisted entity;
 - (f) Audited financials of last 3 years (financials not being more than 6 months old) of unlisted entity;
 - (g) Auditor's Certificate;
 - (h) Detailed Compliance Report duly certified by the Company Secretary, Chief Financial Officer and the Managing Director.
- Any complaints received by the Company (i.e. Directly or Indirectly through Stock Exchange/SEBI) shall be submitted by company as 'Complaints Reports' to the stock exchanges within 7 days of expiry of 21 days from the date of filing of Draft Scheme with Stock Exchange(s).
- In case of unpaid dues / fines / penalties, the listed entity shall submit to stock exchanges a 'Report on the Unpaid Dues' which shall contain the details of such unpaid, prior to obtaining Observation Letter from stock exchanges on the draft scheme. The report on unpaid dues, shall be submitted by listed entity to the stock exchanges along with the draft scheme.

STEP 4 – FIRST MOTION APPLICATION

Preparation and filing of first motion application:

- Consent letter of shareholders and creditors by way of affidavit.
- Certificate from Chartered Accountant certifying creditors.

- Certificate from auditors to the effect that the accounting treatment is in conformity with accounting standards [proviso to sec. 230(7) read with proviso to sec. 232 (3) of CA, 2013]
- Drafting of First Motion Application (NCLT 1), Notice of Admission (NCLT 2) & Affidavit (NCLT 6) – pray for dispensation of meeting.
- No dispensation- order for individual notices to the shareholders/creditors
- Copy of the scheme of compromise or arrangement
- Creditors responsibility statement (Form CAA 1) in case a compromise or arrangement is proposed between company and its creditors or between company and its members
- Advertisement in Newspaper (Form CAA-2).

Contents of First Motion Application

- Details of the Companies.
- Jurisdiction of NCLT Bench.
- Limitation
- Facts of the case including benefit, rationale, etc.
- Relief & prayer (Dispensation) – Specific prayer regarding dispensation for each meeting (in the matter of JVA Trading Private Limited)
- Relief & prayer (Meeting) - Direction for service of notice, approval of Newspaper for advertisement.

Documents/ Annexure(s) to First Motion Application

Documents/ Annexures includes:

- Memo of parties/Brief synopsis
- Joint application
- Affidavit verifying application
- Board Resolution of all the Companies
- Certificate from Chartered Accountants
- Certificate from Auditors
- Audited and/or unaudited financial statement of all the Companies
- Memorandum and Article of Association of all the Companies
- List of shareholders of all the companies along with their consent/NOC by way of affidavits.
- List of Creditors (Secured, unsecured).
- Scheme of Arrangement
- Copy of valuation Report
- List of directors
- Memorandum of Appearance & power of Attorney / Vakalatnama
- Notice of Admission in NCLT 2.

STEP 5 - NCLT will give order on the application of the company on the following:

- Date, time and venue of the meeting
- Appointment of the Chairman
- Time within which the Chairman of the meetings will give his report
- Dispensation of meeting for the unlisted Company

The order of the Tribunal shall be filed with the Registrar by the company within a period of 30 days of the receipt of the order.

STEP 6- Notice of First Meeting on Application

No dispensation – Notice of meeting of arrangement or compromise shall be given to:

- Shareholders & Creditors
- Central Government
- Income Tax Authorities
- Reserve Bank of India
- Securities and Exchange Board of India
- The Registrar
- Official Liquidator
- Competition Commission of India
- Advertisement in Newspaper (Form CAA-2).

The notice to statutory authorities shall be in Form CAA 3 and shall be accompanied with a copy of the scheme of compromise or arrangement, the explanatory statement and the prescribed disclosures

STEP 7 – Holding of Meeting**Process of Meeting**

- Court appointed Chairman/ Alternate Chairman to preside over.
- Quorum, as decided by the Tribunal.
- Public shareholders consent by Postal Ballot (Listed Co.) and through e-voting (if required) as per SEBI norms
- Scrutinizer, as appointed by the Tribunal
- Report of the Scrutinizer to the Chairman
- Report of the Chairman to be filed with Tribunal within the time fixed by the tribunal, or where no time has been fixed, within three days after the conclusion of the meeting submit a report to the Tribunal on the result of the meeting in Form CAA 4

STEP 8- Filing of Second Motion on application

Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case maybe with or without modification, the company (or its liquidator), shall:

- Within 7 days of receipt of certified true copy of order of NCLT and / or filing of report by the Chairperson, as the case may be, the second motion petition must be filed in Form CAA.5 for sanction of the scheme praying for appropriate orders and directions under section 230 read with section 232 of the Companies Act, 2013 [Rule 15 of the Companies (Compromise, Arrangement and Amalgamation) Rule, 2016]
- Where the company fails to present the petition for confirmation of the compromise or arrangement as aforesaid, it shall be open to any creditor or member as the case may be, with the leave of the tribunal, to present the petition and the company shall be liable for the cost thereof.

STEP 9- Hearing on admission of Second Motion

- NCLT shall fix a date of hearing of the petition, and
- Order to advertise the notice of hearing in such newspaper as the NCLT may think fit, not less than 10 days before the date of hearing of petition [Rule 16 of the Companies (Compromise, Arrangement and Amalgamation) Rule, 2016]

Publish the advertisement in Form NCLT-3A, place the same on the Website, if any and file an affidavit of compliance in relation to the same, not less than 3 days before the fixed for hearing [Rule 35 of the National Company Law Tribunal Rules, 2016].

STEP 10- Approval of Regulatory Authorities

- Filing of First motion, second motion along with notice with all the authorities.
- Report of ROC to office of Regional Director.
- Query letter and its reply to office of Regional Director
- Query letter and its reply to office of Official Liquidators
- Report of RD and OL to be filed with Tribunal.

STEP 11- Final Hearing

NCLT may, if it thinks fit, sanction the scheme and pass an Order in Form CAA 7, with such variations as the circumstance may require.

The order shall direct that a certified copy of the same shall be filed with the registrar of companies within 30 days from the date of the receipt of copy of the order, or such other time as maybe fixed by the tribunal.

STEP 12- Filing with Scheme & other Compliance

- Board Meeting to take note of the Copy of Order, fixation of records date and board meeting of Resulting Company for allotment of shares to the members of Demerged Company
- File the certified true copy of order of NCLT with ROC in Form INC-28, within 30 days from the date of the receipt of certified true copy of order [Section 232(5) of the Companies Act, 2013]
- Filing of Form PAS 3, SH. 7
- Change of Name, Conversion, Consolidation of share, reclassification of share, reduction of share, if any
- Dispatch of Share Certificates to the allottees or entering the name of allottees as beneficial owner in the records of depositories
- Apply to Stock Exchange for Listing of Shares of Resulting Company within 30 Days of Receipt of Order of the NCLT sanctioning the Scheme;
- Before commencement of Trading, advertisement is required to be given in one Hindi and one English newspaper having nationwide circulation and one regional newspaper with the wide circulation at the place where the registered office of the Resulting Company is situated
- Formalities for commencement of trading shall be completed within 45 Days of the order of NCLT

STEP 13: Certification of Compliance of Scheme

- A statement (Form CAA 8) is to be filed with Registrar in regard to compliance of scheme in accordance with the orders of the Tribunal every year until the scheme is fully implemented.
- It must be certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the Scheme is being complied in accordance with the orders of the Tribunal or not.

Q55: Pysunsmart Fire Protection Limited (PFPL) is a listed company on the Bombay Stock Exchange (BSE). It is engaged in the manufacture of industrial fire extinguishers. The company has seen a steady growth over the past few years and has attained a robust market presence. The company's stock has been gaining momentum due to company's strong pipeline of upcoming new products and expansion into new markets. As a result, the stock price of (PFPL) has been steadily rising.

A and B have been close friends and business partners over years. Over time, they have started investing jointly in several listed company, including PFPL.

C is a majority shareholder of a company "C holdings" and has also expressed his interest to purchase more shares in PFPL through C holdings and has been in talks with A, B, and Z about a potential joint acquisition strategy to gain control over the company.

Z a prominent investor has been closely monitoring the performance of PFPL. He believes that PFPL is undervalued relative to its growth prospects. He has identified that if the company's product pipeline succeeds, it could increase the company's market capitalization significantly. He already holds 20% shares in PFPL and is interested in increasing his stake further.

While all these shareholders have not made any formal agreements with each other but they have had multiple informal meetings where they discussed the possibility of working together.

PFPL had conducted a buy back through an open offer in order to improve its earning per share (EPS) and boost stock prices. Due to this, the total number of shares of PFPL in circulation decreased and as a result the shareholding of one shareholder, Q, increased from 24% to 28%.

PFPL is also considering proposals for merger with Sangam Limited, a manufacturer in same product. PFPL has attained a robust market presence in North India but operating at a much smaller scale in south. Merger with Sangam Limited will open the avenues to increase its market share in South too. The board of directors of PFPL have shown keen interest in doing premerger due diligence as they want to ensure the post-merger success. Though they have not received any red flag from any other department but HR head who is a part of premerger due diligence team has raised a concern. PFPL has a formal corporate culture, with a hierarchical structure whereas the employees of Sangam Limited are young and thrive in a culture that values innovation and informality. Sangam Limited operates in a flat structure where decision making is quick and decentralized. The HR Department of PFPL wants to draw attention to the problems that might come up regarding the cultural integration and human aspects of combining these companies who are having starkly different cultures. A meeting of Board of Directors has been called to discuss the matter.

Based on the above facts, answer the following questions :

a. The HR Head strongly believes one modification that has great potential to affect the merged entity is a change in the organizational structure. Regardless of whether the change is large or small, planning and an intense analysis are vital to creating a decision-making and communication framework that will support post-merger objectives and help the new business grow. As the member of the HR team, what do you suggest to synchronise these differences in culture and organizational structure of Sangam Limited and PFPL especially during the premerger diligence. (5 Marks)

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OR

What are the key considerations and phases involved in restructuring the organizational structure during a merger, and how can the process be exemplified by the merger of the associate banks of SBI with the State Bank of India?

Answer: Yes, the concern of the HR Head is justified as there is a lot of difference in human and cultural aspects of both the companies and both have to be taken care of to make the merger successful.

Human Aspects: The employees of the amalgamated entity at times face secondary treatment in the amalgamating company.

Cultural Aspects: Behavioral patterns get set because of the culture. These patterns create mental blocks for the people in the organization.

Structural Change Considerations

An organizational structure refers to the levels of hierarchy, chain of command, management systems and job structures and roles. In response to a merger, duplicate departments need to be merged or eliminated, and at least some employees from both companies will either get transfer to new positions or leave the company. Pre-merger survey and summarization of varying cultures of different companies merging, needs to be carried out. People belonging to each defined culture need to be acquainted with other cultures of other merging companies. They need to be mentally prepared to adopt the good points of other cultures and shed the blockades of their own cultures. Such an open approach will make the fusion of cultures and ethos easy and effective.

Important considerations and steps to be taken by HR w.r.t. the above stated aspects are as follows:

Premerger Due Diligence

Review the organizational structures of both businesses to see how well each compares to the mission and long-term objectives for the new company. Analyze hierarchies and reporting relationships to see where the existing structures clash and where they're synchronized. Once an initial review is completed, appoint an integration team to speak with core employees and get their perspective on what works and what doesn't work in their respective structures. Make preliminary decisions about which features best support the new business.

Structural Change Options

Organizational structure change options include starting from scratch, eliminating one in favor of the other and combining the best features of both structures into one. Which is the best option depending on the size, complexity and objectives of the new business.

The Three Phases of Change

Changing an organizational structure due to a merger involves much more than creating a new organizational chart. Although the chart will reflect decisions made about how the new business's employees will communicate with one another and make decisions, this typically occurs in multiple phases. The first phase is awareness, during which employees from both businesses come to understand the new company's direction and what it will mean to them. The goal of the second phase is acceptance, as the integration team works to build new relationships and employees at every level transition into new roles and new ways of getting work done. In the final phase, the merger is complete and the new organizational structure becomes fully adopted.

Alternate Answer,

Example: Merger of the Associate Banks of SBI with the State Bank of India:

Branch and Regional Office Realignment: Some branches of the former associate banks were relocated or closed, and administrative and regional offices were reorganized.

Expansion of Authority: The authority of the existing regional/zonal offices of SBI was expanded to cover more branches, and some regional offices lost their previous identities.

Relocation of Officers: The roles and responsibilities of middle and higher-level officers were realigned to meet the requirements of the merged entity, with new responsibilities assigned after the merger. This structured approach to organizational change ensures a smooth transition and integration of the new company, enabling it to effectively function post-merger.

Q56: How were employee compensation and benefits handled in the merger between Bank of Rajasthan Ltd. (BoR) and ICICI Bank Ltd. in 2010?

Answer: In the merger between Bank of Rajasthan Ltd. (BoR) and ICICI Bank Ltd. in 2010, the employees of BoR, who were aligned with the Indian Bank Association (IBA) compensation policy, had to adopt the compensation policy of ICICI Bank, as it was not linked with the IBA policy. This alignment was necessary to maintain consistency in the compensation policy across the merged entity.

Q57: What happens to the company policies and customer products after a merger, with reference to the example of the merger between Bank of Rajasthan Ltd. (BoR) and ICICI Bank Ltd.?

Answer: After a merger, the merged entity typically adopts the policies and systems of the acquiring company. For instance, in the merger between Bank of Rajasthan Ltd. (BoR) and ICICI Bank Ltd., the acquiring ICICI Bank imposed its accounting software (like Finacle) and policies such as Deposit Policy, Loan Policy, and Recovery & Compromise Policy on the merged entity. However, if the products of the merged entity were satisfactory, they were allowed to continue for some time. In this case, the customers of BoR were charged the same service fees and could continue with some of the product schemes as per the previous terms to maintain customer confidence during the transition.

Q58: What steps are involved in aligning accounting and internal database management systems after a merger or acquisition?

Answer: After a merger or acquisition, the company must align its accounting policies and practices with those of the acquiring company or the merged entity. This involves passing appropriate accounting entries to capture the new financial structure and adopting reporting practices that meet the requirements of the parent company. Additionally, the company must assess its existing database systems and ensure they align with those of the acquiring or merged entity. This may require training personnel to handle new reporting systems and addressing any issues to avoid incorrect reporting. Proper alignment ensures smooth data flow and accurate reporting post-merger.

Q59: What is the importance of record keeping after a merger or acquisition, and what steps should be taken for the preservation and maintenance of records?

Answer: After a merger or acquisition, it is essential to preserve the books and papers of the amalgamated companies. According to Section 239 of the Companies Act, the books and papers of the company being amalgamated cannot be disposed of without prior permission from the Central Government. The government may appoint a person to examine these records to determine if they contain evidence of any offences related to the promotion, formation, or management of the transferor company's affairs.

In addition, the merging entity must ensure proper maintenance of records, such as statutory registers and other relevant forms, returns, certificates, approvals, and litigation records. These records must be accurately updated in the records of the merged entity, including changes in shareholding and directors. To streamline this process, companies may need to centralize these records in a storage system maintained by the new or merged entity. Proper record keeping ensures compliance and aids in legal or regulatory reviews after the merger.

Q60: What are the key considerations for integrating business and operations after a merger?

Answer: The integration of business and operations after merger is the crucial part and many points require attention on the issue. These may be listed out as under:

- Assessment of the future cash flow generation in order to have organic growth after having gone through the process of inorganic growth.
- Integration of the accounting software, accounting policy.
- Integration of various other software.
- The customer retention of the merged entity and acquisition of more customers.
- Satisfaction of the human resources and retaining of the talent.

Q61: What are the human and cultural aspects that need to be considered during a merger, and how can these factors impact the success of the integration?

Answer: During a merger, both human and cultural aspects play a crucial role in determining the success of the integration:

1. Human Aspects:

- Employees of the amalgamated entity often face negative treatment, including harassment, demotion, or forced transfers, which can lead to frustration. This may result in valuable employees opting for voluntary retirement, ultimately causing the company to lose talent.
- The example of the merger between the **Bank of Rajasthan Ltd** and **ICICI Bank Ltd**, and the **Associate Banks of SBI** with **State Bank of India** highlights how employees from merged entities often leave due to dissatisfaction.
- The company must be sensitive to employee concerns and provide support during the integration process to retain skilled personnel and minimize workforce turnover.

2. Cultural Aspects:

- Merging companies often have different organizational cultures, which can create challenges in integrating the employees effectively.
- A **pre-merger survey** of the cultures in the merging companies should be conducted to understand their differences. Employees should be educated about each other's cultures and encouraged to adopt positive practices while shedding mental blocks associated with their own organizational cultures.
- Ignoring cultural differences can lead to short-term success, but it may hinder long-term sustainability. A cultural integration strategy can facilitate smoother interactions and collaboration between employees from different backgrounds, enhancing overall organizational cohesion.

In conclusion, addressing both human and cultural aspects during a merger is essential to ensure a smooth transition, retain talent, and create a unified and productive workforce that supports the long-term success of the merged entity.

Q62: What are the key criteria and parameters used to measure the efficiency and success of a merger post-completion?

Answer: The criterion to judge a successful merger differs in different conditions. Different factors may be considered for making value judgements such as growth in profit, dividend, company's history, increase in size, base for growth, etc. Several studies suggest different parameters to assess the success of mergers:

- Successful merger creates a larger industrial organization than before, and provides a basis for growth [Edith Perirose].
- In Arthur Dewing's study, three criteria were considered viz. (a) merger should give a larger net profit than before (b) merger should provide a higher return on total funds (c) there should be a sustained increase in earnings.
- Earnings on capitalization and dividend records determine the success of merger [Shaw L.]

Q63: What key questions should be addressed to measure the efficiency and success of a merger or acquisition during the integration process?

Answer: During the studies in late 1960s, two types of efficiency improvements were expected to result from mergers:

- (1) Improvements due to economies of large scale production
- (2) Application of superior management skills to a larger organization. Some other researches in the seventies and eighties, measure efficiency based on stock market measures, labour productivity or total factor productivity, etc. These improvements pointed towards market dominance, but for gauging efficiency, resultant profitability was accepted as a benchmark. In order to ensure progress, a conscious and concerted effort to keep track of several key elements is required, along with answers to the following questions:
 1. What impact is the integration (merger/acquisition) having on key indicators of business performance? Whether synergies which were hypothesized during the valuation are being realized?
 2. Are the activities and milestones developed with the integration process on target?
 3. What are the major issues emerging during the integration, requiring considerable attention?
 4. What important facts have emerged during the merger or acquisition that can be used to improve subsequent mergers or acquisition?

Q64: What are the key indicators that need to be measured apart from expected financial results such as earnings and cash flow to evaluate extent of success of merger? (3 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: The main purpose of a merger or acquisition is to deliver the expected financial results namely earnings and cash flow. However, there are certain other measures that serve as key indicators and they also need to be measured. The indicators may be grouped as:

- i. Financial outcomes.

- ii. Component measures of these outcomes namely revenues, costs, net working capital and capital investments.
- iii. Organisational indicators such as customers, employees and operations.

All the areas being integrated and both the acquirer and target, or in a merger, both partners, should be brought within the ambit of continuous appraisal. Also, the appraisal should be based on benchmarks to ensure that merger or acquisition are yielding the financial and strategic objective so intended and are not resulting in value leakage.

Q65: Central Government has power to examine the books and papers, financial reports even after sanction of the scheme by National Company Law Tribunal— Elaborate the issue in relation to preservation of records of amalgamated companies. (3 marks)

PAST YEAR QUESTION JUNE 2019

Answer: In terms of section 239 of the Companies Act, 2013 that corresponds to Section 396A of Companies Act, 1956, the books and papers of a company that has been amalgamated with or whose shares have been acquired by another company shall not be disposed of without obtaining prior permission of Central Government. Before granting such approval the Government is empowered to appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion, formation or the management of the affairs of the transferor company or its amalgamation, or the acquisition of its shares.

Q66: HIJ Entertainment LLP desires to amalgamate as transferor with LMN Exhibitors Ltd. Is it permissible? (3 Marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Yes, it is permissible as was held in the Matter of Scheme of Amalgamation between ***Real Image LLP v. Qube Cinema Technologies Private Limited.***

The National Company Law Tribunal, Chennai Bench in the order dated 11.06.2018 held that, “...the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for companies and...

“For this purpose, both the Acts have provided provisions for merger or amalgamation of two or more LLPs and companies,” noted the NCLT bench.

“If the intention of Parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act prohibits a merger of an Indian LLP with an Indian company.

“Thus, there does not appear any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company,”

National Company Law Tribunal, Chennai Bench taking such view decided by order dated 11th June 2018. The counsels submitted that Sections 60 to 62 of LLP Act and Sections 230 to 234 of the Companies Act, empowers National Company Law Tribunal to sanction a scheme put by the applicant entities. The Bench noted that there is no express legal bar to permit or sanction merger of Indian LLP with an Indian Company.

Q67: What is 'observat on let er' issued by stock exchanges ? What are the obligat ons of listed companies in relat on to 'observat on let er' with reference to merger? (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Observat on let er is a let er on the draf scheme of amalgamat on by the stock exchange before the same is f led with the court. It is a no object on let er or let er with some observat ons on the scheme.

(1) The listed ent ty desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall f le the draf scheme of arrangement, proposed to be f led before any Court or Tribunal Sect ons 230-234 and Sect on 66 of Companies Act, 2013, whichever applicable, with the stock exchange(s) for obtaining Observat on Let er or No-object on let er, before f ling such scheme with any Court or Tribunal, in terms of requirements specif ed by the Board or stock exchange(s) from t me to t me.

(2) The listed ent ty shall not f le any scheme of arrangement under Sect ons 230-234 and Sect on 66 of Companies Act, 2013, whichever applicable, with any Court or Tribunal unless it has obtained observat on let er or No-object on let er from the stock exchange(s).

(3) The listed ent ty shall place the Observat on let er or No-object on let er of the stock exchange(s) before the Court or Tribunal at the t me of seeking approval of the scheme of arrangement:

The validity of the 'Observat on Let er' or No-object on let er of stock exchanges shall be six months from the date of issuance, within which the draf scheme of arrangement shall be submit ed to the Court or Tribunal.

Q68: What is the purpose of observat on let er issued by Stock Exchange(s) under SEBI (Obligat ons and Disclosure Requirements) Regulat ons, 2015? (3 marks)

PAST YEAR QUESTION JUNE 2018

Answer: A listed ent ty desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement shall under Regulat on 37 of SEBI (List ng Obligat ons and Disclosure Requirements) Regulat ons, 2015 f le the draf scheme of arrangement, proposed to be f led before any Tribunal under Sect ons 230-234 and sect on 66 of Companies Act, 2013, whichever applicable, with the stock exchange(s) for obtaining Observat on Let er or No-object on let er (let er with the comments of the stock exchange and SEBI on the draf scheme), before f ling such scheme with any Tribunal, in terms of requirements specif ed by the Board or stock exchange(s) from t me to t me.

The listed ent ty shall place the Observat on let er or No-object on let er of the stock exchange(s) before the Tribunal at the t me of seeking approval of the scheme of arrangement.

Q69: "There have been occasions when shareholders holding miniscule shareholdings have made frivolous object ons against the restructuring scheme, just with the object ve of stalling or deferring the implementat on of the scheme. The courts have, on a number of occasions, overruled their object ons." Comment on the statement with relevant case law. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: There have however been some instances when shareholders holding a small number of shares, have made frivolous object ons against the scheme, just with the object ve of deferring the implementat on of the scheme. The courts have, on a number of occasions, overruled their object ons. But Companies had to bear the consequences in the form of t me and cost over-runs.

In case of Parke-Davis India Limited

In 2003, Parke-Davis India Limited and Pf zer Limited were considering implementat on of a Scheme of Merger. The Minority shareholders of Parke-Davis India Ltd objected to the Scheme on the grounds that the approval from the requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They f led an urgent pet t on before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementat on of the scheme of amalgamat on, which was further extended t ll September 2003. The dissent ng shareholders f led a Special Leave Pet t on with the Supreme Court. The turmoil came to an end when the Supreme Court dismissed the pet t on f led by the shareholders. Parke-Davis then proceeded to complete the implementat on of the scheme of amalgamat on with Pf zer.

In case of Tomco with HLL Merger

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

Q70: “Consequent to restructuring, more part cularly through mergers, amalgamat ons or takeovers, the management needs to be sensit ve to employees’ morale”. Briefly comment on the validity of the statement. (3 marks)

PAST YEAR QUESTION JUNE 2018

Answer: A merger can join two cultures, two sets of procedures and protocols, two sets of policies and change the employment environment and prospects of several hundreds of employees, who have been the bed rock of past successes and the key to future value.

Companies need to be sensit ve with regard to terms and condit ons of employment specif cally at senior levels in order to ward of high labour turnover. Usually, Courts would uphold terms of employment to be no less favourable than exist ng terms and condit ons. Post-acquisit on, parent company may want the acquired to adopt compensat on structure of the parent ent ty. The Company needs to carefully handle such sensit ve areas to ensure employee sat sfact on and comfort, which pays in the long run in building an image apart from prevent ng or reducing employee turnout. At t mes, in support funct ons, allocat on becomes a challenge for senior posit ons like CFO, HR Head, etc. A careful planning is needed to avoid overlapping, underut lizat on.

Q71: ABC Bank Ltd. contemplates to merge with PQR Bank Ltd. Accordingly, draf scheme of amalgamat on is placed before the Board of Directors of both the banks. The said scheme is aimed to be placed in the shareholders meet ng thereaf er. Ment on the aspects which board of both the companies should consider in approving draf scheme of amalgamat on. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: Boards of both the companies should give part cular at ent on to the following:

- (a) As per paragraph 6 of the master direction issued by RBI, the decision of amalgamation is approved by the Board of the Bank concerned with a two thirds majority and not just those present and voting.
- (b) The values at which the assets, liabilities and the reserves of the amalgamated company are proposed to be incorporated into the books of the amalgamating company and whether such incorporation will result in a revaluation of assets upwards or credit being taken for unrealized gains.
- (c) Whether due diligence exercise has been undertaken in respect of the amalgamated company.
- (d) The nature of the consideration, which, the amalgamating company will pay to the shareholders of the amalgamated company.
- (e) Whether the swap ratio has been determined by independent valuers having required competence and experience and whether in the opinion of the Board such swap ratio is fair and proper.
- (f) The shareholding pattern in the two banking companies and whether as a result of the amalgamation and the swap ratio, the shareholding of any individual, entity or group in the amalgamating company will be violative of the Reserve Bank guidelines or require its prior approval.
- (g) The impact of the amalgamation on the profitability and the capital adequacy ratio of the amalgamating company.
- (h) The changes which are proposed to be made in the composition of the Board of Directors of the amalgamating banking company, consequent upon the amalgamation and whether the resultant composition of the Board will be in conformity with the Reserve Bank guidelines in that behalf.

Q72: XYZ Ltd. and ABC Ltd. filed applications before National Company Law Tribunal (NCLT) for amalgamation of both the companies to form a new Company PQR Ltd. Regional Director by an affidavit pointed out the following inconsistencies in the application(s) :

- (i) Main objects of XYZ Ltd. are not similar to that of ABC Ltd; and**
- (ii) Authorized capital of PQR Ltd. is not sufficient to cover the total consideration.**

As a Company Secretary, you are requested to brief the facts and background, along with the judicial precedents, to the counsel enabling him to proceed in the matter. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: The Counsel in the matter can be briefed with the following judicial precedents to the objections or observations made by the Regional Director before the National Company Law Tribunal:

- (a) It was held in the matter of *Re. Rangkala Investments Ltd. (1996) 1 Comp LJ 298 (Guj)* that Court will sanction the scheme if alteration of the memorandum is by reshuffling of the Objects Clause by shifting Other Objects to Main Objects as per procedure prescribed under the Act;
- (b) Bombay and Calcutta High courts have even held that there need not be unison or identity between objects of transferor and transferee companies. Companies carrying entirely dissimilar businesses can amalgamate. May refer to *Re: PMP Auto India Ltd. (1994) 80 Comp Cas 291 (Bom)*; *Re: McLeod Russel (India) Ltd. (1997) 13 SCL 126 (Cal)*.
- (c) On approval of the scheme, transferee company can increase its authorized capital as was held in *Mahavir Weaves Pvt. Ltd. (1985) 83 Comp Cas 180*.

CHAPTER- 5 AS PER ICSI MODULE

DOCUMENTATION – MERGER & AMALGAMATION

Q1: “Documentat on is an important aspect in fulf lment of legal requirements and obligat ons in merger and amalgamat on for an ef ect ve and successful venture.” Analyse the statement indicat ng the important steps to be involved for successful complet on of mergers or amalgamat ons. (5 marks)

PAST YEAR QUESTION JUNE 2024

OR

What are the various stages involved in the merger of a company under the Companies Act, 2013? (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: Documentat on is an important aspect in fulf lment of legal requirements and obligat ons in merger and amalgamat on for an ef ect ve and successful venture. The quantum of such obligat ons will depend upon the size of company, debt structure and prof le of its creditors, compliances under the corporate laws, controlling regulat ons, etc. In all or in some of these cases legal documentat on would be involved. If foreign collaborators are involved, their exist ng agreements would need a mandatory documentat on to protect their interests if their terms and condit ons so require. Secured debenture holders and unsecured creditors would also seek legal protect on to their rights with new or changed management of the amalgamat ng company. Regulatory bodies like the RBI, Stock Exchanges, SEBI, etc. would also ensure adherence to their respect ve guidelines, regulat ons or direct ves. In this way, while draf ing the scheme of merger and amalgamat on the transferor and transferee would have to ensure that they meet legal obligat ons in all related and requisite areas.

Stages Involved in Mergers or Amalgamat on

In brief, it can be said that there are broadly eight stages involved in merger and amalgamat on, which are listed below:

Stage 1– Draf ing 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 – Applicat on / Pet t on for convening the meet ng of members/creditors shall be f led with Nat onal Company Law Tribunal.

Stage 5 – Convening meet ngs of the Shareholders and Creditors and obtaining their consent on. Stage 6– Scheme Approvals or No object on from Regional Director / Of cial Liquidator.

Stage 7- Filing of f nal pet t on with NCLT for approving the Scheme.

Stage 8 - Obtaining order for approval for scheme of merger/amalgamat on from the Nat onal Company Law Tribunal.

Q2: Under a “Scheme of Amalgamat on”, “Acme Inc.” (Transferor Company) is being merged with “Beta Corp.” (Transferee Company), where Acme Inc.’s assets and liabilit es would be transferred to Beta Corp., result ng in Acme Inc. dissolving, with shareholders receiving a specif c exchange rat o of Beta Corp. shares

for their Acme Inc. shares, aiming to achieve operational synergies and cost savings by combining operations under one entity.

In this respect, Managing Director of Transferee Company approaches you as a Practising Company Secretary for seeking advice on the list of key documents required to be filed in this scheme of amalgamation. Advise in the matter. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: List of Documents is to be filed in case of a scheme of amalgamation.

In this case there are two companies to the amalgamation, i.e., the Transferor (1st Applicant) and the Transferee (2nd Applicant)

1. Memorandum and Articles of Association of the First Applicant Company
2. Audited Balance Sheet of the First Applicant Company – latest
3. Board Resolution for approval and authorization of the scheme by the First Applicant Company
4. List of Equity Shareholders of the First Applicant Company
5. Consent Affidavits filed by the Equity Shareholders of the First Applicant Company
6. Auditors Certificate stating out the no. of Secured Creditors in the First Applicant Company
7. Auditor's Certificate listing out the no. of Unsecured Creditor in the First Applicant Company
8. Consent Affidavit filed by no. of Unsecured Creditor of the First Applicant Company
9. Auditors Certificate of the 1st Applicant Company in relation to the accounting treatment proposed in the Scheme of Amalgamation
10. Memorandum and Articles of Association of the Second Applicant Company
11. Audited Balance Sheet of the Second Applicant Company
12. Board Resolution for approval and authorization of the Scheme by the Second Applicant Company
13. List of Equity Shareholders of the Second Applicant Company
14. Auditors Certificate listing out the no. of Secured Creditors in the Second Applicant Company
15. Consent Affidavit filed by the no. of Secured Creditor of the Second Applicant Company
16. Auditors Certificate listing out the no. of Unsecured Creditors in the Second Applicant Company
17. Consent Affidavit filed by the no. of Unsecured Creditor of the Second Applicant Company
18. Auditors Certificate of the 2nd Applicant Company in relation to the accounting treatment proposed in the Scheme of Amalgamation
19. Certificate of the Chartered Accountant for Non-Applicability of obtaining a Valuation Report
20. Fairness Opinion issued by the Merchant Banker on the Scheme of Amalgamation
21. Undertaking regarding the Non-Applicability of paragraph I(A) 9(a) of Annexure I of SEBI Circular No. CIR/CFD/CMD/16/2015 dated 30 November 2015
22. Observation Letter issued by the Stock Exchanges approving the Scheme of Amalgamation
23. Scheme of Amalgamation.

As a Practising Company Secretary, the Managing director of the Transferee Company is thus advised accordingly.

Q3: Who are the persons eligible to file a petition before the National Company Law Tribunal (NCLT) in the case of a merger, amalgamation, or other corporate restructuring?

Answer: 1. An application for merger & amalgamation shall be filed with Tribunal (NCLT) by both the transferor(s) and the transferee company in the form of petition under section 230-232 of the Companies Act, 2013 for the purpose of sanctioning the scheme of amalgamation.

2. Where more than one company is involved in a scheme, such application may, at the discretion of such companies, be filed as a joint-application.

In case, the registered office of the companies involved is in different states, there will be two Tribunals having the jurisdiction over those. Both the companies shall have to file separate petition with the respective Tribunals. However as a matter of practice and smother the process, first registered office of companies may be shifted as per section 12 of the Companies Act, 2013 to a single jurisdiction.

Q4: Discuss briefly the points to be considered while drafting a scheme of merger and amalgamation.

Answer: The Scheme of amalgamation would comprise of various parts containing details about Transferor Company, Transferee Company. The Scheme in particular would comprise of the following in detail:

Introductory Part

1. Basic Details of the Transferor & Transferee company like date of incorporation, CIN and registered office and address for service of notice
2. Main objects in Memorandum of Association of Transferor and Transferee Company
3. Jurisdiction of the Bench
4. Limitation
5. Facts of the case - reason in brief for going into merger or amalgamation
6. Nature of business
7. Share Capital of the companies involved and shareholding relationship between the companies involved
8. Definition Clause

Operating Part – The Scheme

9. Appointed Date - The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.
10. Transfer of the undertaking of the Transferor Company or transfer of the Transferor Company per se
11. Transfer of assets
12. Transfer of debts and liabilities
13. Transfer of licenses, approvals / permissions
14. Transfer of Company's staff, workmen and employees
15. The transfer of undertaking of the Transferor Company not to affect the transaction / contracts of transferor Company
16. Enforcement of contracts, deeds, bonds and other instruments
17. Enforcement of Legal Proceedings
18. Issue and Allotment of Shares under the Scheme
19. Increase in Authorized Share Capital
20. Accounting Treatment
21. Conduct of business by the transferor Company till effective date

22. Dissolution of Transferor Company
23. Effect of Scheme
24. Expenses relating to the Scheme
25. Scheme conditional upon approval / sanctions
26. Effect of non-receipt of approvals
27. General terms and conditions applicable for the scheme Prayer / Relief Part
28. Approval of scheme
29. Particulars of Bank draft evidencing payment of fee for the Application.

Q5: A clean and clear drafting of the Petition is required to be submitted to the NCLT, which would make process easier. Elaborate the standard guidelines for presenting an application or petition before NCLT, prescribed in National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

Answer: Following are the standard guidelines for presenting an application or petition before NCLT, prescribed in National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016:-

1. The petition / application being filed shall fall under the proper territorial jurisdiction of NCLT Bench
2. The petition / application and all enclosures shall be legibly typewritten in English language.
3. The petition / application / appeal / reply shall be printed in double line spacing on one side of the standard petition paper with an inner margin of about 4 cms width on top and with a right margin of 2.5 cm left margin of 5 cm and duly paginated, indexed and stitched together in paper book form.
4. The petition / application shall be filed in prescribed form with stipulated fee in triplicate by duly authorised representative of the companies or by an advocate duly appointed in this behalf.
5. The petition shall also be accompanied by an index and memo of the parties.
6. The cause title of the petition / application shall be "Before the National Company Law Tribunal" and it shall also specify the Bench to which it is presented.
7. All the relevant provisions of the Companies Act, 2013 / NCLT Rules, 2016 shall be clearly mentioned in the petition / application.
8. The petition / application shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain a separate fact or point.
9. The foot of petition / application shall have name and signature of the authorized representative.
10. The name of the petitioner / applicant along with complete address, viz, the name of the road street lane and municipal division or ward, municipal door and other number of the house, the name of the town or village; the post office; postal district and pin code shall be mentioned in the petition / application.
11. The fax number, mobile number, valid email addresses of the petitioner / applicant shall also be mentioned.
12. Every interlineations, eraser or correction or deletion in petition / application shall be initialed by the party or his authorized representative.
13. The affidavit verifying the petition in Form NCLT-6 shall be drawn on non-judicial / stamp paper of requisite value duly attested by Notary public / Oath Commissioner.

14. Full name, parentage, age, description of each party, date, address and in case a party sues or being sued in a representative character, has been set out in accordance to Rule 20(5) of the NCLT Rules, 2016.
15. Petition / application / appeal reply has been drawn in the prescribed form i.e. Form No. NCLT-1 with stipulated fee given in the Schedule of these rules. The fee is to be paid by way of demand draft / PO drawn in favour of the "The Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi" or can be paid through online at nclt.gov.in.
16. The documents attached with petition / application shall be duly certified by the authorized representative or advocate filing the petition or application.
17. The annexure to the petition / application shall be serially numbered.
18. The Vakalatnama shall bear court fee stamp.
19. The documents with regard to shareholding/paid-up capital/latest balance sheet of the petitioner/applicant shall be attached.
20. Document other than in English language shall be duly translated and accordingly a translated copy duly certified shall be attached with petition/application.

Q6: What are the various documents to be enclosed along with various types of petitions / applications to be made before the NCLT?

Answer: Petition to the Tribunal for merger & amalgamation shall be submitted in Form No. NCLT-1 along with following documents:

1. A notice of admission in Form No. NCLT
2. Affidavit in Form No. NCLT-6
3. A copy of Scheme of compromise and arrangement (Merger & Amalgamation)
4. The applicant shall also disclose to the Tribunal in the application, the basis on which each class of members or creditors has been identified for the purposes of approval of the scheme.

Q7: What are the basic information about Notice of Meeting in Form No. CAA-2.

Answer: The Notice of the meeting pursuant to the order of Tribunal shall be given in Form No. CAA-2. The table below provides basic information about Notice of Meeting:

Person entitled to receive the notice	The notice shall be sent individually to each of the Creditors or Members and the debenture-holders at the address registered with the company
Person authorized to send the notice	Chairman of the Meeting or if Tribunal so directs- by the Company or liquidator or by any other person
Modes of sending of notice	By Registered post, or by Speed post, or by courier, or By e-mail, or by hand delivery, or by any other mode as directed by the Tribunal

Minimum time of notice	At least one month before the date fixed for meeting

Q8: What are the following details to be attached along with notice in Form No. CAA-2

Answer: The notice shall be accompanied with a copy of the scheme. Additionally, if the scheme does not include the following details, then the same shall also be sent along with the notice.

(a) Details of the order of the Tribunal directing the calling, convening and conducting of the Meeting

- Date of the Order;
- Date, time and venue of the meeting

(b) Details of the company including –

- Corporate Identification Number (CIN) or Global Location Number (GLN) of the company;
- Permanent Account Number (PAN);
- Name of the company;
- Date of incorporation;
- Type of the company (whether public or private or one-person company);
- Registered office address and e-mail address;
- Summary of main object as per the memorandum of association; and main business carried on by the company;
- Details of change of name, registered office and objects of the company during the last five years;
- Name of the stock exchange(s) where securities of the company are listed, if applicable;
- Details of the capital structure of the company including authorized, issued, subscribed and paid up share capital;
- Names of the promoters and directors along with their addresses.

(c) Relationship between companies: if the scheme of compromise or arrangement relates to more than one company, then the fact and details of any relationship subsisting between such companies who are parties to such scheme of compromise or arrangement, including holding, subsidiary or of associate companies.

(d) Disclosure about the effect of the compromise or arrangement on:

- Key managerial personnel;
- directors;
- promoters;
- non-promoter members;
- depositors;
- creditors;
- debenture holders;
- deposit trustees and debenture trustees;
- employees of the company.

(e) Disclosure about effect of M&A on material interests of directors, Key Managerial Personnel (KMP) and debenture trustee. The term 'interest' extends beyond an interest in the shares of the company, and is with reference to the proposed scheme of compromise or arrangement.

(f) Details of Board Meeting: The date of the board meeting at which the scheme was approved by the board of directors, the name of the directors who voted in favour of the resolution, the names of the directors who voted against the resolution and the names of the directors who did not vote or participate on such resolution.

(g) Investigation or proceedings, if any, pending against the company under the Act.

(h) Details of the availability of the following documents for obtaining extract from or for making/obtaining copies of or for inspection by the members and creditors, namely:

- latest audited financial statements of the company including consolidated financial statements;
- copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with;
- copy of scheme of compromise or arrangement;
- contracts or agreements material to the compromise or arrangement;
- the certificate issued by auditor of the company to the effect that the accounting treatment if any proposed in the scheme of compromise or arrangement is in conformity with the accounting
- standards prescribed under section 133 of the Companies Act, 2013; and
- such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme.

(i) Details of approvals, sanctions or no-object(s), if any, from regulatory or any other government authorities required, received or pending for the purpose of scheme of compromise or arrangement.

(j) A statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by voting through electronic means.

Further details to be provided in the Notice

1. A copy of the valuation report, if any;
2. Copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with copy of scheme of Merger & Amalgamation;
3. Contracts or agreements material to the Merger & Amalgamation;
4. Such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme;
5. The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
6. a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
7. Confirmation that a copy of the draft scheme has been filed with the Registrar;
8. The report of the expert with regard to valuation, if any;
9. A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

The notice along with the aforementioned documents and information shall also be placed on the website of the company, if any. In case of a listed company, these documents shall be sent to Securities and Exchange\

Board of India (SEBI) and stock exchanges where the securities of the companies are listed, for placing on their website.

Q9: What are the details incorporating in explanatory statement of the scheme of compromise or arrangement.(3 Marks)

PAST YEAR QUESTION JUNE 2021

Answer: Explanatory Statement disclosing details of the scheme of compromise or arrangement include the following:

- (a) Parties involved in compromise or arrangement;
- (b) Appointed date, effective date, 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) Ratios 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.

Q10: What are the various forms prescribed under the NCLT Rules and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016?

Answer: The National Company Law Tribunal (NCLT) and the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, prescribe various forms to facilitate corporate proceedings. Below is an overview of some key forms under these rules:

1. NCLT Rules Forms:

Form No. NCLT.1: Application for the order of a meeting under section 230 of the Companies Act, 2013.

Form No. NCLT.2: Notice of admission of application under section 230 of the Companies Act, 2013.

Form No. NCLT.3: Notice of motion in proceedings before the Tribunal.

Form No. NCLT.3A: Advertisement detailing petition under rule 35.

Form No. NCLT.9: General form for all purposes if no specific form is prescribed.

2. Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 Forms:

Form No. CAA.1: Application for sanctioning a scheme of compromise or arrangement.

Form No. CAA.2: Notice of meeting of creditors or members.

Form No. CAA.3: Report by the chairperson of the meeting.

Form No. CAA.4: Report of the result of the meeting by the Chairperson

Form No. CAA.5: Application for confirmation of the scheme.

Form No. CAA.6: Order of the Tribunal sanctioning the scheme.

Form No. CAA.7: Certificate of registration of the order of the Tribunal.

Form No. CAA.8: Notice of the order of the Tribunal.

Form No. CAA.9: Declaration of solvency.

Form No. CAA.10: Statement of assets and liabilities.

Form No. CAA.11: Affidavit verifying the petition.

Form No. CAA.12: Power of attorney.

Form No. CAA.13: Proxy form.

Form No. CAA.14: Notice of petition.

Form No. CAA.15: Advertisement of pet t on.

Form No. CAA.16: Declaration for cross-border mergers and amalgamations.

Q11: Kiran is a recently qualified lawyer who intends to appear before the National Company Law Tribunal (NCLT). Advise her on basic principles that shall be kept in mind while drafting of applications and petitions before NCLT. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Before any professional commences drafting of any Petition, Written Statement, Replication/Rejoinder or Miscellaneous application (cumulatively called pleadings) or an Interlocutory application before the NCLT, it is absolutely necessary to keep in mind the provisions of Companies Act, 2013, Code of Civil Procedure, Limitation Act, Indian Evidence Act, National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and also procedural laws and certain basic and fundamental principles of drafting and pleadings.

1. As per Order 6, Rule 2 of CPC every pleading shall contain only a statement in a concise form of material facts on which the party is relying upon. However, text of documents or evidence in the form of Agreement/MOU, Letters, e-mails, Negotiable instruments, Deeds, written documents or well settled position of law need not be elaborated in the pleadings but only reference is required to be made. Every pleading should not contain arguments. Further,

[illegible]

(b) dates, sums and numbers shall be expressed in a pleading in figures as well as in words.

2. However, as per Order 6 Rule 4 of CPC, in all cases where the party alleges (a) misrepresentation (b) fraud (c) breach of trust (d) willful default (e) undue influence, the party alleging any of these must state clearly and specifically the time, date, month or year when any of the aforesaid happened - however, merely vague allegations are not sufficient and adequate and the court will not take cognizance.

3. Before any one proceeds to commence drafting, it is absolutely necessary to gather information/documents/papers by having extensive discussions with the clients. The information could be gathered by asking the questions on the following points:

- Whether all Factual Details have been taken out
- Whether basic details of the parties have collated
- All Evidence Necessary for Drafting
- Appointment of Additional Directors
- Cessation of Office of Existing Directors
- Removal of Promoter Directors
- Illegal Transfer of Shares / Removal of Directors

- Information can be obtained under Right to Information Act, 2005

4. As per Order 6 Rule 14 of CPC, every pleading shall be signed by the party and his pleader, if any, provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. The authorization to sign the pleadings could be either by way of (a) Board resolutions in case of body corporate or (b) Power of Attorney duly executed.

5. Generally, the rules prescribe the format of petition or application but does not prescribe the format for filing of Written Statement/Reply or Rejoinder or Replication. Therefore, the contents of petition must always be set out under various headings or sub-headings in accordance with the format prescribed - otherwise, the Registry of the NCLT or NCLAT may raise objection and petition may not be listed for admission, hearing and consequently, grant of interim relief may be delayed. The petition must adhere to the following:-

- (a) Form prescribed
- (b) Set brief description of each of the petitioner and respondents
- (c) Narrate the Facts.

Q12: What are the general points to be kept in mind while filing Application / Petition with NCLT.

Answer: 1. Where a particular situation is not provided in the NCLT Rules, the NCLT may for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.

2. The general heading in all proceedings before the Tribunal, in all advertisement and notices shall be in Form No. NCLT-4.

3. Every petition or application or reference shall be filed in form as provided in Form No. NCLT-1 with attachments thereto accompanied by Form No. NCLT-2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT-1 accompanied by such attachments thereto along with the Form No. NCLT-3.

4. Every petition or application including interlocutory application shall be verified by an affidavit in Form.

5. Notice to be issued by the NCLT to the opposite party shall be in Form No. NCLT-5.

Q13: Explain the following forms.

1. Form No. CAA-2
2. Form No. CAA-4
3. Form No. CAA-5
4. Form No. CAA-6
5. Form No. CAA-8

Answer:

1. **Form No. CAA-2: Notice of meeting of creditors or members.**

The Notice of the meeting pursuant to the order of Tribunal shall be given in Form No. CAA-2. The table below provides basic information about Notice of Meeting:

Person entitled to receive the notice	The notice shall be sent individually to each of the Creditors or Members and the debenture-

	holders at the address registered with the company
Person authorized to send the notice	Chairman of the Meeting or if Tribunal so directs- by the Company or liquidator or by any other person
Modes of sending of notice	By Registered post, or by Speed post, or by courier, or By e-mail, or by and delivery, or by hand delivery, any other mode as directed by the Tribunal
Minimum time of notice	At least one month before the date fixed for meeting

2. Form No. CAA-4: Report of the result of the meeting by the Chairperson

The Chairperson of the meeting shall within the time fixed by the Tribunal, or where no time has been fixed, within three (3) days after the conclusion of the meeting, submit a report to the Tribunal on the result of the meeting in Form no. CAA.4.

3. Form No. CAA-5: Petition for confirming compromise or arrangement

Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case may be, the company shall within seven (7) days of filing of report by the Chairperson, present a petition to the Tribunal in Form no. CAA.5.

4. Form No. CAA-6: Final Order of Tribunal

On the date of final hearing, if the Tribunal is satisfied that meeting of creditors or members has been held as per the prescribed procedure and required disclosures were made to them, then the Tribunal may, by order, sanction the compromise or arrangement. The order shall be in **Form No. CAA. 6**. However, no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the prescribed accounting standards.

The order may include directions in regard to any matter or such modifications in the compromise or arrangement for the proper working of the compromise or arrangement. The Tribunal also has the power to supervise the implementation of the compromise or arrangement. Moreover, if the Tribunal is satisfied that the compromise or arrangement sanctioned cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding-up the company.

5. Form No. CAA-8: Statement of compliance in mergers and amalgamations

Every company in relation to which an order has been made by the Tribunal sanctioning the scheme shall file with the Registrar of Companies a statement in Form No. CAA.8, until the scheme is fully implemented within **two hundred and ten days** from the end of each financial year. The statement shall be duly certified by a

chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

Q14: “Documentat on in a proper manner is the steppingstone and an important aspect in fulfillment of legal requirements and obligations in mergers and amalgamations” – analyse the statement indicating the important steps to be involved for successful completion of mergers or amalgamations. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: In cases of a compromise or arrangement in connection with scheme for reconstruction of any company or companies or for amalgamation or merger of any two or more Companies, petitions need to be filed with National Company Law Tribunal (NCLT) in

terms of Sections 230 to 232 of the Companies Act, 2013.

There is no definition of either merger or amalgamation in the Companies Act, 2013. Nevertheless, Central Government made Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 that guides effective steps for fruitful results.

Accordingly, steps involved are Drafting the scheme, approvals by Boards of directors of the companies involved, Stock Exchange approvals in case of Listed companies, Application to NCLT to convene meetings of members and creditors and convening of such meetings, No objections from Regional Director and Official Liquidator, Filing petition to NCLT for Approving Scheme and Obtaining orders and filing the orders with Registrar of Companies.

Q: How should a Board Resolution be drafted to consider and approve a Scheme of Amalgamation between the Transferee and Transferor Companies under Section 233 of the Companies Act, 2013, involving approval by members and creditors?

Answer:

Consider and approve the Scheme of Amalgamation between the _____ (Transferee Company) and _____ (Transferor Company) and their respective members and creditors under Section 233 of the Companies Act, 2013.

To consider, and if thought fit, to pass with or without modifications, the following Special Resolution:

“RESOLVED THAT pursuant to the provisions of Sections 230 to 232 read with Section 234 and other applicable provisions, if any, of the Companies Act, 2013 including rules, circulars, notifications, if any, made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force), the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 and other applicable provisions of the regulations and guidelines issued by the Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) from time to time, and the applicable provisions of the Memorandum and Articles of Association of the Company and subject to the approval of the Hon’ble National Company Law Tribunal, _____ Bench and subject to such other approvals, permissions and sanctions of regulatory and other authorities, as may be necessary and subject to such conditions and modifications as may be prescribed or imposed by the Hon’ble National Company Law Tribunal, _____ Bench or by any regulatory or other authorities, while granting such consents, approvals and permissions, which may be agreed to by the Board of Directors of the Company (hereinafter referred to as the (“Board”)), which term shall be deemed to mean and include one or more Committee(s) constituted/to be constituted by the Board

or any person(s) authorized by the Board to exercise its powers including the powers conferred by this resolution), the Scheme of Amalgamation for merger of the businesses of the industrial undertakings of _____ and _____ ("Scheme"),
be and is hereby approved.

RESOLVED FURTHER THAT the Board be and is hereby authorized to do all such acts, deeds, matters and things, as it may, in its absolute discretion deem requisite, desirable, appropriate or necessary to give effect to this resolution and effectually implement the amalgamation/merger embodied in the Scheme and to accept such modifications, amendments, limitations and/or conditions, if any, which may be required and/or imposed

by the Hon'ble National Company Law Tribunal, _____ Bench or such other regulatory/statutory authorities while sanctioning the amalgamation/merger embodied in the Scheme or as may be required for the purpose of resolving any doubts or difficulties that may arise in giving effect to the Scheme or for any other such reason, as the Board may deem fit and proper."

TAKE FURTHER NOTICE that in compliance with the provisions of (i) Sections 230, 232, 234 read with Sections 108 and 110 of the Companies Act, 2013; (ii) Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016; (iii) Rule 20, 22 and other applicable provisions of the Companies (Management and Administration) Rules, 2014; (iv) Regulation 44 and other applicable provisions of the SEBI Listing Regulations;

and (v) Secretarial Standards on General Meetings, the Transferee Company has also provided the facility of voting prior to the meeting through Postal Ballot and e-voting, so as to enable the Shareholders, to consider and approve the Scheme by way of the aforesaid resolution. Accordingly, voting by Shareholders of the Transferee Company to the Scheme shall be carried out through (i) Postal Ballot (ii) remote e-voting and (iii) e-voting at the venue of the meeting to be held on _____ at _____.

Place:

For and on behalf of the Board of Directors of
_____ (Name of Company)

Date:

_____ Chairman and Managing Director
DIN: _____
Chairperson appointed for the meeting

Q15: How should a Board Resolution be drafted for the consideration and approval of a Scheme of Amalgamation under Sections 230-232 of the Companies Act, 2013, including provisions for share exchange ratio, auditor certification of accounting treatment, Audit Committee recommendations, SEBI compliance, and authorization of representatives to implement the scheme?"

Answer:

CERTIFIED TRUE COPY OF THE RESOLUTION PASSED AT THE MEETING OF THE BOARD OF DIRECTORS OF _____ HELD ON _____ AT THE REGISTERED OFFICE OF THE COMPANY SITUATED AT _____.

Consideration and approval of draft Scheme of Amalgamation under section 230-232 and other applicable provisions, if any, of the Companies Act, 2013.

“RESOLVED THAT pursuant to the provisions of Sections 230-232 of Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and other applicable rules and regulations made thereunder (including any statutory modification(s) or re-enactment(s) or amendment(s) thereof for the time being in force), relevant provisions of Memorandum of Association and Articles of Association of the Company, and subject to the approval of the shareholders of the Company, the Hon’ble National Company Tribunal, _____ Bench (**“NCLT”**) and any other statutory authorities, as may be applicable, on the basis of Audit Committee recommendations the consent of the Board of Directors (hereinafter referred to as **“the Board”**) be and is hereby accorded to the draft Scheme (**“Scheme”**) of Amalgamation along with Share Exchange Ratio between _____ (**“Transferee Company”**) and _____ (**“Transferor Company”**) and their respective shareholders.

RESOLVED FURTHER THAT Certificate of _____, Chartered Accountants, the Statutory Auditors of the Transferee Company confirming that the accounting treatment outlined in the Scheme is in compliance with the applicable Indian Accounting Standards (Ind AS) notified under Section 133 and Companies (Indian Accounting Standards) Rules 2015 and other generally accepted accounting principles.

RESOLVED FURTHER THAT the report of the Audit Committee, considering inter alia the Valuation Report dated _____ of _____, Chartered Accountants and Fairness opinion dated _____ given by _____ SEBI authorized Cat 1 Merchant Banker, be and is hereby taken on record.

RESOLVED FURTHER THAT in compliance with the SEBI Circular, for the purpose of approval under Regulation 37 of the Listing Regulations, 2015 and coordinating with SEBI, the Board of Directors of the company hereby designate **“BSE Limited”** as the Designated Stock Exchange.

RESOLVED FURTHER THAT any Director of the Transferee Company or Mr _____ or Mr _____, Authorised Signatories of Transferee Company, be and are hereby severally authorized to give effect to the Scheme and to do such acts, deeds, matters and things and also to execute such documents, writings etc. as may be necessary and to settle any questions or difficulties which may arise and give any directions necessary for obtaining approval of and giving effect to the Scheme, as and when required including to take all necessary steps.

CERTIFIED TRUE COPY

FOR _____ (Company Name)

_____ (Name of the Director)

(Designat on _____)

Address:

Date:

Place:

CS ANOOP JAIN

CHAPTER- 6 AS PER ICSI MODULE

ACCOUNTING IN CORPORATE RESTRUCTURING: CONCEPT AND ACCOUNTING TREATMENT

Q1: Define Corporate Restructuring. What are the common forms of Corporate Restructuring.

Answer: Corporate Restructuring is re-arranging business of a company so as to increasing its efficiency and profitability. Restructuring is a method of changing the organizational structure in order to achieve the strategic goals of the organization. It involves dramatic changes in an organization.

The most common forms of corporate restructuring are mergers/amalgamations, acquisitions/takeovers, financial restructuring, divestitures/demergers and buy-outs. It is essentially the process of re-designing one or more aspects of the Company.

Q2: Which accounting standards govern the treatment and reporting of corporate restructuring transactions?

Answer: Accounting for corporate restructuring is dealt with in the following accounting standards:

- (a) Accounting for Amalgamation (AS-14) - Applicable to those who have to comply with Companies (Accounting Standards) Amendment Rules, 2016
- (b) Business Combinations (IND AS-103) - Applicable to those who have to comply with Companies (Indian Accounting Standards) Rules, 2015.

Accounting Standard-14 (AS-14) explains how to account for amalgamations (when two companies combine). It says that an amalgamation can be either a **merger** or a **purchase**.

For an amalgamation to be considered a **merger**, certain conditions need to be met, such as:

- 1. The assets and liabilities of the company being merged must be transferred to the new company.
- 2. The shareholders of the company being merged must become shareholders of the new company.
- 3. The company being merged should continue its business through the new company.

AS-14 also says that there are two ways to account for an amalgamation:

- 1. **Pooling of Interest Method:** This method is used when the amalgamation is considered a merger. It treats the combining companies as if they were always together, so no new goodwill or reserves are created.
- 2. **Purchase Method:** This method is used when the amalgamation is considered a purchase. It means the acquiring company buys the other company, and the difference between the purchase price and the value of assets and liabilities is recorded as goodwill.

It also covers how to handle reserves, goodwill, and amalgamations that happen after the balance sheet date.

• **IND AS-103** sets the rules for accounting business combinations, not asset combinations. It is different from AS-14, which deals with amalgamations. To apply IND AS-103, there must be a transaction that qualifies as a business combination.

Q3: Describe the 'pooling of interests method' of account ng adopted by amalgamated company. (5 marks)
PAST YEAR QUESTION DECEMBER 2016

Answer: Since merger is a combinat on of two or more separate business, there is no reason to restate carrying amounts of assets and liabilit es. Accordingly, only minimal changes are made in aggregat ng the individual f nancial statements of the amalgamat ng companies.

In preparing the transferee company's f nancial statements, the assets, liabilit es and reserves (whether capital or revenue or arising on revaluat on) of the transferor company should be recorded at their exist ng carrying amounts and in the same form as at the date of the amalgamat on. The balance of the Prof t and Loss Account of the transferor company should be aggregated with the corresponding balance of the transferee company or transferred to the General Reserve, if any.

If, at the t me of the amalgamat on, the transferor and the transferee company having conf ict ng account ng policies, a uniform set of account ng policies should be adopted following the amalgamat on. The ef ects on the f nancial statements of any changes in account ng policies should be reported in accordance with Account ng Standard (AS-5), Net Prof t or Loss for the Period 'Prior Period Items and Changes in Account ng Policies'.

The dif erence between the amount recorded as share capital issued (plus any addit onal considerat on in the form of cash or other assets) and the amount of share capital of the transferor company should be adjusted in reserves. Furthermore, reserve created on amalgamat on is not available for the purpose of distribut on to shareholders as dividend and/or bonus shares. It means that if considerat on exceeds the share capital of the transferor company(or companies), the unadjusted amount is a capital loss and adjustment must be made, f rst of all in the capital reserves and in case capital reserves are insuf cient, in the revenue reserves. However, if capital reserves and revenue reserves, are insuf cient the unadjusted dif erence may be adjusted against revenue reserves by making addit on thereto by appropriat on from prof t and loss account.

There should not be direct debit to the prof t and loss account. If there is insuf cient balance in the prof t and loss account also, the dif erence should be ref ected on the assets side of the balance sheet in a separate heading.

Q4: Is it possible to retain the same characters of various reserves of transferor Companies amalgamat on, mergers or demergers as per Standards of Account ng concepts or convent ons? Discuss. (5 marks)
PAST YEAR QUESTION DECEMBER 2024

Answer: Scheme of merger or amalgamat on implies a process where the legal ownership or operat onal control or other structures of the company are reorganized.

- The Inst tute of Chartered Accountants of India (ICAI) has formulated Account ng Standard (AS) -14 'Account ng for Amalgamat on'.
- AS-14 lays down the account ng and disclosure requirements in respect of amalgamat on of companies, as well as treatment of resultant of goodwill or reserves.
- As per AS-14, amalgamat on may be either in the nature of merger or in the nature of purchase
- In case of amalgamat on in the nature of merger, the ident ty of the reserves is retained and shall be ref ected in the f nancial statements of the Transferee Company in the same form in which they appeared in the balance sheet of the transferor company prior to amalgamat on.

- General reserve of the Transferor Company remains part of general reserve of the Transferee Company and similarly, Capital Reserve or Revaluation Reserve forms part of the Capital or Revaluation Reserve of the Transferee Company.
- Consequently, reserves available for distribution of dividends prior to amalgamation would also be available for distribution of dividends post amalgamation.

Where amalgamation is in the nature of purchase, none of the reserves are retained in the books of the Transferee Company. In other words, none of the reserves are recorded in the books of the Transferee Company. However, only statutory reserves retain the character and are recorded in the Balance Sheet of Transferee Company.

Q5: Business Combinations (IND AS-103) applies to a transaction or other event that meets the definition of a business combination." Mention three cases where IND AS-103 does not apply. (3 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Business Combinations (IND AS-103) does not apply to the following:

- The formation of a joint venture.
- The acquisition of an asset or a group of assets that does not constitute a business. In such cases the acquirer shall identify and recognise the individual identifiable assets acquired (and liabilities assumed). The cost of the group shall be allocated to the individual assets and liabilities on the basis of their relative fair values at the date of purchase. Such a transaction or event does not give rise to goodwill.
- Accounting for combination of entities or business under common control.

Q6: What are the conditions that must be satisfied for an amalgamation to be considered in the nature of a merger?

Answer: An amalgamation should be considered to be an amalgamation in the nature of merger when all the following conditions are satisfied:

- All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.
- Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.
- The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.
- The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.
- No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

Q7: X Ltd. acquire Y Ltd. under the scheme of merger sanctioned by the Tribunal. Y Ltd. ceases to exist. Consideration is discharged by way of issue of equity shares of X Ltd. to the shareholders of Y Ltd. in the ratio of 1:1. X Ltd. already held 5% in Y Ltd. as an investment prior to the effective date of merger i.e. 1st October 2022. 86% of the shareholders (by face value) of Y Ltd. excluding X Ltd. agreed to become shareholders of X Ltd. Whether the above case will qualify to be classified as merger as per AS-14.

Answer: Even if we exclude the shares of Y Ltd. already held by X Ltd., consequent to the allotment of shares pursuant to merger, 90% criteria for amalgamation to be classified as merger is being met. Since 90% of the remaining shares i.e. 95% comes out to 85.5% shareholders. Thus the threshold is being met. Hence the above case will qualify as merger.

Q8: What are the two main methods of accounting for amalgamations?

Answer: There are two main methods of accounting for amalgamations:

(a) the pooling of interests method; and

(b) the purchase method.

The Pooling of Interests Method

In a merger, there's no need to restate the carrying amounts of assets and liabilities. The financial statements of the merging companies are combined with minimal changes.

In the transferee company's financial statements, the assets, liabilities, and reserves of the transferor company are recorded at their existing carrying amounts. The Profit and Loss Account balance of the transferor is either added to the transferee's corresponding balance or transferred to the General Reserve.

If there's a difference between the share capital issued by the transferee company and the share capital of the transferor company, this difference is adjusted in reserves. This difference is treated as a capital reserve, similar to share premium.

The reserve created in a merger cannot be distributed as dividends or bonus shares. If the consideration exceeds the transferor company's share capital, the difference is adjusted first in capital reserves, and if those are insufficient, in revenue reserves. If both are insufficient, the difference may be adjusted from the profit and loss account, but not directly debited to it. If there's also insufficient profit, the difference is shown separately on the balance sheet.

The Purchase Method

In the transferee company's financial statements, the assets and liabilities of the transferor company should be recorded at their fair value or based on their fair value at the date of the amalgamation. Reserves of the transferor company, except statutory reserves, should not be included in the transferee company's financial statements.

If the consideration exceeds the fair value of the net assets acquired, the excess is recognized as goodwill, which should be amortized over a period not exceeding five years. If the consideration is lower than the net assets' fair value, the difference is treated as Capital Reserve.

Statutory reserves, required by law, should be recorded in the transferee company's financial statements, with a corresponding debit to an appropriate account (e.g., "Amalgamation Adjustment Account"). When no longer required, the statutory reserve and the related account should be reversed.

Q9: What should be done if the transferor and transferee companies have conflicting accounting policies at the time of amalgamation, and how should the effects of any changes in accounting policies be reported?

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

Q10: Differences between Pooling of Interest Method and Purchase Method

Answer:

Particulars	Pooling of Interest Method	Purchase Method
Purchase consideration	Consideration will be in the form of shares only.	Consideration may be in the form of equity shares/ other securities / cash/ other assets
Recording of assets and Liabilities	Under this method assets and liabilities of transferor companies are recorded at Book Value only.	Under this method assets and liabilities of transferor companies are recorded at Fair Value.
Difference in consideration and Net assets taken over	Difference in consideration and Net assets taken over is adjusted in Reserve and surplus.	Difference in consideration and Net assets taken over is recorded in Goodwill or capital reserve
Reserve	All reserve are incorporated in the books of Transferee company at the same value at which they appeared in the books of transferor.	No reserve are incorporated in the books of Transferee company except statutory reserve.

Q11: "What does the term 'consideration for amalgamation' mean, and how is its value determined?"

Answer: The consideration for amalgamation includes the shares, securities, cash, or other assets issued by the transferee company to the shareholders of the transferor company. Its value is determined by the agreed or negotiated value of these elements. If the scheme includes a contingent adjustment based on future events, the additional payment should be included in the consideration if it is probable and measurable. Otherwise, the adjustment should be recognized once the amount is determinable.

Q12: A Ltd. acquire B Ltd., on 1st April, 2022 and discharges consideration for the business as follows:

- (a) Issued 42,000 fully paid equity shares of Rs.10 each at par to the equity shareholders of B Ltd.
- (b) Issued fully paid up 15% preference shares of Rs.100 each to discharge the preference shareholders (Rs.1,70,000) of B Ltd. at a premium of 10%

(c) It is agreed that the debentures of B Ltd. (Rs.50,000) will be converted into equal number and amount of 13% debentures of A Ltd.

Calculate the amount of purchase consideration.

Answer: Calculation of purchase consideration:

(a) 42,000 equity shares Rs. 10 each issued at Rs. 10 = 4,20,000

(b) 15% preference shares of Rs. 1,70,000*110% = 1,87,000

Total = 6,07,000

(c) Not to be included in purchase consideration as it is payment to debenture holders.

Q13: Draft balance sheet of Mentos Ltd. as on 31st March, 2019:

(Rs. in '000)

Liabilities	Amount	Assets	Amount
Share Capital		Land & Building	7,500
Equity shares (Rs. 10 each)	10,000	Plant & Machinery	3,700
16% Preference shares (Rs.100 each)	3,000	Furniture	730
General Reserve	1,050	Investments	1,620
18% debenture	600	Inventory	550
Other current liabilities	350	Trade receivables	750
		Cash at bank	150
	15,000		15,000

Add additional information:

(i) Zeus Ltd. will take over Mentos Ltd. on 10th May, 2019.

(ii) Debenture holder of Mentos Ltd. are discharged by issuing 12% debenture of Zeus Ltd. at a premium of 15%.

(iii) Intrinsic value per share of Mentos Ltd. is Rs. 40 and that of Zeus Ltd. Rs. 50. Zeus Ltd. will issue shares on basis of intrinsic value to satisfy the equity shareholder of Mentos Ltd. However the entry should be made at par value only. The nominal value of each equity share of Zeus Ltd. is Rs. 10.

(iv) 16% preference shareholder of Mentos Ltd. are discharged at a premium of 20% by issuing necessary number of 10% preference share of Zeus Ltd. (Face value Rs. 100 each).

Compute the purchase consideration. (5 Marks)

PAST YEAR QUESTION

Answer: Calculation of purchase consideration

The conversion ratio for equity shareholders is 40:50 and for preference shares is 5:6

(Rs. in '000)

Issued to	From Zeus Ltd.	Amount
Equity shareholder of Mentos Ltd. (10,00,000 shares x 10 x 40/50)	8,00,000 equity shares of Zeus Ltd. of Rs.10 each	8,000

Preference shareholder of Mentos Ltd.	36,000, 10% preference shares of Zeus Ltd. Of Rs.100 each	3,600
Total		11,600

Note: Consideration to debenture holders not included in computation of purchase consideration as per AS-14. The same will be taken over by Zeus Ltd. and then discharged.

Alternate Answer 2A(ii)

Calculation

Amount to be paid by transferee company i.e. Zeus Ltd. (Rs.)

No. of shares to be issued by transferee company i.e. Zeus Ltd.

Payment to preference shareholder of Mentos Ltd.

	(Rs.)		
Preference share capital of Mentos Ltd.	30,00,000		
Premium to be paid (20% of 30,00,000)	6,00,000		
Total amount to be paid to preference shareholders	36,00,000	36,00,000	
No. of 10% preference shares (Rs.100 each) to be issued	36,00,000 / 100	—	36,000

B. Payment to equity shareholders of Mentos Ltd:

1. No. of equity share of Mentos Ltd.	10,00,000		
2. Intrinsic value of one share of Mentos Ltd.	Rs. 40		
3. Total intrinsic value of equity shares of Mentos Ltd. (10,00,000*40)	400,00,000		
No. of equity shares to be issued on the basis of intrinsic value (400,00,000/50) of Rs.10 each (as per			8,00,000

terms shares are to be
issued at par)

Total amount to be paid 80,00,000

to equity shareholders

Total 116,00,000

Note : Consideration to debenture holders not included in computation of purchase consideration as per AS-14. The same will be taken over by Zeus Ltd. and then discharged.

Q14: A Ltd. acquires B Ltd., on 1st April, 2024 and discharges consideration for the business as follows:

- (i) Issued 21,000 fully paid equity shares of Rs. 10 each at par to the equity shareholders of B Ltd.**
- (ii) Issued fully paid up 15% preference shares of Rs. 100 each to discharge the preference (Rs. 2,00,000) of B Ltd. at a premium of 10%.**
- (iii) It is agreed that the debentures of B Ltd. (Rs. 75,000) will be converted into equal number and amount of 13% debentures of A Ltd.**

Calculate the amount of purchase consideration. 3 marks

(PAST YEAR QUESTION DECEMBER 2024)

Answer: Calculation of purchase consideration

(i) 21,000 equity shares Rs. 10 = 2,10,000

(ii) 15% preference shares of Rs. 2,00,000 * 110% = 2,20,000

Total = 4,30,000

(iii) Not to be included in purchase consideration as it is payment to debenture holders.

Q15: Max Ltd. proposes to takeover Mini Ltd. The Share capital of Max Ltd. and Mini Ltd. comprises of 15,000 and 10,000 equity shares of Rs. 10 each and 5000 and 4000 10% preference shares of Rs. 100 each respectively.

The purchase consideration to be discharged is as under:

(1) Equity shareholders of Mini Ltd. will be given 50 equity shares of Rs. 10 each of Max Ltd. fully paid up in exchange for every 5 shares held in Mini Ltd.

(2) Issue of 10% preference shares of Rs. 100 each in the ratio of 4 preference shares of Max Ltd. for every 5 preference shares held in Mini Ltd.

In addition to share capital stated above, Max Ltd has 12% debentures of Rs. 100 each amounting to Rs. 5,00,000 and Mini Ltd has 13% debentures of 100 each amounting to Rs. 4,00,000. It was agreed to issue 12% debentures of Rs. 100 each of Max Ltd. worth Rs. 5,00,000 to the debenture holders of Mini Ltd.

Compute Purchase consideration and capital after takeover. Also comment upon treatment of debenture holders of Mini Limited during the above takeover. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Calculation of Purchase Consideration:

1. Equity Shares 10,000 * (50/5) * 10 Rs. 10,00,000

2. 10% Preference Shares 4,000 * (4/5) * 100 Rs. 3,20,000

Purchase Consideration Rs. 13,20,000

Calculation of Capital of Max Limited after Takeover:

1. Equity Share Capital	(15,000 shares + 1,00,000 shares) of Rs. 10 each	Rs. 11,50,000
2. 10% Preference Share Capital	(5000 Preference shares + 3200 Preference Shares)	Rs. 8,20,000
	Capital of Max Limited after Takeover	Rs. 19,70,000

Treatment of debentures in purchase consideration: Issue of debentures will not form part of purchase consideration as these are issued to debenture holders. Further, Increased number of debentures are issued to debenture holders of Mini Ltd, as there is reduction in rate of interest on debentures.

Q16: Based on the following information find out the total amount of purchase consideration and the post-Merger Capital Structure of the Company. Capital structure of Transferor and Transferee Companies are as follows:

A Ltd. (Transferor Company)		B Ltd. (Transferee Company)	
1,00,00,000 Equity Shares of ₹ 10 each	10,00,00,000	15,00,000 Equity Shares of ₹ 100 each	15,00,00,000
5,00,000 10% Preference Shares of ₹ 100 each	5,00,00,000	10,00,000 12% Preference Shares of ₹ 100 each	10,00,00,000

The swap ratio is fixed as follows:

(a) For every 40 Equity Shares in A Ltd. 5 Shares of B Ltd.

(b) For every 5 Preference Shares in A Ltd. 4 Shares of B Ltd.

(c) Debenture holders will be allotted with 12% Redeemable Debentures of ₹ 1,000 each for every one Debenture held in A Ltd. (with no change in tenure) (2+2+1=5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer:

Transferor Company - Existing Shareholding

Type of Shares/Debentures	No. of Shares	Face Value	Total Value (INR)
Equity	1,00,00,000	10	10,00,00,000
10% Preference	5,00,000	100	5,00,00,000
11% Debentures	1,00,000	1000	10,00,00,000
Total			25,00,00,000
Transferee Existing Shareholding			
Equity	15,00,000	100	15,00,00,000
12% Preference	10,00,000	100	10,00,00,000
Total			25,00,00,000

Shares allotted to Shareholders of Transferor Company – Purchase Consideration

	Shares of Existing holding	New Shares to be allotted	Face value (INR)	Purchase Consideration (INR)
Equity (Swap ratio)	40	5		
Total Shares	2,50,000	12,50,000	100	12,50,00,000
	(10000000/40)	(250000*5)		
Preference swap ratio)	5	4		
Total Shares	1,00,000	4,00,000	100	4,00,00,000
	4,00,00,000 (500000/5)	(100000*4)		
Total Purchase Consideration				16,50,00,000

Post-Merger Capital Structure

Type of Shares/Debentures	No. of Shares	Face Value	Total Value (INR)
Equity	27,50,000	10	27,50,00,000
12% Preference	14,00,000	100	14,00,00,000
11% Redeemable Debentures	1,00,000	1000	10,00,00,000
Total			25,00,00,000

Note: Debentures being debt does not form part of purchase consideration.

Q17: "What happens to the reserves in an 'amalgamation in the nature of merger,' and how are they treated in the transferee company's financial statements?"

Answer: In an "amalgamation in the nature of merger," the reserves of the transferor company (such as General Reserve, Capital Reserve, and Revaluation Reserve) are preserved and appear in the transferee company's financial statements in the same form. Reserves that were available for dividend before the amalgamation remain available for distribution after the amalgamation. Any difference between the issued share capital and the transferor company's share capital is adjusted in the transferee company's reserves.

Q18: X Ltd. having a share capital of Rs. 20 lakhs and Y Ltd. having a share capital of Rs. 30 lakhs. Z Ltd. Was formed to take over the business of X Ltd and Y Ltd. at a purchase consideration of Rs. 25 lakhs and Rs. 28 lakhs, payable in shares of Z Ltd. The assets and liabilities were taken at their carrying amounts. Compute the Goodwill or Capital Reserve.

Solut on: Since the purchase considerat on is payable in shares of the transferee company and all the assets and liabilit es are taken over at their carrying amounts, the amalgamat on is in the nature of merger, i.e. pooling of interests method.

For X Ltd. Purchase considerat on = Rs. 25 lakhs

Less: Share capital of X Ltd = Rs. 20 lakhs

Excess of purchase considerat on = Rs. 5 lakhs.

This shall have to be adjusted against the Reserves of Z Ltd.

For Y Ltd. Purchase Considerat on = Rs. 28 lakhs

Less: Share Capital of Y Ltd = Rs. 30 lakhs

Since purchase considerat on is less than share capital of the transferor company, Rs. 2 lakhs shall be treated as Capital Reserve.

Q19: ABC Ltd. is having a share capital of Rs.35 Crore and XYZ Ltd. is having a share capital of Rs.45 Crore. DNF Ltd. was formed to take over the business of ABC Ltd. and XYZ Ltd. at a purchase considerat on of Rs.45 Crore and ` 38 Crore respect vely, payable in shares of DNF Ltd.

The assets and liabilit es were taken over at their carrying amounts. Compute the Goodwill or Capital Reserve. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Since the purchase considerat on is payable in shares of the transferee company and all the assets and liabilit es are taken over at their carrying amounts, the amalgamat on is in the nature of merger, i.e., pooling of interests' method.

To compute the "Goodwill" or "Capital Reserve" for DNF Ltd., we need to compare the purchase considerat on (the amount paid for acquiring the business) with the net assets (share capital) of the companies acquired, which in this case are ABC Ltd. and XYZ Ltd.

1. For ABC Ltd. Acquisit on:

Purchase considerat on = Rs. 45 crores

Share capital of ABC Ltd = Rs.35 crores

Net Assets of ABC Ltd.= Rs. 35 crore (since assets and liabilit es are taken over at their carrying amounts)

Goodwill or Capital Reserves for ABC Ltd. acquisit on= Purchase considerat on less Net Assets i.e. Rs.45 cr - Rs. 35 cr = 10 cr

Since the purchase considerat on is higher than Net Assets, Goodwill of `10 cr is created for ABC Limited.

2. XYZ Ltd Acquisit on

Purchase considerat on for XYZ Ltd.= Rs. 38 cr

Share capital of XYZ Ltd. = Rs. 45 cr

Net Assets of AXYZ Ltd. = Rs. 45 cr (again, assets and liabilit es are taken over at their carrying amounts)

Goodwill of Capital Reserves for XYZ Ltd

= Rs.38cr- Rs.45 cr= Rs.7 cr

Since the purchase considerat on is lower than the net assets, a Capital Reseve of Rs. 7 cr is to be created for XYZ Ltd.

3. Total Goodwill or Capital Reserves for DNF Ltd.

Goodwill from ABC Ltd.= Rs.10 cr

Capital Reserve from XYZ Ltd.= Rs. 7 cr

Thus, the net Goodwill or Capital Reserve for DNF Ltd. = Rs.10 cr- Rs. 7 cr= Rs. 3 cr (Goodwill)

Conclusion:

Goodwill of Rs. 3 cr will be created for DNF Ltd. af er taking over the businesses of ABC Ltd. and XYZ Ltd.

Q20: Max Ltd. proposes to takeover Mini Ltd. The Share capital of Max Ltd. and Mini Ltd. comprises of 15,000 and 10,000 equity shares of `10 each and 5000 and 4000 10% preference shares of Rs.100 each respect vely.

The purchase considerat on to be discharged is as under:

(1) Equity shareholders of Mini Ltd. will be given 50 equity shares of Rs.10 each of Max Ltd. fully paid up in exchange for every 5 shares held in Mini Ltd.

(2) Issue of 10% preference shares of Rs.100 each in the rat o of 4 preference shares of Max Ltd. for every 5 preference shares held in Mini Ltd.

In addit on to share capital stated above, Max Ltd has 12% debentures of Rs.100 each amount ng to Rs.5,00,000 and Mini Ltd has 13% debentures of 100 each amount ng to Rs.4,00,000. It was agreed to issue 12% debentures of Rs.100 each of Max Ltd. worth Rs.5,00,000 to the debenture holders of Mini Ltd. Compute Purchase considerat on and capital af er takeover. Also comment upon treatment of debenture holders of Mini Limited during the above takeover. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer:

Computat on of Purchase Considerat on:

1.	Equity Shares	$10,000 * (50/5) * 10$	Rs. 10,00,000
2.	10% Preference Shares 4,000	$4,000 * (4/5) * 100$	Rs. 3,20,000
		Purchase Considerat on	Rs. 13,20,000

Computat on of Capital of Max Limited af er Takeover Company's HR Policies:

1.	Equity Shares	(15,000 shares + 1,00,000 shares) of Rs. 10 each	Rs. 11,50,000
2.	10% Preference Shares 4,000	(5000 Preference shares + 3200 Preference Shares	Rs. 8,20,000
		Capital of Max Limited af er Takeover	Rs. 19,70,000

Treatment of debentures in purchase considerat on : Issue of debentures will not form part of purchase considerat on as these are issued to debenture holders. Further, Increased number of debentures are issued to debenture holders of Mini Ltd, as there is reduct on in rate of interest on debentures.

Q21: Company X, has acquired Company Y, in a merger transaction. The acquisition is considered to be in nature of purchase. As per the merger agreement, the fair value of identifiable assets and liabilities of the company is 150 lakhs and 50 lakhs respectively.

The purchase consideration is to be paid as follows :

One share of X and Rs. 40/- per share in cash in exchange of one share of Y. Each share of X is valued at Rs. 80/- per share.

The total number of shares of Y are 1,00,000.

Calculate the following from the above transaction in the books of transferee company X :

Purchase consideration

Fair value

Goodwill/Capital reserve. (5 marks)

Answer: In preparing the transferee company's financial statements, the assets and liabilities of the transferor company should be incorporated at their fair value or, alternatively, the consideration should be allocated to individual identifiable assets and liabilities on the basis of their fair values at the date of amalgamation. Any excess of the amount of the consideration over the fair value of the net assets of the transferor company acquired by the transferee company should be recognized in the transferee company's financial statements as goodwill arising on amalgamation in the nature of purchase. If the amount of the consideration is lower than the negotiated value of the net assets acquired, the difference should be treated as Capital Reserve.

Total amount of purchase consideration in this case is Rs.120 lakhs i.e. (Rs. 80/- + Rs. 40/-)*1,00,000 Shares. In the given case, the excess of the amount of the consideration i.e. Rs.120 lakhs over the fair value of the net assets i.e. (150-50=100 lakhs) of the Y, (the transferor company) should be recognized in the transferee company's financial statements as goodwill. The assets and liabilities taken over from company Y (the transferor company) should be incorporated at their fair values and Rs. 20 lakhs will be recorded as goodwill in the books of company X.

Q22: "In an 'amalgamation in the nature of purchase,' how are reserves treated, particularly statutory reserves, and how is the difference between the consideration and the net assets of the transferor company handled?"

Answer: In an "amalgamation in the nature of purchase," the identity of reserves, except statutory reserves, is not preserved. Statutory reserves (e.g., Development Allowance Reserve, Investment Allowance Reserve) must retain their identity if required by law, and are recorded in the transferee company's financial statements. Any changes in these reserves are recorded in an "Amalgamation Adjustment Account" under miscellaneous expenditure.

The consideration amount is deducted from the net assets acquired. If the result is negative, the difference is debited to goodwill. If positive, the difference is credited to Capital Reserve. When statutory reserves are no longer required, both the reserve and the adjustment account are reversed.

Q23: How should goodwill arising on amalgamation be treated in financial statements, and what is the maximum period for its amortization?

Answer: Goodwill arising from amalgamation is treated as an asset and amortised over its useful life. Typically, it should be amortised over a period not exceeding five years, unless a longer period can be justified, due to the difficulty in estimating its exact useful life.

Q24: When does goodwill arise on amalgamation? Comment on its amortisation. How will you estimate the useful life of the goodwill? Differentiate goodwill and capital reserve as per AS-14. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

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

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

- i. the foreseeable life of the business or industry;
- ii. the effects of product obsolescence, changes in demand and other economic factors;
- iii. the service life expectancies of key individuals or groups of employees;
- iv. expected actions by competitors or potential competitors; and
- v. legal, regulatory or contractual provisions affecting the useful life.

Goodwill Vs. Capital reserve as per AS-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 (agreed value) of the net identifiable assets acquired over the purchase price.

Q25: How goodwill and capital reserve are differentiated as per AS-14? (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q26: What happens to the balance of the Profit and Loss Account in the case of an 'amalgamation in the nature of merger' and an 'amalgamation in the nature of purchase'?

Answer: In an 'amalgamation in the nature of merger,' the Profit and Loss Account balance of the transferor company is either aggregated with or transferred to the General Reserve of the transferee company. In an 'amalgamation in the nature of purchase,' the Profit and Loss Account balance of the transferor company loses its identity, whether debit or credit.

Q27: "Certain disclosures are required to be made in the first financial statements"

prepared after the amalgamation on orders." Ment on such disclosures. (6 marks)

PAST YEAR QUESTION JUNE 2016

Answer: For amalgamations of every type following disclosures should be made in the first financial statements after the amalgamation;

- (i) names and general nature of business of the amalgamating companies;
- (ii) effective date of amalgamation for accounting purposes;
- (iii) the method of accounting used to reflect the amalgamation; and
- (iv) particulars of the scheme sanctioned under a statute.

Q28: What additional disclosures are required in the first financial statements following an amalgamation accounted for under the pooling of interests method and purchase method?

Answer: In case of amalgamations accounted for under the pooling of interests method, the following additional disclosures are required to be made in the first financial statements following the amalgamation:

- (i) description and number of shares issued, together with the percentage of each company's equity shares exchanged to effect the amalgamation;
- (ii) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof.

In case of amalgamations accounted for under the purchase method the following additional disclosures are required to be made in the first financial statements following the amalgamations:

- (i) consideration for the amalgamation and a description of the consideration paid or contingently payable, and
- (ii) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof including the period of amortization of any goodwill arising on amalgamation.

Q29: What disclosures should be made if an amalgamation occurs after the balance sheet date but before the issuance of the financial statements, and when can it be incorporated in those financial statements?

Answer: While an amalgamation is effected after the balance sheet date but before the issuance of the financial statements of either party to the amalgamation, disclosure should be made as per the provisions of AS-4, '**Contingencies and Events Occurring after the Balance Sheet Date**', but the amalgamation should not be incorporated in that financial statements. In certain circumstances, the amalgamation may also provide additional information affecting the financial statements themselves, for instance, by allowing the going concern assumption to be maintained.

Q30: What are the three elements that define a business under IND AS, and what does each element consist of?

Answer: Business: A business consists of inputs and process applied to those inputs that have the ability to create outputs. Thus, a business has three elements:

- (a) Input: An economic resource that creates or has the ability to create outputs when one or more processes are applied to it. Example Non-current assets.

(b) Process: Any system, standard, protocol, convention or rule that when applied to an input or inputs, creates or has the ability to create outputs. Example: Strategic management processes.

(c) Output: The results of inputs and processes applied to those inputs that provide or have the ability to provide a return in the form of dividend, lower costs or other economic benefits directly to investors or other owners, members or participants.

Q31: How is a business combination defined under IND AS, and can you provide an example?

Answer: A business combination is an act of bringing together of separate entities or business into one reporting unit. The result of business combination is one entity obtains control of one or more businesses. If an entity obtains control over other entities which are not business, the act is not a business combination. In such a case the reporting entity will account it as asset acquisition.

For example, if X Ltd., acquires 70% shares of Y Ltd., then it is a case of business combination even if X Ltd. and Y Ltd. will continue to exist. X Ltd. becomes a holding company of Y Ltd. and therefore, they become one reporting entity by reporting consolidated financial statements.

Q32: Difference between Ind AS-103 Business Combinations and Ind AS-110 Consolidated Financial statements.

Answer:

Aspect	Ind AS-110 (Consolidated Financial Statements)	Ind AS-103 (Business Combinations)
Focus	Deals with the accounting for consolidation of businesses.	Deals with the scope and measurement of business combinations.
Main Objective	Defines control and prescribes consolidation procedures.	Focuses on the measurement of assets, liabilities, goodwill, non-controlling interest, etc.
Application	Applied after applying Ind AS-103 for measurement of acquired assets, liabilities, goodwill, and non-controlling interest.	Applied first to measure assets, liabilities, non-controlling interest, and goodwill before consolidation.
Key Areas Covered	Consolidation procedure, control, and presentation in consolidated financial statements.	Measurement of business combination items like goodwill, non-controlling interest, etc.

Q33: What are the key steps involved in applying the acquisition method for business combinations?

OR

How should an entity account for a business combination under the acquisition method, and what are the required steps?

OR

What are the components that need to be identified and measured when applying the acquisition method for business combinations?"

Answer: An entity shall account for each business combination by applying the acquisition method. Applying the acquisition method requires the following:

- (a) Identifying the acquirer
- (b) Determining the acquisition date
- (c) Identification and measurement of consideration transferred
- (d) Recognising and measuring the identifiable assets acquired, liabilities assumed and any non-controlling interest in the acquiree; and
- (e) Recognising and measuring goodwill or a gain from a bargain purchase.

(a) Identifying the acquirer

- For each Business Combination one of the combining entities shall be identified as the acquirer.
- Acquirer is the entity that obtains control of business.
- The guidance in Ind AS 110 shall be used to identify the acquirer — the entity that obtains control of another entity, i.e., the acquiree.

(b) Determining the acquisition date

The acquirer shall identify the acquisition date, which is the date on which it obtains control of the acquiree. The date on which the acquirer obtains control of the acquiree is generally the date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree—the closing date. However, the acquirer might obtain control on a date that is either earlier or later than the closing date.

(c) Identification and measurement of consideration transferred

In a business combination, the **consideration transferred** is the sum of the fair values of assets transferred, liabilities incurred, and equity issued by the acquirer. This consideration must be measured at fair value, calculated by adding:

1. Fair values of assets transferred by the acquirer.
2. Liabilities incurred to the former owners of the acquiree.
3. Equity interests issued by the acquirer.

If the acquirer transfers assets (e.g., land) with a carrying amount different from fair value, the assets must be remeasured to fair value at the acquisition date, and any gains or losses are recognized in profit or loss. Contingent consideration (obligation to transfer additional assets or equity if certain conditions are met) is also measured at fair value at the acquisition date. It must be classified as a liability or equity, depending on the nature of the obligation, according to Ind AS 32.

Note: Acquisition-related costs should be accounted for separately, not as part of the business combination.

(d) Recognising and measuring the identifiable assets acquired, liabilities assumed and any non-controlling interest in the acquiree

At the acquisition date, the acquirer must recognize identifiable assets acquired, liabilities assumed, and any non-controlling interest in the acquiree, separate from goodwill. These must meet the definitions of assets and liabilities under Indian Accounting Standards (Ind AS).

Future costs expected but not required to be incurred (e.g., exiting an activity, employee relocation) are not recognized as liabilities at the acquisition date. These are recognized in post-combination financial statements.

The acquirer may also recognize assets or liabilities not previously recognized by the acquiree, such as intangible assets (e.g., brand name, patent, customer relationship) that the acquiree developed internally but did not recognize in their financial statements.

e) Recognising and measuring goodwill or a gain from a bargain purchase

Goodwill is recognized as the excess of the following (a) over (b) at the acquisition date:

(a) The aggregate of:

- Consideration transferred.
- Non-controlling interest in the acquiree.
- Fair value of the acquirer's previously held equity interest (if applicable).

(b) The net value of identifiable assets acquired and liabilities assumed at the acquisition date.

In rare cases, if **(b)** exceeds **(a)**, the acquirer has made a **bargain purchase**. The excess is recognized as a gain in **other comprehensive income** on the acquisition date and accumulated as **capital reserve** in equity, attributed to the acquirer.

Q34: Company ABC purchased 51% equity interest in Company XYZ, and the consideration was paid in cash.

The following dates are relevant:

Date of agreement with shareholders: 1st December 2022

Appointed date as per agreement: 1st April 2022

Date of obtaining control over the Board: 1st July 2022

Date of payment of consideration: 15th July 2022

Which date should be considered as the acquisition date for accounting purposes?

Answer: The acquisition date for accounting purposes is **1st July 2022**, as this is the date when Company ABC obtained control over the financial and operating policies of Company XYZ by acquiring control over the Board.

The appointed date (1st April 2022) and the date of agreement (1st December 2022) are not considered acquisition dates, as Company ABC did not have control over Company XYZ on those dates. The payment of consideration (15th July 2022) does not determine the acquisition date; instead, it is the control over the Board that marks the acquisition date.

Q35: Sony Ltd. and Zee Ltd. are in the business of producing films and TV serials. Sony Ltd. makes a bid for Zee Ltd.'s business, and the Competition Commission of India (CCI) announces that the proposed transaction will be scrutinized to ensure compliance with competition laws. Although the contracts are subject to CCI approval, Sony Ltd. and Zee Ltd. mutually agree on the terms of the acquisition and the purchase price before obtaining CCI clearance. Can the acquisition date be considered as the date when Sony Ltd. and Zee Ltd. agree on the terms, even though CCI approval is still pending?

Answer: No, the acquisition date cannot be considered as the date when Sony Ltd. and Zee Ltd. agree on the terms. According to **Ind AS 103 - Business Combinations**, the acquisition date is defined as the date on which the acquirer obtains control of the acquiree.

As per paragraph 9 of Ind AS 103, the acquisition date is typically the date on which the acquirer legally transfers the consideration, acquires the assets, and assumes the liabilities of the acquiree—referred to as the "closing date." However, in this case, since the approval from CCI is a substantive condition for the acquisition, the acquisition date cannot precede the approval date.

Q36: Company A acquires Company B in April 2022. The acquisition agreement includes a contingent consideration clause, where an additional cash payment of Rs. 20 Crore will be made to Company B's former shareholders if B's profits exceed Rs. 100 Crore in the next two years after the acquisition.

- 1. How should Company A determine the fair value of the contingent consideration at the acquisition date?**
- 2. How should this contingent consideration be classified in Company A's financial statements, and what impact will it have on the acquisition accounting (goodwill or gain on bargain purchase)?**

Answer: 1. Determining Fair Value of Contingent Consideration:

- Contingent consideration depends on future profits of Company B, so Company A must estimate the probability and amount of the future payment.
- The fair value should be measured at the **acquisition date** using an appropriate valuation technique, considering the likelihood of the future profit targets being met.
- This fair value is recognized as part of the total purchase consideration in the business combination.

2. Classification and Impact on Financial Statements:

- Since the contingent consideration is to be settled in cash, it is classified as a financial liability rather than equity.
- The liability for the contingent consideration should be recognized at its fair value at the acquisition date.
- The fair value of this contingent consideration will increase goodwill (or reduce gain on bargain purchase), as it is considered part of the total consideration transferred by Company A in the acquisition.

Q37: What is Non-Controlling Interest (NCI) in a business combination, and how is it measured at the acquisition date under Ind AS 103?

- 1. Define Non-Controlling Interest (NCI) and explain its role in a business combination.**
- 2. How can the acquirer measure the fair value of the NCI at the acquisition date?**
- 3. What is the difference between the per-share fair value of the acquirer's interest in the acquiree and the non-controlling interest?**

Answer:

1. Non-Controlling Interest (NCI) Definition:

Non-Controlling Interest (NCI) represents the portion of equity ownership in a subsidiary that is not owned by the parent company. The parent company has a controlling interest (greater than 50% but less than 100%) and consolidates the subsidiary's financial results with its own.

2. Measurement of NCI at Acquisition Date:

Ind AS 103 allows the acquirer to measure NCI at its **fair value** at the acquisition date. The fair value can be determined in two ways:

Quoted Price in an Active Market: If there is a quoted price for the equity shares not held by the acquirer, the fair value can be measured based on this price.

Other Valuation Techniques: If no quoted price is available, the acquirer must use other valuation techniques to measure the fair value of the NCI.

3. Difference in Per-Share Fair Value:

The per-share fair value of the acquirer's interest in the acquiree and the NCI may differ due to:

Control Premium: The acquirer's interest may include a premium for control, as the acquirer has the ability to direct the operations of the acquiree.

Discount for Lack of Control: The NCI may include a discount for lack of control (also called a non-controlling interest discount), as the NCI holders do not have control over the acquiree's operations.

Market participants may take these factors (control premium or lack of control discount) into account when determining the fair value of the acquirer's interest and NCI.

Q38: Amber Ltd. acquires 60% of the equity shares of Natural Ltd. a private entity, for Rs. 150 crore. The fair value of its identifiable net assets is Rs. 120 crore. How will the non-controlling interest be measured?

Answer: (a) Fair value method

Fair value of 40% of the equity shares owned by non-controlling shareholders = $150/60\% \times 40\% = 100$ crore.

(b) Proportionate Net Asset value method

Net asset value of 40% of the equity shares owned by non-controlling shareholders = $120 \times 40\% = 48$ crore

Q39: Under Ind AS 103, what disclosures are required for each business combination that occurs during the reporting period? Specifically, what must the acquirer disclose regarding the acquiree?

Answer: Ind AS 103 requires detailed disclosures on Business Combination. The acquirer shall disclose the following information for each business combination that occurs during the reporting period:

- a. **Acquiree Information:** Name and description of the acquiree.
- b. **Acquisition Date:** Date of acquisition.
- c. **Voting Equity Interests:** Percentage of voting equity interests acquired.
- d. **Reasons for Acquisition:** Primary reasons for the business combination and how control was obtained.
- e. **Goodwill:** Qualitative description of factors making up the goodwill (e.g., synergies, intangible assets).
- f. **Consideration Transferred:** Total acquisition-date fair value of consideration transferred, including cash, assets, liabilities, and equity interests.
- g. **Contingent Consideration:** Amount recognized, arrangement details, and range of outcomes for contingent consideration.
- h. **Acquired Receivables:** Fair value, gross contractual amounts, and estimated uncollected cash flows for acquired receivables.
- i. **Assets and Liabilities:** Amounts recognized for each major class of assets acquired and liabilities assumed.
- j. **Contingent Liabilities:** Information required by Ind AS 37 for contingent liabilities not recognized due to unreliable fair value measurement.
- k. **Goodwill for Tax Purposes:** Total amount of goodwill expected to be deductible for tax purposes.
- l. **Separate Transactions:** Description and accounting treatment for transactions recognized separately from the acquisition.
- m. **Acquisition-Related Costs:** Amount of costs incurred and their recognition as expenses.
- n. **Bargain Purchase:** Gain recognized in other comprehensive income and reasons for the gain.

- o. **Non-Controlling Interest:** Amount of NCI recognized and the basis for measurement.
- p. **Business Combination Achieved in Stages:** Fair value of pre-acquisition interest and any gain or loss from remeasuring it.
- q. **Revenue and Profit Disclosure:** Revenue and profit of the acquiree since acquisition and for the combined entity as if acquisition occurred at the beginning of the period.

These disclosures ensure transparency and provide a clear picture of the business combination's financial impact.

Q40: What are the key principles and treatment under the pooling of interest method for business combinations involving entities under common control?

Answer: Method Used:

The pooling of interest method is used for business combinations under common control, where assets and liabilities are combined at their carrying amounts without adjustments to fair value.

1. **Treatment of Assets and Liabilities:** No fair value adjustments are made. Only adjustments to harmonize accounting policies are done.
2. **Adjustments to Prior Period Financials:** Prior period financial information is restated as if the business combination occurred at the beginning of the earliest period presented, regardless of the actual acquisition date.
3. **Recording of Consideration:** Consideration may include securities, cash, or other assets. Securities are recorded at nominal value, and other assets are recorded at their fair values.
4. **Handling of Retained Earnings and Reserves:** Retained earnings of the transferor are aggregated with the transferee's retained earnings. Alternatively, they may be transferred to General Reserve. The identity of the reserves is preserved in the transferee's financial statements.
5. **Excess or Deficiency in Share Capital:** Excess share capital is recognized as goodwill. Any deficiency in share capital is treated as a capital reserve.

Q41: What disclosures are required to be made in the first financial statements following a business combination?

Answer: The following disclosures shall be made in the first financial statements following the business combination:

- (a) Names and general nature of business of the combining entities;
- (b) The date on which the transferor obtains control of the transferee;
- (c) Description and number of shares issued, together with the percentage of each entity's equity shares exchanged to effect the business combination; and
- (d) The amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof.

Q42: What is a reverse acquisition, and how is it accounted for under Ind AS 103? Provide examples of reverse acquisitions.

Answer: Definition of Reverse Acquisition: A reverse acquisition occurs when the legal acquirer (the entity that issues securities) is identified as the acquiree for accounting purposes. The entity whose equity interests are acquired is considered the acquirer for accounting purposes.

Key Characteristics:

In a reverse acquisition, the accounting acquirer must meet the definition of a business under Ind AS 103. All recognition and measurement principles of Ind AS 103, including goodwill recognition, apply.

Example:

Godrej Soaps (1994): The company merged with its loss-making subsidiary, **Gujarat Godrej Innovent Chemical**, and renamed it **Godrej Soaps Ltd.**

ICICI (2002): ICICI merged with its subsidiary, **ICICI Bank**, and renamed the combined entity as **ICICI Bank**.

Q43: What are the recent developments in mergers and acquisitions (M&A) accounting, particularly with the introduction of IND AS 103, and how have these changes impacted the accounting treatment of business combinations, goodwill, tax benefits, and common control business combinations?

Answer: 1. Method of Accounting for Business Combinations:

AS-14: Allowed the use of the purchase method for business combinations, especially for commonly controlled enterprises, which provided tax benefits from goodwill amortization.

IND AS 103: Requires the pooling of interest method for business combinations involving commonly controlled enterprises, restricting the previous tax benefits from goodwill amortization.

2. Appointed Date vs. Effective Date:

AS-14: Accounting was done from the appointed date (specified in the court-approved scheme).

IND AS 103: Accounting is done from the date the acquirer obtains control over the acquiree.

3. Accounting for Goodwill:

AS-14: Allowed a choice to compute goodwill based on fair value or net asset value, with goodwill amortization over five years.

IND AS 103: Prohibits goodwill amortization and requires annual impairment testing of goodwill. Tax benefits from goodwill amortization are no longer available.

4. Common Control Business Combinations:

IND AS 103: Mandates the use of the pooling of interest method for business combinations under common control. Comparative periods should be restated to reflect the combination as if it occurred from the earliest period presented.

5. Income Taxes: IND AS 12: No deferred tax consequences on initial recognition except for assets and liabilities acquired during a business combination. The acquirer must account for deferred tax assets and liabilities arising from temporary differences at the acquisition date.

6. Indemnification Assets: The acquirer may recognize an indemnification asset if the seller indemnifies against specific liabilities. The indemnification asset is recorded at the same time as the indemnified item, with a possible valuation allowance for uncollectible amounts.

7. Intangible Assets: IND AS 103: Requires the acquirer to separately recognize identifiable intangible assets (such as patents, trademarks) from goodwill. These assets must meet the separability or contractual-legal criteria.

8. **Share-Based Payment Transactions:** The acquirer must measure share-based payment transactions of the acquiree or any replacements using the methods specified in Ind AS 102, Share-based Payment.

9. **Assets Held for Sale:** The acquirer must measure any acquired non-current assets or disposal groups classified as held for sale at fair value less costs to sell, in accordance with Ind AS 105.

Q44: The accounting treatment of Mergers and Acquisitions has undergone a drastic change with the introduction of IND-AS 103 — Business Combination. Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q45: Auditor of Jumbo Ltd. has informed following to the Board of directors :

(i) Tax neutrality of a demerger may get affected on adoption of IND-AS 103.

(ii) Appointed Date has lost relevance if a company accounts the transaction in accordance with IND-AS 103.

Examine the correctness of the observations made by the auditor. (3 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: (i) Tax neutrality of Demerger on Adoption of IND AS 103

In the context of demergers, tax benefits are available only if the conditions of demerger provided in section 2(19AA) of the Income-Tax Act, 1961 are met. One such condition is that assets and liabilities are to be recorded by the transferee company at the book value of the transferor company.

However, under IND-AS 103, the requirement is to record assets and liabilities at fair value in case of non-common control business combination which may create problem in achieving a most tax efficient demerger.

(ii) Relevance of Appointed date under IND-AS 103

Appointed date refers to the date with effect from which the assets and liabilities of the transferor company vests in the transferee company. The appointed date is specified in the scheme of merger itself and once the scheme is approved with the approval of the NCLT, the accounting takes place with effect from the appointed date.

As per IND-AS 103 accounting for business combination should be done on the date on which the acquirer obtains control. Thus appointed date may not have relevance if IND AS 103 is adopted.

Accordingly, the observations of the auditor appear to be correct.

Q46: State the distinctive features of Ind AS 103 in contrast to existing AS 14 for accounting treatment in cases of amalgamations and combinations. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

OR

“Accounting treatment under AS 14 is confined to Amalgamations unlike Ind AS 103.” Discuss how far Ind AS 103 can be distinguished with AS 14. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: AS 14 on Accounting for Amalgamations

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

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

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

(iv) Ind AS 103 requires that for each business combination, the acquirer shall measure any non-controlling interest in the acquiree either at fair value or at the non-controlling interest's proportionate share of the acquiree's identifiable net assets. On the other hand, the existing AS 14 states that the minority interest is the amount of equity attributable to minorities at the date on which investment in a subsidiary is made and it is shown outside shareholders' equity.

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

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

Q47: Applicability of Accounting Standard (AS) – 14 for amalgamation. Comment. (3 Marks)

PAST YEAR QUESTION DECEMBER 2015

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

- (a) Amalgamation in the nature of merger.
- (b) Amalgamation in the nature of purchase.

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

Q48: What is a demerger, and how does it affect the parent company and the new entity? Also, why is AS-14 not applicable to demergers under the Income Tax Act, 1961?

Answer: A **demerger** is a corporate restructuring method in which a business unit or subsidiary of a company becomes an independent entity. In a demerger, the parent company distributes shares of the subsidiary to its shareholders, typically through a stock dividend. This unlocks hidden shareholder value by allowing the parent company to focus more on its core operations and enabling the new entity to make independent decisions and explore new opportunities based on its strengths.

As per the Income Tax Act, 1961, a demerger involves the transfer of one or more undertakings from a demerged company to a resulting company under a scheme of arrangement. However, AS-14 (Accounting for Amalgamations) is not applicable to demergers because AS-14 primarily deals with mergers and amalgamations, not demergers. The accounting treatment for demergers is separate, following guidelines under different standards.

Q49: State the salient features of Reconstruction that differs with Demerger. (3 marks)

PAST YEAR QUESTION DECEMBER 2017

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

On the other hand 'demerger' denotes de-linking of an undertaking or substantial part of undertaking of transferor company in favour of transferee company through process of compromise or arrangement in terms

of sections 230 to 240 of the Companies Act, 2013 approved by NCLT. All the properties and liabilities attributable to the relevant undertaking are transferred to the resulting transferee company. As such valuation report by a registered valuer is invariably necessary whereas in the case of reconstruction, requirement of valuation report depends on the circumstances. Thus, reconstruction includes demerger but demerger is not otherwise.

Q50: “Demerger is not expressly defined under the Companies Act, 2013”. How does an application move before the National Company Law Tribunal (NCLT) for Demerger under the said Act? (3 marks)

PAST YEAR QUESTION JUNE 2016

Answer: 'Demerger', 'merger', or 'amalgamations' are not expressly defined under Companies Act, 2013. However explanation to Section 230(1) gives a clue about the word demerger.

Applications are filed in accordance with sections 230 to 234 of the Companies Act, 2013 with the National Company Law Tribunal because such applications involve compromise or arrangement with creditors and members. As per the same arrangement, a reorganization of the company's share capital by consolidation of shares of different classes or by the division of shares into shares of different classes or both. Thus, said explanation indicates appropriateness to move the Tribunal.

Q51: What is internal reconstruction, and how is it carried out in a company facing losses for several years? Discuss the methods of internal reconstruction and provide examples.

Answer: **Internal reconstruction** is a process used by a company to address the issue of overvalued assets and a higher net worth than its actual financial position, which may arise due to sustained losses over several years. It is necessary to reflect the true financial position of the company and involves revaluation of assets, negotiation of liabilities, and writing off losses by reducing the paid-up value of shares or altering the rights attached to different classes of shares. Unlike external reconstruction, the company is not liquidated during internal reconstruction.

The methods of internal reconstruction include:

1. **Cost Reduction through Closure of Units:** The company may shut down unprofitable units or segments to cut down unnecessary costs and streamline operations.
2. **Redundancy Programmes:** The company may reduce its workforce to cut down on expenses, particularly where there are excess employees compared to operational requirements.
3. **Management or Organisational Restructuring:** The company might restructure its management or operations, often involving decentralization to improve efficiency and focus on core areas of the business. These methods help the company regain financial stability without the need for liquidation.

CASE STUDY: Transfer of Software Undertaking from Sony India to Sony Software

Background: In 2012, Sony India proposed a scheme of arrangement to transfer its software undertaking to Sony Software under the Companies Act, 1956. The scheme involved distributing any excess value of net assets of the transferred undertaking to the shareholders of Sony Software.

Object on Raised: The Regional Director objected, stating that any excess value should be adjusted to capital reserve under AS-14 (Accounting for Amalgamations), rather than being transferred to the general reserve.

Court's Clarification: Sony India argued that AS-14 applies only to amalgamations and not demergers. The Delhi High Court clarified that AS-14 is applicable only in cases of amalgamations and not demergers. The Court also referred to the Gujarat High Court's decision (2010), which confirmed that AS-14 does not apply to demergers.

Outcome: The Delhi High Court approved the scheme, allowing the excess value of net assets to be distributed to Sony Software's shareholders, affirming that AS-14 does not govern demergers.

Key Takeaway: The case highlights that AS-14 is applicable to amalgamations, not demergers, clarifying how excess value in a demerger should be treated.

Case Study: Gallops Realty (P) Ltd. v. State of Gujarat (2010)

Background:

Gallops Realty (P) Ltd. and the resulting company sought approval for a scheme of arrangement involving the demerger of the hotel business from the demerged company. This also included the reconstruction of share capital and reduction of paid-up share capital under Sections 391, 394, and 100 of the Companies Act, 1956.

Object on:

The Regional Director objected to transferring capital profit from the demerger to the general reserve, stating it should go to the capital reserve as per Accounting Standard-14 (AS-14), which applies to amalgamations, not demergers.

Court's Ruling: The High Court of Gujarat held that AS-14 applies only to amalgamations, not demergers. Therefore, the transfer of capital profit to the general reserve was valid, and the scheme was approved.

Key Point: The case clarified that AS-14 does not govern demergers, and capital profits arising from demergers can be transferred to the general reserve.

Q52: As per the scheme of arrangement, 'Software Undertaking' of S India is proposed to be transferred to S Software under Sections 391 to 394 of the Companies Act, 1956. One of the conditions of the scheme was that any excess in the value of net assets of software undertaking transferred to the resulting company shall be applicable for distribution to the shareholders of the resulting company.

Regional Director of Northern Region, Ministry of Corporate Affairs (MCA) has raised objection in his affidavit filed with the High Court stating that excess, if any, in the value of the net assets of the software undertaking should be adjusted to the capital reserve as prescribed in AS-14 and not to the general reserve as proposed in the scheme of arrangement.

Decide the matter with reference to a decided case law. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: The matter is similar to the case of 2010 1CLJ 351 titled *Gallops Realty (P) Ltd. v. State of Gujarat* as decided by the Gujarat High Court.

The petitioners contended that AS-14 is applicable only to amalgamations and not to demerger. It was clarified that AS-14 is applicable only to amalgamations and not to demerger. On a plain reading of the accounting standard under reference, it is clear that the same is applicable only in case of an amalgamation and not in case of demergers.

High Court of Gujarat in the case of *Gallops Realty (P) Ltd., In re v. K.A. PUJ, J.*(2010), under Section 391, read with sections 394 and 100, of the Companies Act, 1956 Petitioner-companies, i.e., demerged company and resulting company, sought for sanction of composite scheme of arrangement in nature of purchase of shares

and demerger of hotel business of demerged company to result ng company and consequent reconstruct on of share capital of demerged company under sect on 391, read with sect ons 394, 78 and 100 consist ng of reduct on of paid-up share capital as well as ut lizat on of share premium account. Regional Director stated that as per scheme, capital prof t on demerger would be transferred to general reserve in books of result ng company which was not in consonance with generally accepted account ng principles as also Account ng Standard-14 which provide that any prof t arising out of a capital transact on ought to be treated as capital prof t and, hence, would be transferred to capital reserve and not to general reserve. It was held that the observat on of Regional Director was not in consonance with account ng principles in general and Account ng Standard-14 in part ular, as Account ng Standard-14 is applicable only in case of amalgamat on and not in case of demerger, as envisaged in instant scheme.

Q53: There are certain departures in account ng aspects dealing with amalgamat ons or mergers as per IFRS – 3 in comparison to IND – AS 103. Enlist such variat ons brief y. (5 marks)

PAST YEAR QUESTION JUNE 2021

Answer: The principles of IND-AS 103 Business Combinat on and IFRS -3 are same to a very great extent.

There are only few carve out in IND-AS 103 when compared to IFRS 3. They are as follow:

IFRS-3 excludes from its scope business combinat ons of ent t es under common control. IND- AS 103 gives the guidance in this regard.

IFRS-3 requires bargain purchase gain arising on business combinat on to be recognised in prof t or loss account. IND-AS 103 requires that the bargain purchase gain to be recognised in other comprehensive income and accumulated in equity as capital reserve, unless there is no clear evidence for the underlying reason for classif cat on of the business combinat on as a bargain purchase, in which case, it shall be recognised directly in equity as capital reserve.

The main reason for this carve out is, the recognit on of such gains in prof t or loss would result into recognit on of unrealised gains as the value of net assets is determined on the basis of fair value of net assets acquired.

Q54: Is External Reconstruct on superior to Internal Reconstruct on? (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) In 'Internal Reconstruct on', the assets are re-valued, liabilit es are negot ated, and losses suf ered are writ en-of by reducing the paid-up value of shares and/ or varying the rights at ached to dif erent classes of shares.

(ii) Internal Reconstruct on (IR) is considered to be superior to External Reconstruct on(ER) since the exercises undertaken in IR requires an in-depth analysis and remedies instead of giving up in ER in the form of merger or acquisit on and losing ident ty.

(iii) In many a case, Internal Reconstruct on does not require approvals from Courts or tribunals that may require conduct ng meet ngs of classes of shareholders and creditors, except in a case of reduct on of paid up capital.

Q55: A Ltd. is incurring losses for past 8 years as several of its business units are running under losses. The balance sheet does not ref ect the true posit on of the business, as higher net worth is depicted, than that

of the real one. The assets are overvalued and it has many intangible and fictitious assets, which does not depict a true picture of the financial statements. The management of the company approaches Mr. X, a practicing Company Secretary to suggest the way out in such a situation. Prepare suggestive measures for Mr. X for resolution of the current status with respect to corporate restructuring. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The problem in the question is a clear case requiring Internal Reconstruction of the organisation. The following methodology may be suggested by Mr. X as a practicing company secretary to the management of A Ltd.

Internal Reconstruction

When a company incurs loss for number of years, the balance sheet does not reflect the true position of the business, as a higher net worth is depicted, than that of the real one. In such a company the assets are overvalued and it has many intangible assets and fictitious assets. Such a situation does not depict a true picture of financial statements. Such a situation requires reconstruction. Such a reconstruction may be carried out internally. In an internal reconstruction, the assets are revalued, liabilities are negotiated, and losses suffered are written off by reducing the paid-up value of shares and/or varying the rights attached to different classes of shares. Existing company is not liquidated.

Internal Reconstruction may be done by ways of:

(a) Cost Reduction through Closure of Units:

Assessment of Underperforming Units: The company evaluates its business units or operations to identify those that are underperforming or no longer aligned with its strategic objectives.

Closure or Rationalization: Underperforming units or operations may be closed down entirely or rationalized to reduce costs. This could involve shutting down unprofitable facilities, discontinuing unproductive product lines, or exiting unprofitable markets.

Impact Analysis: The company assesses the financial and operational impact of closure or rationalization, considering factors such as employee layoffs, asset write-offs, lease terminations, and potential restructuring costs.

Communication and Stakeholder Management: Transparent communication with employees, suppliers, customers, and other stakeholders is essential to manage the impact of closures effectively. The company may provide support to affected employees and establish a transition plan for suppliers and customers.

Optimization of Resources: By closing underperforming units, the company can reallocate resources, including capital, personnel, and management attention, to focus on core businesses or areas with higher growth potential.

(b) Redundancy Programs:

Identification of Redundancies: The company identifies areas of duplication, inefficiency, or overlap in its operations, such as redundant processes, roles, functions, or departments.

Voluntary or Involuntary Redundancy Programs: Redundancy programs may involve offering voluntary retirement packages, early retirement incentives, or severance packages to employees. In some cases, involuntary layoffs or job eliminations may be necessary to streamline operations.

Skills Assessment and Retention: The company assesses the skills and capabilities of its workforce to retain critical talent and ensure that the right people are in the right roles post-restructuring.

Legal and Regulatory Compliance: Redundancy programs must comply with applicable labor laws, regulations, and collective bargaining agreements. The company may need to consult with employee representatives or unions and provide adequate notice and compensation to affected employees.

Reorganization and Workforce Planning: Following redundancy programs, the company may reorganize its workforce and realign roles and responsibilities to optimize efficiency and productivity. Workforce planning ensures that the company has the necessary talent and skills to support its strategic objectives.

(c) Management or Organizational Restructuring involving Decentralization:

Evaluation of Organizational Structure: The company assesses its existing organizational structure to determine whether it is conducive to agility, innovation, and effective decision making.

Decentralization: Management restructuring may involve decentralizing decision making authority and empowering lower-level managers or teams to make more autonomous decisions. This could lead to faster responses to market changes, improved customer service, and increased accountability.

Clarification of Roles and Responsibilities: Clear delineation of roles, responsibilities, and accountability is essential in decentralized structures to avoid confusion and ensure alignment with organizational goals.

Communication and Training: Effective communication is critical to ensure that employees understand the rationale behind decentralization and their roles in the new structure. Training programs may be provided to equip managers and employees with the necessary skills to thrive in a decentralized environment.

Performance Monitoring and Feedback: The company establishes performance metrics and feedback mechanisms to evaluate the effectiveness of decentralization and make adjustments as needed. Regular monitoring helps identify bottlenecks, address challenges, and capitalize on opportunities for improvement.

Q56: Briefly explain the provisions regarding accounting treatment in the books of the transferee company on amalgamation where Indian Accounting Standard 103 (Business Combinations of Entities under Common Control) is applicable. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Accounting treatment in the books of the transferee company on amalgamation where Indian Accounting Standard 103 (Business Combinations of Entities under Common Control) is stated as under:

1. All the assets and liabilities recorded in the books of Transferor Company shall be transferred to and vested in the books of Transferee Company pursuant to the scheme and shall be recorded by Transferee Company at their respective book values as appearing in the books of Transferor Company.
2. The identified reserves of Transferor Company shall be preserved and they shall appear in the financial statements of Transferee Company in the same form and manner, in which they appeared in the financial statements of Transferor Company prior to this scheme being effective.
3. The investments in the equity capital of Transferor Company as appearing in the financial statements of Transferee Company shall stand cancelled.
4. Inter-company balances, loans and advances if any, will stand cancelled.
5. In case of any differences in accounting policy between Transferor Company and Transferee Company, the accounting policies followed by Transferee Company will prevail and the difference till the appointed date shall be adjusted in capital reserves of Transferee Company, to ensure that the financial statements of Transferee Company reflect the financial position on the basis of consistent accounting policy.

6. Subject to any corrections and adjustments as may, in the opinion of the Board of Directors of the Transferee Company, be required and except to the extent otherwise by law required, the reserves of the Transferor Company, if any, will be merged with the corresponding reserves of the Transferee Company.

Q57: What is meant by 'goodwill on amalgamation'? Which factors are to be taken into account in estimation of useful life of goodwill? (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

- (i) the forceable life of the business or industry;
- (ii) the effects of product obsolescence, changes in demand and other economic factors;
- (iii) the service life expectancies of key individuals or groups of employees;
- (iv) expected actions by competitors or potential competitors; and
- (v) legal, regulatory or contractual provisions affecting the useful life.

Q58: As per the scheme of arrangement, textiles undertaking of Cotton Ltd. is proposed to be demerged to Jutevel Ltd. under sections 230 and 232 of the Companies Act, 2013. One of the conditions of the aforesaid scheme is that any excess in the value of net assets of textiles undertaking proposed to be transferred to the resulting company shall be credited to general reserve.

If you as an advisor to the parties to the arrangement are asked to advise, what will be your response considering the applicable accounting standards and legal provisions applicable to the aforesaid case. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: The given case is similar to the case of demerger of software undertaking of Sony India limited, where it was decided that AS-14 is not applicable to Demergers. The Delhi High Court (the High Court), while approving scheme of arrangement between Sony India and Sony Software in 2012 has clarified that AS-14 (i.e., accounting standards issued by the Institute of Chartered Accountants) is applicable only to amalgamations and not to demerger.

As per the scheme of arrangement, 'Software Undertaking' of Sony India is proposed to be transferred to Sony Software under Sections 391 to 394 of the Companies Act, 1956. One of the conditions of the scheme was that any excess in the value of net assets of software undertaking transferred to the resulting company shall be applicable for distribution to the shareholders of the resulting company. Regional Director of Northern Region, Ministry of Corporate Affairs has raised objection in his affidavit filed with the High Court stating that excess if any, in the value of the net assets of the software undertaking should be adjusted to the capital reserve as prescribed in AS-14 and not to the general reserve as proposed in the scheme of arrangements. The petitioners contended that AS-14 is applicable only to amalgamations and not to demerger. It was

clarified that AS-14 is applicable only to amalgamations and not to demerger. On a plain reading of the accounting standard under reference, it is clear that the same is applicable only in case of an amalgamation and not in case of demergers. This has also been held by the Gujarat High Court in the case of 2010 1 CLJ 351 titled Gallops Realty (P) Ltd.

CS ANOOP JAIN

CHAPTER 7 AS PER ICSI MODULE

TAXATION & STAMP DUTY ASPECTS OF CORPORATE RESTRUCTURING

Q1: How does the Income Tax Act, 1961 define 'amalgamation' in relation to companies, and what are the key conditions for a merger to be considered an amalgamation?

Answer: The Income Tax Act, 1961 defines 'amalgamation' as the merger of one or more companies with another company or the merger of two or more companies to form a single company. The key conditions for a merger to qualify as an amalgamation under Section 2(1B) are:

1. **Transfer of property:** All the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation.
2. **Transfer of liabilities:** All the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation.
3. **Shareholder approval:** Shareholders holding at least three-fourths in value of the shares in the amalgamating company or companies (excluding shares held by the amalgamated company or its subsidiary) must become shareholders of the amalgamated company by virtue of the amalgamation. This condition ensures that the merger is not simply a purchase of assets but a true amalgamation of businesses.

Q2: ETA Motors Ltd. is an Indian automotive company, headquartered and registered in Delhi, incorporated on 12th May, 2002. The company manufactures vans and buses. The technical experts of the company have an opinion that four critical technological disruptions – mobility, autonomous driving, electric vehicles, and connected technologies – are poised to revolutionize the automotive landscape. The Company besides its plan to increase its market share by 20% to 35% by 2025-26, wants to enter the global market through joint ventures or technology transfers. The company decided to chalk out an expansion strategy for the same. K&G Associates, the official and legal advisors to the Company were asked to deliberate on the expansion strategies. In their presentation to the Board of directors of ETA Motors Ltd., they explained that Mergers and Acquisitions (M&A) and Takeovers are common occurrences in the business world as enterprises aim for inorganic growth and diversification. By merging, the companies hope to reap the benefits by becoming bigger and dominating and also through tax benefits, economies of scale, acquiring new technology and improved market reach and industry visibility. After gaining an insight into the M&A opportunities, ETA Motors Ltd. created a separate (M&A) team to look out for acquisition targets as the Board of Directors felt that strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

(M&A) team was assigned the task to do the investigating effort and to gather all relevant facts and information about the targets that can influence a decision to enter into a transaction or not. M&A team after their detailed due diligence recommended an unlisted company, Daisy Commercial Vehicle Company Ltd. (DCVL) in South India as a potential target to give ETA Motors Ltd. a major breakthrough on the expansion front. The acquisition offer seemed to open up possibilities for strong synergies like expansion of the product line, good R&D capabilities and new markets.

As Merger & Acquisition process is normally proceeded by formulation of strategy, carrying out due diligence, conducting valuation, ensuring all legal compliances and considering the aspects of stamp duty and other applications, K&G Associates was consulted regarding legal procedures and compliances under various acts and also regarding the valuation aspects of shares.

Both the companies deliberated and discussed together at the Board level and came out with a scheme. The scheme received approval of 96% of the shareholders of DCVL but rest 4% dissented from the scheme. K&G Associates advised that Sect on 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Where the scheme has been approved by the holders of not less than nine tenths (90%) in value of the shares of the DCVL whose transfer is involved, ETA Motors Ltd., may give notice to the dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the DCVL (including dissenting shareholders), unless the Tribunal orders otherwise (i.e., that the scheme shall not be binding on all shareholders). Accordingly, the ETA Motors Ltd. shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

Accordingly, the circular along with all information as provided in the Act was sent to the dissenting shareholders in Form No : CAA 14 to the last known address of the dissenting shareholders. Some of the shareholders held their shares in DEMAT form.

Based on the above facts, answer the following questions :

Will the takeover achieved in the above process fall within the meaning of amalgamation under the Income Tax Act, 1961 and will benefits of amalgamation as provided under the said Act be available to the acquisition under consideration? (5 marks)

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Answer: According to sect on 2 (1B) of the Income Tax, 1961, “amalgamation”, in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that –

- (i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;
- (ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;
- (iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise, than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

The given case deals with acquisition which does not result in the transferor Company losing its identity. Therefore, the takeover achieved in the above process through Sect on 235 of the Companies Act, 2013 Act will not fall within the meaning of amalgamation under the Income Tax Act, 1961

and as such benefits of amalgamation provided under the said Act will not be available to the acquisition under consideration. The takeover in the above process will not enable carrying forward of unabsorbed depreciation and accumulated losses of the transferor Company in the transferee Company for the reason that the takeover does not result in the transferor Company losing its identity as it is stated in the question that this is takeover of an unlisted company through transfer of undertaking.

Q3: In a merger between Company "A" and Company "B," where Company "B" holds 20% of the shares in Company "A," how can the condition of shareholder approval be satisfied for the merger to qualify as an 'amalgamation' under the Income Tax Act, 1961?

Answer: For the merger to qualify as an 'amalgamation' under the Income Tax Act, 1961, the condition regarding shareholder approval can be satisfied as follows:

- Company "B" holds 20% of the shares in Company "A," so 80% of Company "A" remains with other shareholders.
- According to the Income Tax Act, at least three-fourths in value of the shares in the amalgamating company (Company "A") must become shareholders of the amalgamated company (Company "B").
- Since Company "B" already holds 20% of the shares in Company "A," the remaining 80% of Company "A" shares must meet the condition.
- Therefore, shareholders holding 60% (three-fourths of 80%) of Company "A" must become shareholders of Company "B" by virtue of the amalgamation. This ensures the shareholder approval condition is met.

Q4: What are the provisions under Sect on 72A of the Income Tax Act, 1961, regarding the carry forward and set-off of accumulated business loss and unabsorbed depreciation allowance in case of an amalgamation?

Answer: Under Sect on 72A of the Income Tax Act, 1961, certain provisions relax the rules regarding the carry forward and set-off of accumulated business losses and unabsorbed depreciation allowances in case of an amalgamation. The key provisions are:

1. General Provisions for Amalgamation:

In case of an amalgamation, the accumulated business loss and unabsorbed depreciation of the amalgamating company are allowed to be carried forward and set off against the income of the amalgamated company for the previous year in which the amalgamation takes place.

The provisions of the Income Tax Act related to the set-off and carry forward of losses and depreciation will apply accordingly.

2. Specific Cases of Amalgamation:

(a) Amalgamation of a company owning an industrial undertaking, a ship, or a hotel with another company.

(b) Amalgamation of a banking company with a specified bank.

(c) Amalgamation of one or more public sector companies with other public sector companies.

(d) Amalgamation of an erstwhile public sector company with other companies, provided the amalgamation is carried out within five years after the restriction on amalgamation in the share purchase agreement ends due to strategic disinvestment.

3. Special Provisions for Public Sector Companies:

In case of amalgamation referred to in **clause (d)**, the accumulated loss and unabsorbed depreciation of the amalgamating public sector company will be deemed to be the loss or unabsorbed depreciation of the amalgamated company.

However, this accumulated loss and unabsorbed depreciation cannot exceed the accumulated loss and depreciation of the public sector company as of the date when it ceases to be a public sector company due to strategic disinvestment.

Thus, Section 72A provides relief to companies undergoing amalgamation by allowing the carry forward and set-off of accumulated losses and unabsorbed depreciation, subject to certain conditions and limitations.

Q5: What are the conditions for the carry forward and set-off of accumulated loss and unabsorbed depreciation allowance under Section 72A of the Income Tax Act, 1961, in case of amalgamation?

Answer: Under Section 72A, for the accumulated loss and unabsorbed depreciation to be set off in the amalgamated company, the following conditions must be met:

1. For the amalgamating company:

- It must have been engaged in the business where the loss occurred or depreciation remains unabsorbed for at least 3 years.
- It must have held at least three-fourths of the book value of fixed assets for 2 years before the amalgamation.

2. For the amalgamated company:

- It must hold at least three-fourths of the book value of the fixed assets acquired from the amalgamating company for 5 years.
- It must continue the business of the amalgamating company for at least 5 years.
- Other conditions may apply to ensure the business revival or genuine business purpose.

If these conditions are not met, the set-off of loss or depreciation will be deemed income and taxed in the year when the conditions are violated.

Q6: What are the provisions related to the carry forward and set-off of accumulated loss and unabsorbed depreciation in the case of a demerger under the Income Tax Act, 1961?

Answer: Under the Income Tax Act, 1961, in the case of a demerger:

- 1. Directly Relatable Loss or Depreciation:** If the accumulated loss or unabsorbed depreciation is directly related to the undertakings transferred to the resulting company, it can be carried forward and set off in the hands of the resulting company.
- 2. Not Directly Relatable Loss or Depreciation:** If the loss or depreciation is not directly related to the undertakings transferred, it will be apportioned between the demerged company and the resulting company. The apportionment is based on the proportion of assets retained by the demerged company and those transferred to the resulting company. The loss or depreciation will be carried forward and set off accordingly in the hands of either company.
- 3. Government Notification:** The Central Government may specify conditions to ensure that the demerger is for genuine business purposes, through a notification in the Official Gazette.

Q7: What are the provisions related to the carry forward and set-off of accumulated loss and unabsorbed depreciation in the case of business reorganisation under the Income Tax Act, 1961?

Answer: Under the Income Tax Act, 1961, in the case of a business reorganisation where a firm or proprietary concern is succeeded by a company:

1. **Transfer of Loss or Depreciation:** The accumulated loss and unabsorbed depreciation of the predecessor firm or proprietary concern are deemed to be the loss or allowance for depreciation of the successor company for the previous year in which the business reorganisation occurred.
2. **Conditions for Set-off:** The provisions relating to the carry forward and set-off of loss and allowance for depreciation will apply to the successor company as if the loss or depreciation were incurred by it.
3. **Non-compliance of Conditions:** If any of the conditions laid down in the proviso to clauses (xiii) or (xiv) of section 47 are not met, the set-off of the loss or allowance of depreciation will be deemed to be income and charged to tax in the year in which the conditions are not fulfilled.

Q8: Discuss in brief the provisions regarding carry forward and set-off of accumulated business losses and unabsorbed depreciation by an amalgamated company. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

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

- (i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths in the book value of fixed assets of amalgamating company acquired in a scheme of amalgamation.
- (ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation.
- (iii) fulfils such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

It further provides that in case where any of the above conditions are not complied with, the set-off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be

deemed to be the income of amalgamated company chargeable to tax for the year in which such conditions are not complied with.

Q9: What are the provisions related to the carry forward and set-off of accumulated loss and unabsorbed depreciation in case of conversion of a private company or unlisted public company into a limited liability partnership (LLP) under Section 72A(6A) of the Income Tax Act, 1961?

Answer: Under Section 72A(6A) of the Income Tax Act, 1961, in the case of business reorganisation where a private company or unlisted public company is succeeded by a limited liability partnership (LLP), the following provisions apply:

1. **Transfer of Loss or Depreciation:** The accumulated loss and unabsorbed depreciation of the predecessor company (private company or unlisted public company) are deemed to be the loss or depreciation of the successor LLP for the purpose of the previous year in which the business reorganisation occurs.
2. **Set-off and Carry Forward Provisions:** The provisions relating to the carry forward and set-off of loss and allowance for depreciation will apply to the successor LLP as if the loss or depreciation were incurred by it.
3. **Non-compliance of Conditions:** If the conditions laid down in the proviso to clause (xiiib) of Section 47 are not complied with, the set-off of loss or depreciation made in any previous year in the hands of the successor LLP will be treated as income, and such income will be charged to tax in the year when the conditions are not met.

Q10: Define the following:

- a) "accumulated loss"
- b) "industrial undertaking"
- c) "unabsorbed depreciation"
- d) "specified bank"

Answer: (a) "accumulated loss" means so much of the loss of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited liability partnership or the amalgamating company or the demerged company, as the case may be, under the head "Profits and gains of business or profession" (not being a loss sustained in a speculation business) which such predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, would have been entitled to carry forward and set off under the provisions of section 72 if the reorganisation of business or conversion or amalgamation or demerger had not taken place;

(aa) "industrial undertaking" means any undertaking which is engaged in—

- (i) the manufacture or processing of goods; or
- (ii) the manufacture of computer software; or
- (iii) the business of generation or distribution of electricity or any other form of power; or
- (iiia) the business of providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services; or
- (iv) mining; or
- (v) the construction of ships, aircrafts or rail systems;

(b) "unabsorbed depreciation" means so much of the allowance for depreciation of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited

liability partnership or the amalgamating company or the demerged company, as the case may be, which remains to be allowed and which would have been allowed to the predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, as the case may be, under the provisions of this Act, if the reorganisation of business or conversion or amalgamation or demerger had not taken place;

(c) “specified bank” means the State Bank of India constituted under the State Bank of India Act, 1955 or a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 or a new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980.

Q11: What are the provisions regarding the carry forward and set-off of accumulated business losses and unabsorbed depreciation in a scheme of amalgamation under Sect on 72AA of the Income Tax Act, 1961?

Answer: Sect on 72AA of the Income Tax Act, 1961 provides the following provisions regarding the carry forward and set-off of accumulated business losses and unabsorbed depreciation in certain cases of amalgamation:

1. Applicability:

This section applies to the amalgamation of:

- One or more banking companies with another banking institution under a scheme sanctioned by the Central Government (under Sect on 45 of the Banking Regulation Act, 1949) or a subsequent amalgamation carried out within five years of a strategic disinvestment.
- One or more corresponding new banks with another corresponding new bank under a scheme brought into force by the Central Government (under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or 1980).
- One or more Government companies with another Government company under a scheme sanctioned by the Central Government (under Sect on 16 of the General Insurance Business (Nationalisation) Act, 1972).

2. Allowability of Carry Forward and Set-Of : The accumulated loss and unabsorbed depreciation of the amalgamating company (whether a banking company, corresponding new bank, or Government company) will be deemed to be the loss or depreciation of the amalgamated company for the previous year in which the amalgamation is carried out. The provisions of the Income Tax Act relating to the set-off and carry forward of losses and depreciation will apply accordingly.

Thus, the losses and unabsorbed depreciation of the amalgamating entity will be transferred and allowed to be carried forward and set off against the income of the amalgamated entity as per the relevant provisions of the Income Tax Act.

Q12: Apart from availing the benefit of set off and carry forward of unabsorbed depreciation and accumulated losses, what are the other tax benefits if the strategy of the acquirer to merge with a loss making company is in the form of a reverse merger? (5 marks)

PAST YEAR QUESTION DECEMBER 2017

OR

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

PAST YEAR QUESTION DECEMBER 2015

Answer: One of the modes of corporate restructuring strategy is to merge with a sick or a company with accumulated losses. If the scheme of merger gets approval of the competent authority under sect on 72A of the Income-tax Act, 1961, the resultant company avails the opportunity of get ng losses of sick undertakings of set against profit making undertakings of the transferee company. Even if approval by Competent Authority is not obtained, the merged undertakings of the resultant company st ll avail other benef ts and privileges as detailed below under the Income-tax Act, 1961:

- (a) The benef t of amort zat on of preliminary expenses under sect on 35D for the balance unexpired period out of 10 or 5 years shall be available to the resultant company.
- (b) Capital expenditure on scient f c research under sect on 35 can be availed by the resultant company.
- (c) Expenditure for patent or copyrights under sect on 35A for the balance unexpired period of out of 14 years.
- (d) Sect on 35DD for expenses towards amalgamat on or demerger for next 5 years in equal instalments.
- (e) Similarly benef ts under sect ons 35AB(3) and 35ABB are available to resultant company for the unexpired period if incurred for expenditure on know-how and telecom licenses respect vely.

Alternate Answer,

The remaining company is ent tled to the following benef ts.

Amort zat on of Preliminary Expenses

The benef t of amort zat on of preliminary expenses under sect on 35D are ordinarily available only to the assessee who incurred the expenditure. However, the benef t will not be lost in case the undertaking of an Indian company which is ent tled to the amort sat on is transferred to another Indian company in a scheme of amalgamat on within the 10 years/5 years period of amort sat on. In that event the deduct on in respect of previous year in which the amalgamat on takes place and the following previous year within the 10 years/5 years period will be allowed to the amalgamated company and not to the amalgamat ng company.

Capital Expenditure on Scient f c Research

In the case of an amalgamat on if the amalgamat ng company transfers to the amalgamated company, which is an Indian company, any asset represent ng capital expenditure on scient f c research, provision of sect on 35 would apply to the amalgamated company as they would have applied to amalgamat ng company if the lat er had not transferred the asset.

Expenditure on Acquisit on of Patent Right or Copyright

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

The deduct on under this sect on is however available for expenditure incurred before 1st April, 1998 only.

Expenditure on Amalgamat on

Sect on 35DD provides that where an assessee being an Indian company incurs any expenditure, on or af er the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamat on or demerger of an undertaking, the assessee shall be allowed a deduct on of an amount equal to one-f f h of such expenditure for each of the f ve successive previous years beginning with the previous year in which the amalgamat on or demerger takes place.

Expenditure on know-how

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

The deduction under this section is however available for any lump sum consideration paid in any previous year relevant to the assessment year commencing on or before 1.4.1998.

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

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

Q13: Yellow Overseas Ltd. (YOL) merged with Yellow India Ltd. (YIL). YOL availed the benefit of amortisation of preliminary expenses only for two years till merger order. Whether YIL is eligible to avail this benefit for the remaining period ?

Substantiate your answer. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: The benefit of amortisation of preliminary expenses under section 35D of Income Tax Act, 1961 are ordinarily available only to the assessee who incurred the expenditure.

However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortisation is transferred to another Indian company in a scheme of amalgamation within the 10 years/5 years period of amortisation. The amount of preliminary expenses of the amalgamating company to the extent not yet written off shall be allowed as deduction to the amalgamated company in the same manner as would have been allowed to the amalgamating company.

Q14: Define capital assets as per Income Tax Act, 1961. (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: '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.

Q15: Does any tax concessions accrue to a foreign company in case of demerger? (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Where a foreign company holds any shares in an Indian company and transfers the same in case of a demerger, to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under the Income Tax Act, 1961 if the following conditions are satisfied:

- (a) The shareholders holding not less than three-fourth in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company, and
- (b) Such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated.

Q16: Discuss the tax aspects on 'slump sale' and 'demerged company'. (3 marks)**PAST YEAR QUESTION AUGUST 2021**

Answer: Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such cases.

As per section 50B of Income Tax Act, 1961 any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income tax as capital gains from the transfer of long term capital asset and shall be deemed to be the income of the previous year in which the transfer took place.

Demerged company has been defined under section 2(19AA) of the Income Tax Act, 1961. According to section 47(vib), where there is a transfer of any capital asset in case of demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

Q17: Explain the tax aspects on slump sale. (5 marks)**PAST YEAR QUESTION DECEMBER 2016**

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

Computation of Capital Gains from Slump Sale

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

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

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

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

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

Q18: Profit on slump sale is a Capital Receipt." Explain and support the statement through decided Case Laws.

PAST YEAR QUESTION JUNE 2022

Answer: A slump sale means a sale that has a lump sum price as consideration without attributing values to the individual assets and liabilities disposed. Normally, sale of capital assets results in capital receipt and any profit derived is liable for capital gains in certain case.

The Supreme Court in the case of *CIT vs. West Coast Chemicals and Industries Ltd.* held that a slump sale price paid is an appreciation of capital but not arising out of trading. In the case of *CIT vs. Mungeeram Bangar & others* it was held that mere fact that in the schedule price of land was stated does not lead to conclusion that part of the slump price is attributable to the land sold.

Gujarat High Court also recognized the sale of undertaking as a whole as a going concern creates liability of Capital Gain Tax (*Sarabhai M. Chemicals Pvt. Ltd.* (126 ITR)).

Q19: What is deemed dividend under Sec 2(22)(e) of the Income Tax Act, 1961? Discuss its taxability. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Section 2(22)(e) of the Income Tax Act, 1961 defines the term deemed dividend as any payment by a company, not being a company in which public are substantially interested, of any sum by way of advance or loan to the following:

- To a shareholder, being a person who is the beneficial owner of the shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits), holding not less than 10% of the voting rights, or
- To any concern in which such shareholder is a member or a partner and in which he has a substantial interest, or
- On behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.

Exceptions to deemed dividend:

- any advance or loan made, to a shareholder or to such concern in which the shareholder is interested, by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;
- any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off ;
- any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of Section 68 of the Companies Act, 2013;

d. any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).

Finance Act, 2018 has brought the deemed dividend within the ambit of dividend distribution tax under section 115-0, at the rate of 30% in the hands of the closely held companies.

As per the provisions of Section 10(34), dividend income under section 2(24)(e) is 100% exempt in the hands of the shareholders as it is charged to Dividend Distribution Tax under section 115-0 of the Income Tax Act, 1961.

Q20: Payment of stamp duty under Indian Stamp Act, 1899 is required even in cases of orders made by National Company Law Tribunal (NCLT) in terms of Section 230 to 240 of the Companies Act, 2013. Are there any exceptions or exemptions? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: The Central Government has exempted the payment of stamp duty on instrument evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in a case:

- (i) where at least 90 percent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
- (ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 percent of the issued share capital of the other.

A circular was issued in the year 1937 vide which exemption was granted on payment of Stamp Duty when there is an amalgamation/merger between holding and subsidiary company. Delhi High Court in the case of *Delhi Towers Ltd. vs. GNCT of Delhi* made reference to this circular.

Otherwise, stamp duty is payable on such orders, being an instrument liable to duty as a Conveyance Deed as was held in *Hindustan Lever Ltd. vs. State of Maharashtra* (2003) 117 Comp Cas SC 758, *Emami Biotech Ltd* (2012).

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

Imposition of Stamp Duty is the prerogative of the State Government, hence applicable in only those states that have adopted the said circular.

Q21: "Stamp Duty is exempted when amalgamation is between Holding and Subsidiary Companies". Comment. (3 Marks)

PAST YEAR QUESTION JUNE 2024 OLD

Answer: Amalgamation between Holding and Subsidiary Companies-Exemption from payment of Stamp Duty

The Central Government has exempted the payment of stamp duty on instrument evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in a case:

- i) where at least 90 percent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
- ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 percent of the issued share capital of the other, or

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

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

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

A circular was issued in the year 1937 vide which exemption was granted on payment of Stamp Duty when there is an amalgamation/merger between holding and subsidiary company. Delhi High Court in the case of *Delhi Towers Ltd. Vs. GNCT of Delhi* made reference to this circular.

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

Q22: Raja Ltd has sold entire engineering division to Vibha Ltd for Rs. 2,500 crore while retaining other remaining business of chemicals and fertilisers with it :

- Is this sale of engineering division slump sale?***
- How the gain/loss on slump sale is calculated?***
- Explain the tax on aspects of slump sale. (5 marks)***

PAST YEAR QUESTION JUNE 2024

Answer: Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertakings by any means for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer.

The word any means now allows the transfer of a business undertaking not only 'by way of sale' but also 'by way of an exchange' or any other transfer structure defined in Section 2(47) of the Act to be included within its scope. Thus, sale of engineering division is considered as slump sale.

As per section 50B of the Income Tax Act, 1961 any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains from the transfer of long-term capital asset and shall be deemed to be the income of the previous year in which the transfer took place. The gain or loss resulting out of a slump sale shall be a Capital Gain/Loss under the Income Tax Act. The computation has been prescribed as follows:

Amount of Full Value of Consideration - Expenses in relation to transfer = Net Consideration - Cost of Acquisition / net worth = Capital Gain or (Loss)

Sale consideration to be calculated as per the Fair Market Value computation which includes monetary as well as non-monetary considerations.

The capital gain or loss as computed above will be either long term or short-term depending upon the period for which the undertaking is held. If the undertaking is held for more than 36 months, the resulting capital gain or loss shall be long-term and if it is held for less than 36 months, the resulting capital gain or loss shall be short term. Further, there will be no indexation benefit available in the computation of the capital gains.

Tax rates: The rates of tax applicable to the capital gain in a slump sale are as follows:

- Short Term Capital Gain: Normal Rates of tax on and
- Long Term Capital Gain: 20%.

In computing the net worth of the entity, the following points need to be considered:

1. The value of net worth should not take into account any change in the value of the asset or liability resulting from revaluation of such asset or liability.
2. In case of depreciable assets under the Income Tax Act, the Written Down Value of Block of assets as per the Act shall be considered.
3. In case of assets on which 100% deduction has been allowed under section 35AD (specified business), the value of such assets will not be considered.
4. In case of any other asset, value as appearing in the books of accounts shall be considered.
5. After considering the above points, if the resulting net worth is negative, then the cost of acquisition shall be taken as nil for the purpose of computation of capital gains.
6. Value of goodwill of business or profession (other than goodwill acquired by purchase from a previous owner) would need to be taken as NIL.

Q23: Flora Ltd. and Fauna Ltd. submitted joint application to National Company Law Tribunal (NCLT) Kolkata which has approved merger into Happy Ltd. and passed an order. Happy Ltd. management is of opinion that West Bengal govt has no authority to levy stamp duty. Here, value of shares allotted by Happy Ltd. is Rs. 500 crore and cash Rs. 57 crore. Citing relevant decided cases, as Company Secretary of Happy Ltd. give advice about legal status for levy of West Bengal state stamp duty and value over which stamp duty will be levied. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: In exercise of power conferred by Entry 63, List II, the State Legislature can make amendment in the Indian Stamp Act, 1899 under article 372, in regard to the rates of stamp duty in respect of documents other than those specified in provisions of List I related to Union Government list.

Stamp duty is levied in India on almost all, except a few documents, by the States and hence the rate and incidence of stamp in different states vary. The State Legislature has jurisdiction to levy stamp duty under entry 44, List III of the Seventh Schedule of the Constitution of India and prescribe rates of stamp duty under entry 63, List II.

The landmark decision of Bombay High Court in ***[Li Taka Pharmaceuticals v. State of Maharashtra (1996) 8 SC 102 (Bom.)]*** has serious implications for mergers covered not just by the Bombay Stamp Act, 1958 but also mergers covered by Acts of other States.

The following are the major conclusions of the Court:

1. An amalgamation under an order of Court under Section 394 of the Companies Act, 1956 is an instrument under the Bombay Stamp Act, 1958.
2. States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.
3. Stamp duty would be levied not on the gross assets transferred but on the “undertaking”, when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

The Calcutta High Court in the case of *Emami Biotech Ltd. (2012)* held that a Court order sanctioning a scheme of amalgamation or demerger under section 391 to 394 of the Companies Act, 1956 [section 230 and 232 of Companies Act 2013] is an instrument and conveyance within the meaning of the Stamp Act applicable to the State of West Bengal and is accordingly, subject to stamp duty.

Therefore, it cannot be said that the State Legislature has no jurisdiction to levy such duty on an order of the High Court sanctioning a scheme of compromise or arrangement under section 394 of the Companies Act, 1956

As per point 3, Stamp duty will be leviable on value of shares allotted i.e. 500 cr plus other consideration paid i.e. Rs. 57 cr resulting into a total of Rs. 557 cr.

Q24: The Board of directors of Bright Electronics Ltd. (BEL) has decided to amalgamate with Comfort Electricals Ltd. (CEL) which is the holding company of BEL. In order to fasten their amalgamation process, they approached their secured and unsecured creditors to seek their written consent to the proposed scheme of amalgamation. All the secured creditors of CEL have given their consent in writing but unsecured creditors have raised their doubt on the scheme and they refused to give their consent. The Board of directors of CEL requested the court to grant exemption or waiver from calling the meeting of secured and unsecured creditors of CEL on the ground that the proposed amalgamation would help them to pay of the entire outstanding dues of unsecured creditors. Offer your comments as to whether CEL can get exemption from convening the meeting of secured and unsecured creditors. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: Section 230 deals with the rights of a company to enter into a compromise or arrangement (i) between itself and its creditors or any class of them; and (ii) between itself and its members or any class of them. In the given case the proposed scheme is not acceptable to unsecured creditors of the holding company. In order to safeguard the interest of the unsecured creditors of the holding company, it is necessary to convene the meeting of the unsecured creditors and waiver may not be allowed.

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

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

Q25: Define demerger as per section 2(19AA) of the Income-tax Act, 1961. (3 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Section 2(19AA) of the Income Tax Act, 1961 defines the term demerger as follows:

“Demerger”, in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 231 to 232 of the Companies Act, 2013 by a demerged company of its one or more undertakings to any resulting company in such a manner that-

(i) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger:

- (ii) all the liabilities relating to the undertaking being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
- (iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger: Provided that the provisions of this sub-clause shall not apply where the resulting company records the value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015.
- (iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;
- (v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;
- (vi) the transfer of the undertaking is on a going concern basis;
- (vii) the demerger is in accordance with the conditions, if any, notified under subsection (5) of section 72A by the Central Government in this behalf.

Q26: Flying Ltd. got demerged and the resulting company Soars Ltd. was formed. It was a demerger within the meaning of section 2(19AA) of the Income-tax Act, 1961. Your advice is sought by Flying Ltd. regarding the tax concession available to a demerged company. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: If any demerger takes place within the meaning of section 2(19AA) of the Income tax Act, the following tax concessions shall be available to:

1. Demerged company.
2. Shareholders of demerged company.
3. Resulting company

Tax concession to demerged company

(i) *Capital gains tax not attracted [Section 47(vib)]*

According to section 47(vib), where there is a transfer of any capital asset in case of a demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

(ii) *Tax concession to a foreign demerged company [Section 47(vic)]*

Where a foreign company holds any shares in an Indian company and transfers the same, in case of a demerger, to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under section 45 if the following conditions are satisfied:

- (a) at least seventy-five per cent of the shareholders of the demerged foreign company continue to remain shareholders of the resulting foreign company; and

(b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated.

(iii) *Reserves for shipping business* : Where a ship acquired out of the reserve is transferred in a scheme of demerger, even within the period of eight years of acquisition there will be no deemed profits to the demerged company.

Q27: Zed Ltd. got demerged and the resulting company Zen Ltd. was formed. It was a demerger within the meaning of section 2(19AA) of the Income-tax Act, 1961. As a Company Secretary, advise Zed Ltd. regarding the tax concession available to the demerged company. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: (i) *Capital gains tax not attracted [Section 47(vib) of the Income-tax Act]*

According to section 47(vib), where there is a transfer of any capital asset in case of a demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

(ii) *Tax concession to a foreign demerged company [Section 47(vic) of the Income-tax Act]*

Where a foreign company holds any shares in an Indian company and transfers the same, in case of a demerger, to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under section 45 if the following conditions are satisfied:

(a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and (b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated:

Provided that the provisions of Sections 391 to 394 of the Companies Act, 1956 (1 of 1956) (Now Sections 230 to 232 of Companies Act, 2013) shall not apply in case of demergers referred to in this clause;

(iii) any transfer in a demerger, of a capital asset, being a share of a foreign company, referred to in Explanation 5 to clause (i) of sub-section (1) of section 9, which derives directly or indirectly its value substantially from the share or shares of an Indian Company, held by the demerged foreign company to the resulting foreign company will not be regarded as transfer for the purpose of capital gains if the following conditions are satisfied:

(a) Shareholders holding not less than three-fourths in value of the shares of the demerged foreign company, continue to remain shareholders of the resulting foreign company and

(b) Such transfer does not attract tax on capital gains in the country in which the demerged foreign company is incorporated.

(iv) *Reserves for shipping business*: Where a ship acquired out of the reserve is transferred in a scheme of demerger, even within the period of eight years of acquisition there will be no deemed profits to the demerged company.

Q28: Dragon Esquire Ltd. Indian company demerged plastic toys division into Zen Ltd. If demerger satisfies conditions of section 2(19AA) of the Income Tax Act, 1961, advise Zen Ltd, regarding the tax concession available to the Zen Ltd, the Resulting Company. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The resulting company shall be eligible for tax concessions only if the following two conditions are satisfied:

- (i) The demerger satisfies all the conditions laid down in section 2(19AA); and
- (ii) The resulting company is an Indian company.

The following concessions are available to the resulting company pursuant to a scheme of demerger:

(a) Amortisation of certain preliminary expenses (Section 35D): The benefit of amortisation of preliminary expenses under section 35D of the Income-tax Act, 1961 are ordinarily available only to the assessee who incurred the expenditure. However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortisation is transferred to another Indian company in a scheme of demerger within the 5 years period of amortisation. In that event the deduction in respect of previous year in which the demerger takes place and the following previous year within the 5 years period will be allowed to the resulting company and not to the demerged company.

(b) Treatment of bad debts [Section 36(1)(vii)]: Where due to demerger, the debts of the demerged company have been taken over by the resulting company and subsequently by such debt or part of debt becomes bad such bad debt will be allowed as a deduction to the resulting company. This is based upon the decision of the Supreme Court in the case of *CIT v. Veerabhadra Rao (T.), K. Koteswara Rao & Co. (1985) 155 ITR 152 (SC)*.

(c) Exemption of Capital Gain Tax: Section 47 of the Income Tax Act, 1961 treats certain transactions from amalgamation as not transfer and hence capital gains tax will not be applicable w.r.t.

- transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company.

- any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking

(d) Expenditure on Amalgamation: Section 35DD of the Income-tax Act, 1961 provides that where an assessee being an Indian company incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.

(e) Forward and set off of business losses and unabsorbed depreciation of the demerged company [Section 72A (4) & (5)]: Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

Q29: Your Company is considering for demerger of one of its division and requested you to prepare a note on amortization of expenditure, carry forward and set off of business losses and unabsorbed depreciation as per the provisions of the Income Tax Act, 1961. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Income Tax Act, 1961 demerger in relation to companies, means the transfer, pursuant to a scheme of arrangement under Companies Act, 2013 by a demerged company of its one or more undertakings to any resulting company subject to conditions specified. The company before undertaking the demerger should consider the below mentioned provisions of Income Tax Act, 1961 with respect to the amortization of expenditure and carry forward & set-off of business losses and unabsorbed depreciation respectively:

Amortization of expenditure in case of amalgamation or demerger

Section 35DD (1) of the Income Tax Act, 1961 provides that where an assessee, being an Indian company, incurs any expenditure wholly and exclusively for the purposes of demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fourth of such expenditure for each of the five successive previous years beginning with the previous year in which the demerger takes place.

Further, as per section 35DD (2) of the Income Tax Act, 1961 no deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act.

Carry forward and set off of business losses and unabsorbed depreciation of the demerged company

Section 72A (2) of the Income Tax Act states that notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—

(a) the amalgamating company—

(i) has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;

(ii) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation;

(b) the amalgamated company—

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

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

(iii) fulfils such other conditions as may be prescribed⁴¹ to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with. [Section 72A (3)]

Section 72A (4) of the Income Tax Act provides that notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

Section 72A (5) of the Income Tax Act the Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

Q30: Board of directors of A Ltd. is evaluating merger of B Ltd. (wholly owned subsidiary of A Ltd.). B Ltd. has large parcels of land and several buildings in the same cities. Company Secretary of A Ltd. has advised that "Stamp Duty is exempted when amalgamation is between Holding and Subsidiary Companies". Comment. (3 Marks)

PAST YEAR QUESTION DECEMBER 2022

OR

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

PAST YEAR QUESTION DECEMBER 2015

Answer: A circular was issued in the year 1937 vide which exemption was granted on payment of Stamp Duty when there is an amalgamation/merger between holding and subsidiary company.

The exemption granted by the circular was applicable in three cases:

1. When the transferor company owns 90% of the issued capital of the transferee company, or
2. The transfer takes place between a holding and subsidiary company, or
3. When a transfer takes place between two subsidiary companies, and each of whose 90% shared capital is owned by a common parent company.

Provided, in all these three cases, a certificate is obtained by parties from the officer appointed in this behalf by the local government that the above conditions are fulfilled.

This exemption is only for those states, where the State government follows the Central government notification.

The Delhi High Court in a case made an observation about the aforesaid circular and its validity. It stated that even though, this notification is of pre-independence era, it is not superseded by any law made by the parliament. To revoke this circular, specific repeal is required.

Withdrawal of circular dated January 16, 1937

The notification was withdrawn by Delhi government, dated 1st December 2011. However, there is still no clarity whether the benefits of this notification will still persist in other states where the notification is not explicitly withdrawn.

Stamp duty being a State subject, the above would only be applicable in those States where the State Government follows the above stated not f cat on of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said not f cat on.

Alternate Answer,

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

- (i) Where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
- (ii) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other, or
- (iii) Where the transfer takes place between two subsidiary companies each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company:

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

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

However, stamp being a state subject, the above would only be applicable in those states where the State Government follows the above stated not f cat on of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said not f cat on.

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

Q31: Name various documents which requires Stamping in case of merger. (3 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Documents mentioned below require stamping in case of merger:

Court Order : When transfer takes place by virtue of a court order to a scheme of amalgamation, stamp duty is payable. The order of the court ordering the transfer of assets and liabilities of the transferor company to the transferee company is deemed to be a conveyance.

Stamp duty on other documents : Usually, in a merger, several other documents, agreements, indemnity bonds, etc. are executed, depending on the facts of each case and requirements of the parties. Stamp duty would also be leviable as per the nature of the instrument and its contents.

Q32: "Price received on sale of an undertaking as a Going Concern is a Capital Receipt". Comment on the statement with judicial pronouncements, supporting the statement. (3 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Any sale of an undertaking as a going concern for a lump sum consideration is a slump sale in which values are not assigned to individual assets and liabilities that are sold. Normally, any sale of a capital asset

is considered as capital receipts and subjected to capital gain tax and stock in trade is subjected to tax as revenue profit or loss. Supreme Court held in *CIT v. West Coast Chemicals and Industries Ltd.* 46 ITR 135 and *CIT v. Mugneeram Bangur & Co* 57 ITR 299, where a slump price is paid, and no portion is attributable to the stock-in-trade, since it may not be possible to say that there is a profit other than what is resulted as the appreciation of capital. Gujarat and Bombay High Courts have also held that there will be a capital gain only when a sale of business as a whole occurs. Undertaking of a business is a capital asset as its disposal at slump price is capital receipt which can attract capital gain tax alone.

Q33: A scheme of Merger of Happy Limited with Lucky Pvt. Ltd. was filed with the National Company Law Tribunal (NCLT). The Regional Director raised objections that the additional filing fees and stamp duty on the increased share capital of the Lucky Pvt. Ltd. is to be paid and also against the changing name of the transferee company, for not complying with Sect on 61 of the Companies Act 2013. Will the objection of the Regional Director hold good? Explain. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: The intent of sect on 230(7) of the Companies Act, 2013 is to reconstitute the company without being required to make a number of applications under the Companies Act, 2013 for various alternatives which may be required in the Memorandum of Association and Articles of Association of the company for functioning as reconstructed company under the scheme under sect on 230 of the Companies Act, 2013. It is intended to be used as a single window clearance.

It has been held in various cases that not only sect on 230 of the Companies Act, 2013 (previously sect on 391 of the Companies Act, 1956) is a complete code, it is intended to be used as a 'single window clearance system' to encourage that parties are not put to avoidable unnecessary procedure of making repeated applications to the Tribunal (previously court), for various other alternatives or changes which might be ordered effecting to implement the sanctioned scheme, whose overall fairness and feasibility have been judged by the NCLT under sect on 230 of the Companies Act, 2013 (previously sect on 394 of the Companies Act, 1956).

The authorised share capital could be clubbed and additional fees may not be required to be paid and processes which are applicable for the change of name [sect on 13(2) of the Companies Act, 2013] could be duly made under sect on 230 of the Companies Act, 2013 by the power vested with the NCLT.

The power to approve the scheme along with the change of name of company lies with the NCLT under sect on 230(7) of the Companies Act, 2013.

So, the objection of Regional Director will not hold good.

Case law

In *Jaypee Cement Limited v. Jayprakash Industries Limited* [2004] 2 Comp LJ 105 (All)/ [2004] XXXIVCS LW 50 the Allahabad High Court held that the combining of the authorised share capital of the transferor company with that of the transferee company resulting in increase in the authorised share capital of the transferee company does not require the payment of registration fee or the stamp duty because there is no reason why the same fee should be paid again by the transferee company on the same authorised capital.

CHAPTER-8 AS PER ICSI MODULE

REGULATION OF COMBINATIONS

Q1: What is the role and purpose of the Competition Commission of India (CCI) as established under Section 7 of the Competition Act, 2002?

Answer: The Competition Commission of India (CCI) is a statutory body established under Section 7 of the Competition Act, 2002. Its primary mandate is to prevent practices that have an adverse effect on competition, promote and sustain competition in Indian markets, protect consumer interests, and ensure the freedom of trade for all market participants.

To achieve these objectives, the CCI is vested with various powers, including:

1. **Inquisitorial** powers – to investigate competition-related matters.
2. **Investigative** powers – to gather information and assess practices that may hinder competition.
3. **Regulatory** powers – to implement rules and policies related to competition.
4. **Adjudicatory** powers – to resolve disputes and make decisions on competition issues.
5. **Advisory** powers – to provide guidance on competition matters.

Filing information before the CCI initiates action and sets the regulatory process in motion. The CCI functions as the overarching supervisory and regulatory authority for competition matters in India, ensuring fair market practices and consumer protection.

Q2: What does Section 5 of the Competition Act, 2002 define as a combination in the context of competition law?

Answer: Section 5 defines the combination as

- (i) acquisition of control, shares, voting rights or assets; or
- (ii) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; or
- (iii) merger or amalgamation

A combination beyond the prescribed thresholds is regulated under the Act. Section 6 declares a combination as void if it causes or is likely to cause an adverse effect on competition within the relevant market in India.

Q3: What are the different kinds of combinations under the Competition Act, 2002, and how are they classified based on economic activities and geographical location?

Answer: Combinations under the **Competition Act, 2002** can be classified into the following categories:

1. Based on Economic Activities:

- **Horizontal Combinations:** These involve the joining together of two or more enterprises engaged in producing the same goods or rendering the same services. These enterprises are competitors to each other. Such combinations can reduce competition and may lead to the creation of a dominant enterprise in the market.

- **Vertical Combinations:** These involve enterprises that operate at different levels of the product or supply chain. One enterprise is an actual or potential supplier of goods or services to the other. The objective of vertical combinations is often to ensure a stable supply of inputs or outlets for products, or to improve efficiency.

- **Conglomerate Combinations:** These involve the combination of enterprises engaged in unrelated activities, with no horizontal or vertical connection. The objective is typically to diversify into new areas or expand into unrelated markets.

2. Based on Geographical Location:

- **Domestic Combinations:** These involve the joining together of two or more enterprises located within India.

- **Cross-border Combinations:** These involve enterprises where one or more of the parties are located outside India. For cross-border combinations, the Competition Commission of India (CCI) will only approve the combination if the overseas enterprises meet the **local nexus test**, as stated in Section 5 of the Act. The combination must exceed the de minimis exemption thresholds for it to be considered for approval.

Q4: What are the key aspects of the combination regulations under the Competition Act, 2002, and how does the Competition Commission of India (CCI) analyze proposed combinations?

Answer: The Competition Act, 2002, mandates the notification of combinations (mergers and acquisitions) when certain asset and turnover thresholds are crossed. These thresholds, outlined in Section 5 and 6 of the Act, are subject to modification by the government under Section 20(3). The primary concern is to assess whether the combination could lead to an appreciable adverse effect on competition (AAEC) in the relevant market in India.

The process for analyzing combinations by the CCI is as follows:

1. **Delineation of the Relevant Market:** This involves identifying both the product and geographic market affected by the combination.
2. **Identification of Overlap:** The CCI looks at areas where the combining entities overlap in the relevant market.
3. **Competition Analysis:** Under Section 20(4), the CCI examines whether the combination will result in AAEC. This involves balancing potential benefits against the adverse effects on competition.

The CCI also facilitates the process through:

- **Pre-Merger Consultative Process:** An informal, non-binding consultation to guide parties on procedural and substantive requirements.

- **Guidance Notes:** The CCI provides guidance notes, such as the Introductory Note and Notes to Form I, to help parties in drafting merger notifications.

Q5: What do you understand by the Competition Test? (3 Marks)

PAST YEAR QUESTION JUNE 2023

OR

Explain Competition Test (AAEC). (3 Marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Sect on 5 of the Compet t on Act, 2002 explain the combinat on. Sect on 6 of the Compet t on Act, 2002 prohibits any person or enterprise from entering into a combinat on which causes or is likely to cause an appreciable adverse ef ect on compet t on within the relevant market in India and if such a combinat on is formed, it shall be void.

The Compet t on Commission of India shall have due regard to all or any of the following factors listed under sect on 20(4) for the purposes of determining whether the combinat on causes or is likely to cause an 'Appreciable Adverse Ef ect on Compet t on' (AAEC) in the relevant market. Most of the facts enumerated in sect on 20(4) are external to an enterprise. It requires the Commission to evaluate whether the benef ts of the combinat on outweigh the adverse impact of the combinat on, if any. In other words, if the benef ts of the combinat on outweigh the adverse ef ect of the combinat on, the Commission will approve the combinat on. Conversely, the Commission may declare such a combinat on as void.

Alternat ve Answer,

Answer: Sect on 5 of the Compet t on Act, 2002 explains combinat on. The acquisit on of one or more enterprises by one or more persons or merger or amalgamat on of enterprises shall be a combinat on of such enterprises and persons through acquisit on of controlling shares, vot ng rights or assets.

However, sect on 6 of the Compet t on Act, 2002 declares a combinat on as void if it causes or is likely to cause an adverse ef ect on compet t on within the relevant market in India.

The Commission shall have due regard to all or any of the following factors listed under sect on 20(4) of the Compet t on Act, 2002 for the purpose of determining whether the combinat on causes or is likely to cause an 'appreciable adverse ef ect on compet t on in the relevant market. The adverse impact can be caused due to extent of barriers to entry in the market or degree of countervailing power in the market, level of combinat on and other derogatory market forces.

Q6: Explain De Minimis Exempt on under the Compet t on Act, 2002. (3 marks)**PAST YEAR QUESTION DECEMBER 2022**

Answer: The Central Government has granted exempt on to acquisit on of small targets which is known as de minimis exempt on. Combinat ons where the assets or the turnover is below the specif c thresholds need not be not f ed to the Commission for its approval.

According to Not f cat on No.S.O.988(E) dated March 27, 2017, all forms of combinat ons involving assets of not more than Rs.350 crore in India or turnover of not more than Rs. 1,000 crore in India, are exempt from Sect on 5 of the Act for a period of 5 years. Following table gives an overview of the thresholds for availing of the De Minimis exempt on:

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION				
		Assets		Turnover
Target Enterprise	In India	< Rs 350 Cr	OR	< Rs 1,000 Cr

Not f cat on No. S.O.988 (E) dated March 27, 2017 has given a relaxat on to the combinat ons where a port on of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise.

Q7: What is a "combination" under the Competition Act, 2002, and how is it defined in Section 5 of the Act?

Answer: A "combination" under the Competition Act, 2002, refers to a situation where one enterprise acquires control over another, or two or more enterprises merge or amalgamate, subject to specific financial thresholds. Section 5 of the Act outlines the conditions under which combinations are formed, and combinations exceeding these thresholds require mandatory approval by the Competition Commission of India (CCI).

The Supreme Court, in *Competition Commission of India v. Thomas Cook (India) Ltd. & Anr.*, explained combinations under Section 5 as follows:

1. **Section 5(a):** A combination is formed when one person or enterprise acquires control, shares, voting rights, or assets of another enterprise, provided certain financial thresholds in terms of assets or turnover are met, whether within or outside India.
2. **Section 5(b):** A combination occurs if one person gains control over an enterprise that already has direct or indirect control over another enterprise engaged in producing, distributing, or selling similar, identical, or substitutable goods. This also applies when the relevant asset or turnover thresholds are met.
3. **Section 5(c):** Mergers and amalgamations are considered combinations, and the resulting enterprise, after the merger or amalgamation, must meet the required minimum asset or turnover thresholds to be subject to the provisions of Section 5.

Thus, combinations can involve acquisitions of control or assets, as well as mergers and amalgamations, as long as the financial thresholds in terms of assets or turnover are exceeded, triggering the need for CCI approval.

Q8: What are the current financial thresholds for filing a notice for combinations under the Competition Act, 2002, as per the notification dated March 4, 2016?

Answer: As per the Notification No. S.O. 675(E) dated March 4, 2016, issued by the Central Government under Section 20(3) of the Competition Act, 2002, the asset and turnover thresholds for filing a notice for combinations have been enhanced by 100%. The thresholds are applicable when the combined assets of the parties or the group to which the target entity would belong after the acquisition meet the prescribed limits. The current thresholds are as follows:

Enterprise Level:

• **Assets:**

- India: Greater than Rs. 2000 crore
- Worldwide with India leg: Greater than US\$ 1 billion (with at least Rs. 1000 crore in India)

• **Turnover:**

- India: Greater than Rs. 6000 crore
- Worldwide with India leg: Greater than US\$ 3 billion (with at least Rs. 3000 crore in India)

Group Level:

• **Assets:**

- India: Greater than Rs. 8000 crore
- Worldwide with India leg: Greater than US\$ 4 billion (with at least Rs. 1000 crore in India)

• **Turnover:**

- India: Greater than Rs. 24000 crore
- Worldwide with India leg: Greater than US\$ 12 billion (with at least Rs. 3000 crore in India)

These enhanced thresholds ensure that only combinations meeting significant financial criteria in terms of assets and turnover are subject to mandatory notification to the Competition Commission of India (CCI).

Q9: One of the most important facets of the Indian merger control regime is the element of 'control'. Control over an enterprise has the ability to change the competitive dynamics of any market, and the Competition Commission of India (CCI), like all other competition regulators, gives due importance to changes in control. On this backdrop, elaborate on 'Control' and 'Group' under the Competition Act, 2002 and also through light on exemptions, if any under these definitions. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Section 5 of the Competition Act, 2002 (as amended in 2023), "Control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—

- (i) one or more enterprises, either jointly or singly, over another enterprise or group; or
- (ii) one or more groups, either jointly or singly, over another group or enterprise;

Further, "Group" means two or more enterprises where one enterprise is directly or indirectly, in a position to—

- (i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise;

De Minimis Exemption: The Central Government has granted exemption to acquisition of small targets which is known as de minimis exemption. Combinations where the assets or the turnover is below the specific thresholds need not be notified to the Commission for its approval. According to Notification, all forms of combinations involving assets of not more than Rs.350 crore in India or turnover of not more than Rs.1,000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. The Government of India (MCA), through notification has extended the Small Target Exemption for another five years, i.e., until March 26, 2027.

Q10: What are the key provisions under Section 3 of the Competition Act regarding anti-competitive agreements, and how does the recent amendment in 2023 affect such agreements?

Answer: Section 3 of the Competition Act, 2002, prohibits certain anti-competitive agreements that can have an appreciable adverse effect on competition in India. The Act specifically targets agreements related to the production, supply, storage, or control of goods or services, where the objective is to prevent competition or distort the market.

Any agreement between enterprises or persons engaged in identical or similar businesses will have such adverse effect on competition if it meets certain criteria. These include: (a) directly or indirectly determining

purchase or sale prices, (b) controlling product on, supply, markets, or provision of services, or (c) directly or indirectly leading to collusive bidding.

The **2023 amendment** extends the definition of anti-competitive agreements to include enterprises or persons not directly involved in similar trade but who participate in or facilitate such agreements. This broadens the scope, ensuring that even indirect participants are held accountable for anti-competitive behavior.

Q11: What is the definition of "Group" and "Turnover" under Section 5 of the Competition Act, 2002, as amended in 2023?

Answer: Under Section 5 of the **Competition Act, 2002**, as amended in 2023:

1. **Group:** A "Group" refers to two or more enterprises where one enterprise is in a position to directly or indirectly:

- Exercise 50% or more of the voting rights in another enterprise.
- Appoint more than 50% of the members of the board of directors in another enterprise.
- Control the management or affairs of another enterprise.

2. **Turnover:** "Turnover" is defined as the turnover certified by the statutory auditor based on the last audited financial accounts of the company from the financial year immediately preceding the year in which the notice is filed. For turnover in India, it excludes:

- Intra-group sales
- Indirect taxes
- Trade discounts
- Amounts generated from assets or businesses dealing with customers outside India.

Q12: Suggest the regulations to be referred to in respect of Combinations under the Competition Act, 2002. (3 Marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Section 6 of the Competition Act, 2002, regulates a 'combination' by prohibiting any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.

(ii) Any person who proposes to enter into a combination shall give notice to the Commission in the Form specified, and the fee which may be determined disclosing the details of the proposed combination.

(iii) Any person who proposes to enter into a combination shall comply with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

(iv) The provisions for this combination shall not be applicable to share subscription or financing facility by a public financial institution, foreign institutional investor, any bank or venture fund.

Q13: While combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited under section 6 of the Competition Act, 2002, certain transactions are exempted and are, therefore, not prohibited.

List out the transactions or dealings which are not hit by section 6 of the Competition Act, 2002. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: The provisions of sect on 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. This exemption appears to have been provided in the Act to facilitate raising of funds by an enterprise in the course of its normal business. Under sect on 6(5), the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement, within seven days from the date of such acquisition or entering into such agreement, as the case may be.

Q14: “Ant-trust laws world over believe that the free trade benefits the economy and at the same time, the legislations are formulated to forbid several types of restraints of trade and monopolisation”. Justify the statement in the context of the provisions of Competition Act, 2002 with respect to mergers, demergers or reverse mergers. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: In India, ant trust law was formulated in the name of Monopolies and Restrictive Trade Practices Act, 1969 that has been subsumed to the Competition Act, 2002.

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

Sect on 6(2) of Competition Act, 2002 envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination in the form prescribed together with prescribed fee within 30 days of (a) approval of merger or Amalgamation referred to in Sect on 5(c) by the Board of Directors or (b) execution of any agreement or document for acquisition and Commission can deal it to investigate through Director General. Competition Act, 2002 is enacted with a view to promote the economic development of the country, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in market in India.

Q15: What does Sect on 6A of the Competition Act, 2002 state regarding open offers and acquisitions through stock exchanges?

Answer: Sect on 6A of the **Competition Act, 2002** provides that an open offer or an acquisition of shares or securities convertible into other securities through a series of transactions on a regulated stock exchange can proceed without being affected by certain provisions (sub-sect on 2A of Sect on 6 and Sect on 43A) if the following conditions are met:

1. **Notice Filing:** The acquirer must file a notice of the acquisition with the Competition Commission of India (CCI) within the specified time and in the manner outlined by regulations.
2. **Restriction on Rights:** The acquirer must not exercise any ownership or beneficial rights, including voting rights, receiving dividends, or other distributions, for the shares or convertible securities until the CCI approves the acquisition. However, the acquirer may exercise rights as specified by regulations.

Q16: Under what circumstances, the Competition Commission may inquire into the appreciable adverse effect caused or likely to be caused on competition in India? (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: The Commission under section 20 of the Competition Act, 2002 may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination in the following circumstances:

- i. upon its own knowledge or information (suo moto); or
- ii. upon receipt of notice under section 6(2) relating to acquisition referred to in section 5(a); or acquiring of control referred to in section 5(b); or merger or amalgamation referred to in section 5(c) of the Act.

It has also been provided that a suo moto enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the Act has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition within the relevant market in India.

Q17: Compliance of the Competition Act, 2002 in relation to merger and amalgamation. Comment. (3 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

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

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

- (a) approval of the proposal relating to merger or amalgamation, referred to in section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
- (b) execution of any agreement or other document for acquisition referred to in section 5(a) or acquiring of control referred to in section 5(b).

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

Q18: What exemptions are provided under the Competition Act, 2002, for the banking and oil and gas sectors?

Answer: Under Section 54(a) of the Competition Act, 2002, the Central Government has the power to grant exemptions to certain enterprises from complying with the provisions of the Act if such exemptions are necessary for the security of the State or public interest. The government has issued the following notifications that provide specific exemptions for the banking and oil and gas sectors:

1. Regional Rural Banks:

Regional Rural Banks, for which the Central Government has issued a notification under Section 23A of the Regional Rural Banks Act, 1976, are exempted from complying with Sections 5 and 6 of the Competition Act, 2002, for a period of five years.

Notification: S.O. 2561(E), dated 10th August 2017.

2. Nationalized Banks:

Exemption applies to the reconstruction, transfer, or amalgamation of nationalized banks under the Banking Companies (Acquisition and Transfer of Undertakings) Acts, 1970 and 1980. These combinations are exempt from complying with Sections 5 and 6 of the Competition Act for a period of five years.

Notification: S.O. 2828(E), dated 30th August 2017.

3. Oil and Gas Sector:

Combinations involving Central Public Sector Enterprises (CPSEs) in the oil and gas sectors, operating under the Petroleum Act, 1934, and the Oilfields (Regulation and Development) Act, 1948, along with their subsidiaries, are exempt from complying with Sections 5 and 6 of the Competition Act for a period of five years.

Notification: S.O. 3714(E), dated 22nd November 2017.

These exemptions are granted to facilitate smoother operations in the banking and oil and gas sectors while ensuring that national security and public interest are maintained.

Q19: Explain the provisions related to combinations under section 5 of the Competition Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors. (3 marks)
(PAST YEAR QUESTION DECEMBER 2024)

Answer: In exercise of the powers conferred by Section 54(a) of the Competition Act, 2002, the Central Government in the public interest hereby exempts all cases of combinations under section 5 of the Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the Oil and Gas Sectors, from the application of the provisions of sections 5 and 6 of the Act, for a period of five years from the date of publication of this notification in the Official Gazette.

The exemption, which was initially valid for five years until November 21, 2022, has been extended for another five years, now valid until November 21, 2027.

Paving a way for fast-track consolidation in the oil and gas sector, the Ministry of Corporate Affairs, Government of India has exempted all cases of combinations involving CPSEs operating in OGS, along with their wholly or partly owned subsidiaries operating in OGS, from Section 5 and Section 6 of the Competition Act, 2002.

Q20: “In case any combination is to be not fed for ex post facto approval, it would defeat the very intendment of the provisions of the Competition Act, 2002 yet there are exemptions from compliance either under regulations or through notifications issued by the Central Government”. Express your views on the statement. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Prior approval from the Competition Commission of India is required to any combination as was held by Apex Court in *SCM Solifert Limited & Anr. vs. CCI (Civil Appeal No. 10678 of 2016)*.

Section 6 (2) of Competition Act, 2002 requires filing of application within 30 days prior to combination. Such combination shall take effect after 210 days thereof or orders under Section 31, whichever is earlier.

Notification no. S.O. 2039(E) dated 29th December 2017 does away with time requirement of 30 days but to wait for orders by the Commission. In addition, notifications have been issued on 10-08-2017, 30-08-2017 and 22-11-2017 respectively granting exemption combination relating for five years to Regional Rural Banks, Public sector Banks so also Public Sector Oil and Gas Bodies.

The provisions of section 6 of the Act do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

Categories of combinations mentioned in Schedule I to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section (2) of section 6 of the Act need not normally be filed.

Q21: Critically examine the criteria considered by Competition Commission of India, before sanctioning or approving a Combination. (5 Marks)

PAST YEAR QUESTION AUGUST 2022

OR

What factors does the Commission consider under Section 20(4) of the Competition Act, 2002, to determine whether a combination causes or is likely to cause an appreciable adverse effect on competition (AAEC) in the relevant market?

PAST YEAR QUESTION

Answer: Commission of India (CCI). The CCI has to follow a set of procedures which have been laid down in the Competition Act, 2002 and with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (Combination Regulation).

The CCI will consider a few criteria before sanctioning or approving a combination.

These criteria are:

- Actual and potential level of competition through imports in the market;
- Extent of barriers to entry into the market;
- Level of combination in the market;
- Degree of countervailing power in the market;
- Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

- Extent of effective competition likely to sustain in a market;
- Extent to which substitutes are available or likely to be available in the market;
- Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- Likelihood that the combination would result in the removal of a vigorous and effective competition or competitors in the market;
- Nature and extent of vertical integration in the market;
- Possibility of a failing business;
- Nature and extent of innovation;
- Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Q22: Define the following:

a) Relevant market

b) Relevant geographic market

c) Relevant product market

OR

Explain the term “relevant geographic market” and “relevant product market” in terms of the Competition Act, 2002. (3 marks)

PAST YEAR QUESTION JUNE 2024 OLD

Answer:

a) Relevant market is the mix of “relevant geographic market” and “relevant product market”. **Section 2(r)** defines **relevant market** to mean the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

b) Section 2(s) defines the “relevant geographic market” to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

c) Section 2(t) defines “**Relevant product market**” means a market comprising of all those products or services—

(i) which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or

(ii) the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

Q23: What is the procedure for filing a notice for approval of a proposed combination under the Competition Act, 2002, and when should Form I or Form II be used?

Answer: Under the Competition Act, 2002, parties to a proposed combination are required to file a notice with the Competition Commission of India (CCI) for approval. The notice is filed in Form I or Form II as per the

Combination Regulations. The choice of form depends on the market share and the nature of the combination.

1. **Not ce by f ling Form I** (Regulation 5(2)):

o **Form I** is typically used when:

- The parties to the combination are engaged in similar, identical, or substitutable goods or services.
- The combined market share of the parties after the combination is NOT more than 15% in the relevant market.
- Alternatively, if the parties are engaged at different stages or levels of the product chain in different markets, their individual or combined market share is NOT more than 25% in the relevant market.

2. **Not ce by f ling Form II** (Regulation 5(3)):

o **Form II** is used when:

- The parties are engaged in similar, identical, or substitutable goods or services, and the combined market share after the combination is more than 15% in the relevant market.
- If the parties operate at different stages or levels of the product chain and their individual or combined market share exceeds 25% in the relevant market.

o Filing Form II is often preferred in such cases, as it provides a more detailed analysis of the combination's impact on competition.

These forms help the Commission assess whether the proposed combination would adversely affect competition in the relevant market.

Q24: What are the requirements and procedures for filing a not ce for a proposed combination under the Competition Act, 2002, including confidentiality requests and authorizations?

Answer: Under the **Competition Act, 2002**, the filing of a not ce for a proposed combination follows specific procedures depending on the type of combination (acquisition, merger, or amalgamation) and includes provisions for confidentiality and authorization.

1. **Filing the Not ce:**

Acquisition or Control: The acquirer must file the not ce in the applicable form (Form I or Form II).

Merger or Amalgamation: The parties to the combination must file the not ce jointly.

The completed not ce, along with a copy and an electronic version, must be delivered to the Commission's office.

2. **Confidentiality Requests:**

If the notifying party requests confidentiality for any information or documents submitted during the inquiry, a **non-confidential version** must also be filed, along with an electronic copy.

Confidentiality can be requested if disclosing the document(s) could:

- Reveal trade secrets.
- Lead to destruction or significant diminution of the commercial value of the information.
- Cause serious injury to the business.

The request for confidentiality must be supported by cogent reasons and detailed justification. Mere statements that documents contain trade secrets or are commercially valuable are not sufficient.

Affidavit for Confidentiality: A formal affidavit requesting confidentiality, in line with **Regulation 30(3)** of the Combination Regulations, must be filed along with the confidentiality request.

3. Authorization Documents:

Indian Companies: A **certified copy of the board resolution** authorizing the signatory to file the notice must be provided.

Foreign Body Corporates:

- If board resolutions are required under foreign laws, a **certified copy of the board resolution** must be submitted.
- If no board resolution is required, an **authorization letter** from key managerial personnel (such as CEO, MD, CFO, or Director) must be submitted. This letter should be printed on the company's letterhead and bear the company seal (if applicable).

4. Translation of Documents:

If any document submitted is in a language other than English, a **translation** of the document into English must be provided.

These procedures ensure that the Commission receives complete and accurate information for reviewing the proposed combination, while also protecting confidential business information where

Q25: The parties intending to file a notice with the Competition Commission prior to filing of the notice to a proposed combination in terms of Regulation 5 of Combinations Regulations are encouraged to approach the Commission for pre-filing consultations. Outline the procedure to be followed along with details to be submitted to the Commission in this respect. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: In accordance with international best practices, the Commission allows for an informal and verbal consultation with the staff of the Commission prior to filing of the notice to a proposed combination in terms of the Competition Act, 2002 and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

Such pre-filing consultations help the parties intending to file a notice with the Commission in identifying the information required for filing a complete and correct Form I/II/III as well in identifying additional information that the Commission may require to assess the likely impact of the proposed combination on competition in the relevant markets.

The parties intending to file a notice with the Commission are encouraged to approach the Commission for pre-filing consultations. A request for pre-filing consultation should be made by the parties intending to file a notice at the earliest and at least 10 days before the intended date of filing, to allow time for allocating a case team for the pre-filing consultation. A copy of draft application comprising of Form I/II/III, as the case may be and supporting documents should be forwarded along with the request for scheduling a pre-filing consultation.

A summary of the proposed combination along with the following details should also be submitted:

- a. Basic details of the proposed combination including various steps involved in the same;
- b. A brief description of the relevant market(s) and sector(s) involved;
- c. The likely impact of the proposed combination on competition in those markets and sectors in general terms;
- d. Key issues regarding which the parties wish to seek consultation from the Commission;
- e. Any other details which according to the parties may be pertinent for a meaningful consultation.

Q26: You are one of the Company Secretary in the big multi-national conglomerate, which is contemplating a merger. As the Management is keen on completion of merger without any regulatory hiccups, your department head have advised you to sought an informal consultation with Competition Commission. Suggest the management if such informal consultation is allowed. Brief the process of informal consultation with Competition Commission prior to business combinations and the conditions applicable, if any. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: In accordance with international best practices, the Competition Commission of India allows for an informal and verbal consultation prior to filing of the notice to a proposed combination in terms of Regulation 5 of CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 read with Section 6(2) of the Competition Act, 2002 with the Commission.

The parties intending to file a notice with the Commission are encouraged to approach the Commission for pre-filing consultations. A request for pre-filing consultation should be made by the parties at the earliest and at least 10 days before the intended date of filing so that the commission gets ample amount of time to allocate appropriate team expert in particular case for pre-filing consultations. A copy of draft application comprising of Form I/II, as the case may be and supporting documents should be forwarded along with the request for scheduling a pre-filing consultation.

Such pre-filing consultations help the parties intending to file a notice with the Commission, in identifying the information required for filing a complete and correct Form I/II/III along with identification of additional information that the Commission may require to assess the likely impact of the proposed combination on competition in the relevant markets.

Hence, it is apprised to the management that such informal consultation is allowed.

A summary of the proposed combination along with the following details should also be submitted:

- (a) Basic details of the proposed combination including various steps involved in the same;
- (b) A brief description of the relevant market(s) and sector(s) involved;
- (c) The likely impact of the proposed combination on competition in those markets and sectors in general terms;
- (d) Key issues regarding which the parties wish to seek consultation from the Commission;
- (e) Any other details which according to the parties may be pertinent for a meaningful consultation.

Q27: John Ltd. is in the process of taking over Tony Ltd. Turnover of Tony Ltd as per latest financial statements is Rs.800 Crore and assets value is Rs. 280 Crore. There are no material changes in the value of assets and projected turnover for the current financial year. The Board of Directors seek your opinion for obtaining approvals in terms of Competition Act, 2002. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Section 5 of Competition Act, 2002 envisages financial thresholds beyond which any combination requires approval of the Competition Commission of India.

Combinations that involve assets or turnover below threshold limits need to be notified to the Competition Commission of India for seeking approval.

Central Government has granted exemption to acquisition of small targets known as de minimis exemption. In terms of Notification No. S.O. 988 (E) dated March 27, 2017, all forms of combinations involving assets not more than Rs. 350 Crore in India or turnover of not more than Rs. 1000 Crore in India are exempt from Section 5 of the Act for a period of 5 years.

In the given case both value of assets and turnover are within the notified thresholds and hence no need to seek approval from the Competition Commission of India.

Q28: “Competition Commission of India takes into consideration various factors while assessing the adverse effect on competition.”—Analyse briefly. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Section 20(4) of the Competition Act, 2002 illustrates the factors that may be taken into view to test the appreciable adverse effect of competition (AAEC) by the Competition Commission of India.

The factors are actual and potential level of competition through imports in the market, barriers to entry in the market, market share, and likelihood of removing effective competition, innovation, whether benefits outweigh the adverse effects on competition.

The above yardsticks are to be taken into account irrespective of the fact whether an inquiry is instituted, on receipt of notice under section 6 of the Act or upon its own knowledge. The scope of assessment of adverse effect is confined to relevant market which is a mix of geographical and product involved as per the terms of Combination.

Most of the facts enumerated in section 20(4) are external to an enterprise. It is noteworthy that Section 20(4) requires to invoke principles of a “balancing”. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words if the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

Being a quasi-judicial body, the Commission provides an opportunity of being heard to the affected parties before arriving at a decision to approve or reject a proposal through application or otherwise.

Q29: What orders can the Commission pass after considering a proposed combination under the Competition Act, 2002?

Answer: Under the **Competition Act, 2002**, after reviewing the relevant facts and assessing the effect of a proposed combination on competition in the relevant market in India, the **Competition Commission of India (CCI)** may pass one of the following orders:

1. **Approve:** If the Commission determines that the combination does not, or is not likely to, have an appreciable adverse effect on competition in the relevant market in India, it may approve the combination.
2. **Reject:** If the Commission finds that the combination has, or is likely to have, an adverse effect on competition, it shall reject the combination and direct that it shall not take effect.
3. **Modify:** If the Commission believes that the adverse effects on competition can be eliminated by modifying the combination, it will direct the parties to carry out the necessary modifications to the proposed combination.

These orders help ensure that the combination does not harm competition in the relevant market, while also allowing flexibility for the parties to make adjustments if needed.

Q30: What are the possible orders that the Competition Commission of India (CCI) can pass under Section 31 of the Competition Act, 2002 regarding a proposed combination?

Answer: Under Section 31 of the Competition Act, 2002, the Competition Commission of India (CCI) can pass the following orders after considering the proposed combination:

1. Approval of Combination (Section 31(1)):

If the Commission is of the opinion that the combination does not, or is not likely to, have an appreciable adverse effect on competition, it will approve the combination. This includes combinations for which notice has been given under **Section 6(2)**.

2. Rejection of Combination (Section 31(2)):

If the Commission believes that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.

3. Approval with Modifications (Section 31(3)):

If the combination is likely to have an appreciable adverse effect on competition, but the adverse effects can be eliminated through modifications proposed by the parties or by the Commission, the Commission may approve the combination subject to such modifications.

4. Modification of Deadline (Section 31(4)):

If the combination is approved with modifications, the parties to the combination must carry out the required modifications within the period specified by the Commission.

5. Rejection or Declaration of Combination as Void (Section 31(5)):

If:

- The Commission has directed that the combination shall not take effect,
- The parties fail to carry out the modifications within the specified period, or
- The Commission finds that the adverse effects cannot be eliminated through modifications, the Commission may:
 - Order that the combination shall not take effect, or
 - Declare the combination void, or
 - Frame a scheme for the parties to address the adverse effects on competition.

6. Deemed Approval (Section 31(6)):

If the Commission does not pass an order within 150 days from the date of the notice given under Section 6(2), the combination is deemed to have been approved.

These provisions ensure that the Commission can either approve, modify, or reject a combination based on its effects on competition, and if necessary, take actions to prevent anti-competitive outcomes.

Q31: Explain "Deemed approval" as per provision of section 31(11) of the Competition Act, 2002. (3 marks)
(PAST YEAR QUESTION DECEMBER 2024)

Answer: Deemed approval

A deeming provision has been introduced by section 31(11). It provides that, if the Commission does not, on expiry of a period of 210 days from the date of filing of notice under section 6(2) pass an order or issue any direction in accordance with the provisions of section 29(1) or section 29(2) or section 29(7), the combination shall be deemed to have been approved by the Commission. In reckoning the period of 210 days, the period

of thirty days specified in section 29(6) and further period of thirty working days specified in section 29(8) granted by Commission shall be excluded. Furthermore, where extension of time is granted on the request of parties the period of two hundred ten days shall be reckoned after deducting the extended time granted at the request of the parties.

Q32: The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India. Comment and explain the extra territorial jurisdiction of Competition Commission of India. (5 Marks)

PAST YEAR QUESTION DECEMBER 2024

OR

Explain the provision relating to extra territorial jurisdiction of the Competition Commission of India. (5 Marks)

PAST YEAR QUESTION JUNE 2023

OR

The draftsmen of the Competition Act, 2002 had demonstrated utmost concern and care in identifying questionable combinations and prohibiting such combinations. In order to achieve this object, extra territorial jurisdiction is conferred on the Competition Commission of India (CCI) to inquire and pass orders even if both the parties to an agreement are outside India.

List out the circumstances where the CCI can pass orders consequent to extra territorial jurisdiction conferred on it. (5 marks)

PAST YEAR QUESTION JUNE 2015

OR

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

PAST YEAR QUESTION DECEMBER 2017

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

- (a) an agreement referred to in section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or
- (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or act arising out of such agreement or dominant position or combination is outside India.

have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant

posit on or combinat on has, or is likely to have, an appreciable adverse ef ect on compet t on in the relevant market in India and pass such orders as it may deem f t in accordance with the provisions of this Act.

The above clearly demonstrate that the Compet t on Commission of India will have jurisdict on even if both the part es to an agreement are outside India but only if the agreement, dominant posit on or combinat on entered into by them has an appreciable adverse ef ect on compet t on in the relevant market of India.

Q33: The Compet t on Commission of India has power to init ate invest gat on of combinat on under sect on 29 of the Compet t on Act, 2002. What are the dif erent stages involved in the procedure for invest gat on of combinat on? (5 marks)

PAST YEAR QUESTION JUNE 2023

OR

The Compet t on Commission of India has power to init ate invest gat on for any combinat on and there is set procedure for the same under sect on 29 of the Compet t on Act, 2002. Ment on important milestones of the procedure for the invest gat on of a combinat on. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: The procedure for invest gat on by the Commission has been st plulated under sect on 29 of the Compet t on Act. It involves the following stages:

(i) The Commission frst has to form a *prima facie* opinion that a combinat on is likely to cause, or has caused an appreciable adverse ef ect on compet t on within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a not ce to the part es to the combinat on, calling upon them to show cause why an invest gat on in respect of such combinat on should not be conducted.

(ii) Af er receipt of the response of the part es to the combinat on, the Commission may call for the report of the Director General.

(iii) When pursuant to response of part es or on receipt of report of the Director General whichever is later, the Commission is, *prima facie*, of the opinion that the Combinat on is likely to cause an appreciable adverse ef ect on compet t on in relevant market, it shall, within seven working days from the date of receipt of the response of the part es to the combinat ons or the receipt of the report from Director General under sect on 29 (1A) whichever is later, direct the part es to the combinat on to publish within ten working days, the details of the combinat on, in such manner as it thinks appropriate so as to bring to the informat on of public and persons likely to be af ected by such combinat on.

(iv) The Commission may invite any person af ected or likely to be af ected by the said combinat on, to f le his writ en object ons within f f een working days of the publishing of the public not ce, with the Commission for its considerat on.

(v) The Commission may, within f f een working days of the f ling of writ en object ons, call for such addit onal or other informat on as it deems f t from the part es to the said combinat on and the informat on shall be furnished by the part es above referred within f f een days from the expiry of the period not f ed by the Commission.

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

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

Q34: Explain the provisions relating to the power of Competition Commission of India to impose penalty for the non-submission of information on combination. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

OR

Discuss the provisions and powers of Competition Commission of India to impose penalty for non-furnishing of information on combination under the Competition Act, 2002. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: According to Section 43A of Competition Act, 2002 (as amended in 2023) If any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination:

It may be noted that in case any person or enterprise has given a notice under subsection (4) of section 6 and such notice is found to be void ab initio under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

Q35: ABC Ltd. was incorporated on May 12, 1986, under the Indian Companies Act, having its registered office at Mumbai, Maharashtra. The present capital structure of the petitioner company is as follows:

Rs. 1,000 crore Authorised Capital-100 crore equity shares of Rs.10 each. Issued Subscribed Capital and paid-up capital of Rs. 780 crore -78 crore equity shares of Rs. 10 each [includes equity shares represented by GDRs]. The company is having 4 business segments related to manufacturing of products L, M, N and O. Turnover of O product is around Rs.1,300 crore. Asset of ABC Ltd are Rs. 2,700 crore out of which product O related asset are Rs. 1,400 crore.

XYZ Ltd. is a company having its registered office at Surat, Gujarat. Authorised, issued and paid up capital of company is Rs. 750 crore having turnover of ` Rs. 820 crore. It is engaged in the business of manufacture and sale of product O. Assets of XYZ Ltd. are Rs. 1,500 crore.

XYZ Ltd. already hold 14.98% of the equity shares of the ABC Ltd. acquired at Rs. 267 per share from Six ventures and got two directors in Board of Directors of ABC Ltd. XYZ Ltd. has made an open offer to shareholders of ABC Ltd at Rs. 190 per share to acquire controlling stake of ABC Ltd. ABC Ltd. Management opposed the open offer citing reasons of low price that was not beneficial to the shareholders of ABC Ltd. but in reality the management of ABC Ltd. had fear of losing control over the company. XYZ Ltd. had an eye on the Product O business of ABC Ltd. for a long time. The open offer was a step towards fulfilling the dream. Full control of product O business was ultimate purpose of XYZ Ltd. ABC Ltd. script was trading at Rs. 207.50 on the closing hours of trading at the Bombay Stock Exchange.

After lot of fights and hassles, both companies came to truce. Pursuant to acquisitions through negotiated transactions, a proposal to demerge the ABC Ltd. company's Product O business into company TRM Ltd. and acquisition of 51% controlling stake in TRM Ltd. was given by XYZ Ltd. and after due deliberation, the Board of Directors of the ABC Ltd company accepted the proposal for demerger of the Product O business into TRM Ltd. and subsequent acquisition of 51% stake in same by XYZ Ltd. After demerger TRM Ltd. will have around 35% market share of product O business on pan India basis.

ABC Ltd. Employees Welfare Foundation is an employee welfare trust established under the Indian Trusts Act, 1882.

Shareholders of ABC Ltd. and XYZ Ltd. call meeting of shareholders, creditors and pass special resolution. They submit copy of resolution to ROC, NCLT and publish in newspaper about successful arrangement. Few members of ABC Ltd. having 1.5% shares of valued Rs. 10 lakh objected to scheme of Acquisition by XYZ Ltd. ABC Ltd. Employee trust also objected to acquisition. NCLT cancelled the scheme citing grounds of unfair, unjust and objections of members having 1.5% shares in company.

Based on above facts, answer the following with reasons quoting relevant provisions :

Whether the proposed combination crosses the thresholds prescribed by the Competition Commission of India thus necessitating not to CCI before going for proposed acquisition? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: As per Section 5 of the Competition Act, 2002, Combination is defined as (i) acquisition of control, shares, voting rights or assets; or (ii) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; or (iii) exceeding financial thresholds stated in it which are required to be mandatorily approved by the Competition Commission of India (CCI).

Regulation 9 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that it is the responsibility of the acquirer to notify an acquisition or a hostile takeover. In case of a merger or an amalgamation, a joint notice is to be filed by the merging or amalgamating parties. In case of formation of a joint venture, the responsibility to file a notice would lie with all the parties forming the joint venture.

Thresholds For Filing Notice:

		Assets		Turnover
Enterprise level	In India	> Rs.2000 crore	OR	>Rs. 6000 crore
	Worldwide with	> US\$ 1 bn.		> US\$ 3 bn.

		With at least Rs.1000 crore in India		With at least Rs.3000 crore in India
		OR		
		Assets		Turnover
Group Level	In India	>Rs. 8000 crore	OR	>Rs. 24000 crore
	Worldwide with	> US\$ 4 bn With at least Rs.1000 crore in India		>US\$ 12 bn. With at least Rs.3000 crore in India

Item 1 of Schedule 1 along with Explanation read with Regulation 4 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that where acquisition of voting rights or shares under section 5 shall be treated as Combination to be reported under section 6 if the acquirer becomes a member on the Board of Directors of the enterprise and exercise a right to nominate or control Board of Directors of the enterprise though acquisition is less than 25% of shares or voting rights of an enterprise. Acquisition of less than 10% shall be treated solely as an investment.

In the present case, XYZ Limited, the acquirer, has to not fy the substantial acquisition or hostile takeover under section 6 of the Act to CCI because as a result of such acquisition, Combination is meeting threshold of combined assets (2700 cr+1500 cr=4400 cr) and it holds the total shares or voting rights of ABC Limited between 10 to 25% and got two directors in the Board of Directors of ABC Limited.

Regulation 5(3)(a) of the CCI(Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 states that the parties to the combination may, at their option, give notice in Form II, as specified in schedule II to these regulations, preferably in the instances where the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than fifteen percent (15%) in the relevant market. Regulation 5(9) of the CCI(Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 provides that where in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.

In the present case, XYZ Limited, the acquirer, has to not fy the substantial acquisition or hostile takeover to CCI because as a result of such acquisition, it holds not less than 10% the total shares or voting rights of ABC Limited and got two directors in the Board of Directors of ABC Limited.

As it is meeting threshold criterion for demerger of TRM Limited from assets crossing `2000 crore, further acquisition of 51% shareholding by XYZ Limited in TRM Limited is part of the same transaction and market share of product "O" for TRM Limited is crossing 15%. A notice of combination shall be filed by the parties

with CCI under section 5 and the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

Q36: Certain ambiguities are cleared with the notification of Competition Commission of India (Procedure in regard to transactions of business relating to Combinations) Amendment Regulations, 2018 on 9th October 2018 — Briefly comment. (3 Marks)

PAST YEAR QUESTION JUNE 2019

Answer: Certain ambiguities are cleared on notification of the CCI (Procedure in regard to transactions of business relating to combinations) Amendment Regulations, 2018 on 9th October, 2018. There is a clarity in computing 210 days for a notified transaction that could be extendable on the number of requests by the Commission. Applicant has liberty to offer voluntary modifications. Regulation 27 of the said regulations has made provision for appointing agencies to oversee the implementation of modifications directed by the Commission. Regulation 25 of the said regulations affords parties not to wait for the Commission to order modification after a long Drawn Phase II review process. This would result in speedier resolution of the Competition Commission of India's concern according quicker approvals in line with international practices.

CHAPTER 9 AS PER ICSI MODULE

REGULATORY APPROVALS OF SCHEME

Q1: Which regulatory authority is responsible for notifying combinations, and what is its role in the process?

Answer: The Competition Commission of India (CCI) is the statutory authority responsible for reviewing combinations. Its role is to assess whether the combination is likely to cause an appreciable adverse effect on competition within the relevant market(s) in India. CCI approval is required for combinations where the parties involved exceed the asset/turnover thresholds set out in Section 5 of the Competition Act.

Q2: What are the triggering events that require the approval of the Competition Commission of India (CCI)?

Answer: Any one of the following events requires approval of CCI:

1. The acquisition of shares, voting rights, assets or control in one or more enterprises, or
2. A merger or amalgamation of enterprises that meets the prescribed thresholds, which constitutes a combination and must be pre-notified to CCI for approval before the transaction can be completed.

Q3: What are the types of notifiable transactions under Section 5 of the Competition Act, 2002?

Answer: Section 5 of the Competition Act, 2002 covers three broad categories of notifiable transactions:

1. The acquisition of control, shares, voting rights, or assets of one or more enterprises by one or more persons, where the parties, or the group the target will belong to post-acquisition, meet the specified asset/turnover thresholds.
2. The acquisition of control over an enterprise by a person who already has direct or indirect control over a competing enterprise, where the parties, or the group the target will belong to, meet the specified asset/turnover thresholds.
3. Mergers or amalgamations where the remaining or created enterprise, or the group the enterprise will belong to, meets the specified asset/turnover thresholds.

Q4: What is the time period for the Competition Commission of India (CCI) to give approval for a combination, and what are the related provisions?

Answer: The Competition Commission of India (CCI) is required to "endeavour" to pass an order or issue directions within 150 days from the date of notification. Key provisions include:

1. Prohibition of Combinations:

No combination shall be entered into that causes or is likely to cause an appreciable adverse effect on competition within India. Such a combination will be void.

2. Notice to CCI:

Any person or enterprise proposing a combination must notify the Competition Commission of India (CCI) before consummating the combination.

The notice must be filed after board approval or execution of the agreement, but before finalizing the transaction.

3. Time Period for CCI Approval (Sub-Sect on 2A):

CCI has 150 days from the date of the notice to either pass an order or issue directions. The combination cannot be effective before this period unless CCI has passed an order earlier.

4. Deemed Approval (Sub-Sect on 2A):

If CCI does not pass an order within 150 days, the combination is deemed approved.

5. Regulation and Filing Process (Sub-Sect ons 3, 4, 5):

CCI processes the notice and can approve combinations, subject to specific procedures for filing and the required fees.

After filing, CCI will acknowledge the notice, and certain combinations can be deemed approved upon the Commission's acknowledgment.

6. Failure to Meet Criteria (Sub-Sect on 6):

If CCI finds that the information provided is incorrect or the combination does not meet the required criteria, the approval may be void.

7. Exemptions (Sub-Sect on 7):

Certain categories of combinations may be exempted from notification requirements if prescribed criteria are met.

8. Public Financial Institutions & Foreign Portfolio Investors (Sub-Sect on 9):

Provisions of Section 6 do not apply to acquisitions by public financial institutions, foreign portfolio investors, banks, or Category I alternative investment funds under specific agreements (such as loan or investment agreements).

9. Transitional Provisions (Sub-Sect on 8):

Pre-existing rules and regulations under this Act continue until new rules are made, ensuring continuity of the approval process for ongoing matters.

These provisions ensure that combinations are evaluated to avoid adverse effects on competition and maintain

10. Exemption for Certain Acquisitions:

The provisions of Section 6 of the Competition Act, 2002 do not apply to acquisitions by:

- Public Financial Institutions (PFIs)
- Foreign Portfolio Investors (FPIs)
- Banks
- Category I Alternative Investment Funds (AIFs)

These acquisitions are exempt if made under a loan agreement or investment agreement.

Q5: What are the key provisions under the Competition Act, 2002 and related regulations regarding mergers, acquisitions, and the filing requirements with the Competition Commission of India (CCI)?

Answer:

1. **Regulation 5(9):** In related transactions involving asset transfers for mergers or acquisitions, the asset and turnover values of the transferring enterprise are attributed to the acquiring enterprise.

2. **Regulation 9(3):** For mergers or amalgamations, the parties must jointly file the notice in **Form I** or **Form II**, signed by the relevant persons, including authorized company representatives.

3. **Schedule I-Para 9:** A merger or amalgamation where one enterprise holds more than 50% shares/voting rights in another or where both enterprises are within the same group, provided there is no change from joint to sole control.
4. **Schedule II-Para 6.5:** Copies of the board approval and/or relevant acquisition agreement must be submitted as part of the filing.
5. **Form I:** Notice form for filing with the CCI, containing the required information for approval.
6. **Form II:** A detailed filing form under Section 6(2) of the Competition Act for notifying the CCI about mergers/acquisitions.
7. **Form III:** A form for filing details of acquisition under Section 6(5) of the Competition Act.

Q6: ABC Textiles Ltd., a listed company, is in the process of merger with XYZ Yarn Ltd., not being a listed company. As the Company Secretary of ABC Textiles Ltd., advise on importance and process of obtaining Observations Let or No Object on Let or from the stock exchange. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Regulation 37 of the SEBI of the (Listing Obligations and Disclosure Requirements) Regulations provides that the listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal under Sections 230-234 and an scheme of arrangement by way of reduction of capital under Section 66 of the Companies Act, 2013, along with a non-refundable fee as specified in Schedule XI, with the stock exchange(s) for obtaining Observations Let or No-object on let or, before filing such scheme with any Court or Tribunal, in terms of requirements specified by the Board or stock exchange(s) from time to time.

The listed entity shall not file any scheme of arrangement under sections 230-234 and scheme of arrangement by way of reduction of capital under Section 66 of the Companies Act, 2013, with Tribunal unless it has obtained observations let or No-object on let or from the stock exchange(s).

The listed entity shall place the Observations let or No-object on let or of the stock exchange(s) before the Tribunal at the time of seeking approval of the scheme of arrangement. The validity of the 'Observations Let or' or No-object on let or of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.

The listed entity shall ensure compliance with the other requirements as may be prescribed by the Board from time to time.

Q7: MNP Ltd is a listed company and is in the process of merging SQW Ltd, not being a listed company. The management of MNP Ltd desires your suggestions and process in getting the No object on or observations let or from the concerned stock exchange in the matter. Guide the management of MNP Ltd on the issue. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Any listed company desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal under Sections 230-234 and Section 66 of Companies Act, 2013, along with a non-refundable fee as specified in Schedule XI, with the concerned stock exchange for obtaining Observations Let or No-Object on let or, before filing such

scheme with any Court or Tribunal, in terms of requirements specified by the Securities & Exchange Board of India or concerned Stock Exchange from time to time.

The listed entity shall place the letter of the stock exchange before the Tribunal at the time of seeking approval of the scheme of arrangement. The validity of such letter is six months from date of issue. On sanction of the scheme by the Tribunal, order needs to be filed with the Stock exchange.

The listed entity shall ensure compliance with the other requirements as may be prescribed by the Securities & Exchange Board of India from time to time.

MNP Ltd is advised to comply the requirements as suggested.

Q8: What is the procedure for the stock exchange upon receiving the draft scheme of arrangement according to Regulation 94?

Answer: Stock Exchange's Role: Upon receiving the draft scheme and prescribed documents, the designated stock exchange must forward them to the Board in the prescribed manner.

No-Object on Letter: The stock exchange must submit its No-Object on Letter to the Board within 30 days or 7 days after receiving clarifications from the listed entity or an independent chartered accountant.

Issuance of No-Object on Letter: The stock exchange must issue the No-Object on Letter to the listed entity within 7 days after receiving the Board's comments, with a validity of 6 months.

Objections at Court/Tribunal: The stock exchange must inform the Court or Tribunal of any objections during the approval process.

Recommendations Post-Sanction: After the Tribunal sanctions the scheme, the stock exchange must forward its recommendations to the Board based on the documents submitted by the listed entity.

Q9: Apka Bank, one of the largest private sector bank, is willing to merge with Hamara Bank, a small regional bank. Apka Bank wants to expand its footprint in rural sectors where Hamara Bank has a strong presence. Merging with Apka Bank will provide better technology and financial boost to Hamara Bank. Here the amalgamation is to take place between two banking companies.

The Reserve Bank has discretionary powers to approve the voluntary amalgamation of two Banking companies under the provisions of Section 44A of the Banking Regulation Act, 1949.

You are required to enumerate the provisions of Section 44A of the Banking Regulation Act, 1949 in a joint meeting of representatives of both the banks. (5 marks)

OR

What is the procedure for the amalgamation of banking companies under Section 44A of the Banking Regulation Act, 1949?

Answer: Procedure for amalgamation of banking companies. —

The Reserve Bank has discretionary powers to approve the voluntary amalgamation of two banking companies under the provisions of Section 44A of the Banking Regulation Act, 1949.

Section 44A provides that:

1. Notwithstanding anything contained in any law for the time being in force, no banking company shall be amalgamated with another banking company, unless a scheme containing the terms of such amalgamation has been placed in draft before the shareholders of each of the banking companies concerned separately, and approved by a resolution passed by a majority in number representing two-thirds in value of the

shareholders of each of the said companies, present either in person or by proxy at a meeting called for the purpose.

2. Notice of every such meeting as is referred to in sub-section (1) shall be given to every shareholder of each of the banking companies concerned in accordance with the relevant articles of association indicating the time, place and object of the meeting, and shall also be published at least once a week for three consecutive weeks in not less than two newspapers which circulate in the locality or localities where the registered offices of the banking companies concerned are situated, one of such newspapers being in a language commonly understood in the locality or localities.

3. Any shareholder, who has voted against the scheme of amalgamation at the meeting or has given notice in writing at or prior to the meeting of the company concerned or to the presiding officer of the meeting that he dissents from the scheme of amalgamation, shall be entitled, in the event of the scheme being sanctioned by the Reserve Bank, to claim from the banking company concerned, in respect of the shares held by him in that company, their value as determined by the Reserve Bank when sanctioning the scheme and such determination by the Reserve Bank as to the value of the shares to be paid to the dissenting shareholder shall be final for all purposes.

4. If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the Reserve Bank for sanction and shall, if sanctioned by the Reserve Bank by an order in writing passed in this behalf, be binding on the banking companies concerned and also on all the shareholders thereof.

5. On the sanctioning of a scheme of amalgamation by the Reserve Bank, the property of the amalgamated banking company shall, by virtue of the order of sanction, be transferred to and vest in, and the liabilities of the said company shall, by virtue of the said order be transferred to, and become the liabilities of, the banking company which under the scheme of amalgamation is to acquire the business of the amalgamated banking company, subject in all cases to the provisions of the scheme as sanctioned.

6A. Where a scheme of amalgamation is sanctioned by the Reserve Bank under the provisions of this section, the Reserve Bank may, by a further order in writing, direct that on such date as may be specified therein the banking company (hereinafter in this section referred to as the amalgamated banking company) which by reason of the amalgamation will cease to function, shall stand dissolved and any such direction shall take effect notwithstanding anything to the contrary contained in any other law.

6B. Where the Reserve Bank directs a dissolution of the amalgamated banking company, it shall transmit a copy of the order directing such dissolution to the Registrar before whom the banking company has been registered and on receipt of such order the Registrar shall strike off the name of the company.

6C. An order under sub-section (4) whether made before or after the commencement of section 19 of the Banking Laws (Miscellaneous Provisions) Act, 1963 shall be conclusive evidence that all the requirements of this section relating to amalgamation have been complied with, and a copy of the said order certified in writing by an officer of the Reserve Bank to be a true copy of such order and a copy of the scheme certified in the like manner to be a true copy thereof shall, in all legal proceedings (whether in appeal or otherwise and whether instituted before or after the commencement of the said section 19), be admitted as evidence to the same extent as the original order and the original scheme.

7. Nothing in the foregoing provisions of this section shall affect the power of the Central Government to provide for the amalgamation of two or more banking companies under section 396 of the Companies Act,

1956, [corresponding to Sect on 237 of the Companies Act, 2013], Provided that no such power shall be exercised by the Central Government except after consultation with the Reserve Bank.

Alternate Answer,

The procedure for the amalgamation of banking companies under Sect on 44A of the Banking Regulation Act, 1949 is as follows:

1. **Shareholder Approval:** The draft scheme of amalgamation must be placed before the shareholders of each banking company. A resolution must be passed by a majority in number and two-thirds in value of the shareholders at a meeting called for the purpose.
2. **Notice and Publication:** Notice of the meeting must be given to shareholders and published in at least two newspapers circulating in the localities where the registered offices of the companies are situated.
3. **Dissenting Shareholders:** Shareholders who dissent from the scheme are entitled to claim the value of their shares, determined by the Reserve Bank, if the scheme is sanctioned.
4. **Sanction by Reserve Bank:** After approval by shareholders, the scheme is submitted to the Reserve Bank for sanction. Once sanctioned, the scheme is binding on the banking companies and their shareholders.
5. **Transfer of Assets and Liabilities:** Upon sanction, the assets and liabilities of the amalgamated company transfer to the acquiring company as per the scheme.
6. **Dissolution of Amalgamated Company:** The Reserve Bank may direct the dissolution of the amalgamated company on a specified date.
7. **Registrar's Role:** The Reserve Bank's dissolution order must be transmitted to the Registrar, who will strike off the company from the register.
8. **Conclusive Evidence:** A certified copy of the Reserve Bank's sanction order and the scheme will serve as conclusive evidence of compliance in legal proceedings.
9. **Government's Power:** The Central Government may also provide for amalgamation under Sect on 396 of the Companies Act, 1956 (Sect on 237 of the Companies Act, 2013) after consulting with the Reserve Bank. This ensures a structured and regulated process for amalgamation while safeguarding the interests of shareholders and complying with legal provisions.

Q10: What is the procedure for merger or amalgamation of certain companies under Sect on 233 of the Companies Act, 2013, and the regulatory approvals required?

Answer: The procedure for merger or amalgamation under Sect on 233 of the Companies Act, 2013 involves the following steps:

1. **Notice of Proposed Scheme:** The transferor and transferee companies must issue a notice inviting objections or suggestions from the Registrar, Official Liquidator, and affected persons within 30 days.
2. **Shareholder Approval:** The scheme must be approved by at least 90% of the shareholders (in number and value) in a general meeting.
3. **Declaration of Solvency:** Each company must file a declaration of solvency with the Registrar.
4. **Creditors' Approval:** The scheme must be approved by 90% of creditors (by value) in a meeting, or by written consent.
5. **Filing with Central Government:** The transferee company must file the approved scheme with the Central Government, Registrar, and Official Liquidator.

6. **Registrar/OL No Object on:** If there are no object ons from the Registrar or Of cial Liquidator, the Central Government registers the scheme. If there are object ons, the Central Government may refer the mat er to the Tribunal within 60 days.
7. **Tribunal's Decision:** The Tribunal may either conf rm the scheme or direct it to be considered under Sect on 232.
8. **Dissolut on of Transferor Company:** Upon conf rmat on, the transferor company is deemed dissolved without winding up.
9. **Ef ect of Registrat on:**
 - o Transfer of assets and liabilit es to the transferee company.
 - o Charges on the transferor company's property are transferred to the transferee.
 - o Legal proceedings against the transferor company cont nue with the transferee company.
10. **Cancellat on of Shares:** The transferee company cannot hold shares in itself post-merger, and such shares must be cancelled.
11. **Revised Capital:** The transferee company must f le the revised authorized capital with the Registrar and pay the relevant fees.
12. **Compromise or Arrangement:** The provisions of Sect on 233 also apply to compromises or arrangements under Sect on 230 and transfers under Sect on 232.
13. **Central Government's Role:** The Central Government may prescribe further procedures for merger or amalgamation.
14. **Use of Section 232:** Companies under Section 233 can also use Section 232 procedures for approval of mergers.

Q11: Two insurance companies Goyenka General Insurance and Binani Alliance General Insurance decide to amalgamate.

Since the amalgamat on or merger involved companies being regulated by a sectoral regulator like Insurance Regulatory and Development Authority (IRDA), the approval of the Regulators was also taken in addit on to compliance with the Companies Act, 2013.

In addit on, where an amalgamat on takes place between any two or more insurers, the insurer carrying on the amalgamated business has to submit some statements to the IRDA.

Make a list of documents to be submit ed under the provisions of Sect on 37 of the Insurance Act, 1938 in this context. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Sect on 37 of the Insurance Act, 1938 deals with the statements required af er amalgamat on and transfer. It states that:

Where an amalgamat on takes place between any two or more insurers, or where any business of an insurer is transferred, whether in accordance with a scheme conf rmed by the Authority or otherwise, the insurer carrying on the amalgamated business or the person to whom the business is transferred, as the case may be, shall, within three months from the date of the complet on of the amalgamat on or transfer, furnish in duplicate to the Authority-

(a) a cert f ed copy of the scheme, agreement or deed under which the amalgamat on or transfer has been ef ected, and

(b) a declaration signed by every party concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

(c) where the amalgamation or transfer has not been made in accordance with a scheme approved by the Authority under Section 36:

(i) balance-sheet in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(ii) certified copies of any other reports on which the scheme of amalgamation or transfer was founded.

Q12: What is the procedure for the amalgamation of insurers under Section 37A of the Insurance Act, 1938, and the regulatory approvals involved?

Answer: The procedure for amalgamation of insurers under Section 37A of the Insurance Act, 1938, involves the following steps:

1. **Authority's Power to Prepare Scheme:** The Authority may prepare a scheme for the amalgamation of an insurer with another if it is in the public interest, in the interest of policyholders, to ensure proper management, or for the broader interest of the insurance business.
2. **Written Consent:** The insurer must obtain written consent from the other insurer for amalgamation.
3. **Scheme Provisions:** The scheme may include provisions for:
 - Transfer of assets, liabilities, and business.
 - Changes in the Board of Directors.
 - Alteration of the transferee insurer's capital and constitution.
 - Payment or allotment to policyholders, creditors, and shareholders.
 - Continuation of employee services with terms and conditions.
 - Other relevant matters for effective amalgamation.
4. **Draft Scheme for Objections:** A draft of the scheme is sent to the insurers for suggestions and objections within a specified period. The Authority may modify the scheme based on feedback.
5. **Approval by Central Government:** The scheme is submitted to the Central Government for sanction, which may approve it with or without modifications.
6. **Compensation for Reduced Rights:** Policyholders and shareholders whose rights are reduced will receive compensation, assessed by the Authority. They can appeal the compensation decision to the Securities Appellate Tribunal.
7. **Binding Nature of Scheme:** Once the scheme is sanctioned, it becomes binding on the insurers, policyholders, shareholders, creditors, and employees involved.
8. **Transfer of Assets and Liabilities:** From the specified date, the properties and liabilities of the insurers are transferred to the transferee insurer.
9. **Remedy for Difficulties:** If issues arise in implementing the scheme, the Central Government can make necessary orders.

10. **Laying Before Parliament:** Copies of the scheme and orders must be laid before Parliament after sanction.
11. **Amalgamation of Multiple Insurers:** The amalgamation can involve more than two insurers in a single scheme.
12. **Override of Other Laws:** The provisions of Section 37A override any contrary provisions in the Act, other laws, or agreements.
13. **Exemption from Section 37:** Section 37 does not apply to amalgamations under this section.

Q13: Discuss the key provisions of the Merger and Acquisition Guidelines 2014 issued by the Department of Telecommunications, Government of India, for telecom service licenses and authorizations under the Unified License (UL).

Answer: National Telecom Policy 2012: Promotes a simplified M&A regime ensuring adequate competition, liberalized with 100% FDI and potential spectrum trading.

1. **Regulatory Approval:** Any merger/amalgamation must be approved by the **National Company Law Tribunal (NCLT)**, and relevant telecom licenses transferred to the resultant entity.
2. **Timeframe:** The process must be completed within one year from NCLT approval for transferring/merging licenses.
3. **Lock-in Period:** The lock-in period applies to new shares issued in the merged entity for auction-based licenses.
4. **Spectrum Transfer:** Transfer of licenses includes spectrum, but the spectrum validity period remains unchanged. Additional licenses for other services may be required.
5. **Market Share Limit:** If the market share exceeds 50% after a merger, the merged entity must reduce it to 50% within one year.
6. **Spectrum Cap:** The merged entity cannot exceed 25% of total spectrum for access services and 50% of spectrum in any given band. In specific cases (like 3G spectrum), exceptions apply.
7. **Excess Spectrum:** If spectrum exceeds the cap, it must be surrendered within one year. Spectrum Usage Charges apply for the excess period.
8. **Financial Obligations:** All pending demand dues must be cleared before merger approval, and an undertaking from the merged entity is required for the payment of such dues.
9. **Significant Market Power (SMP):** If the merged entity qualifies as SMP, additional regulations and obligations will apply.
10. **Dispute Resolution:** Disputes will be settled by the Telecom Dispute Settlement and Appellate Tribunal (TDSAT).
11. **Modification Rights:** The Licensor reserves the right to modify these guidelines in the interest of national security, public interest, or proper conduct of telegraphs.

Q14: 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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

CHAPTER 10

AS PER ICSI MODULE

FAST TRACK MERGER

Q1: What is a fast-track merger? Why is it important to have legal framework around a fast track merger in India?

Answer: Fast track mergers have been introduced in order to encourage small companies to grow and expand. Small companies should not be dissuaded from entering into mergers just because the process is long, tedious and complicated.

Fast track mergers are applicable only to small companies, holding and subsidiary companies and any other company as may be prescribed by the government.

Following are the benefits of section 233 or fast track mergers:

- Simplified procedure for merger
- No judicial approval required
- Separate procedures for certain type of companies would enable them to expand without any roadblocks
- Formalities required also significantly reduced.
- No requirement to apply to the National Company Law Tribunal
- No requirement to get a special audit conducted for the transferor company
- No requirement to issue public advertisements announcing the merger
- Less cost intensive and less time consuming.

Q2: "Small Companies can only opt for Fast Track Mergers" — Elucidate briefly for identifying small companies. (3 Marks)

PAST YEAR QUESTION JUNE 2019

Answer: Section 233 of the Companies Act, 2013 has introduced the concept of fast track mergers. It exempted small companies and holding and subsidiary companies entering into merger arrangements from the regular merger procedure as stipulated under sections 230-232 of the Companies Act, 2013. Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 lay down the entire legal framework of fast track mergers.

'Small Company' under section 2(85) of the Companies Act, 2013 means a company, other than a public company -

- (i) paid-up share capital of which does not exceed four crore rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and
- (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed forty crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to, (a) a holding company or a subsidiary company; (b) a company registered under section 8 of the Companies Act, 2013; or (c) a company or body corporate governed by any special Act.

Q3: The Board of directors of MNM Ltd., a small company is considering to merge with BRQ Ltd., another small company. The Board wants the merger to be fast and seeks your opinion about the conditions to be complied in this respect. Render your opinion based on the provisions of Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: In a Fast Track Merger under section 233 of the Companies Act, 2013 and rules made thereunder, broadly the steps followed are as under:

1. Both the companies need to check their Articles of Association and ensure that they have the requisite authority under them to enter into a merger. If no, the Articles of Association should be amended before the merger can take place.
2. Convene the Board meeting and prepare a draft scheme of merger or amalgamation.
3. Prepare the financial statement of assets and liabilities and get an Auditor's Report prepared.
4. Get the draft scheme approved in the Board meeting.
5. Both the companies need to send a notice to the Registrar of Companies (ROC) and Official Liquidator (OL) of their respective regions inviting suggestions/ objections to the scheme, if any, within 30 days of issuing the notice.
6. Notice to the ROC shall be in Form CAA-9.
7. Both the companies are required to file a declaration of solvency with their respective ROCs. The declaration of solvency shall be accompanied by (a) Board Resolution (b) Statement of Assets and Liabilities and (c) Audit Report.
8. Sending notice for holding shareholders meeting and creditors meeting.
9. Conducting the shareholders meeting and creditors meeting and getting the scheme approved.
10. Filing the results of such meeting with the Regional Director and Official Liquidator by the transferee company.

Q4: QR Private Limited, a Start-up company proposes for merger with MN Private Limited a small Company. Explaining the meaning of 'Start-up', brief whether the merger proposal can be carried out without the approval of the National Company Law Tribunal. If yes, name the authority with whom they have to approach for such merger. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: Section 233 of the Companies Act, 2013 prescribes simplified procedure for merger or amalgamation of

- two or more small companies, or
- between a holding company and its wholly-owned subsidiary company, or
- such other class or classes of companies as maybe prescribed

As per Explanation to Rule 25(1) (1A) of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021, "start-up company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as start-up in accordance with the notification issued by the DPIIT, Ministry of Commerce and Industry." Further, a scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely: -

- i. two or more start-up companies, or

ii. one or more start-up company with one or more small company.

Yes, merger proposal can be carried out without the approval of the National Company Law Tribunal. Pursuant to the provisions of section 233 of the Act along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, these Companies can make application to the Regional Director of Ministry of Corporate Affairs, Government of India for fast-track merger.

Q5: Outline a list of conditions which companies proposing to enter into fast-track mergers are required to follow under Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

OR

Section 233 of the Companies Act, 2013 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow. Mention the conditions. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Section 233 of the Companies Act, 2013 states that scheme of fast track merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed.

Further Rule 25 (1A) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 prescribes that a scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely:-

- (i) two or more start-up companies; or
- (ii) one or more start-up company with one or more small company

Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies Act, 2013 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow:

- (a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered offices of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;
 - (b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;
 - (c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and
 - (d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.
- (2) The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.
- (3) On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

(4) If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days:

It may be noted that if no such communication is made, it shall be presumed that he has no objection to the scheme.

Alternate Answer,

Section 233 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow:

A notice of the proposed scheme soliciting objections or suggestions from the Registrar and the official liquidators to be issued by the transferor or the transferee companies within thirty (30) days.

If any objections or suggestions are received, then the same are considered in their respective general meetings and approved/disapproved by their respective members.

A declaration of solvency is required to be filed by both the companies involved in the merger.

The scheme has to be approved by majority of creditors representing nine-tenths in value of the creditors or class of creditors of the respective companies.

The transferee company is required to file a copy of the approval in the prescribed manner, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

On receiving the said scheme, if the Registrar or the Official Liquidator does not have any objections or suggestions to the scheme, the Central Government shall register the said scheme and issue a confirmation thereof to the companies.

If the Registrar or Official Liquidator has any objections or suggestions, the same may be communicated to the Central government within a period of thirty days. In the absence of any such communication, it would be presumed that no objections were raised.

If the Central Government after receiving the objections or suggestions or for any other reason forms the opinion that the said scheme is not in public interest or in the interest of the creditors, it can file an application before the Tribunal within a period of sixty days.

After filing of such application, the Tribunal has to render its judgment. If it is of the opinion (with reasons recorded in writing) that the scheme should be considered as per the procedure laid down in section 232, it may give directions accordingly.

Q6: What are the essential components or ingredients that must be included in a scheme of merger from a practical standpoint.

Answer: These ingredients are:

- Preamble
- Definitions of the terms used in the scheme
- A detailing of the pre-merger and the post-merger capital
- The way the assets and liabilities shall be transferred
- Appointed and effective date of the scheme
- Tax treatment of the scheme
- Benefits to be given to the staff
- Consolidation of the authorised share capital
- Dissolution without resorting to winding-up

- Not ce of approval of the scheme
- Any amendments or modif cat ons to the scheme.

Q7: What are the key legal and operat onal consequences that arise from a merger

Answer: The following consequences shall result out of the merger:

- The transferor company shall stand dissolved on the registrat on of the scheme. No winding-up shall be required for the same.
- All the assets and liabilit es of the transferor company shall be transferred to the transferee company.
- Any charge on the transferor's property shall stand transferred to the transferee.
- Payment of social security benef ts of employees will now be the responsibility of the transferee company.

Q8: "What are the pract cal challenges faced during a fast track merger.

Answer: Despite, fast track mergers being an innovat ve and convenient concept it poses certain pract cal dif cult es.

These pract cal dif cult es are:

- 1) Merging the authorised capital of all companies in the transferee company may not be pract cally viable.
- 2) Form INC 28 which f nally registers the scheme does not provide for the following:
 - A separate drop-down menu for Sect on 233;
 - Change in the status of the transferor company.
- 3) There is doubt regarding whether the Regional Director can suggest changes to the scheme. It appears that if the ROC, Of cial Liquidator does not have object ons to the scheme, the Regional Director has to conf rm without any suggest ons of his own.

Q9: What are the key procedural steps and requirements under Rule 25 of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016 for a scheme of merger or amalgamat on?

Answer: The key procedural steps and requirements include:

1. **Not ce for Object ons/Suggest ons:** A not ce invit ng object ons or suggest ons must be issued in Form CAA.9.
2. **Declarat on of Solvency:** Each company must fle a declarat on of solvency in Form CAA.10 before convening meet ngs for scheme approval.
3. **Not ce for Meet ngs:** Not ces to members and creditors must include the solvency declarat on, scheme copy, and other required statements.
4. **Filing with Authorit es:** Af er meet ngs, the transferee company must fle the approved scheme with the Central Government (Form CAA.11), Registrar (Form GNL-1), and the Of cial Liquidator.
5. **Conf rmat on Order:** If no object ons are received within 30 days, the Central Government will conf rm the scheme. If object ons are raised, the Government may issue a conf rmat on order or fle an applicat on with the Tribunal.
6. **Filing Conf rmat on Order:** The conf rmat on order must be f led with the Registrar in Form INC-28 within 30 days.

7. **Opt on for Sect on 230-232:** Companies may opt to undertake the scheme under sect ons 230 to 232 if condit ons under sect on 233 are not met.

8. **Start-up Companies:** As per the 2021 amendment, start-up companies or small companies may merge under sect on 233.

Q10: What are the key pract cal steps a Company Secretary should follow when providing a legal opinion or managing the process of a fast track merger, and how can theoret cal concepts be ef ect vely applied in these real-world scenarios?

Answer: Knowing and learning the basic theoret c concepts around fast track mergers is important. However, one also must know how to use this theory in pract ce. Whenever asked to render a legal opinion on fast track mergers or if your f rm is entering into one, keep in mind the following pract cal steps:

- (a) Assess whether the merger is benef cial before entering into one.
- (b) Conduct due diligence on the f rm sought to be merged with.
- (c) Remember both the companies need to be small companies for FTM to apply.
- (d) Have a prescribed t meline and a strategy in place in order to avoid undue delay.
- (e) Think of all the possible object ons you may receive from ROC and already keep solut ons ready so as to save t me.

Q11: What types of companies can enter into a scheme of merger or amalgamat on according to sect on 230 and sect on 232?

Answer: According to the provisions outlined, a scheme of merger or amalgamat on can be entered into between:

- Two or more small companies,
- A holding company and its wholly-owned subsidiary company, or
- Such other class or classes of companies as may be prescribed.

Q12: What is the required procedure for approving a scheme of merger or amalgamat on under this sect on?

Answer: The procedure for approving the scheme of merger or amalgamat on involves the following steps:

1. **Not ce:** The transferor company or companies and the transferee company must issue a not ce invit ng object ons or suggest ons from the Registrar, Of cial Liquidators, or any af ected persons within 30 days.
2. **General Meet ng:** The object ons and suggest ons received are considered by the companies in their respect ve general meet ngs, and the scheme must be approved by at least 90% of the total number of shares in a general meet ng.
3. **Declarat on of Solvency:** Each company involved must f le a declarat on of solvency in the prescribed form with the Registrar.
4. **Creditors' Approval:** The scheme must be approved by the majority of creditors or classes of creditors (9/10th in value) in a meet ng convened by the company.

Q13: What happens once the scheme is approved by the companies and creditors?

Answer: Once the scheme is approved by the companies and creditors, the transferee company must file a copy of the scheme with the Central Government, Registrar, and Official Liquidator where the registered office of the company is situated.

Q14: What happens if the Registrar or Official Liquidator has objections or suggestions regarding the scheme?

Answer: If the Registrar or Official Liquidator has any objections or suggestions, they must communicate them in writing to the Central Government within 30 days. If no communication is made within this period, it is presumed that there are no objections.

Q15: Can the Central Government reject the scheme of merger or amalgamation?

Answer: Yes, the Central Government can reject the scheme if, after receiving objections or suggestions, or for any other reason, it believes that the scheme is not in public interest or not in the interest of creditors. The Central Government may then file an application with the Tribunal within 60 days of receiving the scheme.

Q16: What are the effects of registering the scheme of merger or amalgamation?

Answer: Upon registration of the scheme, the following effects occur:

- The property and liabilities of the transferor company are transferred to the transferee company.
- Any charges on the property of the transferor company will be applicable to the transferee company.
- Legal proceedings pending against the transferor company will be continued by or against the transferee company.
- If the scheme provides for the purchase of shares or settlement of debts due to dissenting shareholders or creditors, such liabilities become the responsibility of the transferee company.

Q17: What happens to the shares held by the transferee company in its own name post-merger?

Answer: After the merger or amalgamation, the transferee company is not allowed to hold any shares in its own name or in the name of any trust. All such shares held by the transferee company shall be cancelled or extinguished.

Q18: What is the requirement regarding authorised capital after the merger or amalgamation?

Answer: The transferee company must file an application with the Registrar indicating the revised authorised capital and pay the prescribed fees due on the revised capital. The fees previously paid by the transferor company on its authorised capital will be set-off against the fees payable by the transferee company on its enhanced capital post-merger.

Q19: Can a company covered under this section use section 232 for the approval of any scheme?

Answer: Yes, a company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

Q20: What effect does the registration of the scheme have on the transferor company?

Answer: The registration of the scheme leads to the dissolution of the transferor company without the need for a winding-up process.

Q21: As a practicing Company Secretary, a client has approached you and sought your guidance on following procedural aspects of Fast Track Mergers.

(a) Declaration of Solvency

(b) Filing of Scheme

(c) Approval of the Scheme

Prepare a brief note on the aforesaid points to be presented to your client. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: Section 233 of the Companies Act, 2013 along with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 lay down the certain procedures for fast-track mergers.

(a) Declaration of solvency:

Procedure	Timeline	Forms	Who shall be Required to comply
Both the companies are required to file a declaration of solvency with the respective area ROCs where registered offices of respective companies are situated.	This is to be done before the meeting of shareholders or the meeting of creditors is convened.	Form CAA 10	Both the transferor and transferee companies are required to comply with this provision

(b) Filing of the Scheme:

Procedure	Timeline	Forms	Who shall be Required to comply
A copy of the scheme along with a report of result of each of the meeting in Form No. CAA 11 shall be filed with the Regional Director.	Within 7 days of after the conclusion of the meeting of members or class of members or creditors.	Form CAA 11 results of the all meetings	Filing w.r.t. Regional Director is required to be done by transferee company.
A copy of the scheme along with Form CAA 11 is also required to be filed with the		Form GNL1	

ROC in Form GNL1 and the Official Liquidator. It shall be hand-delivered or sent through speed post or registered post to Official Liquidator.			

(c) Approval of the Scheme by Regional Director/Central Government:

(i) Where no object on or suggest on is received within a period of thirty days of receipt of copy of scheme under sect on 233(2), from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12:

(ii) If the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under of sect on 233(2), it shall be deemed that it has no object on to the scheme and a confirmation order shall be issued accordingly.

(iii) Where object ons or suggest ons are received within a period of thirty days of receipt of copy of scheme under sect on 233(2) from the Registrar of Companies or Official Liquidator or both by the Central Government and

(a) such object ons or suggest ons of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

(b) the Central Government is of the opinion, whether on the basis of such object ons or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may within sixty days of the receipt of the scheme file an application before the Tribunal in Form No. CAA.13 stating the object ons or opinion and requesting that Tribunal may consider the scheme under sect on 232\ of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under sub sect on (2) of sect on 233 of the Act, it shall be deemed that it has no object on to the scheme and a confirmation order shall be issued accordingly.

(iv) The confirmation order of the scheme issued by the central government or tribunal under sect on 233(7) of the Act, shall be filed, within thirty days of the receipt of the order of confirmation, in Form INC-28 along with the fees as provided under companies (Registrar on Of ces and Fees) rules 2014 with the Registrar of companies respectively.

Q22: “Under Companies Act, 1956 small companies were deterred from entering into mergers owing to the lengthy process and the Companies Act, 2013 provided a solution”. Comment. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: The legal provisions pertaining to merger process stipulated in sections 391-394 of the Companies Act, 1956 was not considered as a simple procedure and there was no special provision for small companies.

The process involved, *inter alia*, drafting a merger scheme, taking judicial approval for the scheme, getting Board and shareholders authorization, etc.

Section 233 of the Companies Act, 2013 has introduced the concept of fast track mergers. It carved out an exception from the regular merger procedure. It exempted small companies and holding and subsidiary companies entering into merger arrangements from the regular merger procedure as stipulated under sections 230-232 of the Companies Act, 2013. Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 lay down the entire legal framework of fast track mergers.

Fast track merges provide the following benefits:

- Simplified procedure for merger
- No judicial approval is required
- Separate procedures for small companies to enable them to expand without any roadblocks
- Formalities required also significantly reduced
- Fast track mergers have dispensed with Tribunal approval for mergers. Regional

Directors, Registrar of Companies (ROC) and Official Liquidator are the authorities whose approval is required. The process has been simplified to a great extent.

A provision allowing the government to notify any other company in this regard has also been made.

Q23: Brakes Ltd., a small company manufacturing brakes proposes to merge with Lubricants Ltd., another small company. Registrar of Companies (ROC) objected the scheme on the ground that it is not in the interest of the creditors. Comment on further steps as per Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Section 233 of the Companies Act, 2013 provides the conditions which small companies have to follow for the merger (fast track merger). As per the said section further steps in the matter are as follows:

(i) The Registrar will communicate the objections or suggestions to the scheme to the Central government within a period of thirty days. In the absence of any such communication, it would be presumed that no objections were raised.

(ii) If the Central Government after receiving the objections or suggestions or for any other reason forms the opinion that the said scheme is not in public interest or in the interest of the creditors, it can file an application before the Tribunal within a period of sixty days.

(iii) After filing of such application, the Tribunal has to render its judgment. If it is of the opinion (with reasons recorded in writing) that the scheme should be considered as per the procedure laid down in section 232 of Companies Act, 2013, it may give directions accordingly.

Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

CHAPTER 11 AS PER ICSI MODULE

CROSS BORDER MERGERS

Q1: Describe about legal provisions of Cross Border Mergers.

Answer:

- Companies Act, 2013
- The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Foreign Exchange Management (Cross Border Merger) Regulations, 2018
- Competition Act, 2002
- Insolvency and Bankruptcy Code, 2016
- Income Tax Act, 1961
- Foreign Exchange Management Act, 1999.

Q2: Define Cross Border Merger and its benefits and challenges.

OR

Mention anticipated benefits and challenges for business ventures involving Cross Border Mergers. (3 marks)

PAST YEAR QUESTION JUNE 24

Answer: 'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013.

The trend of cross border mergers increased recently. Cross border mergers have opened up vistas of opportunities. It enables an Indian company to utilise sophisticated levels of technical know-how offered by the foreign collaborator whereas enables the latter to utilise the large market and resources of India.

Benefits of Cross Border Mergers & Acquisitions

- Expansion of markets
- Geographic and industrial diversification
- Technology transfer
- Avoiding entry barriers
- Industry consolidation
- Tax planning and benefits
- Foreign exchange earnings
- Accelerating growth
- Utilisation of material and labour at lower costs
- Increased customers base
- Competitive advantage.

And Challenges are -

- the risks regarding Tax implications
- Regulatory Landscape and
- Political scenario is to be tackled with confidence.
- Technological difference
- Strategic issues
- Overpayment in the deal
- Failure to integrate
- HR challenges.
- Legal issues in different countries
- Accounting challenges

Q3: What are the challenges faced during Cross Border Mergers & Acquisitions

Answer: Legal issues in different countries

- Accounting challenges
- Taxation aspects
- Technological differences
- Political landscape
- Strategic issues
- Overpayment in the deal
- Failure to integrate
- HR challenges.

Q4: Difference between outbound merger and inbound merger, which one appears more beneficial to Corporate India? (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Outbound Merger' is one where an Indian company has merged with a foreign company. Accordingly, all properties, assets, liabilities and employees of the Indian company will be transferred to the foreign company. In an outbound merger or acquisition, a domestic company purchases or merges with one in another country.

On the other hand "Inbound Merger" refers to merging a foreign entity with a domestic company such as Tata's acquiring Corus and Jaguar.

Inbound merger scores over outbound merger for the reasons inflow of foreign direct investment, technology, widening the national market to international level, improved operational standards, improving human relations at a global level apart from the elevation of prestige globally.

Q5: GKL Ltd., an Indian company intends to amalgamate with PS International Ltd., a foreign company. Examine the legal provisions that have to be complied with for such an amalgamation. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: 'Outbound merger' means a cross border merger where the resultant company is a foreign company. In terms of the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, GKL Ltd. and PS International Ltd. have to take care of the following provisions in this regard:

(i) A person resident in India may acquire or hold securities of the resultant company in accordance with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

(ii) A resident individual may acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme laid down in the Act or rules or regulations framed thereunder.

(iii) An office in India of the Indian company, pursuant to sanction of the Scheme of cross border merger, may be deemed to be a branch office in India of the resultant company in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016. Accordingly, the resultant company may undertake any transaction as permitted to a branch office under the aforesaid Regulations.

(iv) The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant company shall be repaid as per the Scheme sanctioned by the National Company Law Tribunal (NCLT) in terms of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

The resultant company shall not acquire any liability payable towards a lender in India in Rupees which is not in conformity with the FEMA or rules or regulations framed thereunder. A no-object certificate to this effect should be obtained from the lenders in India of the Indian company.

(v) The resultant company may acquire and hold any asset in India which a foreign company is permitted to acquire under the provisions of the Foreign Exchange Management Act, 1999, rules or regulations framed thereunder. Such assets can be transferred in any manner for undertaking a transaction permissible under the said Act or rules or regulations thereunder.

(vi) Where the asset or security in India cannot be acquired or held by the resultant company under the Foreign Exchange Management Act, 1999, rules or regulations made thereunder, the resultant company shall sell such asset or security within a period of two years from the date of sanction of the Scheme by NCLT and the sale proceeds shall be repatriated outside India immediately through banking channels. Repayment of Indian liabilities from sale proceeds of such assets or securities within the period of two years shall be permissible.

(vii) The resultant company may open a Special Non-Resident Rupee Account (SNRR Account) in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016 for the purpose of putting through transactions under these regulations. The account shall run for a maximum period of two years from the date of sanction of the Scheme by NCLT.

Q6: Differentiate between Inbound merger and Outbound merger. What are the laws governing Cross-border mergers in India? (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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

Q7: Between Inbound merger and Outbound merger, which one appears more beneficial to corporate India? Give reasons in support of your answer. (3 Marks)

PAST YEAR QUESTION JUNE 2023

Answer: 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. Accordingly, all properties, assets, liabilities and employees of the Indian company will be transferred to the foreign company.

Inbound merger score over outbound merger for the following reasons: inflow of foreign direct investment, technology, widening the national market to international level, improving operational standards and human relations at global level apart from the elevation of brand globally.

Q8: Dneers Infotech Ltd., an Indian company, is contemplating to take over Divine Infotech Pvt. Ltd. of Indonesia in accordance with procedures under the provisions of the Companies Act, 2013. Advise top management on key regulations which need to be followed during an inbound merger with respect to the following transactions:

- (i) Transfer of Securities
- (ii) Branch/Office outside India
- (iii) Borrowings
- (iv) Transfer of Assets
- (v) Opening of overseas bank accounts for resultant company. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The concept of inbound mergers was introduced in the Companies Act, 2013 as part of Section 234 of the Companies Act, 2013. Following are the key regulations which need to be followed during an inbound merger:

(i) Transfer of Securities

Typically, the resultant company of the cross-border merger can transfer any security including a foreign security to a person resident outside India in accordance with the provisions of Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instrument) Regulations, 2019. However, where the foreign company is a joint venture/ wholly owned subsidiary of an Indian company, such foreign company is required to comply with the provisions of Foreign Exchange Management (Overseas Investment) Rules, 2022.

(ii) Branch/Office outside India

An office/branch outside India of the foreign company shall be deemed to be the resultant company's office outside India for in accordance with the Foreign Exchange Management. In case of transfer of securities both Buyer as well as Target can use the service of a Tripartite whose job is to have Securities in the Books and doing all back-office operations (including evaluation of the Securities).

(iii) Borrowings

The borrowings of the transferor company would become the borrowings of the resulting company. The Merger Regulations has provided a period of 2 years to comply with the requirements under the External Commercial Borrowings (ECB) regime. The end use restrictions are not applicable here. Cross Border Mergers require hedging of External Commercial Borrowings (ECB) as well. An External Commercial Borrowings (ECB) is an arrangement between Indian Buyer and Foreign Bank whereby Foreign Bank is funding to Indian Corporate via Foreign Currency Loan having specific amount, tenor. Foreign Exchange Management Act, 1999 does permit hedging of loan taken from outside Bank in Indian Books.

(iv) Transfer of Assets

Assets acquired by the resulting company can be transferred in accordance with the Companies Act, 2013 or any regulations framed thereunder for this purpose. If any asset is not permitted to be acquired, the same shall be sold within two years from the date when the National Company Law Tribunal (NCLT) had given sanction. The proceeds of such sale shall be repatriated to India.

(v) Opening of overseas bank accounts for resultant company

The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction for a maximum period of 2 years in order to carry out transactions pertinent to the cross-border merger.

Q9: Tech Innovations Pvt. Ltd., a leading Indian technology firm specializing in software development, has been exploring avenues to expand its global footprint. After evaluating various options, the company's board has approved an outbound merger with GlobalTech Inc., a U.S.-based multinational technology company. Advise top management on key regulations which need to be followed during an outbound merger with respect to the following transactions:

- 1. Issue of Securities**
- 2. Branch Office**
- 3. Other changes**

PAST YEAR QUESTION JUNE 2023

Answer: An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed. The following are the major rules governing an outbound merger:

Issue of Securities

The securities issued by a foreign company to the Indian entity, may be issued to both persons resident in and outside India. For the securities being issued to persons resident in India, the acquisition should be compliant with the ODI Regulations. Securities in the resultant company may be acquired provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme.

Branch Office

An office of the Indian company in India may be treated as the branch office of the resultant company in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.

Other changes

- a) The borrowings of the resulting company shall be repaid in accordance with the sanctioned scheme.
- b) Assets which cannot be acquired or held by the resultant company should be sold within a period of two years from the date of the sanction of the scheme.
- c) The resulting foreign company can now open a Special Non-Resident Rupee Account in terms of the FEMA (Deposit) Regulations, 2016 for a period of two years to facilitate the outbound merger.

Q10: Secure Source Ltd., an Indian Company, is contemplating to take over Super Securers Pte. Ltd. of Singapore through a process of merger and its top Management seeks your advice. Suggest the required compliances. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Since the matter involved pertains to cross border merger of companies, it is necessary to comply with the procedure as per rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 inserted since 13th April 2017. In accordance with said rule, a foreign company incorporated outside India may merge with an Indian Company by filing petition with National Company Law Tribunal in terms of sections 230 to 232 of the Companies Act, 2013.

It is also necessary to obtain prior approval from Reserve Bank of India (RBI). RBI has also issued Foreign Exchange Management (Cross Border Merger) Regulations, 2018 for ease of doing compliance. Merger is generally permitted with companies incorporated in foreign countries whose securities regulator is a member of Organization of Securities Commission's Multilateral Memorandum of Understanding, Central Bank is enrolled with Bank of International Settlements (BIS) and identified with Financial Action Task Force.

Q11: "A company may merge with a Foreign Company, only if it is incorporated in any of the Jurisdictions specified under Rule 25A, of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016." Specify these jurisdictions. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: A company may merge with a foreign company incorporated in any of the jurisdictions specified in Rule 25A(2)(a) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 after obtaining prior approval of the Reserve Bank of India and after complying with provisions of Sections 230 to 232 of the Companies Act, 2013 and these rules.

The Transferee Company shall ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation.

A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under Rule 25A (2) (a).

The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining specified approvals.

Jurisdictions specified are as under:

- (i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or
- (ii) whose central bank is a member of Bank for International Settlements (BIS), and
- (iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:
 - (a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
 - (b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

Q12: "Cross Border Mergers not only bring benefits but also assume risks". — Briefly comment with specific provision under Companies Act, 2013. (3 Marks)

PAST YEAR QUESTION JUNE 2019

Answer: As per section 234(1) of the Companies Act, 2013, the provisions of cross border merger are subject to every other law specifically providing for any restriction.

A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B under Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Companies Act, 2013 and these rules. It is to be ensured that while entering into an outbound merger, it is with a company from one of the specified jurisdictions.

Some of the risks associated with cross border mergers are:

1. **Taxation** : Despite Double Tax Avoidance Agreements, the tax implications in the host countries may prove to be complex and tedious. This may increase the costs as a local professional is required to be hired.
2. **Regulatory landscape** : The laws and regulations in the host country would be different and may be difficult to comply. An unsuitable regulatory landscape may pose risks to a cross border merger.
3. **Political scenario** : It is essential to assess the political situation of the country before one enters into a merger with an entity belonging to that country. Unstable political situation may lead to difficulties in carrying out business.
4. **Valuation** : Valuation is one factor which changes with countries due to changes in exchange rate, stock market transactions and other macroeconomic developments.

Q13: Ganga Infrastructure Ltd. is an Indian Company with its Registered office at New Delhi. Michle Inc is an incorporated company in New York. Ganga Infrastructure Ltd. proposes to merge the business of Michle Inc with its business in India—Brief your opinion with reference to merger and amalgamations with a foreign entity under Companies Act, 2013. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) Section 234 of the Companies Act, 2013 enables merger or amalgamation with a foreign company.

(ii) All the provisions relating to merger or amalgamation as in the case of domestic companies shall apply with required modifications.

(iii) A foreign company may be a company or body corporate incorporated outside India irrespective of whether it has a place of business in India.

(iv) A foreign company incorporated outside India can be merged with in India only with prior permission from Reserve Bank of India (RBI).

Thus in the instant case the prior permission of RBI is required for merging the business entity of Michelle Inc with Ganga Infrastructure Ltd.

Q14: Explain the provisions of Rule 25A of the Companies Amalgamation Rules, 2016, relating to the merger or amalgamation of a foreign company with an Indian company and vice versa.

Answer: Rule 25A of the Companies Amalgamation Rules, 2016, governs the merger or amalgamation of a foreign company with an Indian company and vice versa. The rule lays down the following key provisions:

1. Merger of a Foreign Company with an Indian Company:

A foreign company incorporated outside India may merge with an Indian company, but it must obtain prior approval from the Reserve Bank of India (RBI).

The company must comply with the provisions of Sections 230 to 232 of the Companies Act, 2013, and the other relevant rules.

2. Merger of an Indian Company with a Foreign Company:

An Indian company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B. The company must obtain prior approval from the RBI and comply with Sections 230 to 232 of the Companies Act, 2013, and the applicable rules.

3. Valuation Requirements:

The transferee company must ensure that the valuation is carried out by valuers who are members of a recognized professional body in the jurisdiction of the transferee company.

The valuation must be in accordance with internationally accepted accounting and valuation principles.

A declaration to this effect must be submitted along with the application made to the RBI for obtaining approval.

4. Filing with the Tribunal:

After obtaining the required approvals from the RBI (as per sub-rules 1 and 2), the concerned company must file an application before the National Company Law Tribunal (NCLT) as per the provisions of Sections 230 to 232 of the Companies Act, 2013.

5. Special Provision for Companies from Neighboring Countries:

In cases of compromise, arrangement, merger, or demerger between an Indian company and a company or body corporate incorporated in a country sharing a land border with India, a declaration in Form CAA-16 is required at the time of submitting the application under Section 230 of the Companies Act, 2013.

6. Amendment Procedure:

No amendment to this rule can be made without prior consultation with the Reserve Bank of India (RBI).

Q15: What are the key benefits of entering into a cross-border merger?

Answer: The trend of cross border mergers has increased recently. Cross border mergers have opened up vistas of opportunities. It enables an Indian company to utilise sophisticated levels of technical know-how offered by the foreign collaborator whereas enables the latter to utilise the large market and resources of India. The following are the benefits of entering into a cross border merger:

Diversification: A merger of one leads to product diversification, whereas a cross border in addition to offering diversification of products also leads to geographical diversification. This is extremely important for companies which want to make their global presence felt.

Achieving cost effectiveness: When a company seeks to enter new markets, it takes some resources and money to build capacity. Having an existing infrastructure and resources in the new market helps in achieving cost effectiveness.

Technological advancement: Mergers enable both the parties to use each other's intellectual properties hence enhancing technical know-how.

Distribution: Cross border mergers help in creating a large distribution network transcending boundary.

Q16: Explain the factors that affect the valuation of a cross-border firm and discuss the various valuation methods used in cross-border acquisitions.

Answer: Valuation of a cross-border firm presents unique challenges compared to domestic acquisitions due to factors such as exchange rate fluctuations, stock market variations, and macroeconomic developments in different countries. These factors influence how the value of a target firm is calculated. The key considerations in cross-border valuations include differences in national economic conditions, currency risks, and the regulatory environment.

The following are some common valuation methods used in cross-border acquisitions:

1. The **DCF (Discounted Cash Flow)** approach to valuation calculates the value of the enterprise as the present value of all future free cash flows less the cash flows due to creditors and minority shareholders.
2. The **P/E ratio** is an indication of what the market is willing to pay for a currency unit of earnings. It is also an indication of how secure the market's perception is about the future earnings of the firm and its riskiness.
3. The **market-to-book ratio (M/B)** is a method of valuing a firm on the basis of what the market believes the firm is worth over and above its capital, its original capital investment, and subsequent retained earnings. Like the P/E Ratio, the magnitude of the M/B ratio as compared with its major competitors, reflects the market's perception of the quality of the firm's earnings, management, and general strategic opportunities.

Q17: What are the key tax implications in cross-border mergers, specifically regarding asset acquisitions, slump sales, GST, Securities Transaction Tax (STT), and the treatment of foreign companies?

Answer: In cross-border mergers, various tax considerations arise depending on the method of acquisition. Below are the key tax implications:

1. Asset Acquisition and Slump Sale:

In asset acquisitions, tax losses are generally not transferred to the buyer, and they remain with the seller. However, in the case of a slump sale, where assets are transferred as a whole, certain tax benefits and deductions related to the undertaking may be passed on to the buyer, even though individual asset transfers are not possible.

2. Inadequate Consideration:

If the transfer of assets or shares occurs for inadequate consideration, and tax proceedings are ongoing against the transferor, tax authorities may claim the tax due from the transferee once the proceedings are completed.

3. **GST Implications:**

GST does not apply to a slump sale as it involves the transfer of all assets, rights, properties, and liabilities to the buyer. However, when specific assets are bought individually, GST is applicable at the rate corresponding to the asset.

4. **Securities Transaction Tax (STT):**

STT is applicable when shares are bought or sold through a recognized stock exchange in India. The rate of STT is 0.1% on the purchase or sale price of equity shares listed on such exchanges.

5. **Capital Gains on Foreign Share Transfers:**

When shares of a foreign company are transferred, and the value of these shares is derived substantially from assets situated in India, the capital gains on such transfer are subject to Indian income tax. This applies if the value of the Indian assets is at least INR 100 million and constitutes 50% or more of the total value of the foreign company's assets.

6. **Tax Neutrality in Inbound Mergers:**

In an inbound merger (where a foreign company merges with an Indian company), tax neutrality is provided if the transfer occurs through a slump sale and three-fourths of the shareholders of the transferor company continue holding shares in the resulting Indian company.

7. **Foreign Parent and Indian Subsidiary Merger:**

If a foreign parent company merges with another foreign company, the newly formed company becomes the owner of the Indian subsidiary, provided 25% of the shareholders of the foreign parent remain shareholders in the newly created company. This structure may qualify for tax exemptions.

Q18: What are the key legislations that regulate cross-border mergers in India?

Answer: Several key legislations regulate cross-border mergers in India, ensuring compliance with foreign exchange, investment, and corporate governance frameworks. The important regulations are as follows:

1. **Foreign Exchange Management (Non-Debt Instrument) Regulations, 2019:**

These regulations govern foreign investments in India, particularly non-debt instruments such as equity and other capital instruments. They are relevant for cross-border mergers as they set the framework for foreign entities investing in Indian companies.

2. **Foreign Exchange Management (Overseas Investment) Regulations, 2022:**

These regulations are important for managing outbound investments from India, particularly when an Indian company invests in foreign subsidiaries or associates. They help regulate the flow of funds and ensure compliance with foreign investment policies. In cross-border mergers, if an Indian company is involved in acquiring foreign assets, these regulations will apply.

3. **Foreign Exchange Management (Cross-Border Merger) Regulations, 2018:**

Specifically designed for cross-border mergers, these regulations address mergers, demergers, amalgamations, and arrangements between Indian and foreign companies. They outline the conditions for inbound and outbound investments, and also provide guidelines for joint ventures (JVs) and wholly-owned

subsidiaries (WOS). They require compliance with the Foreign Exchange Management Act (FEMA), 1999, and ensure that foreign investments and cross-border transactions are properly managed.

4. **Foreign Direct Investment (FDI) Regulations:**

Cross-border mergers often lead to the inflow of **foreign direct investment (FDI)** into India. FDI regulations govern how foreign investors can invest in Indian companies, with a focus on **equity shares, convertible debentures**, and **convertible preference shares**. FDI can occur through the **automatic route** or with **government approval**, depending on the sector. Cross-border mergers that bring foreign capital into India must comply with these regulations.

5. **Takeover Code:**

The **Takeover Code** comes into play if the merger involves a listed Indian company. If the merger results in the acquisition of voting rights or control over the company, the regulations under the Takeover Code are triggered. This ensures that the interests of minority shareholders are protected and that proper disclosures and procedures are followed in the event of a change of control.

6. **Competition law**

Commission of India (CCI) regulates mergers to prevent the creation of monopolies and ensure healthy competition in the market. While mergers can create economies of scale and boost profits, they may also lead to monopolistic structures that harm competition. To assess this, the CCI evaluates several factors, including:

- The level of competition from imports in the market
- Barriers to market entry
- The level of concentration in the market

Q19: What are the key accounting treatments for cross-border mergers, and how do earnouts and carveouts impact the process?

Answer: Cross-border mergers involve specific accounting treatments, particularly under merger accounting and acquisition accounting, as well as contingent considerations like earnouts and carveouts:

1. **Merger Accounting:**

In merger accounting, all the assets and liabilities of the transferor are consolidated at their existing book values. This means that the transferor's balance sheet is simply combined with the acquirer's, and no fair value adjustments are made.

2. **Acquisition Accounting:**

Under acquisition accounting, the acquirer allocates the consideration among the assets and liabilities acquired on a fair value basis. This may result in goodwill if the consideration exceeds the fair value of the acquired net assets. Goodwill arising in acquisitions is amortized over 5 years, unlike in mergers where goodwill is not amortized but instead tested for impairment.

3. **Ind AS (Indian Accounting Standards):**

The treatment of mergers within a group is regulated by Ind AS, which requires assets and liabilities of the transferor to be recognized at their book values in a group restructuring. The phased implementation of Ind AS started on April 1, 2016, for listed companies or those with net worth of INR 500 crore or more.

Q20: Briefly discuss on 'Earnouts' and 'Carveouts' in Cross Border Mergers. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: An 'Earnout' is a contingent consideration whereby Buyer of the Target would decide an amount which is to be paid provided certain contingent considerations to happen.

Cross Border Mergers specially covering Information Technology (IT), Technological Mergers, Banking Mergers are subject to Contingent Considerations. Earnouts are divided into below 3 types:

- Cash Earnouts
- Equity Earnouts
- Stock Compensation Earnouts

A **Carveout** is a Potential divestiture of a business unit in which a parent company sells minority interest of a Child Company to outside Investors. A Carveout allows a company to capitalize on a business segment that may not be part of its core operations. A carve-out effectively separates a subsidiary or business unit from its parent as a standalone company. The new organization has its own board of directors and financial statements. However, the parent company usually retains a controlling interest in the new company and offers strategic support and resources to help the business succeed. Unlike a spin-off, the parent company generally receives a cash inflow through a carve-out.

Q21: The need for achieving economic growth and economies of scale are the main reasons for which the cross border mergers take place. Explain the parameters used for assessing post-merger performance of cross border mergers. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Cross border mergers can be truly assessed only by evaluating the post-merger performance of the merged entities.

The following parameters may be used to assess the post-merger performance:

- **Returns:** A comparative analysis of the returns being generated by the entity pre and post-merger should be carried out. If the merged entity is earning significantly higher returns than the merger is deemed successful.
- **Cash flow and operational efficiency:** If post-merger the cash flow significantly increases and this increased cash flow is put to use to obtain operational efficiency, this too shows that the newly created entity is performing well.
- **Stock market reaction:** If the stock market reaction to the announcement of merger is positive then the merger appears to be a positive step.

Q22: What are the key practical considerations that need to be kept in mind while entering into a cross-border merger?

OR

"There are certain practicalities which should be kept in mind while entering into a cross border merger."

Briefly comment. (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Some practicalities which need to be kept in mind while entering cross border mergers are:

- a) Conduct due diligence on the other firm.

- b) Conduct a risk-benefit analysis before entering into the merger.
- c) Valuation of both the firms is essential so as to predict law treatment of the merger.
- d) Make sure that when you enter into an outbound merger it is with a company from one of the prescribed jurisdictions.
- e) Have an in-depth analysis of the host country's regulatory and political landscape ready before you take the decision of the merger.

Q23: Petition by Frugal Industries Limited (19.12.2019), under a scheme of arrangement under Sect on 230-234 of the Companies Act, 2013 [in the nature of demerger] was filed before National Company Law Tribunal ("NCLT"), Mumbai Bench. Demerger application contemplated transfer of hiving of two specified undertakings of Frugal Industries Limited into two overseas Resulting Companies, viz. Frugal (Sweden) B. V., and Frugal Holdings USA Inc.

Since, Petitioner Frugal Company is listed company having its shares listed on BSE Limited and National Stock Exchange of India Limited, therefore the company sought the approval of the Stock Exchanges and SEBI which provided their no objection to the Scheme of Demerger. Further, meetings of equity shareholders and unsecured creditors were convened, whereby demerger scheme was approved by majority of equity shareholders and unsecured creditors. However, Regional Director of Companies red flagged the following observations on scheme of demergers :

(a) Sect on 234 refers to cross border mergers and amalgamations and not to demergers.

(b) Sect on 2 (19AA) of the Income Tax, 1961 is violated and same will not amount to tax neutral transaction.

(c) Company to comply with provisions of FEMA and RBI.

Advice as Company Secretary of the Company on the observations raised by RD. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: To

Xxxxx

Frugal Industries Limited

Dear Sir,

This is to advise that under scheme of arrangement, either in the nature of merger or demerger the Frugal Industries demerged company has to comply with Sect on 230 to 234 of Companies Act, 2013, international laws applicable to company, such as Swedish Laws, USA laws, RBI, FEMA, Income Tax Act, Compliance with Sectoral Regulations as applicable to the company alongwith SEBI Compliances etc.

While going through the provisions of Sect on 234 it is evident that same applies to cross border mergers of Indian companies with foreign companies and vice versa and the provisions mention only about the words "Merger" and/ or "Amalgamation" so the Sect on 234 do not provide for or rather restrict the demerger of the Indian Companies with foreign company.

In addition to the above, Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 is silent on 'Demergers' and mentions only 'Mergers' and 'Amalgamations'. Moreover, Foreign Exchange Management (Cross Border Merger) Regulations, 2018 are applicable to the mergers and amalgamations of the Indian companies with the foreign companies only.

For obtaining of Prior approval of RBI for undertaking any cross-border merger, the transferee entity to ensure valuation by a valuer and a declaration is required to be submitted by the transferee company along with the application to RBI for obtaining its approval for the merger.

Procedure as specified in Section 230-232 of the Act are to be undertaken (like as applicable to a domestic merger. In case of outbound merger, foreign entity involved should be from a permitted jurisdiction.

In the Sun Pharma's Scheme of Arrangement NCLT Ahmedabad stated that the Rule 25A is silent on "demergers". The Procedure mentioned in Rule 25A is for Inbound as well as Outbound merger. In absence of clarity over the permissibility of a foreign company demerging its business undertaking to an Indian company or vice versa under the Act, one should not follow the same procedure for cross border demergers. RBI Foreign Exchange Management (Cross Border Merger) Regulations, 2018 defines Cross Border Merger as: 'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013; Interestingly, the notified FEMA Regulations, 2018 has not included word "Demerger" in the definition of Cross Border Merger. Thus, the NCLT rejected the scheme.

Section 2(19AA) of the Income Tax Act defines the term demerger as "the transfer of one or more undertakings by a demerged company to another company." One of the conditions of section 2(19AA) is the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger. This section is violated as demerger scheme was approved by majority of equity shareholders. Therefore, tax benefits available to demerged companies under the Income Tax Act will not be available in this case.

Yours Sincerely

XXXXXXXXXX

Company Secretary

CHAPTER 12 AS PER ICSI MODULE

OVERVIEW OF BUSINESS VALUATION

Q1: Define 'Valuation' and identify and briefly explain the four parts of the valuation process.

Answer: Valuation is a process of appraisal or determination of the value of certain assets, i.e., tangible or intangible, securities, liabilities and a specific business as a going concern or any company listed or unlisted or company undergoing liquidation or other forms of organization, partnership or proprietorship.

Generally, the valuation process has four parts.

- (i) First, pre-valuation process where the valuer and the client agree on the terms of engagement.
- (ii) Second, investigation which is the formal or systematic examination or research undertaken on the property.
- (iii) Third, data handling and interpretation which requires processing and calculation of data, qualification and verification of data, and analysis of data.
- (iv) Fourth, post-valuation process reporting, which provides for a single value, presented in the valuation report.

Q2: What do you understand by the term 'Value'? How is it different from arithmetical exactness?

Answer: 'Value' is a term signifying the material or monetary worth of a thing, which can be estimated in terms of medium of exchange. In other words, it is an assessment resulting in an expression of opinion rather than arithmetical exactness.

Q3: What is the significance of a valuation report, and what characteristics must it possess to be effective.

Answer: The valuation report provides clients with an independent, comparable evidence and a written confirmation of the value of a property that is neither ambiguous nor misleading. Further, the determination of the value and delivery of the valuation report is made by the valuer on the basis of a framework such as RICS Red Book or the IVS (International Valuation Standards). These standards inter alia provide for the bases of value which are the fundamental measurement assumptions on which values are based, and the approaches and methods which are used to attain different valuation bases.

Q4: Why is professional valuation important in financial decision-making, and how have past financial crises influenced the evolution of the valuation profession?

Answer: Professional valuation is crucial in financial decision-making because it determines the economic worth of an asset or company, which directly influences decisions like loan sanctioning, tax assessments, property distribution, insurance, and insolvency resolution. If the valuation is not accurate or genuine, it can lead to misinformed decisions, financial exposure, unfair gains or losses, and even market distortion.

Past financial crises have shown the damaging consequences of poor valuation. For example:

- In the UK property crash of the 1970s, the RICS introduced the Red Book to establish professional valuation standards.

- After the "savings and loan" crisis in the USA during the 1980s, the government implemented uniform appraisal standards and licensing of valuers.
- The 2008 global financial crisis again highlighted the importance of accurate valuations.

These events demonstrate that inaccurate valuations can contribute to financial bubbles and crashes. Therefore, in response to such crises, efforts have been made globally to enhance the **professionalism, accuracy, and reliability** of the valuation profession, especially given its foundational role in market economies.

Q5: Discuss the key situations where business valuation is required, and explain how fair market value plays a role in ensuring informed and unbiased decision-making.

Answer: Valuation of business plays a very vital role, therefore a business owner or individual may need to know the value of a business. The fair market value standard consists of an independent buyer and seller having the requisite knowledge and facts, not under any undue influence or stressors and having access to all of the information to make an informed decision.

Business valuation is carried out to know the business and helps in strategic decision making. Appropriate purpose for valuation becomes the bases of valuation. The strategic decision making in Business Valuation may be related to following:

1. **Merger, acquisition or take over** so that interested party can obtain fair market value - A Party who enters into a transaction with another for acquiring a business would like to acquire a business as a going concern for the purpose of continuing to carry the same business, he might compute the valuation of the target company on a going concern basis. On the other hand, if the intention of the acquirer is to acquire any property such as land, rights, or brands, the valuation would be closely connected to the market price for such property or linked to the possible future revenue generation likely to arise from such acquisition. In every such transaction, therefore, the predominant objective in carrying out a valuation is to put parties to a transaction in a comfortable position so that no one feels aggrieved.
2. **Strategic Partnership, Joint Venture and Collaborations** - Valuation is needed while evaluating decision on Strategic Partnership or Joint Venture or Foreign Collaboration. These have potential to give competitive edge over others in the form of advanced technology or production processes, additional finance, expanding customer base, reengineering of existing product, new products or services, intensive and extensive market coverage.
3. **ESOP, ESPPS and Employee Retention** - These are various tools to retain employees for longer period. ESOP is incentive arrangement made by employer for retaining its key employees by allowing them to purchase the shares of company at a fixed price on the date of the grant. In this waiting period is known as 'vesting period' and the period in which ESOP can be availed by the employee is known as 'exercise period'. Certain percentage of shares is kept in ESOP trust fund until the option to buy share is exercised by the employee. If the employee leaves the company or his services are terminated before the completion of vesting period, then he loses the options to buy the share at pre-decided price which is usually less than market price at the time of exercise period. Lapsed options cannot be converted into shares. ESOPs are taxable at the time of purchase of shares as salary income (perquisites) in the hands of employees. Difference in fair market price and issued price is taxable as salary on the date of issue of shares whereas difference between actual sale price and fair market value is taxable as capital gain in the hands of employees.

4. **At the time of Peaceful Exit** - Valuation is required to be worked out at the time of resolving the disputes among stakeholders; purchase of equity from dissenting shareholders; stake sale or exit by co-venturers, strategic partners, foreign collaborator or strategic investors; divestment by existing promoters in favour of strategic investors.
5. **Specific Situations** - Minority oppression cases, economic damages computations, ownership disputes, cases of insolvency and bankruptcy, breach of contract, during submission of resolution plans, during liquidation and winding up, as part of succession planning, the death or disability of the owner.
6. **Under Company Law provisions** - Valuation is mandatorily required at the time of further issue of shares; issue of shares for consideration other than cash; private placement of shares.
7. **Under Other Laws** - Valuation is required to be carried out under various laws in various situations. Regulations and Rules issued under various Acts have situation specific requirement for valuation like SEBI Act, Foreign Exchange Management Act (FEMA), Income Tax Act, Customs Act, Stamp Duty Act, IBC Code, 2016.
8. **For Insurance Coverage** - Valuation of asset for insurance cover need to be carefully assessed so that, on one side it covers the damage to the fullest extent possible and on the other insurance premium is not in excess. In the matter of insurance, valuation is a two-edged sword. Over valuation is harmful because it results into higher premium whereas under valuation is equally harmful as it will lead to exposed coverage in case of accidental damage to the assets.
9. **Court Directed Valuations** - Sometimes, business valuations are carried out as per the directions of the court. NCLT issues directions and appoints valuers in the matters of oppression and mismanagement. High Courts appoint valuers to resolve disputes and in winding up matters. ITAT and other tribunals may also engage valuers in certain situations.
10. **During winding up process** - The business assets are valued by the office of Official Liquidators. They are attached to High Courts. In Insolvency and Bankruptcy, valuers are appointed by Resolution Professionals to carry out valuation on Insolvency commencement date. In liquidation, company liquidators are required to appoint valuers to carry out valuation on liquidation commencement date. In case of voluntary winding up, company Board is required to engage valuer before issuing solvency certificate.
11. **For IPO and FPO** - Valuation of securities is required to be worked out at the time of listing of securities of the company. SEBI is regulatory authority. Under various regulations, SEBI has prescribed the requirement of valuation as well as valuation methodology.
12. **At the Time of Debt Funding** - At the time of business loans and debt funding, valuation is required to be worked out for the purpose of assessing security cover and need of funds of the business.

Q6: What are the key factors that influence the valuation of assets and liabilities of a business entity?

Answer: The valuation of the assets and liabilities of the business entity depends upon the various factors. These factors may be as under:

- The past dividend track record of the companies.

- The past earning of the companies.
- The price of shares trading at the bourses of the companies, before the news of the merger deal and af er the announcement of the deal.
- Bonus track record of the companies.
- IPO/ FPO of the companies.
- Past history of the prices of the shares of the companies.
- The vot ng strength in the merged ent ty of the shareholders.
- The net worth of the companies.
- Net assets of the companies.
- Liquidity in the Company.
- The underlying net tangible asset.
- Condit ons of business (Running/closed).
- Future earnings and project ons.
- Order Book status, number of ongoing projects, customer future project ons.
- Future capacity ut lisat on.
- Cash f ows.
- Net Present Value (NPV).
- Expected Rate of Return (ERR).

Q7: Valuat on of shares of an enterprise demands a detailed and comprehensive analysis embracing a host of factors at macro and micro level. List out f ve important factors that inf uence the determinat on of price of the shares. (5 marks)

PAST YEAR QUESTION JUNE 2015

OR

Apart from comprehensive analysis covering the past, present and future earnings and prospects of the company, several other factors are to be taken into account for the valuat on of an enterprise.

List out the important factors that deserve considerat on for proper valuat on of an enterprise. (5 marks)

PAST YEAR QUESTION JUNE 2016

OR

“The key to valuat on is f nding a common ground between all the companies for the purpose of a fair evaluat on.” Comment with reference to factors inf uencing valuat on. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Valuing a business requires the determinat on of its future earnings potent al, the risks inherent in those future earnings, Strictly speaking, a company’s fair market value is the price at which the business would change hands between a willing buyer and a willing seller when neither are under any compulsion to buy or sell, and both part es have knowledge of relevant facts. Arriving at the transact on price requires that a value be placed on the company for sale. The process of arriving at this value should include a detailed, comprehensive analysis which takes into account a range of factors including

the past, present, and most importantly, the future earnings and prospects of the company, an analysis of its mix of physical and intangible assets, and the general economic and industry conditions. The other salient factors include:

- (1) The stock exchange price of the shares of the two companies before the commencement of negotiations or the announcement of the bid.
- (2) Dividends paid on the shares.
- (3) Relative growth prospects of the two companies.
- (4) In case of equity shares, the relative gearing of the shares of the two companies. ('gearing' means ratio of the amount of issued preference share capital and debenture stock to the amount of issued ordinary share capital.)
- (5) Net assets of the two companies.
- (6) Voting strength in the merged (amalgamated) enterprise of the shareholders of the two companies.
- (7) Past history of the prices of shares of the two companies.

Q8: Sun Ltd. (listed company) has paid dividend of Rs. 10 per share in the current year. The estimated annual growth rate of the dividend is 5% per annum and share price is Rs.120. Moon Private Ltd. (unlisted company), has paid dividend of Rs. 2 per share. The annual growth rate of the company is estimated to be 10% per annum. Calculate the rate of return of the listed company, Sun Ltd. and apply the same to unlisted company to compute the value of the share of the unlisted company Moon Private Ltd. (Assuming annual growth rate will continue for the future also.) (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Gordon Growth model provides as under:

$$P_0 = D_0(1 + g) / (r_e - g)$$

Where:

P_0 = share price

D_0 = current dividend

g = rate of growth of dividend

r_e = rate of return required by the equity shareholders (student may also use k_e instead of r_e)

Computation of Rate of return required by shareholder of Sun Ltd. (listed company)

By using the following formula rearranged as:

$$r_e = D_0(1 + g) / P_0 + g$$

$$\text{Rate of return } (r_e) = 10 (1 + 5\%) / 120 + 5\%$$

$$= 10 (1 + 0.05) / 120 + 0.05 = 0.1375 = 13.75\%$$

Computation of value of share of Moon Pvt. Ltd.

$$P_0 = D_0 (1 + g) / (r_e - g)$$

$$\text{Value of share } (P_0) = 2 (1 + 10\%) / (13.75\% - 10\%)$$

$$= 2 (1 + 0.1) / (0.1375 - 0.1) = 2.2 / 0.0375 = \text{Rs. } 58.67 \text{ per share}$$

Q9: Whatever may be the degree of complexity and method of satisfaction, valuation is always an estimate — explain citing principles to be kept in mind for valuation. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Valuation is guessing with tact and intelligence. Different methods are adopted to record the price as near as possible on actual disposal. Certain principles need to be borne in mind before finalising Valuation Report. Report may be required for specific assets or may be for whole business or undertaking. In case of whole business or undertaking the past data on segment performance is required to be commented and taken into consideration. Valuation as per the report is taken as successful when the fair market value is arrived at the satisfaction of the seller company and the buyer company is willing to pay if it is beneficial to owners.

Broadly following principles are to be kept in mind for valuation:

Principle of Time Value of Money : This principle suggests that the value can be measured by calculating the present value of future cash flows discounted at the appropriate discount rate.

Principle of Risk and Return : This principle believes that the investors are basically risk averse and on the other hand expects higher amount of wealth. Higher the risk, higher may be possibility of return and vice versa.

Principle of Substitution : This principle believes that understanding the market with competitive forces is very important in order to decide the price consideration. The risk averse investor will not pay more than that of the substitute available in the market.

Principle of Alternatives : This principle suggests that one should explore the various alternatives available in the market and should not rest only on one option.

The benefits of vetting of various alternatives will give a comparative valuation and a prudent investor will choose the most beneficial alternative to his portfolio.

Principle of Expectation : Cash flows are based on the expectations about the performance in future and not the past. In the case of mature companies, we may assume that the growth from today or after some certain period would be constant.

Principle of Reasonableness : In valuation the principle of reasonableness is most important. It takes into consideration various aspects viz. nature of business, historical background, brand image, book value of the stock, earning capacity, dividend track record, etc.

Q10: Discuss the significance of introducing the concept of Registered Valuer under the Companies Act, 2013, and explain the key responsibilities and ethical requirements imposed on valuers under Section 247(2).

Answer: The introduction of the Registered Valuer concept under Chapter XVII of the Companies Act, 2013 marked a significant step toward standardizing valuation practices in India. The objective is to ensure transparency, consistency, and better governance in valuation processes, especially since valuation is of an subjective and a major cause of litigation in Mergers & Acquisitions (M&A).

To address these challenges, the Institute of Chartered Accountants of India (ICAI) issued ICAI Valuation Standards, providing a structured framework for valuation practices in India.

Under Section 247(2) of the Companies Act, a Registered Valuer has the following responsibilities:

- (a) make an impartial, true and fair valuation of any assets;
- (b) exercise due diligence while performing the functions as valuer;

(c) make the valuation in accordance with the Valuation Rules; and (d) not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during three years prior to his appointment as valuer or three years after valuation of assets was conducted by him.

Q11: What are the key provisions of the Companies (Registered Valuers and Valuation) Rules, 2017, and how do they contribute to the regulation and standardization of valuation practices in India?

Answer: The Companies (Registered Valuers and Valuation) Rules, 2017 were introduced to create a structured regulatory framework for valuation practices under the Companies Act, 2013.

(a) registration of valuers, who may be individuals or partnership firms or companies, with Insolvency and Bankruptcy Board of India (IBBI) for conduct of valuation of different classes of assets under the Companies Act, 2013;

(b) recognition of Registered Valuers Organisations (RVOs) to enroll valuer members, enforce a code of conduct on them, and conduct training and educational courses for its members; and

(c) mechanism for notification and modification of valuation standards based on the recommendations of the "Committee to advise on valuation matters"

Q12: Mr. VG is a practicing member of ICSI and he has also passed PMQ course exam on Valuation conducted by ICSI in the year 2022. Recently VG was appointed as valuer by RJ Electronics Ltd. for valuation of assets/liabilities under merger scheme. Mr. VG has submitted valuation report which has been challenged by directors on grounds of valuers' credentials. Evaluate director's objection giving relevant provisions. (5 marks)

(PAST YEAR QUESTION JUNE 2024)

Answer: Section 247 of the Companies Act, 2013 and the Companies (Registered Valuers and Valuation) Rules, 2017 (Valuation Rules) inter alia provides for (a) registration of valuers, who may be individuals or partnership firms or Companies, with the Central Government for conduct of valuation of different classes of assets under the Companies Act, 2013;

The Central Government delegated its powers and functions under section 247 of the Act to the Insolvency and Bankruptcy Board of India (IBBI) and specified it as the Authority under the said Rules. Only a person registered with the Authority as Registered Valuers can conduct valuations required under the Companies Act, 2013 and the Insolvency & Bankruptcy Code. Subject to meeting other requirements, an individual is eligible to be a Registered Valuer, if he:

(a) is a fit and proper person,

(b) has the necessary qualification and experience,

(c) is a valuer member of a Registered Valuers Organisation (RVO),

(d) has completed a recognised educational course as member of an RVO,

(e) has passed the valuation examination conducted by the Authority within three years preceding the date of making the application for registration, and

(f) is recommended by the RVO for registration as a valuer. The individual is required to have either a post-graduate qualification in the specified discipline and three years' experience, or a bachelor's degree in the specified discipline and five years' experience.

Mr. VG is neither qualified, as he has no required experience [Passed in 2022 shows that 3-year experience is not possessed by Mr. VG], nor he is registered with IBBI. Object on of directors is just failed/ tenable.

Q13: How did financial collapses in the late 20th century lead to the development of valuation standards, and what are the key features of the International Valuation Standards (IVS) and RICS Red Book?

Answer: Financial collapses in the late 20th century, particularly those related to property valuations and transactions, highlighted the need for greater transparency, consistency, and professionalism in valuation practices. This concern led to the emergence of valuation standards at both national and international levels.

- In the UK, the Royal Institution of Chartered Surveyors (RICS) responded to the 1970s property crash by publishing the Red Book, which set out standards of valuation and professional conduct for valuers.
- In the USA, following the “savings and loan” crisis of the 1980s, the federal government mandated uniform appraisal standards and required licensing of valuers in every state.

Two major global standards emerged:

1. International Valuation Standards (IVS):

Issued by the **International Valuation Standards Council (IVSC)**, IVS includes:

- **Five General Standards:** Cover scope of work, investigation, compliance, bases of value, valuation approaches and methods, and reporting.
- **Six Asset-specific Standards:** Address valuation of businesses, intangible assets, plant and equipment, real property, development property, and financial instruments. These standards provide background on characteristics influencing value and asset-specific requirements.

IVS offers flexibility to accommodate national legal and regulatory frameworks. Some countries adopt IVS entirely, while others modify them to suit local needs.

2. RICS Red Book:

The **RICS Red Book**:

- Adopts and applies IVS.
- Contains three types of standards:
 - **Professional standards:** Focus on ethics and conduct.
 - **Technical standards:** Emphasize common definitions and conventions.
 - **Performance/delivery standards:** Promote analytical rigour and objectivity.

RICS allows departures to comply with local statutory requirements. These are called national association valuation standards.

The **RICS Valuation Standards – Global and India (2011)** include four **India-specific guidance notes**:

- Valuation for financial statements.
- Valuation for secured lending.
- Valuation of development land in India.
- Valuation for tax purposes in India.

RICS is also working on a national supplement to the Red Book specifically for Indian jurisdiction.

Q14: Write a note on International Valuation Standards Council. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: The International Valuation Standards Council (IVSC) is the established international standard setter for valuation. Through the International Valuation Standards Board, the IVSC develops and maintains

standards on how to undertake and report valuations, especially those that will be relied upon by investors and other third party stakeholders.

The IVSC also supports the need to develop a framework of guidance on best practices for valuation of the various classes of assets and liabilities and for the consistent delivery of the standards by properly trained professionals around the globe. The IVSC has published International Valuation Standards (IVS) since 1985. Membership of IVSC is open to organisations of users, providers, professional institutes, educators, and regulators of valuation services. IVSC members appoint the IVSC Board of Trustees.

Q15: What do the Valuation Rules (Rules 8, 18, and 19) state regarding the use, notification, and formulation of valuation standards in India?

Answer: The Valuation Rules under the Companies (Registered Valuers and Valuation) Rules, 2017 provide a legal framework for the adoption and implementation of valuation standards in India. Specifically:

Rule 8 – Compliance with Valuation Standards:

- Mandates that a Registered Valuer (RV) must comply with valuation standards as notified or modified by the Central Government while conducting valuations.
- Until such standards are officially notified, an RV may use:
 - Internationally accepted valuation standards, or
 - Valuation standards adopted by any Registered Valuers Organisation (RVO).

Rule 18 – Notification and Modification of Standards:

- Empowers the Central Government to notify or modify valuation standards from time to time.
- This process is based on the recommendations of the Committee constituted to advise on valuation matters.

Rule 19 – Constitution of Advisory Committee:

- Authorizes the Central Government to form a committee tasked with making recommendations on:
 - The formulation of valuation standards, and
 - Policies for compliance by companies and Registered Valuers (RVs).
- In accordance with this provision, the government has constituted a Committee to advise on valuation matters.

Q16: What are the key provisions of Section 247 of the Companies Act, 2013 regarding valuation, and what are the duties, restrictions, and penalties applicable to Registered Valuers?

Answer: Section 247 of the Companies Act, 2013 lays down the legal framework for valuation of assets, liabilities, or net worth of a company and mandates that such valuation must be carried out by a Registered Valuer with prescribed qualifications and experience.

1. Who can conduct valuation:

Only a person registered as a valuer and a member of a recognised Registered Valuers Organisation (RVO) can conduct valuations.

The valuer must be appointed by the Audit Committee of the company, or if there is none, by the Board of Directors.

2. Scope of Valuation:

Valuation is required for property, stocks, shares, debentures, securities, goodwill, or any other assets or liabilities or net worth of a company.

3. Duties of the Registered Valuer:

- Make an impartial, true, and fair valuation.
- Exercise due diligence while performing duties.
- Follow the prescribed rules and valuation standards.
- Must not conduct valuation of any assets in which they have a direct or indirect interest during a period of three years before or after the valuation.

4. Penalties for Contravention:

- If the valuer violates provisions or rules, they may be fined between ₹25,000 and ₹1,00,000.
- If the violation is committed with intent to defraud, the penalty includes imprisonment up to one year and fine between ₹1,00,000 and ₹5,00,000.

5. Liability upon Conviction:

- The valuer must:
 - Refund the remuneration received.
 - Pay for damages to the company or any person who suffered loss due to incorrect or misleading statements in the valuation report.

Q17: What is the significance of the notification of the Companies (Registered Valuers and Valuation) Rules, 2017, and how does it impact valuation practices in India?

Answer:

The Companies (Registered Valuers and Valuation) Rules, 2017, notified by the Central Government vide Notification No. GSR 1316(E) dated 18-10-2017, marked a significant reform in the regulation of valuation practices under the Companies Act, 2013.

Significance and Impact:**1. Clarity and Standardization:**

The Rules bring clarity to various aspects of valuation and establish a uniform framework for valuers, stakeholders, and regulators.

2. Formation of Registered Valuers Organisations (RVOs):

The Rules provide for the creation of RVOs to enroll valuers, impart continuous education, and ensure professional development, addressing the earlier lack of formal training and regulation.

3. Need for Education and Regulation:

Although some consensus existed on valuation methods, there was a strong need for systematic education, training, and regulation of valuation practices to eliminate inconsistencies.

4. Setting of Valuation Standards:

The Rules pave the way for formal Valuation Standards, which will:

- Ensure true, fair, and complete disclosure in valuation reports.
- Promote objectivity and consistency in valuation procedures.

5. Improved Transparency and Governance:

The adoption of standardized valuation practices will lead to greater transparency, better corporate governance, and enhanced stakeholder confidence.

It will also help in plugging loopholes and preventing manipulations in valuation processes.

In essence, the notification of these Rules represents a crucial step toward the professionalization of valuation services in India, contributing to market integrity and investor protection.

Q18: What are the eligibility criteria for an individual to be registered as a valuer under the Companies (Registered Valuers and Valuation) Rules, 2017?

Answer: As per **Rule 3(1)** of the Companies (Registered Valuers and Valuation) Rules, 2017 provides that a person shall be eligible to be a registered valuer if he

- (a) is a valuer member of a registered valuers organisation; Explanation – For the purposes of this clause, “a valuer member” is a member of a registered valuers organisation who possesses the requisite educational qualifications and experience for being registered as a valuer;
- (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;

Explanation – For the purposes of these rules ‘person resident in India’ shall have the same meaning as defined in clause (v) of section 2 of the Foreign Exchange Management Act, 1999 as far as it is applicable to an individual;

- (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: 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;
- (j) has not been levied a penalty under section 271J of Income-tax Act, 1961 and the 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
- (k) 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.

Q19: A partnership firm has been set up for objects for rendering professional or financial services etc. It wants to appoint itself as a registered valuer under rule 3 of The Companies (Registered Valuers and

Valuation, Rules, 2017. Comment and advise whether the firm is eligible for appointment as a registered valuer. (5 marks)

PAST YEAR QUESTION JUNE 2020

OR

PQR Ltd. is in the process of getting its securities listed on the stock exchange.

The company needs to get the valuations done as per the requirements of SEBI. The Board of Directors have proposed the name of M/s Sunidhi and Associates, a partnership firm, to be appointed as the valuers for the above mentioned purpose. In the light of the provisions of Rule 3 of The Companies (Registered Valuers and Valuation) Rules, 2017, a partnership firm becomes ineligible to be appointed as registered valuer in circumstances stated in the above mentioned rule.

As the Company Secretary of PQR Ltd., state such circumstances to confirm that M/s Sunidhi and Associates do not fall under any of the ineligibility criterion. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 provides that no partnership entity or company shall be eligible to be a registered valuer if-

(a) it has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is a subsidiary, joint venture or associate of another company or body corporate;

(b) it is undergoing an insolvency resolution or is an undischarged bankrupt.

(c) all the partners or directors, as the case may be, are not ineligible under clauses (c), (d), (e), (f), (g), (h), (i), (j) and (k) of sub-rule (1);

(d) three or all the partners or directors, whichever is lower, of the partnership entity or company, as the case may be, are not registered valuers; or

(e) none of its partners or directors, as the case may be, is a registered valuer for the asset class, for the valuation of which it seeks to be a registered valuer.

Therefore, from the above, it may be concluded that the firm is eligible to appoint itself as registered valuer.

Q20: What are the qualification and experience requirements under Rule 4 for an individual to be eligible for registration as a valuer?

Answer: Under **Rule 4** of the Companies (Registered Valuers and Valuation) Rules, 2017, an individual must meet **one** of the following criteria to be eligible for registration as a **Registered Valuer**:

(a) post-graduate degree or post-graduate diploma, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least three years of experience in the specified discipline thereafter; or

(b) a Bachelor's degree or equivalent, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least five years of experience in the specified discipline thereafter; or

(c) membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership.

Q21: What are the provisions under Rule 5 and Rule 6 of the Companies (Registered Valuers and Valuation) Rules, 2017 regarding the valuation examination and certificate of registration?

Answer: As per Rule 5 and Rule 6 of the Companies (Registered Valuers and Valuation) Rules, 2017:

- (1) An individual who passes the valuation examination shall receive the acknowledgment of passing the examination.
- (2) After submitting necessary papers along with application for examination, the authority upon satisfaction may grant the certificate of registration to the applicant to carry out activities of registered valuer.

Q22: What are the key requirements under Rule 8 of the Companies (Registered Valuers and Valuation) Rules, 2017 regarding the conduct of valuation by a Registered Valuer?

Answer: Under **Rule 8** of the Companies (Registered Valuers and Valuation) Rules, 2017, the following key requirements are prescribed for the **conduct of valuation** by a Registered Valuer:

- (1) The registered valuer shall, while conducting a valuation, comply with the valuation standards as notified or modified under rule 18:

Provided that until the valuation standards are notified or modified by the Central Government, a valuer shall make valuations as per-

- (a) internationally accepted valuation standards;
 - (b) valuation standards adopted by any registered valuer's organisation.
- (2) The registered valuer may obtain inputs for his valuation report or get a separate valuation for an asset class conducted from another registered valuer, in which case he shall fully disclose the details of the inputs and the particulars etc. of the other registered valuer in his report and the liabilities against the resultant valuation, irrespective of the nature of inputs or valuation by the other registered valuer, shall remain of the first mentioned registered valuer.
 - (3) The valuer shall, in his report, state the following: -
 - (a) background information of the asset being valued;
 - (b) purpose of valuation and appointing authority;
 - (c) identity of the valuer and any other experts involved in the valuation;
 - (d) disclosure of valuer interest or conflict, if any;
 - (e) date of appointment, valuation date and date of report;
 - (f) inspections and/or investigations undertaken;
 - (g) nature and sources of the information used or relied upon;
 - (h) procedures adopted in carrying out the valuation and valuation standards followed;
 - (i) restrictions on use of the report, if any;
 - (j) major factors that were taken into account during the valuation;
 - (k) conclusion; and
 - (l) caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

Q23: What are the eligibility criteria under Rule 12 of the Companies (Registered Valuers and Valuation) Rules, 2017 for recognition as a Registered Valuers Organisation (RVO)?

Answer: As per **Rule 12** of the Companies (Registered Valuers and Valuation) Rules, 2017, an organisation may be recognised as a Registered Valuers Organisation (RVO) for specific asset class(es) if it meets the following criteria:

- (1) An organisation that meets requirements under sub-rule (2) may be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes if
 - (i) it has been registered under section 25 of the Companies Act, 1956 (1 of 1956) or section 8 of the Companies Act, 2013 (18 of 2013) with the sole object of dealing with matters relating to regulation of valuers of an asset class or asset classes;
 - (ii) it is a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession; Provided that, subject to sub-rule (3), the following organisations may also be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes, namely:-
 - (a) an organisation registered as a society under the Societies Registration Act, 1860 or any relevant state law, or;
 - (b) an organisation set up as a trust governed by the Indian Trust Act, 1882.
- (2) The organisation referred to in sub-rule (1) shall be recognised if it –
 - (a) conducts educational courses in valuation, in accordance with the syllabus determined by the authority, under rule 5, for individuals who may be its valuers' members, and delivered in classroom or through distance education modules and which includes practical training;
 - (b) grants membership or certificate of practice to individuals, who possess the qualifications and experience as specified in rule 4, in respect of valuation of asset class for which it is recognised as a registered valuers organisation;
 - (c) conducts training for the individual members before a certificate of practice is issued to them;
 - (d) lays down and enforces a code of conduct for valuers who are its members;
 - (e) provides for continuing education of individuals who are its members;
 - (f) monitors and reviews the functioning, including quality of service, of valuers who are its members; and
 - (g) has a mechanism to address grievances and conduct disciplinary proceedings against valuers who are its members.
- (3) A registered valuers organisation, being an entity under proviso to sub-rule (1), shall convert into or register itself as a company under section 8 of the Companies Act, 2013, within one year from the date of commencement of these rules.

Q24: What does Regulation 27 of the SEBI (ICDR) Regulations, 2018 require regarding the disclosure of the face value of equity shares?

Answer: Regulation 27 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 mandates that the face value of equity shares must be clearly disclosed in the draft offer document, offer document, advertisements, and application forms. This disclosure should be made along with the price band or issue price, and must be presented in identical font size to ensure transparency and avoid any misleading impression for investors.

Q25: What does Regulation 28 of the SEBI (ICDR) Regulations, 2018 state regarding the pricing of equity shares and convertible securities?

Answer: As per Regulation 28 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018:

1. The issuer may determine the price of equity shares, and in the case of convertible securities, the coupon rate and conversion price, in consultation with the lead manager(s) or through the book building process, as applicable.
2. If the book building route is chosen, the issuer must undertake the book building process in the manner specified in Schedule XIII of the Regulations.

Q26: What are the key provisions under Regulation 29 of SEBI (ICDR) Regulations, 2018 regarding the price and price band in public issues?

Answer: (1) The issuer may mention a price or a price band in the offer document (in case of a fixed price issue) and a floor price or a price band in the red herring prospectus (in case of a book built issue) and determine the price at a later date before filing the prospectus with the Registrar of Companies:

Provided that the prospectus filed with the Registrar of Companies shall contain only one price or the specific coupon rate, as the case may be.

(2) The cap on the price band, and the coupon rate in case of convertible debt instruments, shall be less than or equal to one hundred and twenty per cent. of the floor price. Provided that the cap of the price band shall be at least one hundred and five percent of the floor price.

(3) The floor price or the final price shall not be less than the face value of the specified securities.

(4) Where the issuer opts not to make the disclosure of the floor price or price band in the red herring prospectus, the issuer shall announce the floor price or the price band at least two working days before the opening of the issue in the same newspapers in which the pre-issue advertisement was released or together with the pre-issue advertisement in the format prescribed under Part A of Schedule X.

(5) The announcement referred to in sub-regulation (4) shall contain relevant financial ratios computed for both upper and lower end of the price band and also a statement drawing attention of the investors to the section titled "basis of issue price" of the offer document.

(6) The announcement referred to in sub-regulation (4) and the relevant financial ratios referred to in sub-regulation (5) shall be disclosed on the websites of the stock exchange(s) and shall also be pre-filled in the application forms to be made available on the websites of the stock exchange(s).

Q27: What are the provisions related to differential pricing under Regulation 30 of SEBI (ICDR) Regulations, 2018?

Answer: Under Regulation 30 of the SEBI (ICDR) Regulations, 2018, the issuer may offer specified securities at **differential prices** to different categories of investors, subject to the following conditions:

(1) The issuer may offer its specified securities at different prices, subject to the following:

- (a) retail individual investors or retail individual shareholders or employees entitled for reservation made under regulation 33 may be offered specified securities at a price not lower than by more than ten per cent. of the price at which net offer is made to other categories of applicants, excluding anchor investors;

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

(c) In case the issuer opts for the alternate method of book building in terms of Part D of Schedule XIII, the issuer may offer the specified securities to its employees at a price not lower than by more than ten per cent. of the floor price.

(2) Discount, if any, shall be expressed in rupee terms in the offer document.

Q28: What are the pricing provisions for frequently traded shares under Regulation 164 of SEBI (ICDR) Regulations, 2018 in case of preferential issues?

Answer: Regulation 164 specifies the pricing methodology for frequently traded equity shares in a preferential issue based on the duration of listing on a recognised stock exchange:

1) If the shares have been listed for 90 trading days or more as of the relevant date, the issue price shall be not less than the higher of:

- a) The 90 trading days' Volume Weighted Average Price (VWAP) preceding the relevant date, or
- b) The 10 trading days' VWAP preceding the relevant date.

Furthermore, if the issuer's Articles of Association specify a method that results in a higher floor price, that higher price shall be treated as the applicable floor price for the preferential issue.

2) If the issuer's equity shares have been listed on a recognised stock exchange for **less** than 90 trading days as on the relevant date, the floor price for the preferential issue must be not less than the highest of the following:

- a) The IPO price or the value per share determined under a scheme of compromise, arrangement, or amalgamation under Sections 230 to 234 of the Companies Act, 2013, pursuant to which the shares were listed;
- b) The average of the Volume Weighted Average Prices (VWAP) during the entire period the shares have been listed preceding the relevant date;
- c) The average of the 10 trading days' VWAP during the two weeks preceding the relevant date.

Additionally, if the Articles of Association of the issuer specify a method that results in a higher floor price, then that higher price shall be considered the applicable floor price for the preferential issue.

3) When the price of equity shares is determined under sub-regulation (2)—i.e., when the shares have been listed for less than 90 trading days—the issuer is required to recompute the price on completion of 90 trading days from the date of listing.

This recomputed price must be based on the 90 trading days' Volume Weighted Average Price (VWAP) of the equity shares quoted on a recognised stock exchange during that period.

If the recomputed price is higher than the allotment price, the difference must be paid by the allottees to the issuer.

Additionally, if the Articles of Association prescribe a higher floor price, that price shall override the recomputed value and be considered the applicable floor price.

4) (a) when a preferential issue of specified securities is made to Qualified Institutional Buyers (QIBs), not exceeding five in number, the issue price must be not less than the 10 trading days' Volume Weighted Average Price (VWAP) of the equity shares quoted on a recognised stock exchange preceding the relevant date.

Additionally, if the Articles of Association of the issuer specify a method of price determination that results in a higher floor price, that higher price shall be considered the applicable floor price for the preferential allotment.

(b) No allotment shall be made, directly or indirectly, to any Qualified Institutional Buyer (QIB) who is a promoter or a person related to the promoters of the issuer.

However, an exception is made for a QIB who does not hold any shares in the issuer and has acquired rights purely in the capacity of a lender—such a QIB is not considered related to the promoters.

A QIB is deemed to be related to the promoters if they hold any of the following rights:

(a) Rights under a shareholders' or voting agreement with the promoters or promoter group;

(b) Veto rights;

(c) Right to appoint a nominee director on the board of the issuer.

(5) frequently traded shares" are defined as those shares of the issuer in which the traded turnover on any recognised stock exchange during the 240 trading days preceding the relevant date is at least 10% of the total number of shares of that class.

If the share capital of that class was not uniform throughout the 240-day period, the weighted average number of total shares of that class during the period shall be used for this calculation.

For the purpose of determining trading volumes and prices, "stock exchange" refers to any recognised stock exchange where the equity shares of the issuer are listed, and specifically the one that recorded the highest trading volume of the issuer's shares in the 90 trading days prior to the relevant date.

Q29: Write a short note on the valuation of stock options under SEBI (Share Based Employee Benefits) Regulations, 2014. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Valuation under SEBI (Share Based Employee Benefits) Regulations, 2014

Regulation 17 states that the company granting options to its employees under an Employee Stock Option Scheme (ESOS) is free to determine the exercise price of the options. However, this pricing must conform to the accounting policies specified in Regulation 15 of the same regulations. Under Regulation 15, any company implementing share-based schemes must comply with the accounting standards prescribed by the Central Government under Section 133 of the Companies Act, 2013. This includes following the disclosure requirements and any relevant Guidance Note on Accounting for Employee Share-based Payments issued from time to time.

Q30: What are the pricing and lock-in requirements for shares issued under the Employee Stock Purchase Scheme (ESPS) as per Regulation 22 of SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021?

Answer: Under Regulation 22:

1. **Pricing:** A company may determine the price of shares issued under EPS, provided it conforms to the accounting policies specified under Regulation 15.

2. **Lock-in Period:** Shares issued under ESPS must be locked-in for a minimum period of **one year from the date of allotment**.

○ If shares are allotted under ESPS in lieu of shares acquired by the employee under an ESPS of a company that has merged or amalgamated with the first company, the lock-in period already completed on the transferor company's shares will be adjusted against the required lock-in period.

○ The lock-in requirement is waived from the date of death or permanent incapacity of the employee.

3. **Except on for Public Issues:** If ESPS shares are issued as part of a public issue at the same price as the public issue price, the shares

4.

Q31: How is the price of sweat equity shares determined for a listed company as per Regulation 33 of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2011?

Answer: As per Regulation 33, the price of sweat equity shares issued by a listed company shall be determined in accordance with the pricing requirements specified for a preferential issue to a person other than a qualified institutional buyer under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Q32: Explain the provision relating to 'Discovered Price' under the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2011. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Regulation 20 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2011 deals with discovered Price. It states that:

(1) After fixation of the floor price under sub-regulation (2), the discovered price shall be determined through the reverse book building process in the manner specified in Schedule II of these regulations, and the Manager to the offer shall disclose the same in the detailed public announcement and the letter of offer.

(2) The floor price shall be determined in terms of Regulation 8 of SEBI Takeover Regulations as may be applicable.

(3) The reference date for computing the floor price would be the date on which the recognized stock exchange(s) was required to be notified of the board meeting in which the delisting proposal was considered and approved.

(4) The acquirer shall have the option to provide an indicative price in respect of the delisting offer, which shall be higher than the floor price calculated in terms of sub-regulation (2).

(5) The acquirer shall also have the option to revise the indicative price upwards before the start of the bidding period and the same shall be duly disclosed to the shareholders.

(6) The acquirer may, if it deems fit, pay a price higher than the discovered price determined in terms of sub-regulation (1).

Q33: Explain the term "Discovered Price" as defined under regulation 20 of The SEBI (Delisting of Equity Shares) Regulations, 2011. (3 marks)

PAST YEAR QUESTION DECEMBER 2024 OLD

Answer: Regulation 20 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2011 dealing with discovered price.

Regulation 20 (1) provides that after fixation of the floor price under 19 in terms of regulation 19A of these regulations, the discovered price shall be determined through the reverse book building process in the manner specified in Schedule II of these regulations and shall be disclosed in the detailed public announcement and the letter of offer by the Manager of the offer.

The acquirer shall have the option to provide an indicative price in respect of the delisting offer, which shall be higher than the floor price calculated in terms of regulation 19A of these regulations.

The acquirer shall also have the option to revise the indicative price upwards before the start of the bidding period and the same shall be duly disclosed to the shareholders.

R. 20(6) The acquirer may, if it deems fit, pay a price higher than the discovered price determined in terms of sub-regulation (1).

Q34: What is the offer price in the context of SEBI (SAST) Regulations, 2011, and how is it determined?

Answer: The offer price is the price at which an acquirer announces to acquire shares from public shareholders under an open offer. According to SEBI (SAST) Regulations, 2011, the offer price shall not be less than the price calculated under Regulation 8 of the same regulations, which provides the pricing methodology for frequently or infrequently traded shares.

Q35: Explain the pricing of shares issued under FDI Policy, 2015 to persons resident outside India by an Indian company. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

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

- (a) the price worked out in accordance with the SEBI guidelines, as applicable, where the shares of the company are listed on any recognised stock exchange in India;
- (b) the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognised stock exchange in India; and
- (c) the price as applicable to transfer of shares from resident to non-resident as per the pricing guidelines laid down by the Reserve Bank from time to time, where the issue of shares is on preferential allotment.

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

Q36: What are the key valuation requirements under various Indian statutes, specifically the Companies Act, 2013?

Answer: In India, multiple statutes require valuations to be carried out by professionals, including:

- Companies Act, 2013
- Insolvency and Bankruptcy Code, 2016
- Indian Accounting Standards (IndAS)

- SEBI Regulations
- Income Tax Act, 1961
- Foreign Exchange Management Act, 1999 (FEMA)

Q37: Under Sect on 39 of the Companies Act, 2013 and the Companies (Prospectus and Allotment of Securities) Rules, 2014, when is the report of a registered valuer required?

Answer: Under **Sect on 39** and the Companies (Prospectus and Allotment of Securities) Rules, 2014, a registered valuer's report is required when securities (other than bonus shares) are allotted as fully or partly paid up for consideration other than cash.

In such cases, the company must attach the registered valuer's report valuing the non-cash consideration along with the contract and submit it with Form PAS-3 (Return of Allotment).

Q38: Explain issue of Sweat Equity shares and its valuation. (3 Marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Sweat equity shares are issued for consideration other than cash such as technical know-how, brand equity, design, patent or any other intangible asset. The intangible asset could come from promoters or director or even employees of the company.

Sect on 54 of the Companies Act, 2013, specifies the conditions under which sweat equity shares may be issued. The issue is to be authorised by a special resolution, the number of shares to be issued, the recipients, and at least one year must have passed after the company had been incorporated.

Valuation of shares involves two steps -

1. Valuation of the share price; and
2. Valuation of the intangible assets,

The valuation of the share price shall be done by a registered valuer and the intangible asset also be valued by a registered valuer (say the intellectual property right i.e. the human resource value needs to be evaluated and added or considered).

Q39: PQR Ltd. has decided to issue Sweat equity shares, to compensate its employees for their contributions to the company by way of time, effort, expertise, increasing revenue, improving operational efficiency, or developing innovative products or services etc.

In the light of the provisions under the sub rules of rule 8 of Companies (Share Capital and Debentures) Rules, 2014 w.r.t. issue of sweat equity shares, advise the Board of directors of PQR Ltd. regarding:

(i) Valuation of sweat equity shares

(ii) Treatment of the transaction in the books of PQR Ltd. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Sect on 54 of the Companies Act, 2013 read with Rule 8 of the Companies (Share Capital and Debentures) Rules, 2014 states that the:

(i) Valuation of Sweat Equity Shares:

The sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation. The valuation of intellectual property rights or of know how or

value additions for which sweat equity shares are to be issued, shall be carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with justification for such valuation. A copy of gist along with critical elements of the valuation report obtained under clause (6) and clause (7) shall be sent to the shareholders with the notice of the general meeting.

(ii) Treatment of transaction in the books of PQR Limited: Where sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect thereof obtained from the registered valuer, such non-cash consideration shall be treated in the following manner in the books of account of the company-
 (a) where the non-cash consideration takes the form of a depreciable or amortisable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or
 (b) where clause (a) is not applicable, it shall be expensed as provided in the accounting standards.

The amount of sweat equity shares issued shall be treated as part of managerial remuneration for the purposes of sections 197 and 198 of the Act, if the following conditions are fulfilled, namely:-

(a) the sweat equity shares are issued to any director or manager; and
 (b) they are issued for consideration other than cash, which does not take the form of an asset which can be carried to the balance sheet of the company in accordance with the applicable accounting standards.

In respect of sweat equity shares issued during an accounting period, the accounting value of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company, if the sweat equity shares are not issued pursuant to acquisition of an asset.

If the shares are issued pursuant to acquisition of an asset, the value of the asset, as determined by the valuation report, shall be carried in the balance sheet as per the Accounting Standards and such amount of the accounting value of the sweat equity shares that is in excess of the value of the asset acquired, as per the valuation report, shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

Explanation.- For the purposes of this sub-rule, it is hereby clarified that the Accounting value shall be the fair value of the sweat equity shares as determined by a registered valuer under sub-rule (6).

Q40: Prepare a specimen disclosure to be made in accordance with Regulation 6(3) of SEBI (Issue of Sweat Equity Shares) Regulations, 2002. Suitable assumptions may be taken. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Specimen disclosures and its assumptions are given below:

S. No.	Particulars	Sample relevant disclosures
1	Total no. of shares to be issued as sweat equity	1,50,000 equity shares
2	The current market price of the shares of the company	₹45 per share
3	Value of the intellectual property rights / technical know-how or other value addition to be received from the employee or director along with the valuation report / basis of valuation.	₹65,00,000/- arrived at on the basis of Valuation report received from Mr. X, Registered Valuer.

4	Names of employees/directors/promoters to whom sweat equity shares shall be issued and their relationship with the company	Mr. Z, Chief Financial Officer. Joined on 1st January, 2015
5	Consideration to be paid for the sweat equity	The shares are allotted in lieu of the part remuneration payable to Mr. Z.
6	Price at which the sweat equity shares shall be issued	₹35 per share
7	Ceiling on managerial remuneration, if any, which will be affected by such issuance of such sweat equity	None
8	Diluted Earnings Per Share (EPS) pursuant to the issue of securities to be calculated in accordance with International Accounting Standards / standards specified by the Institute of Chartered Accountants of India	₹7.5 per share (as per applicable accounting standards)

Q41: When is a registered valuer's report required under Sect on 62(1)(b) of the Companies Act, 2013 and Rule 16 of the Companies (Share Capital and Debentures) Rules, 2014 for Employee Stock Option or Purchase Schemes?

Answer: Under Sect on 62(1)(b) and Rule 16 of the Companies (Share Capital and Debentures) Rules, 2014, a registered valuer's report is required if the shares of the company are not listed on a recognized stock exchange.

In such cases, for an approved Employee Stock Option Scheme (ESOS) or Employee Stock Purchase Scheme (ESPS)—where money is provided by the company or its holding company for the benefit of employees—the valuation of shares to be purchased or subscribed must be conducted by a registered valuer.

Q42: When is a registered valuer's report required under Sect on 62(1)(c) and Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 for the issue of shares on a preferential basis?

Answer: Under Sect on 62(1)(c) and Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, a registered valuer's report is mandatory when an unlisted company issues shares on a preferential basis, whether for cash or consideration other than cash.

Key requirements include:

- The price of the shares must be determined based on a valuation report by a registered valuer.

The company must disclose the basis on which the price of shares has been arrived at.

This disclosure must be accompanied by the valuation report prepared by the registered valuer.

If the shares are being allotted for consideration other than cash, the company must provide a justification for such allotment, along with the valuation report.

All these details must be included in the explanatory statement that is annexed to the notice of the general meeting, as per Sect on 102 of the Companies Act, 2013.

The price for shares or securities issued on a preferential basis—whether for cash or for any other consideration—must be based on a valuation report prepared by a registered valuer.

For convertible securities issued on a preferential basis:

- The price of the resulting shares upon conversion must be determined:

1. Upfront Valuation (at the time of offer):

- Price is fixed at the time the convertible securities are offered.
- Based on a valuation report from a registered valuer prepared specifically for this offer.

2. Valuation at conversion time:

Price is determined when the holder becomes entitled to apply for shares, but not earlier than 30 days before this date.

The valuation report used for this price must be recent—issued not earlier than 60 days before the entitlement date.

Allotment of Shares or Securities for Non-Cash Consideration:

- When shares or securities are issued in exchange for something other than cash (like assets, services, or any other form of consideration),
- The value of that non-cash consideration must be determined by a registered valuer.

Q43: Under Sect on 73 of the Companies Act, 2013 and Rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014, when is a registered valuer's report required for bonds or debentures?

Answer: Under Sect on 73 and Rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014, a registered valuer's report is required when a company issues secured bonds or debentures that are secured by a first charge or pari passu charge on the company's assets (excluding intangible assets) listed under Schedule III of the Act.

In such cases:

- The amount of bonds or debentures issued must not exceed the market value of the secured assets.
- The market value of those assets must be assessed by a registered valuer.

This ensures that the security offered truly covers the value of the instruments issued, protecting investor interest and maintaining regulatory compliance.

Q44: When is a registered valuer's report required under Sect on 73 and Rule 6 of the Companies (Acceptance of Deposits) Rules, 2014 regarding the creation of security for secured deposits?

Answer: Under Sect on 73 and Rule 6 of the Companies (Acceptance of Deposits) Rules, 2014, a registered valuer's report is required when a company provides security by way of a charge on its assets (excluding intangible assets) as per Schedule III of the Companies Act for accepting secured deposits.

The requirement is:

- The market value of the charged assets must be assessed by a registered valuer.
- The amount of secured deposits and interest payable must not exceed this assessed market value.

This ensures that the security offered is adequate and verifiable, protecting the interests of depositors and complying with legal standards.

Q45: What is the valuation requirement under Sect on 192 of the Companies Act, 2013 regarding non-cash transactions involving directors?

Answer: Under Sect on 192 of the Companies Act, 2013, if a company enters into a non-cash transact on involving a director (or a person connected with the director), such as:

- A director acquiring assets from the company for considerat on other than cash, or
- The company acquiring assets from a director or connected person for non-cash considerat on, then prior approval by way of a resolut on in a general meet ng is required.

The not ce for such approval must include:

- Part culars of the arrangement, and
- The value of the assets involved, which must be duly calculated by a registered valuer.

This ensures transparency and fair valuat on in related-party transact ons involving directors.

Q46: What are the valuat on requirements under Sect on 230 of the Companies Act, 2013 and Rule 3 of the Companies (Compromises, Arrangements and Amalgamat ons) Rules in case of a compromise, arrangement, or takeover?

Answer: Under Sect on 230 of the Companies Act, 2013, when a compromise or arrangement is proposed between a company and its creditors or members, the applicant (company, creditor, member, or liquidator) must submit a valuat on report to the Tribunal. This report must be prepared by a registered valuer and include the valuat on of:

- Shares,
- Tangible and intangible property, and
- Movable and immovable assets of the company.

Addit onally, under Rule 3 of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, if an applicat on involves a takeover of er, it must include a registered valuer's report that discloses:

1. The highest price paid by any person or group for acquisit on of shares in the last 12 months.
2. The fair price of the shares, determined using valuat on parameters such as:
 - Return on net worth,
 - Book value,
 - Earning per share,
 - Price-earning mult ple compared to industry average,
 - And other customary valuat on methods.

These requirements ensure fairness, transparency, and proper valuat on during corporate restructurings or takeovers.

Q47: What are the valuat on requirements under Sect on 234 of the Companies Act, 2013 and Rule 25A of the Companies (Compromises, Arrangements and Amalgamat ons) Rules, 2016 in the case of a merger or amalgamat on involving a foreign company?

Answer: Under Sect on 234 and Rule 25A, in the case of a merger or amalgamat on between an Indian company and a foreign company, the transferee company must ensure that:

- The valuat on is conducted by valuers who are members of a recognised professional body in the jurisdict on of the transferee company.
- The valuat on must follow internat onally accepted account ng and valuat on principles.

If the transferee company is an Indian company, then the valuation must be conducted by a Registered Valuer in accordance with Indian regulatory requirements.

Q48: What are the valuation requirements under Sect on 236 of the Companies Act, 2013 and Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 for the purchase of minority shareholding?

Answer: When an acquirer (or a person acting in concert) becomes the holder of 90% or more of a company's issued equity share capital, they must offer to buy out the minority shareholders at a price determined through a valuation by a registered valuer. The key valuation requirements are:

• **For listed companies:**

- The offer price must be as per SEBI regulations.
- A valuation report by a registered valuer must also be submitted to the Board of Directors justifying the price.

• **For unlisted and private companies:**

The offer price must consider:

- The highest price paid by the acquirer in the last 12 months.
- A fair price determined by a registered valuer using valuation metrics such as:
 - Return on net worth
 - Book value of shares
 - Earnings per share
 - Price-to-earnings ratio vs. industry average
 - Other customary parameters
- A valuation report addressed to the Board of Directors justifying the valuation must be provided.

Q49: 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 sect on 281(1) of the Companies Act, 2013? (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: According to sect on 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)].

Q50: 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 Rule 8 of the Companies (Registered Valuers and Valuation) Rules

Answer: Rule 8 of the Companies (Registered Valuers and Valuation) Rules, provides for the requisites w.r.t. conduct of valuation in terms of mandatory contents to be stated by the valuer in his report: -

- (a) background information of the asset being valued;
- (b) purpose of valuation and appointing authority;
- (c) identity of the valuer and any other experts involved in the valuation;
- (d) disclosure of valuer interest or conflict, if any;
- (e) date of appointment, valuation date and date of report;
- (f) inspections and/or investigations undertaken;
- (g) nature and sources of the information used or relied upon;
- (h) procedures adopted in carrying out the valuation and valuation standards followed;
- (i) restrictions on use of the report, if any;
- (j) major factors that were taken into account during the valuation;
- (k) conclusion; and
- (l) caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

Q51: What are the requirements and guidelines for appointing registered valuers under the Insolvency and Bankruptcy Code, 2016, and what valuations must they perform?

Answer: As per Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,

- The resolution professional shall, within seven days of his appointment but not later than forty-seventh day from the insolvency commencement date,
- appoint two registered valuers,
- to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

Q52: How is the fair value and liquidation value of a corporate debtor determined under Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016?

Answer: Under Regulation 35 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the fair value and liquidation value of a corporate debtor are determined as follows:

- Two registered valuers appointed under Regulation 27 submit estimates of the fair value and liquidation value, computed according to internationally accepted valuation standards, after physically verifying the inventory and fixed assets of the corporate debtor.
- If the resolution professional finds the two estimates significantly different, they may appoint a third registered valuer to provide another estimate using the same method.
- The fair value or liquidation value is then taken as the average of the two closest estimates among the valuers' reports.

Q53: What is the timeline and responsibility for appointing registered valuers under Regulation 38 of the IBBI (Pre-Packaged Insolvency Resolution Process) Regulations, 2021?

Answer: Under Regulation 38, the resolution professional is required to appoint two registered valuers within three days of his appointment. These valuers are tasked with determining the fair value and the liquidation value of the corporate debtor.

Q54: What are the provisions for valuation of assets intended to be sold under Regulation 35 of the IBBI (Liquidation Process) Regulations, 2016?

Answer: Under Regulation 35(1), if valuation has already been conducted under the IBBI (CIRP) Regulations, 2016 or the IBBI (Fast Track CIRP) Regulations, 2017, the liquidator shall consider the average of those valuations for asset valuation purposes. However, if the liquidator believes fresh valuation is necessary, under Regulation 35(2), they must appoint two registered valuers within seven days of the liquidation commencement date to determine the realizable value of the assets or business as specified in regulation 32 of the corporate debtor.

Q55: Global Finance Bank Ltd. has extended Rs. 100 crore to GEO Ltd. against mortgage of 50 acre of landed property with building. GEO Ltd. is being liquidated. Global Finance Bank Ltd. seeks to realise the mortgaged property given as security.

Advise Global Finance Bank Ltd. about realising its security (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Regulation 37 of the IBBI (Liquidation Process) Regulations, 2016 deals with realisation of security interest by a secured creditor (Global Finance Bank Ltd.).

- (i) Global Finance Bank Ltd. who seeks to realize its security interest shall intimate the liquidator of the price at which he proposes to realise its secured asset.
- (ii) The liquidator shall inform the Global Finance Bank Ltd. within twenty one days of receipt of the intimation, if a person is willing to buy the secured asset before the expiry of thirty days from the date of intimation at a price higher than the price intimated.

- (iii) Where the liquidator informs the Global Finance Bank Ltd. of a person willing to buy the secured asset, Global Finance Bank Ltd. shall sell the asset to such person.
- (iv) If the liquidator does not inform Global Finance Bank Ltd. or the person does not buy the secured asset, Global Finance Bank Ltd. may realise the secured asset in the manner it deems fit, but at least at the price intimated.
- (v) Where the secured asset is realised under (iii) above, Global Finance Bank Ltd. shall bear the cost of identification of the buyer.
- (vi) Where the secured asset is realised under (iv) above, the liquidator shall bear the cost incurred to identify the buyer.
- (vii) The provisions of this Regulation shall not apply if Global Finance Bank Ltd. enforces its security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the Recovery of Debts and Bankruptcy Act, 1993.

Q56: What valuation-related requirement must a corporate person fulfil under Section 59(3)(b)(ii) during voluntary liquidation?

Answer: Under Section 59(3)(b)(ii), during the voluntary liquidation of a corporate person, the corporate person must file a solvency declaration along with a valuation report of its assets prepared by a registered valuer.

Q57: What documents must be attached during the voluntary liquidation process of a corporate person as per Regulation 3(1)(b)(ii) of the IBBI (Voluntary Liquidation Process) Regulations, 2017?

Answer: As per Regulation 3(1)(b)(ii) of the IBBI (Voluntary Liquidation Process) Regulations, 2017, the solvency report along with the report of valuation of assets of the corporate person, prepared by a registered valuer, must be attached during the voluntary liquidation process.

Q58: What is the role of the registered valuer under Regulation 30 of the IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019?

Answer: Under Regulation 30 of the IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, the registered valuer appointed must submit to the bankruptcy trustee estimates of the realizable value of the bankrupt's assets. This valuation is to be computed in accordance with internationally accepted valuation standards after physical verification of the assets.

Q59: How is the term "value" commonly defined across standards like IVS, ICAI Valuation Standards, Ind AS, and IBBI Regulations?

Answer: Across these standards, "value" is commonly defined as an estimated amount—either the amount for which an asset or liability should be exchanged or the amount that would be realised on the sale of an asset or group of assets—depending on the purpose of the valuation.

Q60: What is the meaning of Fair Market Value, and how does it differ from Investment Value in the context of valuation?

Answer: Fair Market Value refers to the estimated price at which an asset or property would change hands between a willing buyer and a willing seller in an arm's length transaction, after proper marketing, where both parties act knowledgeably, prudently, and without compulsion. It reflects a price in an open and competitive market without the influence of any party's unique circumstances. In contrast, Investment Value is the value of an asset to a particular investor, based on their individual investment goals and requirements, and may differ from the fair market value due to personal motivations or strategic benefits.

Q61: What is Fair Value, and what are its key characteristics in the context of valuation?

Answer: Fair Value is defined as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement (or valuation) date. Its key characteristics include:

1. **Exit Price** – It represents the price to sell an asset, not acquire it.
2. **Market-Based** – It reflects transactions between independent market participants, not based on entity-specific conditions.
3. **Orderly Transaction** – It assumes sufficient exposure to the market, ruling out forced sales or distress transactions.
4. **Principal Market Price** – It is based on the price in the principal or most advantageous market for the asset or liability.

Q62: What is Book Value, and how is it determined from a company's balance sheet?

Answer: Book Value is the historical value of a company, often synonymous with shareholders' equity, net worth, or net book value. It is calculated as the difference between total assets and total liabilities as recorded on the company's balance sheet at a specific date. Assets are listed at their historical cost (adjusted for depreciation), while liabilities are shown at their face value.

Q63: What is Intrinsic Value, and how is it determined?

Answer: Intrinsic Value is the real or inherent value of a company or asset, determined through fundamental analysis without considering its current market value. It is calculated as the present value of expected future cash flows, discounted at an appropriate rate. Determination of intrinsic value involves both:

- Qualitative factors such as business performance, management quality, productivity, and market conditions, and
- Quantitative factors such as financial statements and accounting data.

These factors help in estimating future cash flows, growth potential, and selecting a suitable discount rate.

Q64: What is Replacement Value, and how does it differ from Reproduction Value?

Answer: Replacement Value is the current cost of acquiring a new asset that provides equivalent utility to the one being valued, using modern materials and current technology. It estimates what it would cost to replace the asset today, rather than duplicating it exactly. In contrast, Reproduction Value refers to the cost of creating an exact replica of the existing asset using current prices. Both concepts are typically used in valuing non-income-generating tangible assets like furniture, fixtures, and office equipment.

Q65: What is Going Concern Value, and why is it important in business valuation?

Answer: Going Concern Value is the value of a business that is expected to continue operating in the future, considering both tangible and intangible assets that contribute to ongoing operations. These intangible elements include trained workforce, brand value, trademarks, operational systems, licenses, and even things like formulations or recipes in certain industries. This value is crucial in mergers and acquisitions because it reflects not just the book value of assets, but the additional value generated by the business being a fully functional, income-producing entity. Even fully depreciated assets may hold value under this concept if they are still in use and generating cash flows.

According to ICAI Valuation Standard 102, Going Concern Value is the value of a business enterprise that is expected to continue operating in the future. This value includes intangible elements that arise from the ongoing operations of the business, such as a trained workforce, operational plant, necessary licenses, established marketing systems, and standardized procedures. These factors contribute to the business's ability to generate future income and are critical in assessing its worth as a going concern.

The example of **Widget Corp.** illustrates Going Concern Value by comparing it to Liquidation Value. While the liquidation value of the company is \$10 million, representing only the value of its tangible assets like inventory and buildings if sold off, its going concern value is much higher at \$60 million. This higher value accounts for the company's reputation, market leadership, and ownership of patents and intellectual property, all of which contribute to a steady stream of future cash flows. This demonstrates that a business as a going concern is often worth significantly more than just the sum of its parts.

Q66: What is Equity Interest Value, and how is return on equity investment calculated?

Answer: Equity Interest Value represents an investor's ownership stake in a business, which can be a long-term investment in a closely held company or a short-term investment in a listed company. Investors expect returns in the form of dividends and capital appreciation. For listed companies, an additional benefit is the availability of an exit route through the stock market. The return on equity investment is calculated using the formula:

$$\text{Return on equity investment} = \frac{\text{Cash Flow (dividend)} + \text{closing market price} - \text{opening market price}}{\text{opening market price}}$$

This equation reflects both the income (dividend) and the change in market value (capital gain or loss).

Q67: (i) Ram purchased 100 shares of M/s. T Ltd, a listed company, @ Rs 750/- per share on May 2, 2024. M/s T Ltd. declared 40% & 50% dividend on September 15, 2024 and on March 15, 2025 respectively. Market value of share of T Ltd. on May 2, 2025 is 1000/- per share.

Calculate the return of equity investment in T Ltd. (face value per share is Rs. 10/-)

(ii) "In order to ensure authenticity and to have a unique reference number of the valuation reports, it has been decided to provide a Valuation Report Identification Number (VRIN) for each valuation conducted under the code."

Comment on the statement on the basis of recent IBBI circular. (5 marks)

PAST YEAR QUESTION JUNE 2025**Answer:**

i) Return on equity investment =

$[\text{Cash Flow (dividend)} + \text{closing market price} - \text{opening market price}] / \text{opening market price}$

Cash dividend on September 15, 2024 @ 40% = 40% of Rs. 10/- = Rs. 4/-;

Cash dividend on March 15, 2025 @ 50% = 50% of Rs. 10/- = Rs. 5/-;

Closing Price = 1000/-; Opening Price = Rs.750/-

So, return on equity investment = $[(4+5) + \{1000 - 750\}] / 750 = 34.53\%$

Generation of Valuation Report Identification Number for valuation conducted by Registered Valuer under Insolvency and Bankruptcy Code, 2016. (IBBI circular dated 12th August, 2024)

In exercise of the powers conferred under the provisions of section 196 of the Insolvency and Bankruptcy Code, 2016, Regulations made thereunder, and the Valuation Rules and IBBI issued circular for Generation of Valuation Report Identification Number for valuation conducted by Registered Valuer under Insolvency and Bankruptcy Code, 2016.

In order to ensure authenticity and to have a unique reference number of the valuation reports, it has been decided to provide a Valuation Report Identification Number (VRIN) for each valuation conducted under the Code.

Accordingly, an online module, in consultation with Registered Valuers Organisations, has been developed by IBBI. The module has been hosted on the IBBI website at <https://www.ibbi.gov.in>. The RV/RVE shall access the module with the login credentials already provided by the IBBI. Before the submission of valuation report, the respective RV/RVEs shall generate a unique VRIN for each valuation report. The RV/RVE shall mention the VRIN on the front page of the valuation report.

A facility is also being provided on the IBBI website to allow stakeholders to verify the authenticity of the report by using VRIN.

ii) The circular shall be applicable to all the cases where the date of valuation report is on or after the date of this circular. The IPs shall not accept any valuation reports without VRIN in all such cases.

Q68: What is Insurable Value, and how is it relevant in valuation?

Answer: Insurable Value refers to the value of the destructible portion of an asset that should be insured to compensate the owner in the event of loss or damage. It is particularly relevant in risk management and sometimes considered during mergers and acquisitions to reduce the risk associated with property. For instance, in real estate, the insurable value typically includes the structure (e.g., building) but excludes the land, as land is not subject to destruction.

Q69: What is the difference between Value-in-Use and Value-in-Exchange in asset valuation?

Answer: Value-in-Use refers to the value of an asset based on its current productive use within a going concern, reflecting the benefits to a particular user from continued use. It assumes the asset remains in its most productive role post-acquisition.

In contrast, Value-in-Exchange is the value of the asset separately exchanged or sold, independent of its use in an operating business. Typically, value-in-exchange is less than value-in-use because it does not account for the additional benefits derived from the asset's role within a functioning business.

Q70: What is Goodwill Value, and how is it determined in the context of business acquisitions?

Answer: Goodwill Value is an intangible asset representing the future economic benefits arising from a business that are not separately identified in other assets. It reflects the imponderable qualities like reputation, customer loyalty, and brand strength that attract stakeholders. In mergers and acquisitions, goodwill is calculated as the difference between the purchase price of a business and the fair market value of its identifiable assets (both tangible and intangible) minus liabilities. Goodwill has important implications for tax, financial reporting, and regulatory purposes, especially for banks.

Q71: What is Salvage Value, and why is it important in acquisition decisions?

Answer: Salvage Value is the amount that can be realised from the sale or disposal of an asset once it is no longer useful to the current owner and is taken out of service. It differs from scrap value, which implies the asset has no use to anyone. Knowing the salvage value of assets in a target company is important in acquisition decisions as it affects the residual worth of those assets.

Q72: What is Liquidation Value, and what factors must be considered when determining it?

Answer: According to IVS 104 Bases of Value, Liquidation Value is the amount that would be realised from the sale of an asset or group of assets on a piecemeal basis. When determining this value, it is essential to account for the costs of getting the assets into saleable condition as well as the costs related to the disposal activity. This value reflects what can be obtained when assets are sold individually rather than as part of an ongoing business.

Under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Clause 2(k), Liquidation Value is defined as the estimated realizable value of the assets of the corporate debtor if the debtor were to be liquidated on the insolvency commencement date. This value represents what can be recovered from asset sales in a liquidation scenario.

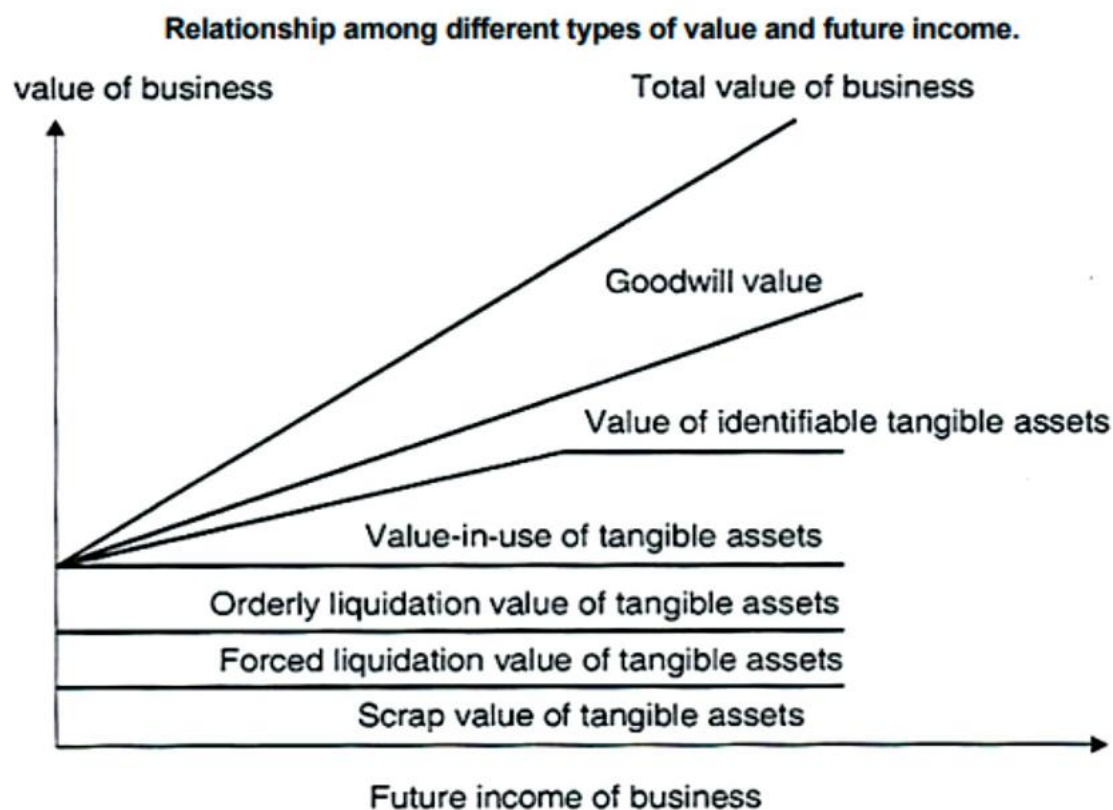
According to ICAI Valuation Standard 102, Liquidation Value is the amount that would be realised from the sale of an asset or group of assets when an actual or hypothetical termination of the business is assumed. This valuation can be conducted under two premises:

- (i) an orderly transaction with a typical marketing period, or
- (ii) a forced transaction with a shortened marketing period.

The valuer must clearly disclose which of these premises is assumed. The net realisable amount is determined after accounting for estimated disposal costs.

Q73: How are different types of value related to each other in the context of a business's total or enterprise value?

Answer:



The relationship among the various types of values discussed earlier in the context of total business value or enterprise value. The diagram exhibits how different levels of future income of a business affect the various types of value.

The lowest expected value of a business is the scrap value of tangible assets, which is the same no matter what the income level is of the enterprise. The scrap value of equipment is constant, at a given point in time, irrespective of the earnings of the business that owns it.

Forced liquidation value is the second lowest potential value, but from a practical point of view, this is perhaps the lowest value a business as a whole. Like scrap value, forced liquidation value remains the same, no matter what the income of the enterprise.

Orderly liquidation value is conceptually identical to forced liquidation, except that a higher value is usually received because more time is allowed to find a buyer.

Value-in-use of the tangible assets typically increases with the income of the business up to the point at which the value-in-use equals the replacement value of the asset.

At zero income, the value-in-use and orderly liquidation value are theoretically equivalent, but as the business becomes more successful, the importance of the tangible assets becomes more significant. Hence, value-in-use exceeds orderly liquidation value.

The value of identifiable intangible assets also tends to increase as the income of the business increases. Along with the tangible assets and the income of the business, the importance of the identifiable intangibles also grows. Goodwill value will always increase with the earnings of the business because it is computed as the difference between the value of the total business and the value of the tangible and identified intangible assets. Consequently, as the earnings of the business grow, so does its total goodwill and enterprise value. The cumulative result is therefore the total business value. This is the value of the tangible and intangible assets, and it increases along with the future income prospects of the business.

Q74: How do price and value differ, and what causes the gap between them?

Answer: Price and value are often used interchangeably, but they have distinct meanings. Price is the amount paid for an asset, determined by market demand and supply, while value is an estimate of economic worth based on the purpose of valuation and the professional judgment of the valuer.

The difference between price and value arises due to market imperfections, not necessarily due to flaws in the valuation. For instance, a buyer might be unaware of an asset's availability or believe the asset is undervalued, leading to a price lower than its estimated value. Conversely, a seller might overprice an asset based on perceived worth. Additionally, the subjective nature of valuation—based on varying methodologies, information, and professional perspectives—means that different valuers may arrive at different valuations for the same asset or business.

Q75: What is the first step a valuer must consider before finalizing the Bases of Value and choosing valuation approaches?

Answer: For carrying out any valuations, the valuer has to look into the purpose of valuation. The next step will be to finalise the Bases of Value/Premises and accordingly the valuation approaches and methods will be decided by considering various factors.

The steps involved in valuation process are:

- Purpose of valuation
- Bases of Value
- Premises of Value
- Business Valuation Approaches
- Determination of Required Value
- Documentation
- Preparation of Valuation Report.

Q76: Why is it important to clearly define the purpose of valuation before undertaking a valuation exercise?

Answer: Clearly defining the purpose of valuation is crucial because different valuation methods produce different values, and there is no single method suitable for all purposes. If the purpose is not well-defined, the valuer may choose an inappropriate methodology, leading to inconclusive or irrelevant value conclusions. Additionally, legal frameworks like IVS in IBC (2016), formula-based valuations for listed companies, and the Income Tax Act, 1961 prescribe specific valuation standards based on the purpose, further emphasizing the need to match the valuation approach with its intended use. Without this clarity, the valuation may become useless or misleading if applied outside its intended context.

Q77: What are the key considerations a valuer must take into account when selecting the Bases of Value for a valuation assignment?

Answer: When selecting the Bases of Value, a valuer must consider several important parameters to ensure the basis is appropriate to the valuation assignment's terms and purpose. These include:

- (a) the nature of the asset to be valued;

- (b) the scope and purpose of the valuation engagement;
- (c) the valuation or measurement date;
- (d) the intended purpose of the valuation;
- (e) applicable bases or standards of value;
- (f) applicable premises of value;
- (g) assumptions and limiting conditions; and
- (h) applicable governmental regulations.

It is also noted that ICAI Valuation Standard 102 will not apply if the bases of value are prescribed by statute, regulation, or agreed upon between parties.

Q78: What does the Premises of Value describe in a valuation, and what are the three principal business valuation approaches?

Answer: The Premises of Value describe the circumstances under which an asset or liability is used. Depending on the situation, either a single premise or multiple premises of value may be adopted. Accurate valuation requires applying appropriate valuation approaches, understanding the exact investment involved, and measuring the company's returns. The three principal business valuation approaches are:

1. Market Approach
2. Income Approach
3. Asset Approach

Q79: What is the Market Approach in valuation, and when should it not be used?

Answer: The Market Approach is a valuation method that determines the value of an asset by using prices and information from recent market transactions involving identical or comparable assets or liabilities. It relies on data from active markets and recent, orderly transactions to ensure accuracy.

A valuer **should not use** the Market Approach if:

- the asset has fewer identical or comparable assets
- the asset to be valued or its market comparable are not traded in the active market;
- sufficient information on the comparable transaction(s) is not available;
- there is no recent transaction either in the asset or in the market comparable; or
- there are material differences between the asset to be valued and the market comparable, which require significant adjustments.

The three valuation methods under this approach are:

1. Market Price Method
2. Comparable Companies Multiple (CCM) Method
3. Comparable Transaction Multiple (CTM) Method.

Q80: What is the Income Approach in business valuation, and which methods are commonly used under it?

Answer: The Income Approach in business valuation determines the value of a business based on the present value of its future economic benefits, such as earnings or cash flows. It uses the time value of money concept

to calculate present value from future income, typically with the formula: $FV = PV \times (1 + i)^n$, where FV is Future Value, PV is Present Value, i is the interest rate, and n is the number of compounding periods.

The most commonly used methods under the Income Approach are:

1. Capitalization of Earnings Method
2. Discounted Earnings Method (also known as Discounted Cash Flow Method or DCF)
3. Dividend Discount Method (mainly for valuing shares).

Q81: What is the Cost Approach in valuation, and when is it most appropriately applied?

Answer: The Cost Approach is a valuation method based on the principle that a buyer will not pay more for an asset than the cost to acquire or construct a similar asset with equal utility. This approach is particularly useful for asset-intensive businesses, holding companies, or distressed entities, where the business is not worth more than its net tangible assets.

It is most appropriately applied when:

- (a) participants would be able to recreate an asset with substantially the same utility as the subject asset, without regulatory or legal restrictions, and the asset could be recreated quickly enough that a participant would not be willing to pay a significant premium for the ability to use the subject asset immediately (nothing special in the assets).
- (b) the asset is not directly income-generating and the not-in-unique nature of the asset makes using an income approach or market approach unfeasible.

The main methods under the Cost Approach include:

1. Replacement Cost Method
2. Reproduction Cost Method
3. Summation Method (also known as the Sum-of-the-Parts Method).

Q82: What are the key principles that guide the valuation of a business or asset?

Answer:

1. **Substitution Principle:** The value of something is usually based on how much it would cost to get something similar. This is called the principle of substitution.
2. **Risk and Return:** The more risky an investment is, the higher the return (profit) people expect from it. So, higher risk = higher expected profit. Different investments come with different risks and potential returns.
3. **Intangible Assets and Excess Earnings:** Some business owners think their business has no intangible assets (like brand, goodwill, customer loyalty, etc.). But if a business earns **more than others in the same field**, that extra income shows that it has intangible value. This is called **excess earnings**, and we can use those to estimate the value of the intangible assets.
4. **Important Questions:** Two big questions come up in valuation:
 - What are **excess earnings**? (They are profits higher than what similar businesses make.)
 - What is a good **capitalization rate**? (This is a rate used to turn future profits into today's value. It depends on industry and business risk.)
5. **No Fixed Formula:** There's **no single formula** to find the exact value of a business. We can't just average different numbers like book value and profits. Every business is different, and we must look at all the relevant facts carefully.

6. **Tangible vs. Intangible Assets:** Sometimes, it's hard to separately value the physical (tangible) and non-physical (intangible) parts of a business. In such cases, we can guess the value of intangible assets by comparing the market value of physical assets to their accounting value.
7. **Keep Learning:** Valuation is not a one-time skill. Professionals must keep learning by reading books, attending seminars, and learning from experienced mentors. It's a growing and changing field.

Q83: In the process of valuing a business, a detailed, comprehensive analysis and the ability to develop accurate projections and assumptions are necessities. Moreover, application of finance theory and professional judgment in the appropriate places is also required. Hence, every valuer faces a lot of hindrances in the process. Discuss some of the most common hindrances faced by valuers during business valuation process. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: For valuing a business, a detailed, comprehensive analysis and the ability to develop accurate projections and assumptions are necessities. Business valuation also requires the application of finance theory in the appropriate places and using professional judgment. Some of the most common hindrances include:

1. Value, as a concept, is ambiguous. An asset has different values depending on the purpose or context. Thus an asset has several values: market value (amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing); fair value (amount that will fairly compensate an owner who was involuntarily deprived of the economic enjoyment of a property where there is neither a willing buyer nor a willing seller); liquidation or forced sale value (amount which may reasonably be expected to be obtained from the sale of a property within a time-frame too short to obtain a value under open market conditions); going concern value (amount ascribed to an established business, not to its constituent parts); investment value (value of a property to a particular investor, or a class of investors for specified investment objectives).
2. Everyone has an opinion of value about a business, a tangible asset, or an intangible asset but actually, the term 'value' means different things to different people. The problems faced by the valuers are enormous. They have to bring forward an appropriate definition of value for a specific valuation. The Webster's dictionary puts value as:
"A fair return or equivalent in goods, services, or money for something exchanged: the monetary worth of something: marketable price; relative worth, utility, or importance: something intrinsically valuable or desirable."
3. Mathematical certainty or certainty of one output based on specific set of inputs is neither demanded, nor possible in valuation discipline. Being context specific, the value keeps on fluctuating. It is for the valuers to express the value attributed by them to the asset, which is estimated on the basis of the facts drawn from the evidence before them. Valuation is an art more than a science and is an interdisciplinary study drawing upon law, economics, finance, accounting, and investment. It is a procedure, essentially, a bringing together of the economic concept of value and the legal concept of property. Valuation discipline is neither science nor an art; it is a craft, i.e., a skill that one learns by doing. The more one does it, the better one gets at it.
4. Valuation may be considered a science but, to a large extent, valuation variables require inherent subjectivity. In other words, valuation is not a precise science as there is always imperfection in the market.

Even in rare instances, where the valuer has perfect knowledge of the market, the market does not have the perfect knowledge of value as well as the valuation methodology and process. On every occasion, there may not be a definitive valuation method or a definitive value conclusion, but every valuation is based only on its circumstances. Right valuation requires logical and methodical approach and careful application of the basic principles. This means that there may not be a prescribed format or a preferred methodology, which is to be adopted always.

5. Any business valuation activity is based on the hypothetical consideration that there is an arm's length sale of a business between a willing buyer and a willing seller, usually for cash. Any valuation theory attempts to search for truth and relates to the practice in order to understand valuation theory.

6. One of the frequent sources of legal confusion between cost and value is the tendency of courts, in common with other persons, to think of value as something inherent in the thing being valued, rather than an attitude of persons toward that thing in view of its estimated capacity to perform a service. Whether or not, as a matter of abstract philosophy, a thing has value except to people to whom it has value, is a question that need not be answered for the sake of appraisal theory. Certainly, for the purpose of a monetary valuation, property has no value unless there is a prospect that it can be exploited by human beings.

7. In a business valuation, the value of an interest in business is typically considered to be equal to the future benefits that are to be received from the business, discounted to the present value, at an appropriate discount rate. However, this simple definition of value raises the following issues to be addressed:

(i) How to define 'benefits'?

(ii) Future projections may be extremely difficult to make and also very difficult to get interested parties to agree to.

(iii) What is an appropriate discount rate that reflects the risk inherent in the subject entity?

8. Developing reasonable assumptions for projections based on historical trends and expected future occurrences and documenting the reasoning behind those assumption choices.

9. Gathering the appropriate market comparable (both public and private) and documenting the reasoning behind the market comparable choices.

10. Choice of Valuation Standards to be followed.

11. Drafting a comprehensive valuation report.

12. Remaining compliant with International Valuation Standards (IVS) or ICAI Valuation Standards IRS guidelines and other industry standards.

Q84: "Valuers must follow the ethical principles of integrity, objectivity, impartiality, confidentiality, competence and professionalism to promote and preserve the public trust." Explain the core principles of valuation to be followed by valuers. (5 marks)

(PAST YEAR QUESTION JUNE 2024)

Answer: Core Principles of Valuation: -

- Ethics- Valuers must follow the ethical principles of integrity, objectivity, impartiality, confidentiality, competence and professionalism to promote and preserve the public trust.
- Competency- At the time the valuation is submitted, valuers must have the technical skills and knowledge required to appropriately complete the valuation assignment.

- Compliance- Valuers must disclose or report the published valuation standards used for the assignment and comply with those standards.
- Basis (i.e., Type or Standard) of Value- Valuers must select the basis (or bases) of value appropriate for the assignment and follow all applicable requirements. The basis of value (or bases) must be either defined or cited.
- Date of Value-Effective Date/Date of Valuation - Valuers must disclose or report the date of value that is the basis of their analyses, opinions or conclusions. Valuers must also state the date they disclose or report their valuation.
- Assumptions and Conditions - Valuers must disclose significant assumptions and conditions specific to the assignment that may affect the assignment result.
- Intended Use- Valuers must disclose or report a clear and accurate description of the intended use of the valuation.
- Intended User(s)- Valuers must disclose or report a clear and accurate description of the intended user(s) of the valuation.
- Scope of Work- Valuers must determine, perform, and disclose or report a scope of work that is appropriate for the assignment that will result in a credible valuation.
- Identification of Subject of Valuation- Valuers must clearly identify what is being valued.
- Data- Valuers must use appropriate information and data inputs in a clear and transparent manner so as to provide a credible valuation.
- Valuation Methodology - Valuers must properly use the appropriate valuation methodology (ies) to develop a credible valuation.
- Communication of Valuation- Valuers must clearly communicate the analyses, opinions and conclusions of the valuation to the intended user(s).

Q85: "Super profits are calculated as the difference between maintainable future profits and the return on net assets." Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: Valuation based on super profits

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

Q86: "Valuation is an important aspect in merger and acquisition and it should be done by a team of experts." Comment on the statement, mentioning which type of experts should be in the team. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Valuation exercise in merger and acquisition should be done by a team of experts keeping into consideration the basic objectives of acquisition. Team should comprise of financial experts, accounting specialists, technical and legal experts who should look into aspects of valuation from different angles.

Accounting expert has to foresee the impact of the events of merger on profit and loss account and balance sheet through projection for next 5 years and economic forecast.

Using the accounting data he must calculate performance ratios, financial capacity analysis, budget accounting and management accounting and read the impact on stock values, etc. besides, installing accounting and depreciation policy, treatment of tangible and intangible assets, doubtful debts, loans, interests, maturities, etc.

Technocrats have their own role in valuation to look into the life and obsolescence of depreciated assets and replacements and adjustments in technical process, etc. and form independent opinion on workability of plant and machinery and other assets.

Legal experts' advice is also needed on matters of compliance of legal formalities in implementing acquisition, tax aspects, review of corporate laws as applicable, legal procedure in acquisition strategy, laws affecting transfer of stocks and assets, regulatory laws, labour laws, preparing drafts of documents to be executed or entered into between different parties, etc.

Q87: The method of valuation of a business, however, depends to a great extent on the acquisition motives. What are those motives of valuation? (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Valuation and acquisition motives are an important aspect in the merger/ amalgamation/takeover activity. The method of valuation of business, however, depends to a great extent on the acquisition motives. The acquisition activity is usually guided by strategic behavioral motives. The reasons could be:

- (i) Either purely financial, e.g., taxation, assets-stripping, financial restructuring involving an attempt to augment the resources base and portfolio-investment;
- (ii) Business related, e.g., expansion or diversification;
- (iii) Behavioral reasons of personal ambitions or objectives of the top management, e.g., desire to grow big.

Q88: Explain the following methods of valuation :

(i) Net Realisable Value Method

(ii) Valuation in case of Slump Sale (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: (i) Net Realisable Value Method

This valuation method is generally used in case of liquidation, where assets have to be valued as if they were individually sold and not on a going concern basis. Liabilities are deducted from the liquidation value of the assets to determine the liquidation value of the business. One should also consider liabilities which will arise on closure such as retrenchment compensation, termination of critical contracts, etc. Tax consequences of

liquidation should also be considered. Any distribution to the shareholders of the company on its liquidation, to the extent of accumulated profits of the company is regarded as deemed dividend. Dividend Distribution tax will have to be captured for such valuation.

(ii) Valuation of Slump Sale

Slump sale is transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities.

The undertaking has to be transferred as a result of sale. If an undertaking is transferred otherwise than by way of sale, say, by way of exchange, compulsory acquisition, extinguishment, inheritance by will, etc., the transaction may not be covered by section 2(42C) of the Income-tax Act, 1961. The consideration for transfer is a lump sum consideration. This consideration should be arrived at without assigning values to individual assets and liabilities.

As per Section 50B of the Income-tax Act, 1961, capital gains arising on slump sale are calculated as the difference between sale consideration and the net worth of the undertaking. Net worth is deemed to be the cost of acquisition and cost of improvement for the purpose of calculation of capital gains tax.

Q89: "Valuation is influenced not only by the motive of the acquirer company but also that of target company's objectives." Analyse the statement in brief. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Merger/Amalgamation/Takeover is backed by the aspect of valuation. Appropriate method of valuation of a business depends to a great extent on the acquisition motives. The reasons for valuation could be to achieve the objectives of the top management i.e. either purely financial aspects relating to taxation, assets stripping, financial restructuring or business related such as expansion or diversification.

However, behavioural reasons have more to do than personal ambitions or objectives of the top management. Normally, top management has desire to expand and diversify the needs to be chosen between Make or Buy decision. A criterion adopted to arrive at a decision is to evaluate present value of the different cash flows. Acquisitions are not only normally market driven but also influenced by non-financial considerations.

Thus the value of a target gets affected not only by the motive of the acquirer, but also by the target company's objectives. The price could be affected by the motives of the other bidders as well.

Q90: From the following information related to Tanu Ltd, find out :

(a) EBITA

(b) PAT

(c) Super profit

(Rs. in Lakh)

Net tangible assets **300.00**

Operational Revenue **560.00**

Employment Cost (including one time payment of Rs.20.00 lakh, not likely to occur in future) **110.00**

Managerial Remunerations (to be increased by

Rs. 10.00 lakh from next year)	40.00
Cost of goods sold	230.00
Finance charges	80.00
Depreciat on/Amort zat on	30.00
Tax provision is to be made @ 25%.	
Expected rate of return on assets is to be assumed @ 20%. (5 marks)	
PAST YEAR QUESTION DECEMBER 2021	

Answer:

(a) Calculat on of EBITA

	<i>(Rs. in lakhs)</i>
Operat onal Revenue	560.00
Less : Cost of goods sold	230.00
Employment Cost	110.00
Managerial Remunerat on	40.00
EBITA	180.00

(b) PAT

	<i>(Rs. in lakhs)</i>
EBITA	180.00
Less : Finance charges	80.00
Depreciat on / Amort zat on	30.00
PBT	70.00
Less : Taxes @ 25%	17.50
PAT	52.50

(c) Computat on of Super Prof t

(i) Future Maintainable Prof t

	<i>(Rs. in lakhs)</i>
PBT	70.00
Add : Employment Cost one-t me payment not likely to occur in future	20.00
Less : Increase in Managerial Remunerat on from next year	10.00
	80.00
Less : Taxes @ 25%	20.00
Future Maintainable Prof t	60.00

(ii) Super Prof t

	<i>(Rs. in lakhs)</i>
Expected return on assets (Rs. 300 lakh * 20%)	60.00
Less : Future Maintainable Prof t	60.00
Super Prof t	NIL

Q91: In any scheme of compromise and arrangement, merger and amalgamation on share exchange ratio is needed to be calculated which requires basic calculation of EBITA, PAT and Super Profit for valuation of shares. From the following information related to Wise Ltd., calculate:

(a) EBITA

(b) PAT

(c) Super profit

(Rs. Figures are given in lakh)

Net tangible assets	Rs. 900
Operational Revenue	Rs. 2,150
Employment Cost Rs. 340 (including one time payment of Rs. 40 lakh, not likely to occur in future)	
Managerial Remunerations Rs. 75 (to be increased by Rs. 20 lakh from next year)	
Cost of goods sold	Rs. 920
Finance charges	Rs. 170
Depreciation/Amortization	Rs. 70
Tax provision is to be made @ 30%.	
Expected rate of return on assets is to be assumed @ 25%. (5 marks)	

PAST YEAR QUESTION JUNE 2024

Answer:

(a) Calculation of EBITA

(Rs. in Lakhs)

Operational Revenue	Rs. 2150
Less: Cost of goods sold	Rs. 920
Employment Cost	Rs. 340
Managerial Remuneration	Rs. 75
EBITA	Rs. 815

(b) Calculation of PAT (Rs. in lakhs)

EBITA	Rs. 815
Less: Finance charges	Rs. 170
Less: Depreciation / Amortization	Rs. 70
PBT	Rs. 575
Less: Taxes @ 30% =	Rs. 172.50
PAT	Rs. 402.50

(c) Calculation of Super Profit

(i) Future Maintainable Profit	(Rs. in lakhs)
PBT	Rs. 575
Add: Employment Cost one time payment not likely to occur future	Rs. 40
Less: Increase in Managerial Remuneration	Rs. 20
	Rs. 595
Less: Taxes @ 30%	Rs. 178.50

Future Maintainable Profit Rs. 416.50

(ii) Super Profit (R in lakhs)

Future Maintainable Profit Rs. 416.50

Less: Expected return on assets (Rs. 900 lakhs*25%) Rs. 225

Super Profit Rs. 191.50

Q92: From the following information related to Wise Ltd., calculate:

(a) EBITA

(b) PAT

(c) Super profit

(₹ in lakh)

Net tangible assets	600
Operational Revenue	1,120
Employment Cost	220
(including one time payment of ₹ 40 lakh, not likely to occur in future)	
Managerial Remunerations (to be increased by ₹ 20 lakh from next year)	80
Cost of goods sold	460
Finance charges 160 Depreciation/Amortization	60
Tax provision is to be made @ 25%.	

Expected rate of return on assets is to be assumed @ 30%. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: (a) Calculation of EBITA

(Rs. in lakhs)

Operational Revenue	1120.00
Less: Cost of goods sold	460.00
Employment Cost	220.00
Managerial Remuneration	80.00
EBITA	360.00

(b) Calculation of PAT

(Rs. in lakhs)

EBITA	360.00
Less: Finance charges	160.00
Depreciation / Amortization	60.00
PBT	140.00
Less: Taxes @ 25%	35.00

PAT 105.00

(c) Computat on of Super Prof t

(i) Future Maintainable Prof t

(Rs. in lakhs)

PBT	140.00
Add: Employment Cost one-t me payment not likely to occur in future	40.00
Less: Increase in Managerial Remunerat on from next year	20.00
	160
Less: Taxes @ 25%	40.00
Future Maintainable Prof t	120.00

(ii) Super Prof t

(Rs. in lakhs)

Expected return on assets (Rs. 600 lakh * 30%)	180.00
Less: Future Maintainable Prof t	120.00
Super Prof t	60.00

Q93: From the details given below, f nd out the Value of Santosh Ltd. an unlisted company:

No. of shares issued and paid up of Rs. 10 each 5,00,000

Current Dividend 5 per share Rs. 5 per share

Annual Dividend growth rate 10%

Assume that this growth rate will be maintained in future also. The values for similar listed company are as under:

Share price Rs. 120 per share

Current Dividend Rs. 20 per share

Annual Dividend Growth rate 10%

(5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Calculat on of Value of Santosh Limited:

Step -I (Rate of return of similar Listed Company)

Rate of Return required by shareholders

= {Dividend Current (1+ rate of growth in dividend) / share price} + Rate of growth of dividend

= {20 (1+0.10) / 120} + 0.10

= 0.283 or say 28.3%

Step -II (Unlisted Company -Santosh Limited)

Share Price = {Current Dividend (1 + rate of growth in dividend)} / {Rate of Return required by shareholders - rate of growth in dividend}

= {5 (1+0.1)}/{0.283-0.10}

= Rs. 30.05

Value of Santosh Limited = No. of shares * Price per share

= 500000 * Rs.30.05

= Rs. 1,50,25,000.00

Q94: Zen Limited is proposing to take over Ken Limited at an exchange ratio of 4 : 5. Following information is available for the companies :

	Zen Limited	Ken Limited
Profit before Tax (in crore)	20	14
No. of shares (in crore)	30	20
P/E Ratio	12	10

Consider Corporate Tax @ 30%.

You are required to calculate :

(i) Market Value of both the companies

(ii) Value of original shareholders

(iii) Price per share after merger. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer:

	Zen Limited	Ken Limited
Profit before Tax (Rs.)(cr)	20	14
Tax @ 30% (Rs.)(cr)	6	4.2
Profit after Tax (Rs.)(cr)	14	9.8
No. of shares (cr)	30	20
P/E ratio	12	10

(i) Market value of the companies

Zen Ltd. = PAT * P/E = 14 * 12 = Rs. 168 cr

Ken Ltd. = 9.8 * 10 = Rs. 98 cr

(ii) Value of original shareholders

	Zen Limited	Ken Limited
Market value of shares (Rs.) (cr)	168	98
No. of shares (cr)	30	20
Price of share i.e. value of original shareholder	168/30 = Rs. 5.6	98/20 = Rs. 4.9

(iii) No. of shares after merger

	Zen Limited	Ken Limited
No. of shares	30	20 * 4 / 5 = 16
Price per share after merger		
Combined PAT of entity (Rs.)	14 + 9.8 = 23.8 cr	
No. of shares after merger	30 + 16 = 46 crores	

PE ratio	12
Market value of combined entity	$= 23.8 \times 12 = \text{Rs. } 285.6 \text{ cr}$
Price per share (after merger)	$285.6 / 46 = \text{Rs. } 6.2087$

Q95: Briefly describe the methods which are used for valuation of intangible assets. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: There are various methods for valuation of intangible assets such as human resources, technical know-how, patents, copyright, brands etc. The commonly used methods are:

- Historical cost method
- Replacement cost method
- Present value of future cash flows method
- The Lev and Schwartz method

Under the historical cost method, cost incurred in recruitment, training and development, cost of retaining, cost of attrition, etc. of human resources is considered in calculation. For other intangible assets, the cost incurred in bringing the intangible asset to its present state is taken.

Under the replacement cost method, the value of intangible asset is calculated based on the current cost which will need to be incurred to create the intangible asset. This method is more reasonable in the sense that it takes into consideration all the changes in the cost components.

Under the present value method, the future cash flows from the economic benefits of the intangible asset is estimated and discounted at the rate of cost of capital to arrive at the present value which is taken as the value of intangible asset.

The Lev and Schwartz method is used for human resources accounting. As per this model, the value of human capital of a person who is y years old is the present value of his future earnings from employment. The following formula is used to calculate the present value:

$$\sum (V_y) = \sum P_y (t+1) \sum I(t) / (1+r)^{t-y}$$

Where:

$\sum (V_y)$ = expected value of a y year old person's human capital

t = the person's retirement age

$P_y(t)$ = probability of the person leaving the organisation

$I(t)$ = expected earnings of the person in period

r = discount rate

Q96: A Company's performance will have an impact on its Valuation. Based on following information prepare a sensitive table on how changes in sales affects the Company's Enterprise Valuation:

	Amount (INR Crore)	Percentage
Sales	1000	
Cost of Sales	700	70% on Sales
Gross Profit	300	
Fixed Cost	150	(Constant upto INR 2000 Crore of Sales)

Variable Cost	100	10% on Sales
Earnings before Tax (EBT)	50	
Tax	12.50	25% of EBT
Earning af er Tax	37.50	
EPS (in Rs.)	25	
P/E rat o of the industry	20	
Market Price per Share	?	
Enterprise Value	?	

The Company has 1.5 Crore Equity Shares of ₹ 10 each :

(i) Find out the Market Value per Share and Enterprise Value. Also give your opinion on the results.

(ii) When the Sales of the Company increases by 10%.

(iii) When the Sales of the Company decreases by 10%. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer:

No. of Shares	1,50,00,000
Market Price	500 (25*20)
(P/E Rat o x EPS)	
Enterprise Value in Rs.	7,50,00,00,000 (1,50,00,000*500)

(No. of Shares x Market price per share)			
Sensit vity Table	Present	Sale increases by 10%	Sale decreases by 10%
Sales (Cr)	1000	1100	900
Cost of Sales (Cr)	700	770	630
Gross Prof t (Cr)	300	330	270
Fixed Cost (Constant up to INR 2000 Cr of Sales) (Cr)	150	150	150
Variable Cost (10% on Sales) (Cr)	100	110	90
Earnings before Tax (EBT) (Cr)	50	70	30
Tax (25% of EBT) (Cr)	12.50	17.50	7.50
Earning af er Tax	37.50	52.50	22.50

EPS (in Rs.)	25	35	15
P/E ratio of the industry	20	20	20
Market Price per Share	500	700	300
Enterprise Value	7,50,00,00,000	10,50,00,00,000	4,50,00,00,000
Change in Market Value per Share		200	-200
Market change (%)		40%	-40%
Change in Enterprise Value		3,00,00,00,000	-3,00,00,00,000
Change in %		40%	-40%
Change in Sales by 10% impacts Market price of Share by Rs. 200 and Enterprise Value by Rs.300 crore in value and by 40%.			

Q97: Of en reputed companies appoint joint valuers for fair valuation of the company. Explain the procedure and purpose of joint valuation. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: A practice of joint valuation report is more prevalent in Merger and Amalgamation transaction involving one or more listed company. The following efficient processes would reduce complexities in delivery the final report:

- Issue independent appointment letters to the valuer from the company on whose behalf the valuation work is to be carried out.
- Joint introductory meeting or call of all the parties and to provide understanding of the business of the companies to be valued, purpose of valuation and timelines.
- Subsequently valuer can independently meet respective company's management for further understanding and clarifications.
- Understand the business rationale for the purpose of transaction.
- Obtain financial information from management of the entities.
- Discussion among the Joint valuers on valuation methods
- Arrive at consensus on the valuation methods to be used for valuation of each of the companies formally part of the transaction. Board valuation assumptions, reconciliation of input data for the valuation exercise, value derived by using selected approach.
- Convergence on value/share swap independently arrived by the valuers.
- Draft of joint valuation report to be prepared, reviewed and confirmed by the joint valuers.
- Final joint valuation report, to be signed by joint valuers and issued to the clients

Q98: "Brands do not command any value unless they are able to bring cash flows to the company that has adopted the same. In order to sustain the value of the brand, there must a constant effort by the company on various aspects." Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

Q99: Explain briefly the features which must be taken into consideration for arriving at valuation of equity shares of a company in a particular transaction. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

Importance of the size of the block of shares: The holder of 75% of the voting power in a company can always alter the provisions of the articles of association; a holder of voting power exceeding 50% and less than 75% can substantially influence the operation of the company even to alter the articles of association of comfortable influence the operation of the company even to alter the articles of association of comfortable pass a special resolution. A controlling interest therefore, carries a separate substantial value.

Restricted transferability: Along with principal consideration of yield and safety of capital, another important factor is easy exchangeability or liquidity. Holders of shares unquoted public companies or private companies

do not enjoy easy marketability; therefore such shares, however good, are discounted for lack of liquidity at rates, which may be determined on the basis of circumstances or an increase in the normal rate of return.

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

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CHAPTER 13 AS PER ICSI MODULE

VALUATION OF BUSINESS AND ASSETS FOR CORPORATE RESTRUCTURING

Q1: What is valuation in business, and why is it important in processes like mergers, acquisitions, debt resolution, and investment decisions?

Answer: Valuation is the process of determining the economic worth of a company or business based on its business model and external environment, supported by analysis and empirical evidence. It involves assessing factors such as management quality, capital structure, future earnings potential, and asset values. Valuation is crucial in mergers, acquisitions, demergers, and amalgamations to determine share exchange ratios or consideration amounts. It also plays a vital role in resolving debts, unlocking hidden asset values, attracting risk capital, and guiding profitable exits from investments, ultimately helping businesses make informed and strategic decisions.

Q2: Why is valuation considered a subjective process, especially in the context of mergers, and what should merging parties do to address this?

Answer: Valuation is considered a subjective process because it involves multiple techniques, principles, and choices—such as valuation bases, approaches, methods, and techniques—that can yield different outcomes. In mergers, for example, the asset value may be assessed either at market price or cost price, depending on the perspective taken. These choices often reflect the rationale and interests of the parties involved in the transaction. Therefore, to avoid conflicts and ensure a fair outcome, it is important that the merging parties openly discuss and agree upon the valuation bases, approaches, methods, and techniques before proceeding with the transaction.

Q3: What is a swap ratio in the context of mergers or amalgamations, and why is it important in the valuation process?

Answer: In mergers or amalgamations, the **swap ratio** is a crucial element of the valuation process. It represents the rate at which the shares of the acquiring company are exchanged for the shares of the acquired company. For example, a swap ratio of 1:2 means that the acquiring company will issue one of its shares for every two shares of the acquired company. The swap ratio directly affects the ownership structure post-merger and must be carefully calculated based on a fair valuation of both companies.

Q4: How do financial market participants determine the value of a business, and why is the choice of valuation model considered subjective?

Answer: Financial market participants use valuation models to determine the true value of a business, which can be applied to the entire company or a specific segment of its operations. Valuation typically involves analysing financial statements, cash flows, and other market factors using various tools and methods. A key component of this process is financial modelling, which varies by entity and industry. Since one financial model may not be suitable for all industries, the choice of model is often subjective, depending on the nature of the business and industry-specific dynamics. This subjectivity adds complexity to the valuation process.

Q5: How do acquisition motives influence business valuation in mergers, amalgamations, or takeovers?

Answer: In mergers, amalgamations, or takeovers, the method of business valuation is largely influenced by the **underlying acquisition motives**, which can be **financial**, **business-related**, or **behavioural**.

Financial motives may include goals such as tax benefits, asset stripping, correcting valuation errors, or financial restructuring to enhance resource availability. In these cases, valuation focuses on expected **financial gains** rather than operational cash flows.

Business-related motives typically involve expansion, diversification, or improving poor performance. Here, valuation is based on the **present value of differential cash flows**, which sets a limit on the premium an acquirer is willing to pay.

Behavioural motives are driven by the personal ambitions of top management, such as the desire to grow the company.

The chosen valuation method will vary depending on which of these motives dominates the acquisition strategy, making it crucial to align valuation practices with the strategic intent behind the transaction.

Q6: What is business valuation, and why is it important in various business and legal contexts?

Answer: Business valuation refers to the process of determining the economic worth or value of a business or company. It involves assessing the various factors that contribute to the financial value of the business, such as its assets, liabilities, financial performance, market position, and growth potential.

The need for business valuation arises in several situations:

1. **Mergers and Acquisitions:** Valuation is crucial when companies are considering buying or selling businesses. It helps determine a fair price for the acquisition or sale and enables negotiation between the parties involved.
2. **Investment Analysis:** Investors, both individual and institutional, require business valuations to assess the potential return on investment and determine if a business is a viable investment opportunity.
3. **Financial Reporting:** In some cases, businesses need to estimate the value of their assets for financial reporting purposes, such as for accounting standards or compliance requirements.
4. **Shareholder Disputes:** During shareholder disputes, business valuation can help determine the fair value of shares or ownership interests.
5. **Estate Planning:** Valuing a business is essential for estate planning and determining the value of business assets to distribute among beneficiaries or for tax purposes.
6. **Litigation and Legal Proceedings:** Business valuations may be necessary in legal situations, such as divorce settlements, partnership dissolutions, or damage claims.
7. **Strategic Planning:** Valuations are useful in strategic planning to assess the overall financial health of the business, identify areas for improvement, and make informed decisions about growth strategies or restructuring.

By conducting a business valuation, stakeholders gain insights into the financial worth of the business, which helps them make informed decisions. It provides a foundation for negotiation, investment decisions, and overall strategic planning. Furthermore, business valuation helps ensure fair transactions, protects the interests of stakeholders, and provides a benchmark for future growth and performance evaluations.

Q7: In what situations does business or share valuation become essential, and why is it important in these contexts?

Answer: The following are some of the usual circumstances when valuation of shares or enterprise becomes essential:

1. When issuing shares to public either through an initial public offering or by offering for sale of shares of promoters or for further issue of shares to public.
2. When promoters want to invite strategic investors or for pricing a first issue or a further issue, whether by way of a preferential allotment or rights issue.
3. In making investment in a joint venture by subscription or acquisition of shares or other securities convertible into shares.
4. For making an 'opening offer' for acquisition of shares.
5. When company intends to introduce a 'buy back' or 'delisting of shares'.
6. In schemes involving mergers/demergers, share valuation is resorted to determine the consideration for the purpose of issue of shares or any other consideration to shareholders or transferor of demerged companies.
7. On directions of Tribunal or other statutory Authority.
8. For determining fair price for effecting sale or transfer of shares as per Articles of Association of the company.
9. As required by the agreements between two parties.
10. To determine purchase price of a 'block of shares', which may or may not give the holder thereof a controlling interest in the company.
11. To value the interest of dissenting shareholders under a scheme of amalgamation, merger or reconstruction.
12. Conversion of debt instruments into shares.
13. Advancing a loan against the security of shares of the company by the Bank/Financial Institution.
14. As required by provisions of law such as the Companies Act, 2013 or Foreign Exchange Management Act, 1999 or Income Tax Act, 1961 or the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [the Takeover Code] or SEBI (Buy Back of Securities) Regulations, 2018 or Delisting Guidelines.

Q8: "Determining the value of a business is a complicated and intricate process. Valuing a business requires the determination of its future earnings, potential and risk inherent in it." Examine the statement explaining major factors influencing the valuation of a business. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Factors Influencing Valuation

Determining the value of a business is a complicated and intricate process. Valuing a business requires determination of its future earnings potential and the risks inherent to those future earnings. The process arriving at this value includes a detailed analysis of its mix of physical and intangible assets, and the economic and industry conditions. Major factors influencing the valuation of a business include:

- debt equity ratio
- nature of business and its growth history
- customer base

- areas of operations
- audited financial statements
- management team and its competency
- litigation and disputes
- Related Party Transactions, etc.

The other salient factors include:

1. The stock exchange price of the shares of the two companies before the commencement of negotiations or the announcement of the bid.
2. Dividends paid on the shares.
3. Relative growth prospects of the two companies.
4. In case of equity shares, the relative gearing of the shares of the two companies.
5. Voting strength in the merged (amalgamated) enterprise of the shareholders of the two companies
6. Past history of the prices of shares of the two companies.
7. Merger and amalgamation deals can take a number of months to complete during which the valuations can fluctuate substantially. Hence provisions must be made to protect against swings.

Q9: "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)

PAST YEAR QUESTION DECEMBER 2019

Answer: Yes, I do agree with the given statement. A business valuation involves analytical and logical application/analysis of historical/future tangible and intangible attributes of business.

- Valuation is a process to assess the worth of an enterprise or a business.
- In case of corporate restructuring through mergers, amalgamations, takeovers, etc., valuation assumed great importance due to determination of the transaction price.
- Valuation plays a vital role in deriving the share exchange (swap) ratio.
- Determining the value of company/business/share is a complicated, elaborate process.
- Valuation shall be exercised judiciously and diligently. However, it is more a subjective than objective process, and depends on the skills and perceptions of the valuer/expert.
- It is an application of facts, figures, skills and insight of valuer. It is more an art than science.
- Business valuation involves analytical and logical application/analysis of past as well as future tangible and intangible aspects of business.

Preliminary study to valuation includes:

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 rates,
13. Market capitalization aspects,
14. Identification of hidden liabilities through analysis of material contracts,
15. Last years audited balance sheets.

Q10: What are the preliminary steps that are to be followed for a proper valuation ? (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

- (a) Analysis of business history
- (b) Profit trends
- (c) Goodwill and Brand name in the market
- (d) Identifying economic factors directly affecting business
- (e) Study of exchange risk involved
- (f) Study of employee morale
- (g) Study of market capitalization aspects
- (h) Identification of hidden liabilities through analysis of material contracts.

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

- (a) Determining the consideration for Acquisition
- (b) Determining the swap ratio for Merger or Demerger
- (c) Sale or purchase of intangible assets including brands, patents, etc.
- (d) Determining the Fair value of shares for issuing ESOP
- (e) Disinvestment of PSU stocks by the Government
- (f) Liquidation or insolvency process of the company

Q11: What are the common methods used for business valuation, and what factors influence the choice of method?

Answer: Business valuation involves assessing various elements such as a company's assets, liabilities, financial performance, market position, and growth potential to determine its economic value. There are several widely used valuation methods, including:

1. **Market Approach:** This method determines the value of a business by comparing it to similar businesses that have recently been sold or are publicly traded. It relies on market data and transactions to estimate the value.

2. **Income Approach:** This method values a business based on its expected future income or cash flow. It involves discounting projected future cash flows to their present value using an appropriate discount rate.
3. **Asset Approach:** This method focuses on the value of the assets and liabilities of a business. It assesses the net asset value by subtracting liabilities from the fair market value of the assets.
4. **Multiple-based Approach:** This method uses financial ratios or multiples (such as price-to-earnings ratio or price-to-sales ratio) derived from comparable companies or industry averages to estimate the value of a business.

The choice of valuation method depends on several factors:

- The purpose of the valuation (e.g., sale, investment, restructuring),
- The industry in which the business operates,
- The reliability and availability of data, and
- The specific circumstances surrounding the valuation.

Since valuation is not an exact science and different methods can yield different results, it is common to engage professional valuers or appraisers. Their expertise helps ensure that the valuation is as accurate, fair, and useful as possible for decision-making, negotiations, and financial transactions.

Q12: What are the key principles and techniques used in valuing companies during a merger, and why is a multi-method approach often necessary?

Answer: Valuing companies during a merger is a complex process that requires applying multiple principles and techniques to ensure an accurate and fair assessment of the combined entity's value. Key techniques include:

1. **Comparable Company Analysis:** This technique involves identifying comparable companies in the same industry or sector and analyzing their financial metrics, such as price-to-earnings ratio (P/E), price-to-sales ratio (P/S), or enterprise value-to-EBITDA ratio (EV/EBITDA). The valuation multiples derived from these comparable companies can then be applied to the target company to estimate its value.
2. **Discounted Cash Flow (DCF) Analysis:** DCF analysis is a widely used valuation technique that estimates the present value of a company's future cash flows. It involves projecting the expected cash flows of the merged entity and discounting them back to their present value using an appropriate discount rate, such as the weighted average cost of capital (WACC). The sum of these discounted cash flows represents the estimated value of the merged entity.
3. **Synergy Analysis:** Synergy refers to the potential benefits and cost savings that can be achieved through the merger. It is important to assess and quantify the synergistic effects of the merger, such as increased revenue, cost reductions, economies of scale, or market expansion. These synergies can then be incorporated into the valuation analysis to determine the enhanced value of the merged entity.
4. **Asset-Based Valuation:** This approach involves assessing the value of the tangible and intangible assets of the companies involved in the merger. It includes analyzing the fair market value of assets, such as property, plant, and equipment (PP&E), inventory, intellectual property, and brand value. Liabilities are subtracted from the asset value to derive the net asset value, which forms the basis of the valuation.
5. **Market Capitalization:** Market capitalization is a straightforward valuation technique that calculates the value of a company based on its market price per share multiplied by the number of outstanding shares. In

the context of a merger, this technique can be used to determine the relative value of the merging entities and the resulting ownership structure.

6. Transaction Multiples: Transaction multiples involve analyzing historical merger and acquisition transactions in the same industry to determine valuation benchmarks. This includes assessing multiples such as the purchase price-to-sales ratio (PP/S), purchase price-to-earnings ratio (PP/E), or enterprise value-to-revenue ratio (EV/Revenue) observed in past transactions. These multiples can then be applied to the financial metrics of the merging entities to estimate their value.

Q13: Define Asset-Based Approach. How do you calculate the Net Asset Value of a company using the Asset-Based Approach?

Answer: The Asset-Based Approach is a valuation method that assesses the value of a business based on its net asset value. It involves calculating the fair market value of the company's assets and subtracting its liabilities to arrive at the net asset value.

To calculate the Net Asset Value (NAV) using the Asset-Based Approach, you subtract the company's total liabilities from its total assets.

Q14: ABC Manufacturing is undergoing a business valuation using the Asset-Based Approach. The company provides the following financial data:

Cash and Cash Equivalents: Rs. 100,000

Accounts Receivable: Rs. 200,000

Inventory: Rs. 300,000

Property, Plant, and Equipment: Rs. 1,000,000

Total Assets: Rs. 1,600,000

Accounts Payable: Rs. 150,000

Long-Term Debt: Rs. 500,000

Total Liabilities: Rs. 650,000

Compute the Net Asset Value (NAV) of ABC Manufacturing.

Answer:

c) Net Asset Value (NAV): $NAV = \text{Total Assets} - \text{Total Liabilities}$

$NAV = \text{Rs. } 1,600,000 - \text{Rs. } 650,000 = \text{Rs. } 950,000$

The Net Asset Value of ABC Manufacturing is Rs. 950,000.

Q15: XYZ Services is undergoing valuation using the Asset-Based Approach. The company has the following asset and liability details:

Cash and Cash Equivalents: Rs. 150,000

Accounts Receivable: Rs. 200,000

Inventory: Rs. 100,000

Property, Plant, and Equipment (PP&E): Rs. 500,000

Intangible Assets (Patents, Trademarks): Rs. 300,000

Accounts Payable: Rs. 100,000

Long-Term Debt: Rs. 400,000

Based on the informat on provided: Compute the Net Asset Value (NAV).

Answer:

Net Asset Value (NAV) = Total Assets – Total Liabilit es NAV = Rs. 1,250,000 – Rs. 500,000 = Rs. 750,000

So, the Net Asset Value of XYZ Services is Rs. 750,000.

Q16: ABC Ltd. has the following values in its books:

Part culars (Rs. in thousand)

Land and building	300
Plant and machinery	200
Inventory	200
Investment	100
Receivables	300
Cash	100
Current liabilit es	300
Term loans	200

Land and buildings will fetch 500 more. Plant and machinery will fetch 100 less. Inventory will fetch 50 less. Receivables will fetch 50 less. Current liabilit es of 50 will not be payable.

Calculate the net realizable value of this business.

Answer:

	Book Value	Impairment/Appreciat on	Realizable Value
Assets			
Land & Buildings	300	+500	800
Plant & Machinery	200	-100	100
Investments	100		100
Inventory	200	-50	150
Receivables	300	-50	250
Cash	100		100
TOTAL	1200	300	1500
Liabilit es			
Bank Borrowings	200		200
Current Liabilit es	300	-50	250
		Net Realisable Value	1050

Q17: What is the Income-Based Approach in business valuat on, and what are the key methods used under this approach?

Answer:

The Income-Based Approach values a business based on its future income or cash f ows, which are discounted to present value using a predetermined rate. Accurate forecast ng of future earnings is crit cal in this method.

Q18: Using the Price-Earnings (P/E) method, calculate the estimated value per share and total value of Company-A, based on the following information:

- Company-A is in the FMCG industry
- Earnings per share (EPS) of Company-A = Rs. 5.5
- Comparable listed companies in the same sector have the following P/E ratios:
Company-B: 39
Company-C: 45
Company-D: 33
- Total earnings of Company-A = Rs. 2 crore
- Also, estimate the value of Company-A if it is unlisted, assuming a 40% reduction in value due to lack of marketability.

Answer:

Calculation Using the P/E Method:

Step 1: Calculate average P/E ratio of comparable companies:

Average P/E = $39 + 45 + 33 = 117 / 3 = 39$

Step 2: Estimate value per share of Company-A:

EPS = Rs. 5.5, P/E = 39

Per Share Value = $5.5 \times 39 = \text{Rs. } 214.5$

Step 3: Estimate total company value (based on total earnings):

Total Earnings = Rs. 2 crore, P/E = 39

Total Company Value = $2 \times 39 = \text{Rs. } 78 \text{ crore}$

Step 4: Adjust for unlisted status (40% discount):

Adjusted Value = $78 \times (1 - 0.40) = 78 \times 0.60 = \text{Rs. } 46.8 \text{ crore}$

Final Answer:

Value per share of Company-A (listed) = Rs. 214.5

Total value of Company-A (listed) = Rs. 78 crore

Estimated value of Company-A (unlisted) = Rs. 46.8 crore

Q19: Zen Ltd. has earned a profit of Rs. 40,00,000 before tax for the year ended 31st March, 2014. Tax amounts to Rs. 11,40,000. The share capital of the company is 60,00,000 (4,00,000 equity share of Rs. 10 each and 2,00,000, 7% preference shares of 10 each). Compute earnings per share (EPS) of Zen Ltd. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Earnings per Share of Zen Limited

Earnings before tax 40,00,000

Less: Tax 11,40,000

Earnings after tax 28,60,000

Less : Preference Dividend 1,40,000

Earnings after tax and

preference dividend 27,20,000

Earnings per share = $27,20,000 / 400,000$ which is Rs 6.8.

Q20: Newrotechnologies Limited is a tech company that needs to find out its valuation for next round of funding. To estimate its fair value, it is planning to use Market Comparable Approach, which involves comparing it with companies which are similar in size, industry and financial characteristics.

The chief financial officer has gathered the following information for this purpose : Comparable Companies in the market :

Company A : P/E Ratio = 18

Company B : P/E Ratio = 20

Company C : P/E Ratio = 22

Company D : P/E Ratio = 21

The financials of Newrotechnologies Limited for the year ending 31st March, 2024 are as follows:

Net income is Rs.20,00,000.

Total number of shares is 50,000

Using the above information, calculate the estimated price per share and estimated value of Newrotechnologies Limited. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Average P/E ratio using the market comparables is = $(18+20+22+21) / 4 = 20.25$

Earnings per share = $20,00,000 / 50,000 = \text{Rs. } 40/-$ per share

Market value per share = Average P/E ratio * EPS

= $20.25 * 40$

= Rs. 810/- per share

Value of the Newrotechnologies Limited = MP Per share * No. of shares

= $810 * 50,000$

= Rs. 4,05,00,000

Q21: Blue Ltd. and Moon Ltd. have agreed to amalgamate to form a new company Blue Moon Ltd. After negotiation, the two companies have decided on the balance

(Rs. in '000)

EQUITY AND LIABILITIES

(1) Shareholders' funds

(a) Share capital

Equity shares of Rs.10 each	5,00,000	10,00,000

(b) Reserves and surplus

Reserve fund	20,000	—

Surplus	40,000	40,000

(2) Current liabilities

Trade payables	40,000	60,000

TOTAL	6,00,000	11,00,000

(Rs. in '000)

	<i>Blue Ltd.</i>	<i>Moon Ltd.</i>
ASSETS		
(1) Non-current assets		
(i) Tangible assets		
(a) Land and building	2,00,000	4,25,000
(b) Plant and machinery	1,70,000	2,75,000
(ii) Intangible assets (Goodwill)	50,000	1,00,000
(2) Current assets		
(a) Inventories	80,000	1,20,000
(b) Trade receivables	30,000	1,00,000
(c) Cash and cash equivalents	70,000	80,000
TOTAL	6,00,000	11,00,000

The assets and liabilities are taken over by Blue Moon Ltd. Compute the total number of shares of the Blue Moon Ltd. having a value of Rs.10 each to be issued to the shareholders of Blue Ltd. and Moon Ltd. using net asset value method. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Number of shares of Blue Moon Limited to be issued to the shareholders of Blue Limited and Moon Limited.

<i>Part ulars</i>	<i>Blue Limited</i>	<i>Amt in '000 Moon Ltd</i>
Land and Building	2,00,000	4,25,000
Plant and Machinery	1,70,000	2,75,000
Goodwill	50,000	1,00,000
Stock	80,000	1,20,000
Trade Receivable	30000	1,00,000
Cash and Bank	70,000	80,000
Total Assets	6,00,000	11,00,000
Les sundry creditors (Trade Payable)	40,000	60,000
Net assets takeover	5,60,000	10,40,000

Number of shares to be issued to the shareholders of Blue Limited 560 lakh shares

Number of shares to be issued to the shareholders of Moon Limited 1040 lakh shares

Total number of shares to be issued by blue moon limited 1600 lakh shares

Q22:The Wind Urja Ltd. (WUL) is a closely held unlisted company with f nancial details as under :

Market Value

on 31.03.2015

Assets **(Rs. in lakh)**

Land and building	6,500
Plant and machinery	2,000
Furniture and fixtures	20
Trade receivables	1,000
Cash and cash equivalents	30
Spares	10
Outside Liabilities	
Trade payables	20
Long-term loans	2,000
Outstanding expenses	5
Worldwide Wind Energy Ltd. (WWEL) is ready to take over WUL by paying 35% premium over the market value of assets and liabilities as goodwill. Calculate the price which WWEL is ready to pay to shareholders of WUL. (5 marks)	
PAST YEAR QUESTION DECEMBER 2015	

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

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

II Plus 35% premium over value = 35% of Rs 75, 35, 00,000 = Rs. 26, 37, 25,000/-

III Price to be paid by WWEL = Value plus 35% premium = Rs (75, 35, 00,000 + 26, 37, 25,000)

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

Q23: You are a Company Secretary of Modern India Ltd., which is planning to go for an IPO. The Managing Director of your company asked you to advise about the different pricing norms necessarily to be followed by the issuer company as per the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Advise the company about the conditions for different pricing. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

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

- retail individual investors or retail individual shareholders or employees of the issuer entitled for reservation made under regulation 42 making an application for specified securities of value not more than one lakh rupees, may be offered specified securities at a price lower than the price at which net offer is made to other categories of applicants: Provided that such difference shall not be more than ten per cent of the price at which specified securities are offered to other categories of applicant;
- in case of a book built issue, the price of the specified securities offered to an anchor investor shall not be lower than the price offered to other applicants;

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

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

Q24: Blue Springs Ltd. incorporated a new company namely Defence Springs Ltd. and transferred its defence component division to it on slump sale basis for a lump sum consideration of ₹255 lakh. The assets and liabilities of the defence component division are as under :

	<i>Rs. (in lakh)</i>
Assets :	
Gross value of fixed assets	410
Accumulated depreciation till date	240
Current assets (other than liquid assets)	80
Liquid assets	30
Liabilities :	
Trade liabilities	60
Secured loans (including short-term loans)	80
Short-term loans	35
Calculate the following —	
(i) Aggregate value of total assets;	
(ii) Book value of net assets;	
(iii) Networth of the defence component division; and	
Capital gains as per section 50B of the Income-tax Act, 1961. (5 marks)	
PAST YEAR QUESTION JUNE 2016	

Answer: In case of slump sale, various figures can be calculated keeping an eye on the provisions of section 51B of the Income Tax Act, 1961. The desired values are as under:

(i) Aggregate value of total assets = Depreciated value of depreciable assets + Book Value of other assets

Aggregate value of total assets = $(410 - 240) + 80 + 30 = 280$

Thus it comes to Rs. 280,00,000/-

(ii) Book Value of Net Assets = Net Fixed Assets + Current Assets

Book Value of Net Assets = $170 + 110 = 280$

Thus it comes to Rs. 2,80,00,000/-

(iii) Net Worth of the Defence Component Division = Aggregate value of Total Assets - Value of liabilities

Net Worth of the Defence Component Division = $280 - 140 = 140$

Thus it comes to Rs. 140,00,000/-

(iv) Capital Gains as per Section 50B of the Income Tax Act = Net Consideration - Net Worth of the Defence Component Division = $Rs. 225 - 140 = 115/-$

Thus it comes to Rs. 115,00,000/-

Q25: White Chicks Ltd. is listed on Bombay Stock Exchange. The management wishes to issue sweat equity shares to the new Chairman and Managing Director for which extra-ordinary general meet ng is scheduled on 15th July, 2016.

Based on the following informat on, calculate the minimum value at which sweat equity shares can be issued, and submit your opinion to the management making your own assumpt ons, wherever required. Substant ate your answer with relevant provisions of SEBI Regulat ons.

Part culars	(Rs.)
Average of weekly high and low of the closing prices during last six months as on 'relevant date'	275.00
Average of weekly high and low of the closing prices during last six weeks as on 'relevant date'	285.00
Average of weekly high and low of the closing prices during last six years as on 'relevant date'	185.00
Average of weekly high and low of the closing prices during last two months as on 'relevant date'	282.00
Average of weekly high and low of the closing prices during last two weeks as on 'relevant date'	314.00
Average of weekly high and low of the closing prices during last two years as on 'relevant date'	214.00
(5 marks)	

PAST YEAR QUESTION JUNE 2016

Answer: Under the SEBI (Issue of Sweat Equity) Regulat ons, 2002, the price of sweat equity shares shall not be less than the higher of the following:

- (a) The average of the weekly high and low of the closing prices of the related equity shares during last six months preceding the relevant date; or
- (b) The average of the weekly high and low of the closing prices of the related equity shares during last two weeks

While calculat ng the minimum price, following assumpt ons have been made (in Rs.)

- (I) Share of White Chick Limited is listed only on BSE.
- (II) Prices given have been considered on relevant date as per SEBI regulat ons.
- (III) The intellectual property or the value addit on for which sweat equity shares are proposed to be issued has been valued as per the provisions of SEBI Regulat ons

Following prices are relevant to decide the minimum price at which shares are to be issued:

The average of the weekly high and low of the closing prices of the related equity shares during last six months preceding the relevant date= INR 275.00

The average of the weekly high and low of the closing prices of the related equity shares during last two weeks preceding the relevant date= INR 314.00

Higher of the two, that is. INR 314/- per share is minimum price at which shares can be issued.

Q26: Gama Pest cide Ltd. (GPL) is taking over Theta Fert lizer Ltd. (TFL). The shareholders of TFL would get 0.8 shares of GPL for each share held by them. The merger is not expected to yield in economies of scale and operat ng synergy.

The relevant data of the two companies are as follows :

	GPL	TFL
Net sales (Rs. in crore)	335	118
Prof t af er tax (Rs. in crore)	58	12
Number of shares (crore)	12	3
Earnings per share (Rs.)	4.83	4.00
Market value per share (Rs.)	30	20
Price-earnings rat o	6.21	5.00

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

(i) Earnings per share

(ii) Price-earnings rat o

(iii) Market value per share

(iv) Number of shares; and

(v) Total market capitalisat on. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: Premium paid to Theta's shares shareholders:

Value of each shares in Gama: $0.8 \times \text{Rs. } 30 = \text{Rs. } 24$

Value of Theta's shares before merger = Rs. 20

Premium = Rs. 4

Premium Percentage = $4/20 = 20\%$

Numbers of shares paid to Theta's shareholders: $3 \times 0.8 = 2.4$ crore

Number of shares of the combined company = $12 + 2.4 = 14.4$ crore

Combined prof t af er tax (= Rs. 58 + Rs. 12) = Rs. 70 Crore

(i) Combined EPS (= $70/14.4$) = Rs. 4.86

(ii) Combined P/E rat o = $6.20 \times (58/70) + 5 \times (12/70) = 6.00$

Combined f rm market capitalizat on

(iii) Market value per share = P/E rat o * EPS = $6.00 \times 4.86 = \text{Rs. } 29.16$

(iv) Number of shares of the combined company = $12 + 2.4 = 14.4$ crore

(v) Capitalisat on : MVPs* No. of shares= Rs. $29.16 \times 14.4 = \text{Rs. } 419.9$ crore

Q27: Groves Ltd. and Wood Ltd. decided to merge and a new company Groves Wood Ltd. is formed. Following are the extracts from the f nancial records of Groves Ltd. and Wood Ltd. :

(Rs. in lakh)

	Groves Ltd.	Wood Ltd.
EQUITY AND LIABILITIES		
(1) Shareholders' funds		

(a) Share capital

Equity shares of Rs. 10 each	800	1,600

(b) Reserves and surplus

Reserve fund	400	600

Surplus	600	700

(2) Current liabilities

Trade payables	700	800

TOTAL	2,500	3,700

ASSETS**(1) Non-current assets**

(a) Land and building	400	600

(b) Plant and machinery	900	1,500

(c) Intangible assets (goodwill)	100	200

(2) Current assets

(a) Inventories	300	400

(b) Trade receivables	400	300

(c) Cash and cash equivalents	400	700

TOTAL	2,500	3,700

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

PAST YEAR QUESTION DECEMBER 2016**Answer:**

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

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

Q28: Soham Limited is proposing to purchase Aham Limited. Information available for both the companies are as follows :

	Soham Limited	Aham Limited
Paid up share capital	5,00,000 equity shares of Rs. 10 each	2,50,000 equity shares of Rs. 10 each
Market value per share	Rs. 40.00 per share	Rs. 30.00 per share
EPS	Rs. 5.00 per share	Rs. 4.00 per share

Following two alternatives are being explored for exchange of shares:

- (i) In proportion to the relative earnings per share of the two companies.**
- (ii) 1 share of Soham Limited for 2 shares of Aham Limited. Calculate:**
 - (i) Earnings Per Share (EPS) after amalgamation under the above two options.**
 - (ii) Impact of EPS for the shareholders of the two companies under both options. (5 marks)**

PAST YEAR QUESTION JUNE 2024

Answer:

Particulars	Soham Limited	Aham Limited	Total
Outstanding shares	5,00,000	2,50,000	
EPS	5	4	
Total earnings	25,00,000	10,00,000	35,00,000

(i) Calculation of EPS after amalgamation when exchange ratio is in proportion to the relative earnings per share of the two companies-

Total Number of shares after merger

$$= 5,00,000 + 2,50,000 \times \frac{4}{5}$$

$$= 5,00,000 + 2,00,000$$

$$= 7,00,000$$

	Soham Limited	Aham Limited
EPS before merger	5	4
EPS after merger	$35,00,000 / 7,00,000 = 5$	EPS after merger * Exchange ratio on EPS basis = $5 \times \frac{4}{5} = 4$

Calculation of EPS when Exchange ratio is 1:2-

Total earnings after merger = Rs. 35,00,000

Total number of shares after merger = $5,00,000 + (2,50,000 \times \frac{1}{2})$

$$= 5,00,000 + 1,25,000$$

$$= 6,25,000$$

EPS after merger = $35,00,000 / 6,25,000$

$$= \text{Rs. } 5.60$$

	Soham Limited	Aham Limited
EPS before merger	5	4

$$\text{EPS after merger} = \frac{35,00,000}{6,25,000} = \text{EPS after merger} \times \text{Exchange ratio on Share basis} = 5.60 \times \frac{1}{2} = 2.80$$

(ii) Impact of merger for the shareholders of the two companies under both options:

Under first option, when share exchange ratio is in proportion to relative earnings per share of the two companies, pre and post-merger EPS of shareholders of both the companies remain same.

Impact on shareholders of Soham Limited:

EPS before merger	5
EPS after merger	5.60
Increase in EPS	0.60

Impact on shareholders of Aham Limited:

EPS before merger	4
EPS after merger = $5.60 \times \frac{1}{2}$	2.8
Decrease in EPS	1.20

Q29: Ram Ltd. is considering Merger with Shyam Ltd. Ram Ltd. shares are currently traded at Rs. 20. It has 1,70,000 shares and its Profit After Taxes (PAT) amounts to Rs. 8,50,000. Shyam Ltd. has 40,000 shares having market price of Rs. 15 and its PAT is Rs. 3,00,000.

(a) If the merger goes through by exchange of equity shares and the exchange ratio is based on the current market price, what would be the new earning per share of Ram Ltd.?

(b) Shyam Ltd. wants to ensure earnings available to its shareholders are not reduced due to proposed merger. What would be the exchange ratio in such a case? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer:

(a) Calculation of New EPS of Ram Ltd.

Number of Equity shares to be issued to shareholders of Shyam Ltd: $40000 \times \frac{15}{20} = 30000$

Total Number of Shares in Ram Ltd after merger:

$$170000 + 30000 = 200000$$

$$850000 + 300000 = 1150000$$

Thus EPS post-merger is $1150000 / 200000 = \text{Rs. } 5.75$

(b) Exchange Ratio with Earning Assurance:

If the exchange ratio is decided with a view to maintain pre-merger EPS of the Transferor Company, shareholders of both the companies should get the same share in earnings as they were getting before the merger.

Pre-merger EPS

$$\text{Ram Ltd.} - 850000 / 170000 = 5$$

$$\text{Shyam Ltd.} - 300000 / 40000 = 7.5$$

Exchange Ratio: $7.5 / 5 = 1.5$ or 3 shares in Ram Ltd for every 2 shares held in Shyam Ltd.

$$\text{Or } 40000 \times \frac{3}{2} = 60000$$

Total number of Shares after merger: $170000 + 60000 = 230000$

$$\text{EPS} = 1150000 / 230000 = \text{Rs. } 5$$

Earnings for Shareholders of Shyam Ltd af er Merger = $60000 \times 5 = \text{Rs. } 3,00,000$ that conf rms to pre-merger earnings of Shyam Ltd.

Q30: Hunny Ltd. is considering merger with Bunny Ltd. Hunny Ltd. has 3,40,000 shares with current market price at ₹ 20 per share and its Prof t Af er Taxes (PAT) amounts to ₹ 17,00,000. Bunny Ltd. has 80,000 shares with current market price of ₹ 15 per share and its PAT is ₹ 6,00,000.

(i) If the merger goes through by exchange of equity shares and the exchange rat o is based on the current market price, what would be the new earning per share of Hunny Ltd.?

(ii) Bunny Ltd. wants to ensure that earnings available to its shareholders are not reduced due to proposed merger. What would be the exchange rat o in such a case? (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer:(i)

Calculat on of New EPS of Hunny Ltd $(80,000 \times 15 / 20) =$ 60,000 shares

Number of Equity shares to be issued
to shareholders of Bunny Ltd:

Total Number of Shares in Hunny $(3,40,000 + 60,000) =$ 4,00,000 shares

Ltd. af er merger

Total PAT post-merger (Rs.17,00,000 + Rs. 6,00,000) Rs.23,00,000

EPS post-merger (Rs. 23,00,000/4,00,000 shares) Rs. 5.75 Per Share

(ii) Exchange Rat o with Earning Assurance:

If the exchange rat o is decided with a view to maintain the pre-merger EPS of the Transferor Company, shareholders of both the companies should get the same share in earnings as they were get ng before the merger.

Pre-merger EPS:

Hunny Ltd Rs. 17,00,000/3,40,000 shares = Rs. 5 per share

Bunny Ltd Rs. 6,00,000/ 80,000 shares = Rs 75 per share

Exchange Rat o: $7.5/5 = 1.5$ or 3 shares in Hunny Ltd. for every 2 shares held in Bunny Ltd

Or $80,000 \times 3 / 2 = 1,20,000$ shares

Total number of Shares af er merger $3,40,000 + 1,20,000 = 4,60,000$ shares

EPS = Rs 23,00,000/4,60,000 shares = Rs. 5 per share

Earnings for Shareholders of Bunny Ltd. af er Merger = $1,20,000 \times 5 = \text{Rs } 6,00,000$ that conf rms to pre-merger earnings of Bunny Ltd.

Q31: Explain the Market-Based Approach to business valuat on. Discuss its key methods and highlight the advantages and limitat ons of using this approach, part cularly when valuing privately held companies. Also, provide examples of industries or situat ons where the Market-Based Approach is most suitable.

Answer: Under the market-based approach, we look for a similar business which has changed hands in the recent past and value the target ent ty on the same basis. If exactly similar business transact on is not available, a closely similar transact on can be taken, and adjustments can be made for any variat ons in any

parameter to arrive at the correct valuation. The adjustments can be for difference in size, quantity, or quality. It is easy to value a company which is publicly traded. However, when a similar company is not available then it becomes necessary to adjust as mentioned above.

There are two popular types of market approach methods, one is based on guideline transaction method and the other based on guideline public method, i.e., publicly traded entity. Market approach method is useful in case of Real Estate Company because we can easily estimate by looking at similar sale transactions. Also, we can look at recent merger and acquisition transactions in the same industry and make adjustments for any size, product or other relevant factor to arrive at the target company valuation. There is also another method called back solve method. This involves analysis of equity transactions of the target entity in the past 12 months with unrelated investors.

Q32: Write a detailed note on discounted cash flows (DCF) valuation method. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

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

- Estimate the future cash flows of the target based on the assumption for its post-acquisition management by the bidder over the forecast horizon.
- Estimate the terminal value of the target at forecast horizon.
- Estimate the cost of capital appropriate for the target.
- Discount the estimated cash flows to give a value of the target.
- Add other cash inflows from sources such as asset disposals or business divestments.
- Subtract debt and other expenses, such as tax on gains from disposals and divestments, and acquisition costs, to give a value for the equity of the target.
- Compare the estimated equity value for the target with its pre-acquisition standalone value to determine the added value from the acquisition.
- Decide how much of this added value should be given away to target shareholders as control premium.

Q32: G-tech solutions is a fast-growing company and is exploring the options for fund raising.

The Management of Company has approached you to determine the valuation of their business using Discounted Cash Flow Market Approach.

Explain the steps involved in this method of valuation of business. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The Discounted Cash Flow (DCF) technique is a widely used method for business valuation. It estimates the present value of a company's projected future cash flows, taking into account the time value of money. The DCF technique involves the following steps:

1. **Project Future Cash Flows:** Forecast the future cash flows of the business over a specific period. Cash flows typically include operating cash flows, capital expenditures, working capital changes, and any other significant cash flow components.
 2. **Determine the Discount Rate:** Select an appropriate discount rate, often the company's Weighted Average Cost of Capital (WACC). The discount rate represents the required rate of return expected by an investor considering the risk associated with the investment. It reflects the opportunity cost of investing in the company rather than alternative investments.
 3. **Discount Cash Flows:** Apply the discount rate to each projected period's cash flow to calculate the present value of the cash flows. This involves dividing each projected cash flow by $(1 + \text{discount rate})$ raised to the power of the respective period.
 4. **Calculate Terminal Value:** Estimate the value of the company beyond the projected period, usually based on a perpetuity or exit multiple. The terminal value represents the value of the business's cash flows beyond the projection period.
 5. **Sum the Present Values:** Sum up the present values of the projected cash flows and the terminal value to obtain the total present value of the future cash flows. This represents the estimated value of the business.
 6. **Sensitivity Analysis:** Perform sensitivity analysis by varying key assumptions such as cash flow projections, discount rate, and terminal value to assess the impact on the estimated value.
 7. **Compare to Market and Comparable Companies:** Consider market conditions, industry trends, and comparable company valuations to evaluate the reasonableness of the estimated value.
- It's important to note that the accuracy of the valuation heavily depends on the quality of cash flow projections, appropriate selection of the discount rate, and other assumptions made during the process. The DCF technique requires careful consideration and professional expertise in financial analysis to ensure a comprehensive and accurate valuation of the business.

Q34: Assume ABC Manufacturing Company is projected to generate the following cash flows over the next five years:

Year 1: 500,000

Year 2: 600,000

Year 3: 700,000

Year 4: 800,000

Year 5: 900,000

The discount rate for ABC Manufacturing Company is determined to be 10%.

Answer:

Step 1: Calculate the Present Value (PV) of Cash Flows

$PV \text{ Year 1} = 500,000 / (1 + 0.10)^1 = 454,545$ $PV \text{ Year 2} = 600,000 / (1 + 0.10)^2 = 495,868$ $PV \text{ Year 3} = 700,000 / (1 + 0.10)^3 = 513,310$ $PV \text{ Year 4} = 800,000 / (1 + 0.10)^4 = 526,446$ $PV \text{ Year 5} = 900,000 / (1 + 0.10)^5 = 535,714$

Step 2: Calculate the Sum of PV Cash Flows

$\text{Sum of PV Cash Flows} = PV \text{ Year 1} + PV \text{ Year 2} + PV \text{ Year 3} + PV \text{ Year 4} + PV \text{ Year 5}$
 $\text{Sum of PV Cash Flows} = 454,545 + 495,868 + 513,310 + 526,446 + 535,714$

$\text{Sum of PV Cash Flows} = 2,525,883$

Step 3: Determine the Terminal Value

Assume the terminal value is estimated to be 10 million. To calculate the present value of the terminal value, we need to select an appropriate exit year and discount it back to the present value using the discount rate.

Assuming the exit year is Year 5: $PV \text{ Terminal Value} = 10,000,000 / (1 + 0.10)^5 = 6,209,677$

Step 4: Calculate the Total Present Value

Total Present Value = Sum of PV Cash Flows + PV Terminal Value
Total Present Value = 2,525,883 + 6,209,677

Total Present Value = 8,735,560

In this example, the estimated valuation of ABC Manufacturing Company using the DCF technique is approximately 8,735,560

Q35: Explain the role and importance of valuation under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Discuss the key provisions related to share valuation, offer pricing, the appointment of valuers, and the valuation report requirement.

Answer: The SEBI (SAST) Regulations, 2011, were formulated by the Securities and Exchange Board of India to regulate substantial acquisitions and takeovers of listed companies in a fair and transparent manner. While the core focus is on the **acquisition of shares and control**, valuation plays a crucial role in protecting the interests of minority shareholders and ensuring fairness in the transaction.

1. Valuation of Shares:

- Regulation 8 of the SEBI (SAST) Regulations mandates that the acquirer must disclose the highest price paid for the shares of the target company in the 26 weeks preceding the public announcement of the acquisition.
- If the acquisition involves a preferential issue of shares, the price at which the preferential issue is made must be disclosed.
- The valuation of shares is important in determining the price to be paid by the acquirer and for assessing the fairness of the transaction.

2. Offer Price:

- Regulation 20 of the SEBI (SAST) Regulations specifies that the offer price should be determined by the acquirer based on the valuation of the shares of the target company.
- The offer price is the price at which the acquirer intends to acquire shares from the public shareholders of the target company.
- The acquirer must ensure that the offer price is fair and in compliance with the SEBI (SAST) Regulations.

3. Registered Valuers:

- The SEBI (SAST) Regulations require the appointment of a registered valuer for determining the valuation of shares.
- Regulation 22 mandates that the valuer must be a merchant banker, registered with SEBI, and should have expertise in valuation.
- The valuer plays a crucial role in assessing the fair value of shares and providing an independent opinion on the valuation.

4. Valuation Report:

- Regulation 35 of the SEBI (SAST) Regulations requires the acquirer to submit a valuation report to SEBI.

- The valuation report provides details of the valuation methodology, assumptions, and factors considered in determining the valuation of shares.
- The report is a crucial document that helps establish the fairness of the acquisition and provides transparency to the regulators and shareholders.

Q36: Discuss the valuation journey of Flipkart from its inception to the Walmart acquisition. How did different funding rounds, market dynamics, and investor interest influence its valuation over time? What insights can be drawn from this case regarding startup valuation in the Indian context?

Answer: The valuation journey of Flipkart offers a comprehensive insight into how startup valuations evolve with growth, investor sentiment, and market conditions. Here's a breakdown of Flipkart's valuation over the years:

1. Initial Valuation (2009):

- **Funding Raised:** \$1 million
- **Valuation:** ~\$5 million
- **Investors:** Early angel investors
- **Insight:** Valuation was based on potential and idea stage, common for early-stage startups.

2. Early Growth (2010):

- **Funding Raised:** \$10 million
- **Valuation:** ~\$50 million
- **Investors:** Accel Partners, Tiger Global
- **Insight:** Rapid user growth and proof of concept boosted investor confidence.

3. Expansion & Market Capture (2011):

- **Funding Raised:** \$20 million
- **Valuation:** ~\$1 billion
- **Insight:** The company was scaling quickly and becoming a market leader, driving up valuation significantly.

4. Billion-Dollar Milestone (2014):

- **Funding Raised:** \$1 billion
- **Valuation:** ~\$7 billion
- **Investors:** Tiger Global, DST Global, etc.
- **Insight:** Flipkart became the first Indian e-commerce company to hit this valuation mark, reflecting strong investor belief and market positioning.

5. Valuation Adjustments (2017):

- **Funding Raised:** \$2.5 billion
- **Valuation:** ~\$11.6 billion
- **Investor:** SoftBank Vision Fund
- **Insight:** Increasing competition, especially from Amazon, affected valuation growth pace.

6. Walmart Acquisition (2018):

- **Acquisition Amount:** \$16 billion
- **Valuation:** ~\$20 billion
- **Insight:** This marked one of India's largest startup exits. It showed how strategic acquisition can unlock value for investors and founders alike.

Key Learnings:

- **Valuation is dynamic:** It evolves with business performance, market leadership, and macroeconomic factors.
- **Investor confidence is crucial:** High-profile VCs significantly influenced valuation jumps.
- **Market competition matters:** Valuation can face downward pressure from competitive threats.
- **Exit opportunities affect valuation:** Walmart's acquisition validated Flipkart's value and rewarded long-term investors.

Conclusion:

Flipkart's journey exemplifies the typical valuation lifecycle of a high-growth startup in a developing market. It shows how early traction, strategic funding, and market leadership can drive valuation, while also emphasizing the need for adaptability in a competitive environment.

Q37: Various judicial pronouncements on valuation principles demonstrate salient dicta of courts in relation to the subject. You are required to list out the principles set-out by the courts in this regard. (6 marks)

PAST YEAR QUESTION JUNE 2015

Answer: Judicial Pronouncement on Valuation Principles/Valuation Reports

Some of the salient dicta of Courts in relation to valuation principles and valuation reports are stated under: In **Bahoo J. Coyajee v. Shanta Genevieve Prommeret Parulekar [1991] (3) Bom. LR 319**, the Court observed: "If the thing complained of is a thing which in substance the majority of the company are entitled to do or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes".

In **Miheer H. Mafatlal v. Mafatlal Industries Ltd. [1996] 87 Comp. Cas. 792 (SC)**, the Hon'ble Supreme Court held:

"If Share Exchange Ratio is fixed by Chartered Accountant upon consideration of various factors and approved by majority of shareholders in meeting, the Court will not disturb ratio".

In **Re. Maknam Investments Ltd. [1995] (4) Comp.LJ page 330**, the Calcutta High Court observed:

"Court does not go into the matter of fixing of exchange ratios in great detail or to sit in appeal over the expert decision of concerned chartered accountant of repute. Court only sees whether there is any manifest unreasonableness or manifest fraud involved in the matter".

In ***Hindustan Lever Employees Union v. Hindustan Lever Limited* [1995] (Supp.) (1) SCC 499** at 517(519), the Hon'ble Court stated:

"The valuation of shares is a technical matter. It requires considerable skill and experience. There are bound to be differences of opinion among accountants as to what is the correct value of the shares of a company. It was emphasized that more than 99% of the shareholders had approved the valuation. The test of fairness of this valuation is not whether the offer is fair to a particular shareholder.... who may have reasons of his own for not agreeing to the valuation of the shares, but the overwhelming majority of the shareholders have approved of the valuation. The Court should not interfere with such valuation".

The Hindustan Lever case also repelled the case that valuation particulars needed a proper disclosure as material facts in the Explanatory Statement. It confirmed the judgment of ***Jitendra R. Sukhadia v. Alembic Chemical Works Co. Ltd.*, (1987) 3 Comp.L.J 141 (Guj)** as follows:

"How this exchange ratio was worked out, however, was not required to be stated in the statement contemplated under Section 394(1)(a)".

The Hindustan Lever's judgment (1995) Supp. (1) SCC 499 at 502 noted:

"In the absence of it being shown to be vitiated by fraud and malafide, the mere fact that the determination done by slightly different method might have resulted in different conclusion would not justify interference of Court."

Q38: In which circumstances, is the market based approach to valuation not relevant and useful ? (4 marks)
PAST YEAR QUESTION JUNE 2015

Answer: Market Price Method of valuation is not relevant in the following cases:

- Valuation of a division of a company
- Where the shares are not listed or are thinly traded
- In the case of a merger, where the shares of one of the companies under consideration are not listed on any stock exchange
- In case of companies, where there is an intention to liquidate it and to realise the assets and distribute the net proceeds.

Q39: "Market based approach to valuation is adopted for determination of price in the case of preferential allotment, buy-back and open offer. But the market price is not so reliable for the purpose of valuation." In the light of the statement, state the limitations of market based approach particularly in case of preferential allotment, buy-back and open offer. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: It is important to note that Regulatory bodies have often considered market value as one of the very important basis — Preferential allotment, Buyback, Open offer price calculation under the Takeover Code. However, Market Price Method is not relevant in the following cases:

- Where the shares are not listed or are thinly traded.
- In case of significant and unusual fluctuations in market price the market price may not be indicative of the true value of the share. At times, the valuer may also want to ignore this value, if according to the valuer; the

market price is not a fair reflection of the company's underlying assets or profitability status. The Market Price Method may also be used as a backup for supporting the value arrived at by using the other methods.

- In earlier days due to non-availability of data, while calculating the value under the market price method, high and low of monthly share prices were considered.

Now with the support of technology, detailed data is available for stock prices. It is now a usual practice to consider weighted average market price considering volume and value of each transaction reported at the stock exchange.

- If the period for which prices are considered also has impact on account of Bonus shares, Rights Issue, etc., the valuer needs to adjust the market prices for such corporate events.

Q40: "The valuation of shares is not only a question of facts, but also arises out of technical & complex issues." Comment and analyse with the help of decided case laws. (5 Marks)

PAST YEAR QUESTION JUNE 2022

Answer: The Supreme Court followed the principle laid down in the case of **Dr. Renuka Dutta vs. B.V. Solvay Pharmaceuticals** and held that the valuation of shares is not only a question of fact, but also raised technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares. If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter. Where a method of valuation is prescribed the valuation must be made by adopting scrupulously the method prescribed, taking into account all relevant factors which may be enumerated as relevant for arriving at the valuation.

In **Duncans Industries Ltd. vs. State of U.P. and others**, the Hon'ble Court held that the question of valuation is basically a question of fact and this Court is normally reluctant to interfere with the finding on such a question of fact if it is based on relevant material on record. Similarly in **Miheer H. Mafatlal vs. Mafatlal Industries Ltd.** the Hon'ble Court sounded a note of caution observing that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy.

Q41: In calculating fair value, element of guesswork or arbitrariness is imminent. Comment. (5 mark)

PAST YEAR QUESTION DECEMBER 2017

Answer: Valuation can be done on the basis of fair value. However, resort to valuation by fair value is appropriate when market value of a company is independent of its profitability.

The fair value of shares is arrived at after consideration of different modes of valuation and diverse factors. There is no mathematically accurate formula of valuation. An element of guesswork or arbitrariness is involved in valuation. Capital cover, Yield, Earning capacity, and Marketability are to be calculated or verified to arrive at fair valuation of the shares in question. While valuing shares, the valuer is required to take into

consideration on any special features, such as, quantum of shares to be acquired as a percentage of total shares, in other words extent of dominance, transferability restrictions, dividend pay-outs, bonus and rights issue made earlier that influences the share value. Over all, funds flow and cash flow analysis is also to be studied for valuation of shares. It is also necessary to follow valuation standards so that uniformity in valuation of various tangible and intangible factors are taken into account.

Q42: "Fair value of shares is in fact not precisely fair but a compromise effort for bringing the parties to an agreement, just like providing extra play time in a Hockey or Football match especially in case of a tie". Justify the statement with your views. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: There is no mathematically accurate formula of valuation. An element of guesswork or arbitrariness is involved in valuation though it is possible to calculate book value, market value averaging quoted prices for a period. The following four factors have to be kept in mind in the valuation of shares:

- (1) Capital cover,
- (2) Yield,
- (3) Earning capacity, and
- (4) Marketability

However, efforts are made to ascertain fair value just like extension of play time in Hockey or Football in case of tie even in extra time. Valuation based on fair value is appropriate when market value of a company is independent of its profitability. Dividing the aggregate of values obtained through net assets method and yield method is the process to arrive at fair value. In another way the following well-known methods are applied to get fair value:

- (a) The manageable profits basis method or the earning per share method;
- (b) The net worth method or the break-up value method; and
- (c) The market value method.

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

Q43: "Courts and Tribunals do not substitute or impose their opinion on the valuation report unless there are not ceable irregularities." Offer your comments with certain judicial pronouncements. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

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

Accountant of repute. Court sees only whether there is any manifest unreasonableness or manifest fraud involved in the matter.”

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

Q44: What are the common strategies that warrant valuation of shares, business or even an undertaking? (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

- (a) Either purely financial such as taxation, asset-stripping, financial restructuring involving an attempt to augment the resources base and portfolio-investment;
- (b) Business related expansion or diversification; or
- (c) The behavioural reasons have more to do with the personal ambitions or objectives of the top management.

The expansion and diversification objectives are achievable either by building capacities on one's own or by buying the existing capacities. In other words 'make' or 'buy' decisions. The decision criteria in such a situation would be the present value of the differential cash flows. These differential cash flows would, therefore, be the limit on the premium which the acquirer would like to pay. On the other hand, if the acquisition is motivated by financial considerations, the expected gains through taxation or asset stripping would form limit on the premium, over and above the price of physical assets. Cash flow from operations may not be the main consideration in such a situation. A merger with financial restructuring as its objective needs to be valued mainly in terms of financial gains.

Q45: Explain Market Comparables Method of valuation. What are the steps involved in this method of valuation ? (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Market Comparables : This method of valuation is generally applied in case of unlisted entities. This method estimates value by relating the same to underlying elements of similar companies for past years. It is based on market multiples of 'comparable companies'. For example:

- Earnings / Revenue Multiples (Valuation of Pharmaceutical Brands)
- Book Value Multiples (Valuation of Financial Institution or Banks)
- Industry Specific Multiples (Valuation of steel companies based on production capacities like price per ton capacity of steel, per store value in the days of retail boom, price per click in e-commerce)
- Multiples from recent M&A Transactions

Following steps are involved in this method of valuation:

1. Comparable assets are identified and their market values are obtained
2. Market values are converted into standardized values, since the absolute price cannot be compared

3. Standardised value or multiple for the asset being analysed are compared with the standardised value of the comparable asset, controlling for any difference between the firms that might affect the multiple, to judge whether the asset is under or over-valued.

Q46: XYZ Tech Solutions is a fast-growing technology company specializing in software development and IT services.

The company was founded five years ago and has experienced rapid revenue growth and a strong customer base. The management team is exploring options for fundraising and needs to determine the valuation of the business.

Key Information:

1. Financial Performance:

Year 1: Revenue - \$2 million, Net Income - \$500,000

Year 2: Revenue - \$3 million, Net Income - \$800,000

Year 3: Revenue - \$5 million, Net Income - \$1.2 million

Year 4: Revenue - \$7 million, Net Income - \$1.8 million

Year 5: Revenue - \$10 million, Net Income - \$2.5 million

2. Industry Analysis:

Comparable companies in the same industry are trading at an average Price-to-Earnings (P/E) ratio of 15x.

The average Enterprise Value-to-Revenue (EV/Revenue) multiple is 2.5x.

Answer: 1. Calculate Average Net Income: Average Net Income = (Net Income Year 1 + Net Income Year 2 + Net Income Year 3 + Net Income Year 4 + Net Income Year 5) / 5
Average Net Income = (\$500,000 + \$800,000 + \$1,200,000 + \$1,800,000 + \$2,500,000) / 5
Average Net Income = \$1,360,000

2. Estimate the Earnings Value: Earnings Value = Average Net Income * P/E Ratio
Earnings Value = \$1,360,000 * 15
Earnings Value = \$20,400,000

3. Estimate the Revenue Value: Revenue Value = Revenue Year 5 * EV/Revenue Multiple
Revenue Value = \$10,000,000 * 2.5
Revenue Value = \$25,000,000

4. Calculate Present Value (PV) of Earnings Value: PV of Earnings Value = Earnings Value / (1 + Discount Rate)^{Number of Years}
Assuming a project on period of 5 years, PV of Earnings Value = \$20,400,000 / (1 + 0.10)⁵
PV of Earnings Value = \$12,187,365

5. Calculate Present Value (PV) of Revenue Value: PV of Revenue Value = Revenue Value / (1 + Discount Rate)^{Number of Years}
Assuming a project on period of 5 years, PV of Revenue Value = \$25,000,000 / (1 + 0.10)⁵
PV of Revenue Value = \$14,911,242

6. Calculate Valuation: Valuation = PV of Earnings Value + PV of Revenue Value
Valuation = \$12,187,365 + \$14,911,242
Valuation = \$27,098,607

In this case, the estimated valuation of XYZ Tech Solutions is approximately \$27,098,607 based on the average net income, industry multiples, and discount rate applied to both earnings and revenue values.

Q47: Explain the role of valuation in the process of amalgamation. What are the key steps involved in the valuation process and which methods are commonly used to determine the exchange ratio?

Answer: Amalgamation is the process through which two or more companies combine to form a single legal entity. This could either involve the formation of an entirely new entity or the absorption of one company by another.

Valuation is a critical component of amalgamation as it helps determine the exchange ratio—the number of shares of the acquiring company that will be offered for each share of the company being acquired. A fair valuation ensures that shareholders of all merging companies are equitably compensated.

The valuation process typically involves the following steps:

1. **Gather Financial Information:** Collect the financial statements and relevant information of the companies involved, including their assets, liabilities, revenues, and expenses.
2. **Select Valuation Method:** Determine the appropriate valuation method or combination of methods based on the nature of the business, industry standards, and regulatory requirements. Common methods include the market approach, income approach, and asset-based approach.
3. **Perform Valuation Analysis:** Apply the chosen valuation method(s) to assess the value of the companies. This may involve analysing financial statements, forecasting future cash flows, considering market comparables, and applying appropriate valuation multiples or discount rates.
4. **Determine Exchange Ratio:** Once the values of the companies are determined, the exchange ratio or share swap ratio is calculated. The ratio determines how many shares of the acquiring company will be issued for each share of the target company.
5. **Consider Other Factors:** Apart from valuation, other factors such as strategic fit, synergies, and management considerations are also considered during the amalgamation process.
6. **Obtain Approvals:** The valuation results and exchange ratio are presented to the board of directors and shareholders of the companies involved. They must approve the terms of the amalgamation, including the valuation methodology and the exchange ratio.

Q48: Company A and Company B are planning an amalgamation. The merger will be based on the book value method.

Company A:

Shareholders' Equity: 10 million

Total Assets: 20 million

Total Liabilities: 5 million

Company B:

Shareholders' Equity: 15 million

Total Assets: 25 million

Total Liabilities: 8 million

Answer: To determine the exchange ratio for the amalgamation, we will use the book value method, which considers the net asset value of each company.

Step 1: Calculate the Net Asset Value (NAV) of each company:

Company A NAV = Shareholders' Equity of Company A = 10 million

Company B NAV = Shareholders' Equity of Company B = 15 million

Step 2: Determine the Exchange Ratio:

Exchange Ratio = NAV of Company A / NAV of Company B

Exchange Ratio = \$10 million / \$15 million Exchange Ratio = 0.67

This means that for every share of Company B, 0.67 shares of Company A will be issued in the amalgamation.

Step 3: Assess the Value of Amalgamated Company:

To assess the value of the amalgamated company, we need to consider the post-amalgamation financials.

Assuming the combined assets of the amalgamated company after the merger are 45 million and the total liabilities are 13 million:

Amalgamated Company Shareholders' Equity = Combined Assets - Total Liabilities Amalgamated Company
Shareholders' Equity = 45 million - 13 million

Amalgamated Company Shareholders' Equity = 32 million

The value of the amalgamated company will be 32 million.

Step 4: Allocate Shares to Shareholders: Based on the exchange ratio, shareholders of Company B will receive 0.67 shares of Company A for each share of Company B held.

For example, if a shareholder of Company B holds 1,000 shares, they will receive $0.67 * 1,000 = 670$ shares of Company A.

Q49: Company A owns a manufacturing division that produces electronic devices. It decides to sell this division to Company B through a slump sale agreement. The division includes:

- Manufacturing equipment worth ₹8 crore
- Inventory worth ₹2 crore
- Intellectual property and contracts valued at ₹3 crore
- Liabilities of ₹4 crore

The agreed consideration for the slump sale is ₹10 crore, payable in cash.

1. What is meant by a slump sale in this context?
2. Is it necessary to individually value the assets and liabilities in a slump sale?
3. What will be the net value transferred to Company B?
4. What are the key implications for Company B post-acquisition?

Answer:

1. A slump sale is the transfer of a business unit or division as a going concern, where all assets and liabilities are transferred in one deal, without assigning individual values. In this case, Company A is transferring its entire manufacturing division to Company B.

2. No. In a slump sale, the business is sold as a composite whole, and no individual values are assigned to each asset or liability in the agreement. The sale consideration is for the entire undertaking, not its components.

3. While individual values are not assigned in a legal sense, for understanding:

- Total Assets = ₹8 crore (equipment) + ₹2 crore (inventory) + ₹3 crore (IP/contracts) = ₹13 crore
- Liabilities = ₹4 crore
- Net Assets = ₹13 crore - ₹4 crore = ₹9 crore

However, the agreed slump sale consideration is ₹10 crore, indicating Company B values the ongoing business potential in addition to the net asset base.

4. Company B assumes all assets and liabilities of the manufacturing division.

- It becomes responsible for employee obligations, supplier and customer contracts, and any pending legal or tax matters linked to the division.
- Company B gains access to an operating business, avoiding the setup cost and time of building the division from scratch.
- The entire business continues uninterrupted, preserving goodwill and market relationships.

Q50: Company X owns many businesses and it also operates a manufacturing division that manufactures and sells electronic devices.

Company Y is interested in acquiring the entire manufacturing division of company X that sells electronic devices as a going concern.

In the sale agreement, Company X transfers its entire manufacturing division of electronic devices, including all its assets and liabilities, to company Y.

No values are assigned to respective assets or liabilities of the manufacturing division. The lump sum consideration for the sale is agreed upon between Company X and Company Y.

In the background of the case, discuss the category of transaction between Company X and Company Y and also discuss rationale behind such transaction by Company X in general and process involved in such transfer. (5 marks)

(PAST YEAR QUESTION JUNE 2025)

OR

ABC Manufacturing Company, operating in the automotive components industry, decided to undertake a slump sale of its non-core business segments. The objective was to improve strategic focus, cut costs, and reduce debt.

Answer the following question:

- 1. What were the key strategic reasons behind ABC Manufacturing's decision to opt for a slump sale?***
- 2. Outline the steps involved in the slump sale process carried out by ABC Manufacturing Company.***
- 3. Discuss the financial and strategic benefits ABC Manufacturing gained from executing the slump sale.***

Answer: The transaction between Company X and Company Y is a slump sale transaction.

A slump sale refers to the transfer of an undertaking, business, or division of a company as a going concern, where all assets and liabilities are transferred as a package to another entity. In a slump sale, the business is sold as a whole, and individual assets and liabilities are not separately identified or valued. The consideration for the slump sale is usually a lump sum amount.

Rationale for Slump Sale: The key reasons for pursuing a slump sale were as follows:

- Strategic Focus:*** The slump sale aimed to enable company X to concentrate its resources and efforts on its core business activities. By divesting non-core assets, the company could redirect its attention to areas where it held a competitive advantage and maximize growth opportunities.
- Cost Rationalization:*** The non-core business segments were associated with additional costs, such as separate management teams, infrastructure, and overhead expenses. Through the slump sale, the company could eliminate these costs and achieve operational efficiencies.
- Debt Reduction:*** In some cases, non-core business segments might have been burdened with significant debt. The proceeds from the slump sale could be utilized to repay debt, thereby strengthening the company's financial position and reducing interest obligations.

Slump Sale Process: The slump sale process involved the following steps:

- a. *Identification of Non-Core Assets*: The management conducted a thorough evaluation of the company's businesses and identified the non-core assets that would be divested. This assessment involved analyzing financial performance, growth prospects, and strategic alignment with the company's long-term objectives.
- b. *Evaluation and Pricing*: The non-core assets were valued based on their fair market value, taking into account factors such as asset condition, market demand, and future cash flows.

The pricing of the slump sale was determined through negotiations with potential buyers or investors.

- c. *Due Diligence*: The potential buyers or investors performed due diligence on the non-core assets to assess their financial, operational, and legal aspects. This step ensured transparency and minimized risks associated with the slump sale.

- d. *Agreement and Execution*: Once the negotiations and due diligence were completed, a formal agreement was drafted, outlining the terms and conditions of the slump sale. The execution of the agreement involved the transfer of ownership and assets, including tangible and intangible assets, contracts, and employees.

- e. *Approval and Registration*: The slump sale transaction may require approval from regulatory authorities and compliance with statutory requirements. The transfer documents are registered with the appropriate authorities.

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- e. *Approval and Registration*: The slump sale transaction may require approval from regulatory authorities and compliance with statutory requirements. The transfer documents are registered with the appropriate authorities.

Alternate Answer,

1. ABC Manufacturing Company pursued a slump sale for the following strategic reasons:

- a. **Strategic Focus**: The company aimed to focus on its core business operations by divesting non-core assets. This would allow it to concentrate on areas with a competitive advantage and enhance growth prospects.
- b. **Cost Rationalization**: The non-core segments involved additional costs, such as separate management and infrastructure. Selling these divisions helped eliminate those costs and improved operational efficiency.
- c. **Debt Reduction**: Some non-core segments were burdened with significant debt. The proceeds from the slump sale could be used to repay that debt, strengthening the company's financial health and reducing interest obligations.

2. The slump sale process followed by ABC Manufacturing Company involved the following key steps:

- a. **Identification of Non-Core Assets**: Management evaluated the company's business portfolio to identify assets that were not aligned with long-term strategic goals. This included analysing financial performance, growth potential, and strategic fit.
- b. **Valuation and Pricing**: The identified non-core assets were valued based on fair market value, considering factors such as asset condition, market demand, and projected future cash flows. The final sale price was determined through negotiations with interested buyers or investors.
- c. **Due Diligence**: Potential buyers conducted due diligence to assess the financial, legal, and operational status of the non-core assets. This step ensured transparency and helped mitigate associated risks.
- d. **Agreement and Execution**: Following successful negotiations and due diligence, a formal agreement was drafted, detailing the terms of the sale. The execution involved transferring ownership of all associated tangible and intangible assets, contracts, and employees.
- e. **Post-Sale Transition**: ABC Manufacturing ensured a smooth transition by managing the handover of operations, customer relationships, and support services to the new owner.

3. The slump sale of non-core assets led to several strategic and financial benefits for ABC Manufacturing Company:

- a. **Enhanced Focus and Efficiency**: The company was able to concentrate on its core operations, leading to better resource utilization, increased efficiency, and improved operational focus.
- b. **Improved Financial Performance**: By eliminating the costs associated with non-core assets, the company enhanced its profitability. It was able to redirect capital into core activities, resulting in better financial performance and increased shareholder value.
- c. **Debt Reduction**: If the divested non-core assets had associated debts, the proceeds from the slump sale helped in reducing those liabilities. This led to lower interest costs and improved the company's overall financial health.

d. Strategic Alignment: The sale allowed the company to realign its business portfolio with its long-term strategic goals, enabling it to strengthen its position in core markets and pursue growth opportunities more effectively.

Q51: Company XYZ is a diversified conglomerate with a pharmaceutical and a real estate division. The management decides to demerge the real estate division into a new independent company—Company R. What is a demerger, Describe the key steps involved in the demerger process of Company XYZ.

Answer: Demerger is a corporate restructuring process in which a company transfers one or more of its divisions, subsidiaries, or business units into separate independent entities. In a demerger, the assets, liabilities, and operations of the division or subsidiary are divided and distributed among the newly formed entities or existing companies.

The demerger process involves the following steps:

1. **Planning and Announcement:** Company XYZ's management identifies the real estate division as a separate entity with its own growth potential. The decision to demerge the division is made, and the company announces its plans to shareholders and stakeholders.
 2. **Valuation and Asset Allocation:** The real estate division's assets, liabilities, and operations are evaluated and valued. The valuation determines the distribution of assets and liabilities between the parent company (Company XYZ) and the new entity (Company R). This may involve conducting a separate business valuation for the real estate division.
 3. **Legal and Regulatory Requirements:** Company XYZ complies with legal and regulatory requirements specific to the jurisdiction where the demerger is taking place. This may involve obtaining approvals from shareholders, regulatory authorities, and other relevant parties.
 4. **Implementation:** The demerger is executed by transferring the identified assets, liabilities, and operations of the real estate division from Company XYZ to Company R. This could involve transferring property titles, contracts, employees, and other necessary arrangements to ensure the smooth functioning of the new entity.
 5. **Shareholder Allocation:** Company XYZ determines how the shares of the newly formed entity (Company R) will be allocated among its existing shareholders. This can be done through a share swap ratio, where shareholders receive shares of the new entity in proportion to their holdings in the parent company.
 6. **Independent Operations:** After the demerger, Company R operates as an independent real estate company, having its own management, board of directors, finances, and strategic direction.
- Company R can raise funds, make investments, and pursue growth opportunities specific to its real estate business.

Q52: List out the various approaches in practice to find out value of shares of each entity post demerger. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: In a demerger, a company splits into two different entities. So the valuation of each entity is estimated on a standalone basis and the relative value as a ratio is arrived at.

The following are the approaches in practice to find out value of shares of each entity post demerger:

- (i) Asset based approach
- (a) Net asset value

- (ii) Income based approach
 - (a) Discounted cash flow method
 - (b) Earnings capitalisation
 - (c) Excess earnings method
 - (d) Incremental cash flows method
- (iii) Market based approach
 - (a) Market price
 - (b) Comparable transaction multiple

Q53: What is the significance of preserving documents and records during the valuation report exercise?

Answer: the valuation report exercise is a structured process that involves observation, inspection, analysis, and calculation. During this process, the **valuer** examines various documents, makes necessary computations, and draws conclusions based on this evidence.

Q54: ABC Ltd is going through the report on valuation of assets/debts/property of company submitted by registered valuer. Discuss salient contents of Summarized Valuation Report which must be invariably incorporated in valuation report? (5 marks)

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Answer: Valuation Report preparation exercise is based on the observation, inspection, analysis, and calculation. Considering the shareholder's interest and the need for transparency and upholding corporate governance principles and after taking into view aspects of minority interest, transparency and corporate governance the Expert Group of Ministry of Corporate Affairs recommended that the following matters should compulsorily be covered in the Valuation Report, in a clear, unambiguous and non-misleading manner, consistent with the need to maintain confidentiality: Contents of summarised report are as under-

1. Background Information
2. Purpose of Valuation and Appointing Authority
3. Identity of the valuer and any other experts involved in the valuation
4. Disclosure of valuer Interest/Conflict, if any
5. Date of Appointment, Valuation Date and Date of Report
6. Sources of Information
7. Procedures adopted in carrying out the Valuation
8. Valuation Methodology
9. Major Factors influencing the Valuation
10. Conclusion
11. Caveats, Limitations and Disclaimers.

Q55: What key background information should be included in a valuation report?

Answer: The valuation report should briefly cover the following:

- Brief particulars of company or business which is the valuation subject
- Proposed Transaction

- Key historical financials
- Capital structure of the company, if relevant, and any changes because of the proposed transaction
- Shareholding pattern, any significant changes (Promoters/FIs), and any changes as a result of the transaction (Note – a table of before and after shareholding patterns ought to be disclosed)
- High/low/average market volumes/price for last six months, where applicable
- Related party issues with respect to the transaction.

Q56: What key disclosures are required in a valuation report related to the purpose, valuer identity, conflicts, and information sources?

Answer: A comprehensive valuation report must include the following key disclosures:

1. Purpose of Valuation & Appointment Authority:

The context and purpose of the valuation should be clearly stated (e.g., management decision, audit committee direction).

The authority commissioning the valuation and the date of appointment must be disclosed.

2. Identity of the Valuer and Experts:

The report must specify the identity and registration number of the Registered Valuer.

The name of the valuation firm and any other experts consulted should be included.

If applicable, details about "Chinese walls" maintained between advisory and valuation teams must be explained to ensure independence.

3. Disclosure of Conflicts of Interest:

The valuer must disclose any potential or existing conflicts of interest, including past or current associations with the company or related parties.

If advisory services are provided separately, the report must confirm that the valuation team remained independent and uninfluenced.

4. Date of Appointment, Valuation Date and Date of Report:

The report must state the date of appointment, the valuation date (the effective date for value assessment), and the report issuance date.

5. Sources of Information:

All principal sources of information—internal or external—used for the valuation must be clearly cited in the report.

Q57: What are the typical procedures adopted by a valuer while carrying out a valuation?

Answer: The procedures adopted in carrying out a valuation depend on the circumstances, nature, purpose, information, and time available. Typically, a valuer may follow these key steps:

- Review of past Financials
- Review and analysis of financial projections
- Industry analysis
- SWOT analysis

- Comparison with similar transactions
- Comparison with other similar listed companies
- Discussions with Management
- Review of principal agreements/documents etc.

The valuer should also include in his report:

- an affirmative statement that information provided and assumptions used by Management/Others in developing projections have been appropriately reviewed and enquiries made regarding basis of key assumptions in the context of analysis of business being valued and the industry/economy; and
- an affirmative statement on adequacy of information and time for carrying out the valuations; with such modifications as may be appropriate and warranted. The affirmative statement shall not negate the professional liability for expertise applied in determining value and if the degree of inadequacy of information is severe, fundamental questions and information as assessed by the valuer as key for the appropriate stage of valuation needs to be disclosed.

Q58: What are the common valuation methodologies, and what should a valuer disclose about the methodology used in the valuation report?

Answer: Common valuation methodologies include:

- Asset Approach
- Book Value, Adjusted Book Value, and Liquidation Value
- Income Approach
- Capitalization of Earnings, Capitalization of Excess Earnings, and Discounted Future Earnings/
- Cash Flows.
- Market Approach
- Current Market Prices, Historical Market Prices, Price to Earnings, Price to Revenue, Price to Book
- Value, Price to Enterprise Value, etc.
- Comparable transactions/Valuations
- Comparable International and Domestic Transactions.

The valuation methodology adopted by the valuer must be disclosed. The valuer should mention in the report the rationale and appropriateness for the adoption of a particular method, or a combination of methods and emphasis/reliance placed on the chosen method/combination of methods in reaching the final conclusion.

Q59: What key elements must be included in a valuation report to ensure completeness and professional responsibility?

Answer: A valuation report must include:

1. **Major Factors Influencing Valuation** – such as the size and significance of assets or shares, nature of the holding (minority or majority), control implications, proposed dividends, historical profits, asset-liability proportions, and marketability.
2. **Conclusion** – a clear and definitive statement of the value ascribed to the business or asset.
3. **Caveats, Limitations, and Disclaimers** – clearly specified conditions or assumptions affecting the valuation, without disclaiming the valuer's professional responsibility or duty of care

Q60: What is the difference between relative valuation and swap ratio in the context of corporate restructuring?

Answer: Relative valuation is a method used to estimate the value of a company by comparing it to similar companies within the same industry, using financial and non-financial benchmarks such as P/E ratios, EBITDA multiples, or revenue multiples.

Swap ratio, on the other hand, refers to the ratio at which the shares of one company are exchanged for the shares of another during a merger, acquisition, or demerger. It is determined based on the relative valuations of the companies involved and affects the shareholding pattern in the new or combined entity.

In essence, relative valuation is the method, while swap ratio is the outcome applied in share exchange decisions during restructuring.

Q61: How are relative valuation and swap ratio interconnected in mergers or demergers?

Answer: Here's how the swap ratio and relative valuation are interconnected:

1. Relative Valuation Analysis:

- **Comparable Company Analysis:** Comparable companies in the same industry are identified, and their financial metrics such as price-to-earnings ratio (P/E ratio), price-to-sales ratio (P/S ratio), or enterprise value-to-EBITDA (EV/EBITDA) are analysed.
- **Relative Multiples:** The financial metrics of the comparable companies are used as multiples. For example, if the average P/E ratio of comparable companies is 15, it implies that investors are willing to pay 15 times the earnings for similar companies.
- **Application to the Target Company:** The multiples derived from the comparable company analysis are applied to the target company's financial metrics (such as earnings, sales, or EBITDA) to determine its estimated value.

2. Determining Swap Ratio:

- **Valuation of Companies:** The relative valuation analysis helps determine the value of each company involved in the merger or demerger.
- **Negotiation and Agreement:** The swap ratio is then negotiated between the companies based on their respective valuations and the ownership stake desired by each party.
- **Share Exchange:** The agreed-upon swap ratio determines the number of shares of the acquiring company that will be exchanged for each share of the target company or vice versa.

The swap ratio is typically expressed as a fraction or ratio. For example, a swap ratio of 1:3 means that for every three shares of the target company, the shareholders will receive one share of the acquiring company. The swap ratio considers the relative value of the companies to ensure a fair exchange of shares between the merging or demerging entities. It takes into account factors such as market conditions, financial performance, growth prospects, synergies, and shareholder interests.

Q62: "Brands belong to a different species. While physical resources could be created easily if augmenting financial resources is not a problem, same is not the case of brands. It is advisable to approach the brand

valuat on on the basis of premium price method." Comment on the statement highlight ng valuat on approach for brands. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: Normally the value of an enterprise could be estimated on a going-concern basis by computing the earning capacity. Net Asset Value method may not be ideal in the cases enterprises with depreciating assets unless the enterprise in question is asset intensive.

For instance, in the case of company engaged in real estate sector, the lands in the hands of the company on ownership basis could be a stock in trade and they may be highly valuable. However, in the case of Brands, which form the lifeline of the Company, there has to be a different approach.

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

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

Q63: What is the Valuation documentation and what is the objective of this? (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Valuation Documentation

Valuation exercise is based on observation, inspection, analysis and calculation. During this process, the valuer goes through various documents, records his observation, makes relevant calculation and records these calculations and analyse results. In this process a lot of documents are generated which forms the basis of his conclusion on the valuation of the subject matter. It is very necessary for him to preserve all such records so that these documents may help him to substantiate his conclusion on valuation.

Moreover, these documents also become a matter of reference in future.

Objectives of documentation in valuation exercise

Documentation is "an essential element" of valuation quality. Valuation documentation provides the principal written record to support the following:

1. The Valuer's report assert on that the valuation exercise was performed with due diligence and in accordance of generally accepted valuation principles; and
2. The Valuers' conclusions about valuation of the subject matter of the valuation exercise and other related aspects of valuation.

The following are some more specific objectives of documentation in Valuation exercise:

- Assisting Valuer to plan and perform the Valuation Exercise;
- Assisting those responsible to direct, supervise, and review the work performed;

- Providing and demonstrating the accountability of those performing the work (i.e., compliance with applicable standards);
- Assisting quality-control reviewers to understand and assess how the engagement team reached and supported significant conclusions;
- Enabling internal and external inspection teams and peer reviewers to assess compliance with professional, legal, and regulatory standards and requirements;
- and
- Assisting successor Valuer.

Q64: Company XYZ, the parent company, is demerging its subsidiary, SubCo. into a separate entity called NewCo. Determine the swap ratio from the following information:

1. Company XYZ:

Number of outstanding shares: 10 million

Market price per share: Rs. 50

2. SubCo:

Number of outstanding shares: 5 million

Market price per share: Rs.30

Answer: To determine the swap ratio, we need to calculate the relative value of SubCo compared to Company XYZ. We can do this by comparing the market capitalization of the two companies.

Market capitalization of Company XYZ = Number of shares * Market price per share = 10 million * 50 = 500 million

Market capitalization of SubCo = Number of shares * Market price per share = 5 million * 30 = 150 million

Now, let's calculate the swap ratio:

Swap ratio = Market capitalization of SubCo / Market capitalization of Company XYZ = 150 million / 500 million = 0.3

This means that for every 0.3 shares of SubCo, shareholders of Company XYZ will receive one share of NewCo. Let's assume a shareholder of Company XYZ owns 1,000 shares. Based on the swap ratio, they would receive:

Number of NewCo shares = Number of Company XYZ shares * Swap ratio
= 1,000 * 0.3 = 300 shares of NewCo

Q65: Company X, the parent company, is demerging its subsidiary, Company Y, into a separate entity called Y New.

The following information is available for company X and company Y :

1. Company X :

Number of outstanding shares : 10 crores Market price per share : Rs. 60

2. Company Y :

Number of outstanding shares : 6 crores Market price per share : Rs. 30

You are required to determine :

– The swap ratio and

– Based on the swap ratio, calculate the number of shares a shareholder would receive in the company Y New if he owns 20,000 shares in Company X. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: To determine the swap ratio, we need to calculate the relative value of Sub Co Y compared to Company X.

Market capitalization of Company X = Number of shares * Market price per share = 10 crore * 60 = 600 crores

Market capitalization of Sub Co Y = Number of shares * Market price per share = 6 crore * 30 = 180 crores

Calculation of the swap ratio:

Swap ratio = Market capitalization of Sub Co Y / Market capitalization of Company X = 180 crore / 600 crores = 0.3

This means that for every 0.3 shares of Sub Co Y, shareholders of Company X will receive one share of Y New. If the shareholder of Company X owns 20,000 shares.

Based on the swap ratio, he would receive:

Number of Y New shares = Number of Company X shares * Swap ratio
= 20,000 * 0.3 = 6000 shares of Y New

Q66: Explain the term 'Economic Value Added'. Consider the facts below and determine whether the company is creating wealth or destroying wealth?

Weighted average cost of capital	16.30%
Tax rate	33%
EBIT margin	20%
Market value of capital	Rs. 3,75,00,000
Operating profit before taxes	Rs. 85,00,000

Answer: The weighted average cost of debt and equity is known as the cost of capital. An enterprise invests this capital for business purpose and earns returns for the investors. The financial performance can be determined by excess earnings of the enterprise over and above the cost of capital. This is known as the "economic value added" (EVA).

EVA = NOPAT – (Invested Capital x WACC)

NOPAT - Net operating profit after tax

WACC - Weighted average cost of capital

NOPAT = EBIT (1-Tax Rate)

EBIT = Earnings before interest and tax

Invested Capital = (Total Assets - non interest bearing liabilities)

Basically, EVA reflects the profitability of the enterprise. If positive, means that the enterprise generates true economic profit. The purpose of a business enterprise is creation of wealth to investors. Unless the EVA is positive, the investors do not get any return on their investment.

Market Value of Capital	Rs. 3,75,00,000
X Cost of Capital	16.30%
Cost of Capital at Market Value — A	Rs. 61,12,500
Operating profit before tax	Rs. 85,00,000
Less Tax @ 33%	Rs. 28,05,000
Net operating profit after tax — B	Rs. 56,95,000
Economic Value Added (B- A)	Rs. (4,17,500)

Therefore, it can be said that the company is destroying the value since the EVA is negative.

Q67: "Profitability of any business is sensitive to several factors that prompts the analyst to prepare Sensitivity Analysis to help in Management decisions." Comment. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Financial performance of any business depends on many factors. The needs of the customer with respect to the product or service are a major factor. Market competition is another factor. Government policies may change cost and hence the price. The product may face obsolescence due to new technologies. Cheaper alternatives may affect the customer preference.

Thus, the profitability of any business may be sensitive to any of the factors. If we take these factors as independent variables, then given a change in or more of the variables affect the profitability. This technique is known as "Sensitivity Analysis".

This technique can also be used to test the validity of any model. For example, in business valuation, there are variables such as discount rate, future growth rate, market share, beta value, required rate of return, etc. Each of these factors can be varied to test the business valuation model.

Q68: The valuation of NETWORKS LTD. was done by an investment Analyst. Based on an expected free cash flow of Rs. 54 million for the following year and an expected growth rate of 9%, the analyst has estimated the book value of the firm to be Rs. 1800 million. However, he committed a mistake of using the book values of debt and equity. You do not know the book value weights employed by him but you know that the firm has a cost of equity of 20% and a post-tax cost of debt of 10%. The market value of equity is thrice its book value, whereas the market value of its debt is nine-tenths of its book value. What is the correct value of the firm? (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: $1800 = \frac{54}{(r - 0.09)} \Rightarrow r = 0.12 \text{ or } 12\%$

$$0.12 = [X * 0.20 + (1 - X) * 0.10]$$

$$X = 0.20$$

X is the weight assigned to equity i.e. = 0.20

$$\text{So, debt / equity} = 0.8 / 0.2 = 4$$

Since the market value of equity is thrice its book value and the market value of debt is nine-tenths of its book value, the market value weights of equity and debt are:

$$0.2 * 3 \text{ / and } 0.8 * 0.9 = 0.6 \text{ and } 0.72$$

Hence the WACC is:

$$[(0.6 / 1.32) * 0.20 + (0.72 / 1.32) * 0.10] = 0.1454 \text{ or } 14.54 \%$$

Hence the value of the firm is:

$$[54 / (0.1454 - 0.09)] = 974.7 \text{ million.}$$

Q69: X Ltd. is considering the proposal to acquire Y Ltd. and their financial information is given below:

Particulars	X Ltd.	Y Ltd.
No. of Equity Shares	1000000	600000

Market price per share (Rs)	30	18
Market Capitalization (Rs)	30000000	10800000
X Ltd. intend to pay Rs. 1,40,00,000 in cash for Y Ltd., if Y Ltd.'s market price reflects only its value as a separate entity, calculate the cost of merger:		
(i) When merger is financed by cash.		
(ii) When merger is financed by stock. (Assume that X Ltd. agrees to exchange 5,00,000 shares in exchange of shares in Y Ltd. instead of payment of cash of Rs. 1,40,00,000). (5 marks each)		
PAST YEAR QUESTION AUGUST 2021		

Answer:(i) Cost of Merger, when Merger is financed by cash = (Cash - MVY) + (MVY - PVY)

Where, MVY = Market Value of Y Ltd

PVY = True/Intrinsic Value of Y Ltd.

Then, = (1,40,00,000 - 1,08,00,000) + (1,08,00,000 - 1,08,00,000) = Rs. 32,00,000

If cost of merger becomes negative, then shareholders of X Ltd. will get benefited by acquiring Y Ltd. in terms of market value.

(ii) Cost of Merger when Merger is financed by Exchange of Shares in X Ltd. to the shareholders of Y Ltd.

Cost of merger = PVXY - PVY

Where,

PVXY = Value in X Ltd. that Y Ltd.'s shareholders get.

PVY = True/intrinsic value of Y Ltd.

Here X Ltd. agrees to exchange 5,00,000 shares in exchange of shares in Y Ltd.

Then the cost of merger is calculated as below:

= (5,00,000 * Rs. 30) - Rs. 1,08,00,000 = Rs. 42,00,000

PVXY = PVX + PVY = 3,00,00,000 + 1,08,00,000 = Rs. 4,08,00,000

Proportion that Y Ltd.'s shareholders get in X Ltd.'s Capital structure will be:

= $\frac{5,00,000}{10,00,000 + 5,00,000}$ = 0.3333

True Cost of Merger = PVXY - PVY

= (0.3333 x 4,08,00,000) - 1,08,00,000 = Rs. 27,98,640 or Rs. 28,00,000

The cost of merger i.e., Rs. 42,00,000 as calculated above is much higher than the true cost of merger Rs. 27,98,640 or Rs. 28,00,000 with this proposal, the shareholders of Y Ltd. will get benefited.

Q70: What are the types of valuation for a start-up unit? Give any five methods. (5 Marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Start-up Valuation Methods are as under:

1. **Venture Capital Method** : is used to arrive, at the preliminary valuations for start-ups which are yet to generate revenues.

Formulas:

- Return of Investment = Terminal Value / Post Money Valuation

- Post Money Valuation = Terminal Value / Anticipated ROI.

2. *Berkus Method* assigns a range of value to the valuation of the start-up based on the progress that the start-up owners have achieved in getting the start-up off to a start.
3. *Scorecard Valuation Method* : The average pre money valuation of other start-ups on the same vertical arrived at and this valuation is then used to value the start-up that is looking for investment.
4. *Risk Factor Summation Method* : The value is to be adjusted for 12 risk factors inherent to the startup.
5. *Cost to Duplicate Method* : Start up value is based on the cost that it would take to duplicate the start-up assets elsewhere. It does not consider future earnings. It is conservative valuation method.
6. *Valuation by stages* : When start-up is in the advanced stage, lesser risk that an investor is taking. This method is used by venture capitalist and angel investors.
7. *Comparable Method* : Valuation is based on precedent transactions, and key ratios within a particular sector.
8. *The Book Value Method* : Net worth is considered.
9. *First Chicago Method* : This method recognizes the fact that start-up is a high-risk investment and there is a high probability that they may grow beyond expectation and equal chances that they may fail badly. Under this method, three valuations are provided
 - I. Worst-cause scenario
 - II. Normal cause scenario
 - III. Best cause scenario.

Q71: The projected Cash Flow of ABC Limited is as following:

Year	Cash Flow	DCF@20%
1	700000	0.833
2	900000	0.694
3	1100000	0.578
4	1300000	0.482
5	1500000	0.401

Assuming the Discount Rate for ABC Limited to be 20%. Terminal Value is estimated to be Rs. 1800000 and estimated year of exit is 5. Calculate the Total Present Value. (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

Answer: Step 1:

Year	Cash Flow	Discount Factor @ 20%	Present Value (PV) of Cash Flow (₹)
1	700000	0.833	583100
2	900000	0.694	624600
3	1100000	0.578	635800
4	1300000	0.482	626600
5	1500000	0.401	601500
	Sum of PV cash flows		3071600

Step 2:

PV Terminal Value in year of exit

(Rs.) $1800000 \times 0.401 = 721800$

Step 3:

Total Present Value of cash flow of ABC Limited = Sum of PV Cash Flows + PV Terminal Value

= $3071600 + 721800$

= (Rs.) 3793400

Q72: ABC Ltd. is intending to acquire XYZ Ltd. by merger and the following information is available in respect of the companies.

<u>PARTICULARS</u>	<u>ABC Ltd.</u>	<u>XYZ Ltd.</u>
Number of equity shares	10,00,000	6,00,000
Earnings after tax(Rs.)	50,00,000	18,00,000
Market value per share(Rs.)	42	28

CALCULATE

1. What is the present EPS of both the companies?

2. If the proposed merger takes place, what would be the new earning per share for ABC Ltd? Assume that the merger takes place by exchange of equity shares and the exchange ratio is based on the current market price.

3. What should be exchange ratio, if XYZ Ltd. wants to ensure the earnings to members are as before the merger takes place?

Answer:

1. PRESENT EPS OF BOTH THE COMPANIES

Earnings per share = Earnings after tax / No. Of equity shares

ABC Ltd. = $\text{Rs. } 50,00,000 / 10,00,000 = \text{Rs. } 5$

XYZ Ltd. = $\text{Rs. } 18,00,000 / 6,00,000 = \text{Rs. } 3$

2. NEW EARNING PER SHARE FOR ABC LTD

Number of Shares XYZ Limited's shareholders will get in ABC Ltd. based on market value per share = $\text{Rs. } 28 / 42 \times 6,00,000 = 4,00,000$ shares

Total number of equity share of ABC Ltd. after merger = $10,00,000 + 4,00,000 = 14,00,000$ shares

Earnings per share after merger = $\text{Rs. } 50,00,000 + 18,00,000 / 14,00,000 = \text{Rs. } 4.86$

3. Calculation of exchange ratio to ensure shareholders of XYZ Ltd.

To earn the same as was before merger

Shares to be exchanged based on EPS = $(\text{Rs. } 3 / \text{Rs. } 5) \times 6,00,000 = 3,60,000$

shares EPS after merger = $(\text{Rs. } 50,00,000 + 18,00,000) / 13,60,000 = \text{Rs. } 5$

Total earnings in ABC Ltd. available to shareholders of XYZ Ltd. = 3, 60,000 x Rs. 5 = Rs. 18, 00,000.

Exchange ratio based on market price is beneficial to shareholders of XYZ Ltd. because of higher Earnings available to them i.e. (4, 00,000 shares x Rs. 4.86 = Rs. 19, 44,000).

Q: M Co. Ltd. is studying the possible acquisition of N Co. Ltd., by way of merger. The following data are available in respect of the companies:

PARTICULARS	M CO.LTD.	N CO.LTD.
Earning after tax(Rs.)	80,00,000	24,00,000
No. of equity shares	16,00,000	4,00,000
Market value per share(Rs.)	200	160

1. If the merger goes through by exchange of equity and the exchange ratio is based on the current market price, what is the new earning per share for M Co. Ltd.?
2. N Co. Ltd. wants to be sure that the available to its shareholders will not be diminished by the merger. What should be the exchange ratio in that case?

ANSWER

1. Calculation of new EPS of M Co. Ltd.

No. of equity shares to be issued by M Co. Ltd. to N Co. Ltd.

= 4, 00,000 shares x Rs. 1.6/Rs. 2.0 = 3, 20,000 shares

Total no. of shares in M Co. Ltd. after acquisition of N Co. Ltd.

= 16, 00,000 + 3, 20,000 = 19, 20,000

Total earnings after tax [after acquisition]

= 80, 00,000 + 24, 00,000 = 1, 04, 00,000

EPS = Rs. 1, 04, 00,000/19, 20,000 equity share = Rs. 5.42

2. Calculation of exchange ratio which would not diminish the EPS of N Co. Ltd. after its merger with M Co. Ltd.

Current EPS:

M Co. Ltd. = Rs. 80, 00,000/16, 00,000 equity shares =

5 N Co. Ltd. = Rs. 24, 00,000 /4, 00,000 equity shares =

6

Exchange ratio = 6/5 = 1.20

No. of new shares to be issued by M Co. Ltd. to N Co. Ltd.

4, 00,000 x 1.20 = 4, 80,000 shares

Total number of shares of M Co. Ltd. after acquisition

= 16, 00,000 + 4, 80,000 = 20, 80,000 shares

EPS [after merger] = Rs. 1,04,00,000/20,80,000 shares = 5

Total earnings in M Co. Ltd. available to new shareholders of N Co. Ltd.

CS ANOOP JAIN (17 years experience in CS Professional)

$$= 4,80,000 \times Rs. 5 = Rs. 24,00,000$$

VALUATION NUMERICALS

IMPORTANT FORMULE FOR VALUATION OF SHARES

$$\text{Share Exchange Ratio} = \frac{\text{Market price of share of Transferor Company}}{\text{Market price of share of transferee company}}$$

$$\text{Number of shares of transferee company to be issued to shareholders of Transferor Company} = \text{Number of shares of transferor company} \times \text{Share Exchange Ratio}$$

$$\text{Combined Profit after Tax} = \text{PAT of Transferor Company} + \text{PAT of Transferee Company}$$

$$\text{Post-Merger Combined EPS} = \frac{\text{Combined Profit after Tax}}{\text{Exit ng Shares of Transferee Co. + New shares Issued to shareholders of Transferor Co.}}$$

PRACTICAL PROBLEMS ON VALUATION OF SHARES

QUESTION – 1

ABC Ltd. is intending to acquire XYZ Ltd. by merger and the following informat on is available inrespect of the companies.

<u>PARTICULARS</u>	<u>ABC Ltd.</u>	<u>XYZ Ltd.</u>
Number of equity shares	10,00,000	6,00,000
Earnings after tax(Rs.)	50,00,000	18,00,000

Market value per share(Rs.)	42	28

CALCULATE

What is the present EPS of both the companies?

If the proposed merger takes place, what would be the new earning per share for ABC Ltd?

Assume that the merger takes place by exchange of equity shares and the exchange ratio is based on the current market price.

What should be exchange ratio, if XYZ Ltd. wants to ensure the earnings to members are as before the merger takes place?

Answer:

PRESENT EPS OF BOTH THE COMPANIES

Earnings per share= Earnings after tax/ No. Of equity shares

ABC Ltd. = Rs. 50,00,000/10,00,000= Rs. 5

XYZ Ltd. =Rs. 18,00,000/6,00,000=Rs. 3

4. NEW EARNING PER SHARE FOR ABC LTD

Number of Shares XYZ Limited's shareholders will get in ABC Ltd. based on market value per share==Rs. 28/ 42 x 6,00,000= 4,00,000 shares

Total number of equity share of ABC Ltd. after merger= 10,00,000 + 4,00,000= 14,00,000 shares

Earnings per share after merger = Rs. 50,00,000 + 18,00,000/14,00,000 = Rs. 4.86

5. Calculation of exchange ratio to ensure shareholders of XYZ Ltd.

To earn the same as was before merger

Shares to be exchanged based on EPS = (Rs.3/ Rs. 5) x 6,00,000 = 3,60,000

sharesEPS after merger = (Rs. 50,00,000 + 18,00,000)/ 13,60,000 = Rs. 5

Total earnings in ABC Ltd. available to shareholders of XYZ Ltd. = 3,60,000 x Rs. 5 = Rs. 18,00,000.

Exchange ratio based on market price is beneficial to shareholders of XYZ Ltd. because of higher Earnings available to them i.e. (4,00,000 shares x Rs. 4.86 = Rs. 19,44,000).

QUESTION - 2

Rosy Ltd. is contemplating the purchase of Lily Ltd. Rosy Ltd. has 3,00,000 shares having a market price of Rs. 30 per share while Lily Ltd. has 2,00,000 shares selling at Rs. 20 per share. The EPS of Rosy Ltd. and Lily Ltd. are Rs. 4 and Rs. 2.25 respectively. Management of both the companies are discussing proposal for exchange of 0.5 shares of Rosy Ltd. for 1 share of Lily Ltd.

You are required to –

- Calculate the EPS after merger; and
- Show the impact on EPS for the shareholders of both the companies

ANSWER: Find out answer as per question 1 above..

QUESTION- 3

M Co. Ltd. is studying the possible acquisition of N Co. Ltd., by way of merger. The following data are available in respect of the companies:

PARTICULARS	M CO.LTD.	N CO.LTD.
Earning after tax(Rs.)	80,00,000	24,00,000
No. of equity shares	16,00,000	4,00,000
Market value per share(Rs.)	200	160

1. If the merger goes through by exchange of equity and the exchange ratio is based on the current market price, what is the new earning per share for M Co. Ltd.?
2. N Co. Ltd. wants to be sure that the available to its shareholders will not be diminished by the merger. What should be the exchange ratio in that case?

ANSWER**1. Calculation of new EPS of M Co. Ltd.**

No. of equity shares to be issued by M Co. Ltd. to Co. Ltd. = 4, 00,000 shares x Rs. 1.6/Rs. 2.0= 3, 20,000 shares

Total no. of shares in M Co. Ltd. after acquisition of N Co. Ltd. = 16, 00,000 + 3, 20,000= 19, 20,000

Total earnings after tax [after acquisition] = 80, 00,000 + 24, 00,000= 1, 04, 00,000

EPS = Rs. 1, 04, 00,000/19, 20,000 equity share =Rs. 5.42

2. Calculation of exchange ratio which would not diminish the EPS of N Co. Ltd. after its merger with M Co. Ltd.**Current EPS:**

M Co. Ltd. = Rs. 80, 00,000/16, 00,000 equity shares = 5

N Co. Ltd. = Rs. 24, 00,000 /4, 00,000 equity shares = 6

Exchange ratio= 6/5= 1.20

No. of new shares to be issued by M Co. Ltd. to N Co. Ltd.

4, 00,000x 1.20= 4, 80,000 shares

Total number of shares of M Co. Ltd. after acquisition = 16, 00,000 + 4, 80,000= 20, 80,000 shares

EPS [after merger] = Rs. 1,04,00,000/20,80,000 shares = 5

Total earnings in M Co. Ltd. available to new shareholders of N Co. Ltd. = 4, 80,000 x Rs. 5 = Rs. 24, 00,000

QUESTION - 4

XYZ Ltd. is considering merger with ABC Ltd. XYZ Ltd.'s shares are currently traded at Rs. 20. It has 2, 50, 000 shares outstanding and its earnings after taxes (EAT) amount to Rs. 5, 00,000. ABC Ltd. has 1, 25,000 shares outstanding; its current market price is Rs. 10 and its EAT are Rs. 1, 25,000. The merger will be effected by means of a stock swap (exchange). ABC Ltd. has agreed to a plan under which XYZ Ltd. will offer the current market value of ABC Ltd. shares.

1. What is the pre-merger earnings per share (EPS) and PE ratios of both the companies?
2. If ABC Ltd.'s P/E ratio is 6.4, what is its current market price? What is the exchange ratio? What will XYZ Ltd.'s post-merger EPS be?

ANSWER:

1 Pre-merger EPS and P/E ratios of XYZ Ltd. and ABC Ltd.

$$P/E = \frac{P \text{ (MPS)}}{EPS}$$

P is the current price;

EPS is earning per share

<u>PARTICULARS</u>	<u>XYZ LTD.</u>	<u>ABC LTD.</u>
Earning after taxes	5,00,000	1,25,000
Number of shares outstanding	2,50,000	1,25,000
EPS	2	1
Market price per share	20	10
P/E Ratio(times)	10	10

2 Current Market Price of ABC Ltd. if P/E ratio is 6.4 = R. 1 x 6.4 = Rs. 6.40

Exchange ratio = Rs. 6.40/20 = 3.125 Post merger EPS of XYZ Ltd.

= Rs. 5, 00,000 + R. 1, 25,000 / Rs. 2, 50,000 + (Rs. 1, 25,000/3.125 = 40000)

= Rs. 6, 25,000 / Rs. 2, 90,000 = 2.1

QUESTION 5

Company X is contemplating the purchase of Company Y. Company X has 3,00,000 shares having a market price of Rs. 30 per share, while Company Y has 2,00,000 shares selling at Rs. 20 per share.

The EPS are Rs. 4.00 and Rs. 2.25 for Company X and Y respectively. Managements of both companies are discussing two alternative proposals for exchange of shares as indicated below:

- In proportion to the relative earnings per share of two companies.
- 0.5 share of Company X for one share of Company Y (0.5: 1).

You are required to calculate the Earnings Per Share (EPS) after merger under two alternatives.

Answer

(i) MERGERS EFFECT ON EPS

(Exchange ratio in proportion to relative EPS)

<u>Company</u>	<u>Existing No. of</u>	<u>EPS</u>	<u>Total earning (in Rs.)</u>
X	3,00,000	4.00	12,00,000
Y	2,00,000	2.25	4,50,000
		Total Earning	16,50,000

No. of shares after merger $3,00,000 + 1,12,500 = 4,12,500$

Note: 1,12,500 may be calculated as $= (2,00,000 \times 2.25/4.00)$

EPS for Co. X after merger $= 16,50,000/4,12,500 = \text{Rs. } 4.00$

Merger effect on EPS with share exchange ratio of 0.5: 1

Total earning after merger Rs. 16,50,000

No. of shares post merger $(3,00,000 + 2,00,000(.5/1))$

EPS $16,50,000 \div 4,00,000 = 4.12$

QUESTION 6

The following information is provided related to the acquiring Firm Mark Limited and the target Firm Mask Limited:

<u>PARTICULARS</u>	<u>Firm Mark</u>	<u>Firm Mask</u>
Earnings after tax (Rs.)	2,000 Lakhs	400 Lakhs
Number of shares outstanding	200 Lakhs	100 Lakhs
P/E ratio (times)	10	5

Required:

- What is the Swap Ratio based on current market prices?
- What is the EPS of Mark Limited after acquisition?
- What is the expected market price per share of Mark Limited after acquisition, assuming P/E ratio of Mark Limited remains unchanged?
- Determine the market value of the merged firm.

v. Calculate gain/loss for shareholders of the two independent companies after acquisition.

Answer

<u>Particulars</u>	<u>Mark Ltd.</u>	<u>Mask Ltd.</u>
EPS	Rs. 2,000 Lakhs / 200 Lakhs = Rs. 10	Rs. 400 Lakhs / 100 Lakhs = Rs. 4
Market Price	Rs. 10 x 10 = Rs. 100	Rs. 4 x 5 = Rs. 20

i. The Swap ratio based on current market price is

Rs. 20/100

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

ii. EPS after merger

= Rs. 2,000 lakhs + Rs. 400 lakhs / 200 lakhs + 20 lakhs

= Rs. 10.91

iii. Expected market price after merger assuming P/E 10 times

= Rs. 10.91 x 10 = Rs. 109.10

iv. Market value of merged firm

= Rs. 109.10 market price x 220 lakhs shares = 240.02 crores

v. Gain from the merger

Post merger market value of the merged firm Rs. 240.02 crores Less: Pre-merger market value

Mark Ltd. 200 Lakhs x Rs. 100 = 200 crores

Mask Ltd. 100 Lakhs x Rs. 20 = 20 crores Rs. 220.00 crores

Appropriation of gains from the merger among shareholders:

<u>PARTICULARS</u>	<u>Mark Ltd.</u>	<u>Mask Ltd.</u>
Post merger value	218.20 crores (109.1*200)	21.82 crores (109.0*20)
Less: Pre-merger market value	200.00 crores	20.00 crores
Gain to shareholders	18.20 crores	1.82 crores

QUESTION 7

The following information is provided relating to the acquiring company Efficient Ltd. and the target Company Healthy Ltd.

<u>PARTICULARS</u>	<u>Efficient Ltd.</u>	<u>Healthy Ltd.</u>
No. of shares (F.V. Rs. 10 each)	10.00 Lakhs	7.5 Lakhs
Market capitalization	500.00 Lakhs	750.00 Lakhs

P/E ratio (times)	10.00	5.00
Reserves and Surplus	300.00 Lakhs	165.00 Lakhs
Promoter's Holding (No. of shares)	4.75 Lakhs	5.00 Lakhs

Board of Directors of both the Companies have decided to give a fair deal to the shareholders and accordingly for swap ratio the weights are decided as 40%, 25% and 35% respectively for Earning, Book Value and Market Price of share of each company:

- Calculate the swap ratio and also calculate Promoter's holding % after acquisition.
- What is the EPS of Efficient Ltd. after acquisition of Healthy Ltd.?
- What is the expected market price per share and market capitalization of Efficient Ltd. after acquisition, assuming P/E ratio of Firm Efficient Ltd. remains unchanged.
- Calculate free float market capitalization of the merged firm.

Answer:

<u>Swap Ratio</u>	<u>Efficient Ltd.</u>	<u>Healthy Ltd.</u>
Market capitalization	500 Lakhs	750 Lakhs
No. of shares	10 Lakhs	7.5 Lakhs
Market Price per share	Rs. 50	Rs. 100
P/E ratio	10	5
EPS	Rs. 5	Rs. 20
Profit	Rs. 50 Lakh	Rs. 150 Lakh
Share Capital	Rs. 100 Lakh	Rs. 75 Lakh
Reserves and Surplus	Rs. 300 Lakh	Rs. 165 Lakh
Total	Rs. 400 Lakh	Rs. 240 Lakh
Book Value per share	Rs. 40	Rs. 32

Book value per share = shareholders fund / no. of equity shares

EPS = profits available for equity shareholders/ no. of equity shares

- Calculation of Swap Ratio EPS**

<u>EPS</u>	4:1	4.0 x 40%	1.6
<u>Book Value</u>	0.8:1	0.8 x 25%	0.2
<u>Market Price</u>	2:1	2.0 x 35%	0.7

		Total	2.5

Swap ratio is for every one share of Healthy Ltd., to issue 2.5 shares of Efficient Ltd. Hence, total no. of shares to be issued $7.5 \text{ lakh} \times 2.5 = 18.75 \text{ lakh shares}$ ($18.75+10= 28.75 \text{ lac shares}$)

Promoter's holding = $4.75 \text{ lakh shares} + (5 \times 2.5 = 12.5 \text{ lakh shares}) = 17.25 \text{ lakh}$ i.e. Promoter's holding % is $(17.25 \text{ lakh}/28.75 \text{ lakh}) \times 100 = 60\%$

Calculation of EPS, Market price, Market capitalization and free float market capitalization.

ii. Total No. of shares Total capital 10 Lakh + 18.75 Lakh = 28.75
Lakh Total capital

TO FIND OUT PROFIT = EPS = EARNINGS/ NO. OF EQUITY SHARES

Total profit = 50 Lakh + 150 Lakh = 200

$200/28.75$

= Rs. 6.956

iii. **Expected market price**

EPS 6.956 (P.E ratio unchanged I.E 10 so market price = $10 \times 6.956 = 69.56$)

Market capitalization = Rs. 69.56 per share $\times 28.75 \text{ Lakh shares}$

= Rs. 1,999.85 Lakh

iv. **Free float of market capitalization** = (Rs. 1,999.85 Lakh* 40%)

= Rs. 799.94 Lakh

QUESTION 8

The following information is relating to Fortune India Ltd. having two division, viz. Pharma Division and Fast Moving Consumer Goods Division (FMCG Division). Paid up share capital of Fortune India Ltd. is consisting of 3,000 Lakhs equity shares of Re. 1 each.

Fortune India Ltd. decided to de-merge Pharma Division as Fortune Pharma Ltd. w.e.f. 1.4.2009.

Details of Fortune India Ltd. as on 31.3.2009 and of Fortune Pharma Ltd. as on 1.4.2009 are given below:

<u>Particulars</u>	<u>Fortune Pharma Ltd. (Rs.)</u>	<u>Fortune India Ltd. (Rs.)</u>
Secured Loans	400 Lakhs	3,000 Lakhs
Unsecured Loans	2,400 Lakh	800 Lakh
Current Liabilities & Provisions	1,300 Lakh	21,200 Lakh

<u>ASSETS</u>		
Fixed Assets	7,740 Lakh	20,400 Lakh
Investments	7,600 Lakh	12,300 Lakh
Current Assets	8,800 Lakh	30,200 Lakh

Loans & Advances	900 Lakh	7,300 Lakh
Deferred tax/Misc. Expenses	60 Lakh	(200) Lakh

Board of Directors of the Company have decided to issue necessary equity shares of Fortune Pharma Ltd. of Re. 1 each, without any consideration to the shareholders of Fortune India Ltd. For that purpose following points are to be considered:

1. Transfer of Liabilities & Assets at Book Value.
2. Estimated Profit for the year 2009-10 is Rs. 11,400 Lakh for Fortune India Ltd. & Rs. 1,470 lakhs for Fortune Pharma Ltd.
3. Estimated Market Price of Fortune Pharma Ltd. is Rs. 24.50 per share.
4. Average P/E Ratio of FMCG sector is 42 & Pharma sector is 25, which is to be expected for both the companies.

Calculate:

1. The Ratio in which shares of Fortune Pharma are to be issued to the shareholders of Fortune India Ltd.
2. Expected Market price of Fortune India Ltd.
3. Book Value per share of both the Companies immediately after Demerger.

ANSWER

Shareholders' funds

Particulars	Fortune India Ltd.	Fortune Pharma Ltd.	Fortune India (FMCG)Ltd.
Assets	70,000	25,100	44,900
Outside liabilities	25,000	4,100	20,900
Net worth	45,000	21,000	24,000

1. Calculation of Shares of Fortune Pharma Ltd. to be issued to shareholders of Fortune India Ltd.

PARTICULARS	Fortune Pharma Ltd.
Estimated Profit (Rs. In lakhs)	1,470
Estimated market price (Rs.)	24.5
Estimated P/E	25

Estimated EPS (Rs.)	0.98
No. of shares lakhs	1,500

P.E RATIO = MPS/EPS

$$25 = 24.5/\text{EPS} = 0.98$$

EPS = PROFITS/NO. EQUITY SHARES 0.98 =

$$1470/\text{E.S} = 1500$$

Hence, Ratio is 1 share of Fortune Pharma Ltd.
for 2 shares of Fortune India Ltd.

2. **Expected market price of Fortune India Ltd.**

PARTICULARS	<u>Fortune India (FMCG) Ltd.</u>
Estimated Profit (Rs. In lakhs)	11,400
No. of equity shares (Rs. In lakhs)	3,000
Estimated EPS (Rs.)	3.8
Estimated P/E	42
Estimated market price (Rs.)	159.6

3. **Book value per share**

PARTICULARS	<u>Fortune Pharma Ltd.</u>	<u>Fortune India (FMCG) Ltd.</u>
Net worth (Rs. In Lakhs)	21,000	24,000
No. of shares (Rs. In Lakhs)	1,500	3,000
Book value of share	Rs. 14 (21000/1500)	Rs. 8 (24000/3000)

QUESTION 9

Reliable Industries Ltd. (RIL) is considering a takeover of Sunflower Industries Ltd. (SIL).
The particulars of 2 companies are given below.

<u>Particulars</u>	<u>Reliable Industries Ltd.</u>	<u>Sunflower Industries Ltd.</u>
Earnings After Tax (EAT)	Rs. 20,00,000	Rs. 10,00,000
Equity shares O/S	10,00,000	10,00,000
Earnings per share (EPS)	2	1

PE Ratio (Times)	10	5

REQUIRED:

- What is the market value of each Company before merger?
- Assume that the management of RIL estimates that the shareholders of SIL will accept an offer of one share of RIL for four shares of SIL. If there are no synergic effects, what is the market value of the Post-merger RIL? What is the new price per share? Are the shareholders of RIL better or worse off than they were before the merger?
- Due to synergic effects, the management of RIL estimates that the earnings will increase by 20%. What are the new post-merger EPS and Price per share? Will the shareholders be better off or worse off than before the merger?

Answer:

- Market value of Companies before Merger**

<u>Particulars</u>	<u>RIL</u>	<u>SIL</u>
EPS	Rs. 2	Re. 1
P/E Ratio	10	5
Market Price Per share	Rs. 20	Rs. 5
Equity shares	10,00,000	10,00,000
Total Market value	2,00,00,000	50,00,000

- Post Merger Effects on RIL**

Post merger earnings Exchange Ratio (1:4)	30,00,000
No. of equity shares o/s (10,00,000 + 2,50,000)	12,50,000
EPS: 30,00,000/12,50,000	2.4
<u>P/E Ratio</u>	10.00
Market Value 10 x 2.4	24
Total value (12,50,000 X 24)	3,00,00,000
<u>GAINS From Merger:</u>	Rs.
Post-Merger Market Value of the Firm	3,00,00,000
Less: Pre-merger market Value RIL 2,00,00,000	

SIL 50,00,000	2,50,00,000
Total gains from Merger	50,00,000

Apportionment of Gains between the shareholders:

Particulars	RIL	SIL
Post Merger Market Value	Rs.	Rs.
10,00,000 x 24	2,40,00,000	--
2,50,000 x 24	--	60,00,000
Less: pre-Merger Market Value	2,00,00,000	50,00,000
Gains from Merger:	40,00,000	10,00,000

Thus, the shareholders of both the companies (RIL + SIL) are better off than before

iii. Post-Merger Earnings: Increase

in Earnings by 20%

New Earnings: Rs. 30, 00,000 x 20% = Rs. 36, 00,000

No. of equity shares outstanding: 12,

50,000 EPS: Rs. 36, 00,000 / 12, 50,000 = Rs. 2.88

P/E Ratio = 10

Market price per Share:

= Rs. 2.88 x 10 = Rs. 28.80

Shareholders will be better-off than before the merger situation.

QUESTION 10

A Ltd. wants to acquire T Ltd. and has offered a swap ratio of 1:2 (0.5 shares for every one share of T Ltd.). Following information is provided:

PARTICULARS	<u>A Ltd.</u>	<u>T Ltd.</u>
Profit after tax	Rs. 18,00,000	Rs. 3,60,000
Equity shares outstanding	6,00,000	1,80,000
EPS	Rs. 3	Rs. 2
PE ratio	10 times	7 times
Market price per share	Rs. 30	Rs. 14

Required:

- The number of equity shares to be issued by A Ltd. for acquisition of T Ltd.

- ii. What is the EPS of A Ltd. after the acquisition?
- iii. What is the expected market price per share of A Ltd. after the acquisition, assuming its PE multiple remains unchanged?
- iv. Determine the market value of the merged firm.

Answer

i. The number of shares to be issued by A Ltd:

The Exchange ratio is 0.5

So, new shares = $1,80,000 \times .5 = 90,000$ shares.

ii. EPS of A Ltd. After acquisition:

Total Earnings	(18,00,000 + 3,60,000) Rs. 21,60,000
No. of shares	(6,00,000 + 90,000) Rs. 6,90,000
EPS	(21,60,000)/6,90,000) Rs. 3.13

iii. New Market Price of A Ltd. (P/E remaining unchanged):

Present P/E Ratio of A Ltd.	10 times
Expected EPS after merger	

R

s. 3.13 Expected Market Price (3.13 x 10)

R

s. 31.30

iv. Market Value of merged firm:

Total number of shares	6,90,000
Expected Market Price	Rs. 31.30
Total value (6,90,000 x 31.30)	Rs.

QUESTION - 11

Allen Ltd., a listed company, is considering merger of Ben Ltd. which is also a listed company, with itself through allotment of shares in the proportion of the market value per share. Explain the impact of the above decision on the wealth of the shareholders of both the companies after merger based on P/E ratio and EPS analysis. The following are the financial data of the two companies:

Particulars	Allen Ltd.	Ben Ltd.
Profit after tax (Rs.)	12,00,000	8,00,000
Number of shares	50,000	10,000
Market value (Rs. Per	50	25

ANSWER:

Find out the answer as per above solved questions.

QUESTION - 12

XYZ Ltd. is intending to acquire ABC Ltd. by merger and the following information is available in respect of both the companies:

PARTICULARS	XYZ Ltd.	ABC Ltd.
No. of equity shares	5,00,000	3,00,000
Profit after tax (Rs.)	25,00,000	9,00,000
Market price per share (Rs.)	21	14

- Calculate the present EPS of both companies.
- If the proposed merger takes place, what would be the new EPS for XYZ Ltd.? Assume that the merger takes place by exchange of equity shares and the exchange ratio is based on the current market price.
- Will you recommend the merger of both the companies? Justify your answer.

ANSWER:

Find out the answer as per above solved questions.

QUESTION - 13

X Ltd. is considering the proposal to acquire Y Ltd. and the financial information is given below:

PARTICULARS	X Ltd.	Y Ltd.
No. of equity shares	10,00,000	6,00,000
Market price per share (Rs.)	30	18
Market capitalization (Rs.)	3,00,00,000	1,08,00,00

X Ltd. intends to pay Rs. 1,40,00,000 in cash for Y Ltd. If Ltd's mark price reflects only its value as a separate entity, calculate the cost of merger when merger is financed by cash.

ANSWER:

Find out the answer as per above solved questions.

QUESTION 14

Sanjay holds 12,000 equity shares in Healthy Food Ltd., the nominal and paid-up share capital of which consists of –

- 40,000 Equity shares of Re. 1 each; and
- 10,000, 8% Preference shares (non-participating) of Re. 1 each. It is ascertained that –
 - The normal annual profit of such a company is 12,000.
 - The normal rate of transfer to general reserve is 10%.
 - The normal return by way of dividend on the paid-up value of equity share capital for the type of business carried on by the company is 15%.

Prepare a share valuation report for Sanjay showing value of his shareholding in Healthy Foods Ltd. Based on the above parameters.

Answer

Normal Annual Profit = 12,000

Less: Transfer to General Reserve = 1,200

10,800

Less: Preference Dividend = 800

Earnings = 10,000

Earning per share = $10,000/40,00$

= 0.25

Value of share (earning capitalisation method $\text{Earnings (EPS)/ke (dividend)}$) = $0.25/15\% = 1.67$

Value of Sanjay's holding = $1.67 \times 12,000$

= Rs. 20,000

QUESTION 15

New Ltd., the transferee company having paid-up share capital of 1,00,000 equity shares of Rs. 10 each, fully paid-up, at Rs. 10,00,000 and Old Ltd., the transferor company having paid-up capital of 50,000 equity shares of Rs. 10 each, fully paid-up at Rs. 5,00,000 out of which 10,000 equity shares were held by New Ltd. (the transferee company). The NCLT passed the scheme of amalgamation with a swap ratio of 1:1. How many new shares of New Ltd. are to be issued to the public shareholders of Old Ltd.? Show calculations.

Answer:

Total paid up share capital New Ltd. (Transferee company) Rs. 10,00,000

1, 00,000 equity shares of Rs. 10 each

Total share capital Old Ltd. (Transferor Company)

50,000 shares of Rs. 10 each Rs. 5,00,000

Share capital held by New Ltd. in Old Ltd.

(10,000 shares of Rs. 10 each) Rs. 1,00,000

Calculation of Net number of share held by public in Old Ltd.

Total shares of Old Ltd. = 50,000 shares

Less: Shares held by New Ltd. = 10,000 shares

Net number of shares held by public = 40,000 shares

Swap ratio being 1: 1, 40,000 new equity shares to be issued by the New Ltd. for the public shareholders in the Old Ltd.

QUESTION 16

Jupitor Ltd. wishes to take-over Tally Ltd. The financial details of both the companies are as under :

<u>LIABILITIES</u>	<u>Jupitor Ltd. (Rs. In '000)</u>	<u>Tally Ltd. (Rs. In '000)</u>
Equity share (Rs. 10 per share)	1,00,000	50,000
Shares premium account	-	2,000
Profit and loss account	38,000	4,000
Preference shares	20,000	-
10% Debentures	<u>15,000</u>	<u>5,000</u>
	<u>1,73,000</u>	<u>61,000</u>
 <u>ASSETS</u>		
Fixed assets	1,22,000	35,000
Net current assets	<u>51,000</u>	<u>26,000</u>
	<u>1,73,000</u>	<u>61,000</u>
Maintainable annual profit (after tax)		
for equity shareholders (Rs. In '000)	24,000	15,000
Market price per equity share (Rs.)	24	27
Price-earnings ratio	10	9

You are required to answer the following:

- (a) What offer do you think Jupitor Ltd. could make to Tally Ltd. in terms of exchange ratio based on
- Net asset value;
 - Earnings per share; and
 - Market price per share

Answer:

- i. Exchange ratio on the basis of net asset value :-

	<u>Jupitor Ltd.</u>	<u>Tally Ltd</u>
Fixed Assets =	1,22,000	35,000
Net Current Assets =	<u>51,000</u>	<u>26,00</u>
	<u>1,73,000</u>	<u>61,00</u>

Less:

10% Debentures =	15,000	5,000
Preference shares =	<u>20,000</u>	-
Net Assets =	<u>1,38,000</u>	<u>56,000</u>
Shares	10,000	5,000
Net Asset Value per share	13.80	11.20
Exchange ratio =		<u>11.20</u>
		13.80
ii.	=	0.812

Exchange ratio based on earning per shares

	<u>Jupiter Ltd.</u>	<u>Tally Ltd.</u>
Earning after tax for equity shareholders	24,000	15,000
Shares	10,000	5,000
Earning per share	2.4	3
Exchange ratio =	3 / 2.4	
	= 1.25	

iii. **Exchange ratio on the basis of market price per share (M/S)**

Exchange ratio =	27 / 24

$$= 1.125$$

QUESTION 17

XYZ Ltd. is intending to acquire ABC Ltd. by merger and the following information is available in respect of both the companies

	<u>XYZ Ltd.</u>	<u>ABC Ltd.</u>
No. of equity shares	5,00,000	3,00,00
Profit after tax (Rs.)	25,00,000	9,00,00
Market price per share (Rs.)	21	14

- Calculate the present EPS of both companies.
- If the proposed merger takes place, what would be the new EPS for XYZ Ltd.? Assume that the merger takes place by exchange of equity shares and the exchange ratio is based on the current market price.
- Will you recommend the merger of both the companies? Justify your answer.

Answer:

	<u>XYZ Ltd.</u>	<u>ABC Ltd.</u>
PAT	= 25,00,000	9,00,00
Shares	= 5,00,000	3,00,00
i. EPS	= 5	3
ii. Exchange ratio	= 14/21 =	2/3
Shares to be issued	= 2/3 X 3,00,000	
	= 2,00,000 shares	
Post merger EPS	= 25,00,000 + 9,00,000 / 5,00,000 + 2,00,000	
	= Rs. 4.857	
	= Rs. 4.86 (approx.)	

iii. EPS of XYZ Ltd. falls to 4.86

Earnings of ABC Ltd. rises to 9,72,000 [2,00,000 x 4.86]

QUESTION 18

Kangan Ltd. is considering merger with Payal Ltd. Kangan Ltd.'s shares are currently traded at 25 per share. It has 2,00,000 shares outstanding and its earnings after taxes (EAT) amount to 4,00,000. Payal Ltd. has 1,00,000 shares outstanding; its current market price is 12.50 per share and its EAT is 1,00,000. The merger will be effected by means of stock-swap

(exchange). Payal Ltd. has agreed to a plan under which Kangan Ltd. will offer the current market value of Payal Ltd.'s shares:

- i. What are the pre-merger earnings per share (EPS) and P/E ratios of both the companies?
- ii. If Payal Ltd.'s P/E ratio is 8, what will be its current market price? What will be the exchange ratio? What will Kangan Ltd.'s post-merger EPS be?

Answer:

i.

	<u>Kangan Ltd.</u>	<u>Payal Ltd.</u>
Shares	2,00,000	1,00,00
Earnings after tax (EAT)	4,00,000	1,00,00
Market price (MPS)	25	12.5
Earning per share (EPS)	$4,00,000 / 2,00,000$ 2	$1,00,000 / 1,00,000$ 1
P/E ratio = MPS / EPS	$25 / 2$ 12.5	$12.5 / 1$ 12.5

ii. Payal's Ltd. P/E ratio = 8

$$\text{MPS} = 8 \times 1 = 8$$

$$\text{Exchange ratio} = 8 / 25 = 0.32$$

Shares to be issued

$$= 1,00,000 \times 0.32 = 32,000 \text{ shares}$$

Post merger EPS:-

$$= 4,00,000 + 1,00,000 / 2,00,000 + 32,000$$

$$= 5,00,000 / 2,32,000$$

$$= \text{Rs. } 2.16 \text{ per share}$$

QUESTION 19

Wide Ltd. prepared a scheme of amalgamation and arrangement with Narrow Ltd. and Small Ltd. and the same was duly approved by NCLT concerned. In the approved scheme, the swap ratio was as under:

Narrow Ltd.: Wide Ltd. will issue 1 equity share of ₹ 1 each in exchange of 3 equity shares of Narrow Ltd.

Small Ltd.: Wide Ltd. will issue 1 equity share of ₹ 1 each in exchange of 2 equity shares of Small Ltd.

The pre-amalgamation share capital were as follows:

<i>Particulars</i>	<i>Wide Ltd.</i>	<i>Narrow Ltd.</i>	<i>Small Ltd.</i>

Face value of equity share (Rs.)	1	1	1
No. of fully paid-up equity shares	10,00,000	5,00,000	4,00,000
Paid-up value (Rs.)	10,00,000	5,00,000	4,00,000
Reserves and surplus (Rs.)	5,00,000	5,00,000	5,00,000
Total (Rs.)	15,00,000	10,00,000	9,00,000

The pre-merger investments were as follows—

	No. of Shares
In Wide Ltd.:	
Equity shares of Narrow Ltd.	1,00,000
Equity shares of Small Ltd.	1,00,000
In Narrow Ltd.:	
Equity shares of Wide Ltd.	1,00,000
Equity shares of Small Ltd.	1,00,000
In Small Ltd.:	
, Equity shares of Wide Ltd.	1,00,000
Equity shares of Narrow Ltd.	1,00,000

As the Company Secretary of Wide Ltd., you are required to advise the Chief Executive Officer:

- The quantum of new shares of Wide Ltd. to be issued to the shareholders of transferor company (a) Narrow Ltd.; (b) Small Ltd.; and
- What will be the post-issue share capital of Wide Ltd. after cancellation of cross holding of equity shares of all companies? (10 marks)

Answer:

Calculation of Number of shares to be issued to Narrow Ltd.	
No. of equity shares of Narrow Ltd.	5,00,000
Less: Shares held by Wide Ltd.	(1,00,000)
Less: Shares held by Small Ltd.	(1,00,000)
	3,00,000

The Exchange ratio being 1:3, Wide Limited will issue 1,00,000 shares to shareholders of Narrow Ltd.

Calculation of No. of shares to be issued to Small Ltd.	
No. of equity shares of Small Ltd.	4,00,000
Less: Shares held by Wide Ltd.	(1,00,000)
Less: Shares held by Small Ltd.	(1,00,000)
	2,00,000

The Exchange ratio being 1:2, Wide Ltd. will issue 1,00,000 shares to shareholders of Small Limited.

Post Issue Capital of Wide Ltd. after cancellation of cross holdings:

Less: Shares held by Narrow Ltd.	(1,00,000)
Less: Shares held by Small Ltd.	(1,00,000)
	8,00,000
Add: Issue of new shares to the shareholders of Narrow Ltd.	1,00,000
Add: Issue of new shares to the shareholders of Small Ltd.	1,00,000
Post Issue Capital	10,00,000

QUESTION 20

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

	Market Value
	on 31.03.2015
Assets	(Rs. in lakh)
Land and building	6,500
Plant and machinery	2,000
Furniture and fixtures	20
Trade receivables	1,000
Cash and cash equivalents	30
Spares	10
Outside Liabilities	
Trade payables	20
Long-term loans	2,000
Outstanding expenses	5

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

Answer:

Market value of assets and liabilities are as follows:

	(Rs. in lakhs)
Land and building	- 6,500
Plant & machinery	- 2,000
Furniture & fixture	- 20
Trade receivables	- 1,000

Cash & cash equivalents	- 30
Spares	- 10
Less:	
Trade payables	- 20
Long term loans	- 2,000
Outstanding expenses	- 5
Net market value of assets	- 75,35,00,000

Premium = 35% of Net market value of assets = 75,35,00,000 x 35% = 26,37,25,000

Total = 75,35,00,000 + 26,37,25,000 = 1,01,72,25,000

QUESTION- 21

Balance sheets of Fair Deal Ltd. (FDL) and Genuine Cosmetics Ltd. (GCL) as on 31st March, 2013, i.e., the date on which the companies are amalgamated and a new company Well Worth Ltd. (WWL) was formed are as follows::

Balance sheets as on 31st March, 2013

	FDL (Rs '000)	GCL (Rs '000)
I. Equity and Liabilities		
Shareholders' funds		
Equity shares of Rs 10 each	6,500	4,500
Reserves and surplus	3,000	5,000
Current liabilities		
Trade creditors and other liabilities	2,000	1,000
Total	11,500	10,500
II. Assets		
Non-current assets	8,000	7,500
Current assets	3,500	3,000
Total	11,500	10,500

The fixed assets of FDL were valued at Rs10,000 thousand and that of GCL were valued at Rs 9,000 thousand. WWL would issue the requisite number of equity shares of Rs 10 each at 50% premium to discharge the claim of equity shareholders of FDL and GCL. How many shares of WWL should be issued to takeover the business of the two merging companies?

ANSWER:**FDL GCL**

(Rs '000)	(Rs '000)		
Non-Current Assets	10,000	9,000	
Current Assets	3,500	3,000	
<i>Less: Current Liabilities</i>	(2,000)	(1,000)	
<i>Net Assets</i>	11,500	11,000	

Total Value of Net Assets = 11,500 + 11,000 =, 22,500

WWL is issuing shares of Rs 10 each with 50 % premium (Le. Rs 5 Premium on each share) No. of shares to be issued by WWL Ltd. = 22,500 / 15 = 1,500 thousands shares

QUESTION-22

Zen Ltd. has earned a profit of Rs 40,00,000 before tax for e year ended 31st March, 2014. Tax amounts to Rs 11,40,000. The share capital of the company is Rs 60,00,000 (4, 00,000 equity share of Rs 10 each and 2,00,000, 7% preference shares of Rs 10 each). Compute earnings per share (EPS) of Zen Ltd.

ANSWER:

Profit before tax	Rs 40,00,000
Tax Rs 11,40,000	
Preference dividend	Rs 1,40,000
Profit after tax available for Equity shareholder	Rs 27,20,000

Equity share	Rs 40,00,000 (4,00,000 equity shares of Rs 10 each)
Preference share	Rs 20,00,000 (2,00,000 equity shares of Rs 10 each)
Earning per share	= Profit available for equity shareholder/Equity shares
Earning per share	= Rs 27,20,000 / 4,00,000
EPS = 6.8	

QUESTION-23

2015- June [5](b) Blue Ltd. and Moon Ltd. have agreed to amalgamate to form a new company Blue Moon Ltd. after negotiation, the two companies have decided on the balance sheet as given below:

EQUITY AND LIABILITY**(1) Shareholders' funds****(a) Share capital****(Rs in '000)****Blue Ltd. Moon Ltd**

Equity shares of Rs 10 each	5,00,000	10,00,000

(b) Reserves and surplus

Reserve fund	20,000	-
Surplus	40,000	40,000

(2) Current liabilities'

Trade payables	40,000	60,000
Total	<u>6,00,000</u>	<u>11,00,000</u>

(Rs in '000)**Blue Ltd. Moon Ltd****Assets****(1) Non- current Assets**

(i)	Tangible assets		
	(a) Land and building	2,00,000	4,25,000
	(b) Plant and machinery	1,70,000	2,75,000
(ii)	Intangible assets (Goodwill)	50,000	1,00,000

(2) Current ASSETS

(a) Inventories	80,000	1,20,000
(b) Trade receivables	30,000	1,00,000
(c) Cash and cash equivalents	70,000	80,000
	<u>6,00,000</u>	<u>11,00,000</u>

The assets and liabilities are taken over by Blue Moon Ltd. Compute the total number of shares of the Blue Moon Ltd. having a value of Rs 10 each to be issued to the shareholders of Blue Ltd and Moon Ltd. using net asset value method

ANSWER:

	Blue Ltd.	Moon Ltd.
Non-Current and Current Assets	Rs 6,00,000	Rs 11,00,000
Less: Current Liabilities	Rs 40,000	Rs 60,000
Net Asset	Rs 5,60,000	Rs 10,40,000
Shares to be issued by Blue & moon Ltd	5,60,000/10	10,40,000/10
Number of shares	= 56.000	=104.000

QUESTION-24

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

	GPL	TFL
Net sales (Rs in crore)	335	118
Profit after tax (Rs in crore)	58	12
Number of shares (crore),	12	3
Earnings per share (Rs)	4.83	4
Market value per share (Rs)	30	20
Price-earnings ratio	6.21	5

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

- Earnings per share
- Price-earnings ratio
- Market value per share
- Number of shares; and
- Total market capitalization

ANSWER:**Premium paid to Theta's shares shareholders:**

Value of each shares in Gama: $0.8 \times \text{Rs } 30$	= Rs 24
Value of Theta's shares before merger	= Rs 20
Premium	= Rs 4
Premium Percentage	= $4/20 = 20\%$
Numbers of shares paid to Theta's shareholders: 3×0.8	= 2.4 crore
Numbers of shares of the combined company	= $12 + 2.4$ = 14.4 crore

Combined profit after tax (Rs 58 + Rs 12) = Rs 70 crore

(i) Combined EPS ($70/14.4$) = Rs 4.86

(ii) Combined P/E ratio = $6.20 \times (58/70) + 5 \times (12/70)$ = 6.00

Combined firm market capitalization

(iii) Market value per share = P/E ratio $\times$ EPS = 6.00×4.86 = Rs 29.16

(iv) Number of shares of the combined company = $12 + 2.4$
= 14.4 crore

(v) Capitalization: MVPs $\times$ No. of shares = $\text{Rs } 29.16 \times 14.4$ = Rs 419.9 crore

QUESTION- 25

Groves Ltd and Wood Ltd. decided to merge and a new company Groves Wood Ltd. is formed. Following are the extracts from the financial records of Grovels Ltd. and Wood Ltd.

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

Assets**(a) Non-current assets**

(a) Land and building	400	600
(b) Plant and machinery	900	1500
(c) Intangible assets (goodwill)	100	200

(b) Current assets

(a) Inventories	200	400
(b) Trade receivables	400	300
(c) Cash and cash equivalents	400	700
Total	2,500	3,700

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

ANSWER:

Assets	(Rs in lakh)	
	Groves Ltd.	Wood Ltd.
1. Non-current assets		
(a) Land and building	400	600
(b) Plant and machinery	900	1500
(c) Intangible assets (Goodwill)	-	-
2. Current assets		
(i) Inventories	300	400
(ii) Trade receivables	400	300
(iii) Cash and cash equivalents	400	700
	2,400	3,500
Less: Current Liabilities	700'	800
Trade Payables Rs in Lakh	1,700	2,700
	1,700/20	2,700/20
	= 85 Lakh	=135 Lakh

No. of Rs 10 Equity shares to be Issued fully paid up at a premium of Rs 10 per share Groves Ltd. 85 Lakh Equity Shares and Wood Ltd. 135 Lakh Equity Shares.

QUESTION-26

2014 - June [4] (a) The shares of XYZ Ltd. are listed on more than one stock exchange. On 3rd February, 2014, its share was quoted @ Rs 100 per share in Bombay Stock Exchange and @

Rs 90 per share in National Stock Exchange. The company issued 10,000 sweat equity shares on the same date @ Rs 90 to Anand. Examine whether the transaction violates SEBI (Issue of Sweat Equity) Regulations, 2002.

ANSWER:

Under the SEBI (Issue of Sweat Equity) Regulations, 2002, the price of sweat equity shares shall not be less than the higher of the following:

(a) The average of the weekly high and low of the closing prices of the related equity shares during last six months preceding the relevant date;

Or

(b) The average of the weekly high and low of the closing prices of the related equity shares during the two weeks preceding the relevant date. "Relevant date" for this purpose means the date which is 30 days prior to the date on which the meeting of the General Body of the Shareholders is convened, in terms of clause (a) of Sub-section (1) of Section 54 of the Companies Act.

1. If the shares are listed on more than one stock exchange, but quoted only on one stock exchange on the given date, then the price on that stock exchange shall be considered.

2. If the share price is quoted on more than one stock exchange, then the stock exchange where there is highest trading volume during that date shall be considered.

3. If shares are not quoted on the given date, then the share price on the next trading day shall be considered

As per the sweat equity regulations, the intellectual property or the value addition in respect of which the company intends to issue the sweat equity should also be valued in accordance with valuation requirements contained in the said regulations. Considering the above provision issuing of sweat equity shares @ Rs 90 violates SEBI (Issue of Sweat Equity) Regulations 2002.

QUESTION-27

Blue Springs Ltd. incorporated a new company namely Defence Springs Ltd. and transferred its defence component division to it on slump sale basis for a lump sum consideration of Rs 255 lakh. The assets and liabilities of the defence component division are as under:

Rs (in lakh)

Assets

Gross Value of fixed assets	410
Accumulated depreciation till date	240
Current assets (other than liquid assets)	80
Liquid assets	30
Liabilities:	
Trade liabilities	60
Secured loans (including short-term 80 loans)	
Short-term loans	35

Calculate the following:

- (I) Aggregate value of total assets;
- (II) Book value of net assets;
- (III) Networth of the defence component division; and
- (IV) Capital gains as per section 50B of the Income-tax Act, 1961.

ANSWER:

In case of slump sale, various figures can be calculated keeping an eye on the provision of Section 51 B of the Income Tax Act, 1961.

The desired values are as under:

- (i) Aggregate value of total assets = Depreciated value of depreciable assets + Book value of other assets

Aggregate value of total assets = $(410 - 240) + 80 + 30 = 280$ Thus, it comes to Rs 2,80,00,000.

- (ii) Book Value of Net Assets = Net Fixed Assets + Current Assets
Book Value of Net Assets = $170 + 110 = 280$

Thus, it comes to Rs 2,80,00,000.

- (iii) Net Worth of the Defence Component Division = Aggregate value of total assets - Value of liabilities

Net Worth of the Defence Component Division = $280 - 140 = 140$ Thus, it comes to Rs 1,40,00,000.

- (iv) Capital Gains as per Section 50B of the Income Tax Act = Net Consideration - Net Worth of the Defence Component Division = $\text{Rs } 255 - 140 = 115$. Thus, it comes to Rs 1,15,00,000.

QUESTION-28

White Chicks Ltd. is listed on Bombay Stock Exchange. The management wishes to issue sweat equity shares to the new Chairman and Managing Director for which extra-ordinary general meeting is scheduled on 15th July, 2016.

Based on the following information, calculate the minimum value at which sweat equity shares can be issued, and submit your opinion to the management making your own assumptions, wherever required. Substantiate your answer with relevant provisions of SEBI Regulations.

Particulars	(Rs)
Average of weekly high and low of the closing prices during last six months as on 'relevant date'	275
Average of weekly high and low of the closing prices during last six weeks as on 'relevant date'	285
Average of weekly high and low of the closing prices during last six years as on 'relevant date'	185
Average of weekly high and low of the closing prices during last two months as on 'relevant date'	282
Average of weekly high and low of the closing prices during last two Weeks as on 'relevant date'	314
Average of weekly high and low of the closing prices during last two years as on 'relevant date'	214

ANSWER:

Under the SEBI (Issue of Sweat Equity) Regulations, 2002, the price of sweat equity shares shall not be less than the higher of the following:

(a) The average of the weekly high and low of the closing prices of the related equity shares during last six months preceding the relevant date;

Or

(b) The average of the weekly high and low of the closing prices of the related equity shares during last two weeks while calculating the minimum price, following assumptions have been made (in Rs) .

- (i) Share of White Chick Limited is listed only on BSE,
- (ii) Prices given have been considered on relevant date as per SEBI regulations.
- (iii) The intellectual property or the value addition for which sweat equity shares are proposed .to be issued has been valued as per the provisions of SEBI Regulations.

Following prices are relevant to decide the minimum price at which shares are to be issued:

The average of the weekly high and low of the closing prices of the related equity shares during last six months preceding the relevant date = INR 275.00.

The average of the weekly high and low of the closing prices of the related equity shares during last two weeks preceding the relevant date = INR314.00.

Higher of the two, that is. INR 314/- per share is minimum price at which. Shares can be issue

CHAPTER 14 AS PER ICSI MODULE

INSOLVENCY

Q1: What is the origin of the term “bankruptcy” and what role does a formal bankruptcy process play in resolving financial distress?

Answer: The term "bankruptcy" is believed to have originated from the Italian phrase “bancarot a”, where “banca” means bench and “rot a” means broken. In medieval Florence, Italy, when a banker was unable to fulfill his financial obligations, his trading bench was symbolically broken to indicate his failure—hence the term “breaking the bench,” or bancarot a, which evolved into the modern concept of bankruptcy.

The role of a formal bankruptcy process is to provide a legal framework that facilitates structured negotiations between creditors and debtors. It creates procedural certainty, reduces information asymmetry, and addresses issues such as the misuse of common property. The ultimate objective is to determine whether the distressed entity is facing financial failure (a mismatch between payments and receivables despite a working business model) or business failure (a flawed business model unable to generate sufficient revenue). A sound bankruptcy process helps both parties—creditors and debtors—maximize the value of the business by clarifying the nature of the failure and finding a mutually beneficial solution.

Q2: Terms “Insolvency” and “Bankruptcy” are synonymous in result but practically refer to different situations and consequences — Briefly explain. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: The terms ‘Insolvency’ and ‘Bankruptcy’ are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term ‘insolvency’ denotes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term ‘insolvency’ is used in a restricted sense to express the inability of a person or an entity to pay his debts as they become due in the ordinary course of business.

‘Bankruptcy’ is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor’s assets are then evaluated and used to pay the creditors in accordance with law.

Thus insolvency is a state and bankruptcy is the conclusion. The term insolvency is used for individuals as well as organisations/ corporates. If insolvency is not resolved, it leads to bankruptcy in case of individuals and liquidation in case of corporates.

Q3: Difference Between Insolvency, Bankruptcy, and Liquidation**Answer:**

Aspect	Insolvency	Bankruptcy	Liquidation
Meaning	A financial state where an individual or entity is unable to pay debts as they become due.	A legal declaration of insolvency, initiated through a court or authorized body.	A legal process of winding up a company to pay off its debts by selling assets.
Who It Applies To	Individuals, firms, and corporates.	Primarily individuals or partnership firms.	Only companies or incorporated entities.
Nature	A situation or condition.	A legal status.	A legal procedure.
Trigger/Event	Occurs when liabilities exceed assets or there is inability to repay debts on time.	Initiated when a court passes a bankruptcy order after determining insolvency.	Triggered when a company is insolvent and cannot be revived or reorganized.
Outcome	May lead to bankruptcy (for individuals) or liquidation (for companies) if unresolved.	Leads to structured repayment or discharge of debts under court supervision.	Ends with closure of the company and distribution of proceeds to creditors.
Legal Reference	General concept recognized in the Insolvency and Bankruptcy Code (IBC), 2016 .	Defined under Section 79(4) and Section 126 of IBC, 2016 .	Governed under IBC, 2016 and Companies Act, 2013 .
Key Purpose	Identifies financial distress.	Provides legal resolution for individuals/partners who cannot repay debts.	Ensures fair settlement of debts and dissolution of a non-viable corporate entity.

Q4: How did the nature and purpose of bankruptcy laws in England evolve from the Act of 1542 to the Statutes of Anne in the early 18th century?

Answer: The bankruptcy laws in England initially began with the Act of 1542 (34 & 35 Henry VIII, c.4), which was enacted under the reign of Henry VIII. This Act treated debtors as offenders, akin to criminals, primarily focusing on strict enforcement for the benefit of creditors. It offered no discharge for debtors and allowed for the execution of even their future earnings to repay debts. Early bankruptcy laws were essentially debt-collection tools that

prioritized the seizure of a debtor's assets due to the strong protections of private property under Common Law.

However, by the early 18th century, the nature of these laws began to change. The Statutes of Anne (4 Anne, c.17 in 1705, and 10 Anne, c.15 in 1711) introduced the possibility of discharging the debts of bankrupt individuals who complied with legal provisions. While these Acts still mainly served creditors' interests, they marked a shift by acknowledging debtors' rights and moving away from treating them purely as offenders. This evolution laid the foundation for modern insolvency laws, which focus more on the rehabilitation and continuation of businesses rather than solely on liquidation.

Q5: What is the current regulatory framework for insolvency in the United Kingdom, and what are the key procedures introduced under the Insolvency Act, 1986?

Answer: The current regulatory framework for insolvency in the United Kingdom is governed primarily by the Insolvency Act, 1986 and the Insolvency Rules, 1986. This framework was established following the recommendations of the Cork Review Committee Report on Insolvency Law and Practice (1982). Prior to the Act, insolvency law in the UK was fragmented across various statutes such as the Bankruptcy Act, 1914, Deeds of Arrangement Act, 1914, Companies Act, 1948, and parts of the County Courts Act, 1959, and also relied on common law and equity principles.

The **Insolvency Act, 1986** consolidated these fragmented provisions and addressed:

- Company insolvency and winding up,
- Individual bankruptcy and insolvency,
- Regulation and qualification of insolvency practitioners,
- Public administration of insolvency,
- Penalisation of malpractice and avoidance of undervalued transactions.

The Act is divided into **three groups**:

1. **Company Insolvency**
2. **Insolvency of Individuals**
3. **Miscellaneous Matters** affecting both company and individual insolvency

To support the revival of financially distressed companies, the Act introduced **three key procedures**, reflecting the rescue-oriented approach found in U.S. corporate law:

1. **Company Voluntary Arrangements (CVAs):** A company can propose a binding agreement with creditors for debt repayment or restructuring. Approval requires consent from **75% of creditors** present and voting at a meeting.
2. **Administration:** A court-appointed administrator is given control to formulate a rescue or restructuring plan. This process provides the company with temporary protection from creditor actions, enabling the business to be saved or sold more advantageously than through liquidation.
3. **Administrative Receivership:** Certain creditors, typically those holding a **floating charge**, may appoint a receiver to recover debts. This allows for control over the company's assets in order to satisfy outstanding liabilities.

Q6: How did the bankruptcy laws evolve in the United States, and what were the key milestones in establishing a uniform and permanent bankruptcy system?

Answer: The evolution of bankruptcy laws in the United States was heavily influenced by its colonial connection to the United Kingdom. Initially, American bankruptcy laws mirrored the English system, including debtor imprisonment until debts were paid or creditors agreed to release the debtor. There was no uniform bankruptcy law, and each state had its own rules, with some becoming known as debtor havens due to their lax enforcement of commercial obligations.

This lack of uniformity negatively impacted interstate commerce, prompting the U.S. Constitution (Article I, Section 8, Clause 4) in 1789 to empower Congress to establish uniform bankruptcy laws across the country.

Subsequent developments include:

1. Temporary Bankruptcy Acts:

- 1800, 1841, and 1867: Enacted during periods of economic recession.
- These laws vested jurisdiction in federal district courts, allowing judges to appoint commissioners or assignees to liquidate debtor property.
- However, these acts were repealed once economic conditions improved.

2. The National Bankruptcy Act, 1898:

- This was the **first permanent bankruptcy law** in the U.S.
- It lasted **80 years** and was amended in **1938** to include **rehabilitation of debtors** as an alternative to liquidation, marking a shift toward debtor protection and financial recovery.

3. The Bankruptcy Reform Act, 1978:

- Replaced the 1898 Act.
- It created separate bankruptcy courts in each district.
- Also introduced bankruptcy judges, thereby professionalizing the system and streamlining the administration of bankruptcy proceedings.

Q7: What is the current regulatory framework governing bankruptcy in the United States, and what are the key types of bankruptcy cases under the U.S. Bankruptcy Code?

Answer: The current regulatory framework for bankruptcy in the United States is governed by the Bankruptcy Code, a uniform federal law codified in Title 11 of the United States Code. It was enacted under §101 of the Bankruptcy Reform Act of 1978. The procedural aspects of bankruptcy cases are regulated by the Federal Rules of Bankruptcy Procedure, commonly known as the Bankruptcy Rules.

The Bankruptcy Code outlines six basic types of bankruptcy cases, each serving different categories of debtors:

1. Chapter 7 – Liquidation

- A court-appointed **trustee** takes possession of the debtor's **non-exempt assets**, liquidates them, and distributes the proceeds to creditors.
- The trustee is responsible for managing the estate, investigating the debtor's financial affairs, and filing reports with the **United States Trustee and the court**.

- Primarily used by **individuals and businesses** seeking full discharge of debts through asset liquidation.

2. Chapter 9 – Adjustment of Debts of a Municipality

- Applies to **municipalities** (e.g., cities, towns, school districts, municipalities).
- Provides for the **reorganization of municipal debt** through a court-approved repayment plan.
- Offers protection from creditor actions while the municipality restructures its obligations.

3. Chapter 11 – Reorganization

- Primarily used by **businesses**, but available to individuals with large debts.
- The **debtor remains in control** as a "debtor in possession" and continues operations while repaying creditors through a reorganization plan.
- A trustee may be appointed, and under **Section 1106**, must file a plan or explain why one will not be filed.

4. Chapter 12 – Family Farmers and Fishermen

- Added in **1986**, this chapter allows **family farmers or fishermen** to continue operating while implementing a debt repayment plan.
- It offers tailored provisions suited to the seasonal and cyclical nature of farming and fishing businesses.

5. Chapter 13 – Repayment Plan for Individuals

- Designed for **individuals with regular income**, Chapter 13 enables the creation of a **3-5 year repayment plan** to pay back all or part of their debts.
- Debtors retain their property and avoid liquidation.

6. Chapter 15 – Cross-Border Insolvency

- Introduced in 2005, Chapter 15 deals with international insolvency cases.
- Allows representatives of foreign bankruptcy proceedings to access U.S. courts and cooperate in cross-border cases.
- Aims to promote cooperation and legal consistency between the U.S. and foreign jurisdictions.

Q8: How did insolvency laws develop historically in India, and what were the key legislative milestones in their evolution?

Answer: The insolvency laws in India have their roots in English law, as India was a colony of the United Kingdom. The evolution of insolvency law in India began with the needs of British commercial interests, particularly in the Presidency towns of Calcutta, Bombay, and Madras, where trade was concentrated.

Key milestones in the historical development of Indian insolvency laws include:

1. Government of India Act, 1800 (Sections 23 & 24):

- This was the earliest legal provision relating to insolvency in India.
- It conferred insolvency jurisdiction on the Supreme Courts at Fort William (Calcutta), Madras, and the Recorder's Court at Bombay.
- These courts were empowered to make rules and grant relief to insolvent debtors.

2. Statute 9 Geo. IV c. 73 (1828):

- Marked the beginning of specialized insolvency legislation in India.
- Established separate insolvency courts in the Presidency towns.
- Though intended to remain in force for only four years, its duration was extended until 1848.

3. Indian Insolvency Act, 1848:

- Replaced the 1828 Act and remained in force until 1909.
- Continued the separation of insolvency jurisdiction in Presidency towns.

4. Presidency Towns Insolvency Act, 1909:

- Applied to individuals and partnership firms in Presidency towns (Calcutta, Bombay, Madras).
- Represented a more codified and structured approach to insolvency in those urban commercial centers.

5. Provincial Insolvency Act, 1920:

- Extended insolvency laws to the rest of British India (i.e., outside the Presidency towns).
- Also applicable to individuals and partnership firms.
- Marked the dual system of insolvency law in India—Presidency towns under the 1909 Act, and provinces under the 1920 Act.

Purpose of Insolvency Law:

Insolvency law in India traditionally served two main purposes:

1. Relief to the debtor – to protect debtors from harassment by creditors when they are genuinely unable to pay their debts.
2. Equitable distribution to creditors – to provide a legal framework for satisfying creditors, especially those who do not hold any security against the debtor's property.

Q9: What was the legal framework for insolvency and bankruptcy in India before the enactment of the Insolvency and Bankruptcy Code, 2016?

Answer: Before the enactment of the Insolvency and Bankruptcy Code (IBC), 2016, the legal framework for dealing with insolvency and bankruptcy in India was fragmented and scattered across multiple legislations. There was no single, comprehensive law, leading to delays, inefficiencies, and jurisdictional overlaps in insolvency resolution.

The following Acts governed insolvency and bankruptcy matters prior to the IBC:

- The Presidency Towns Insolvency Act, 1909
- Provincial Insolvency Act, 1920
- Indian Partnership Act, 1932
- The Companies Act, 1956
- The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)
- The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002)
- The Companies Act, 2013.

Q10: What role did various government-appointed committees play in the evolution of insolvency and bankruptcy laws in India, and what were the key outcomes of their recommendations?

Answer:

S.No.	Year	Committee/Commission	Recommendations/Outcome
1	1964	Third Law Commission	Submitted the 26th Law Commission Report recommending amendments to the Provincial Insolvency Act, 1920.
2	1981	Tiwari Committee	Led to the enactment of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) for early detection and remedy of industrial sickness.
3	1991	Narasimham Committee I	Resulted in the Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993.
4	1998	Narasimham Committee II	Led to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002.
5	1999	Justice Eradi Committee	Recommended the formation of National Company Law Tribunal (NCLT) and repeal of SICA.
6	2001	N.L. Mitra Committee	Proposed the creation of a comprehensive bankruptcy code for India.
7	2005	J.J. Irani Committee	Suggested changes to make insolvency and restructuring more efficient; led to amendments in RDDBFI Act and SARFAESI Act.
8	2008	Raghuram Rajan Committee	Recommended improvements in credit infrastructure to support financial reforms.
9	2013	Financial Sector Legislative Reforms Commission	Proposed reforms in the Indian financial sector, including legal and institutional changes.
10	2014	Bankruptcy Law Reforms Committee (BLRC)	Reviewed the existing laws and proposed the Insolvency and Bankruptcy Code, 2016 as a unified and comprehensive legislation on insolvency and bankruptcy.

Q11: In relation to insolvency laws, mention four reforms carried out in India in 21st Century. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

Answer: Over the last two decades, the Indian financial system has undergone tremendous transformation. Various financial sector reforms have been initiated aimed at promoting an

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

Justice Eradi Committee

In the year 1999, the Government of India set up a High Level Committee headed by Justice V.B. Eradi, to examine and make recommendations with regard to the desirability of changes in existing law relating to winding up of companies so as to achieve more transparency and avoid delays in the final liquidation of the companies; The Committee recognized after considering international practices that the law of insolvency should not only provide for quick disposal of assets but in Indian economic scene, it should first look at the possibilities of rehabilitation and revival of companies. The Committee also recommended that the jurisdiction, power and authority relating to winding up of companies should be vested in a National Company Law Tribunal instead of the High Court as at present. The Committee strongly recommended appointing Insolvency Professionals who are members of Institute of Chartered Accountant of India (ICAI), Institute of Company Secretaries of India (ICSI), Institute of Cost and Works Accountants of India (ICWAI), Bar Councils or corporate managers who are well versed in Corporate management on lines of U.K. Insolvency Act.

Dr J.J. Irani Expert Committee on Company Law

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

Provisions of Companies Act 2012 Relating to Insolvency Administrators

• Appointment as interim administrator

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

• Company Liquidators

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

• Professional assistance to Company Liquidator

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

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

Q12: "insolvency & Bankruptcy Code, 2016 as on date is an of shoot of reports by several commit ees established to make Indian economy free from industrial sickness result ng in loss of product on and to boost the economy." Explain the evolvement of Insolvency & Bankruptcy Code, 2016 through recommendat ons from various commit ees with consequent reforms made in India over a period of t me. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: Every nat on strives to avoid industrial sickness in order to have cont nuous product on, distribut on with boost ng economy. In order to achieve this noble object ve, in India several commit ees were const tuted, out of which, Tiwari Commit ee, N L Mitra Commit ee, Just ce Eradi Commit ee, J J Irani Commit ee and Banking Laws Reforms Commit ee are worth ment oning.

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

(b) N L Mitra Commit ee tried to ident fy the def ciency in Indian laws in respect of cross border insolvency and suggested reforms.

(c) Just ce Eradi Commit ee was formed to examine and to recommend measures for desirable changes in exist ng law relat ng to winding-up of companies so as to achieve transparency or fast dissolut on.

(d) J J Erani Commit ee proposed changes in the law to make speedy restructuring and liquidat on process that culminated to re-codif ed Companies Act, 2013.

(e) Bankruptcy Law Reforms Commit ee headed by Dr. T K Viswanathan had object ves regarding insolvency law with lesser t me involved, lesser loss in recovery and higher levels of debt f nancing across instruments. As on date, Insolvency and Bankruptcy Code, 2016 assures revival as a last chance within 180 or 270 days, failing liquidat on in further 12 months.

Q13: In relat on to insolvency laws, ment on any f ve reforms carried out in India in 21st century. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer:

- Reforms in Companies(Amendment)Act, 2002(though not enforced)
- Recommendat on by JJ Irani Commit ee on insolvency aspects in line with UNCITRAL model.
- Reforms under Companies Act, 2013
- Securit sat on Act, 2002 brought reforms with respect to non-performing assets
- Insolvency and Bankruptcy Code 2016 got gazet ed.

Q14: "Default by debtor was a crime punishable with imprisonment or death". This forgot en percept on with respect to the laws of bankruptcy has now got transformed giving opportunity to a bankrupt or insolvent for revival. Express the views in the current context of evolut on of Insolvency Laws in Britain and U.S.A and now even in India. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: First Bankruptcy Law was enacted in England in 1542 in which debtor was looked upon as in a sense an offender, and the Law was mainly for the benefit of creditors. Said law was providing equal distribution of debtor's assets among creditors yet not relieving the debtor for punishment. But at present Insolvency Act, 1986 in UK is prevalent to deal with insolvencies of individuals and companies.

Opportunity is given to revive the company to emulate the 'rescue' culture that characterised the corporate sector in U.S.A. Early bankruptcy laws in USA were draconian as were in England and were only available to merchants and generally involved imprisonment until debts were paid or until property was liquidated or creditors agreed to release of the debtor. Bankruptcy Abuse Prevention & Reorganization Act, 2005 in USA attempts to overhaul earlier Codes with specific reference to consumer protection, restoring personal responsibilities and integrity in the bankruptcy system.

In India also with promulgation of Insolvency and Bankruptcy Code, 2016, debtor is given revival opportunity before liquidation.

Q15: Progress of enforcement of Insolvency and Bankruptcy Code, 2016 depends on four pillars apart from the adjudicating authorities. State briefly the role of such pillars. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: It is true to state that Insolvency and Bankruptcy Board of India (IBBI), Insolvency Professional Agencies (IPAs), Insolvency Professionals (IPs) and Information Utilities (IUs) are the four pillars for the progress and implementation of the Insolvency and Bankruptcy Code, 2016 apart from the adjudicating authorities, i.e., NCLT and DRT. IBBI functions with a Chairman, 3 Central Government, 1 RBI ex-officio and five members including 3 whole-time members as nominated by Central Government. IBBI is entrusted with framing regulations for insolvency and bankruptcy related matters, setting eligibility and registering intermediaries i.e. IPA, IP and IU as well as monitoring those intermediaries.

IPAs are registered bodies to enroll IPs before registration with IBBI. IPs will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. IP is entrusted with corporate debtor to frame Resolution Plan for revival through Committee of Creditors within 180/270 days.

IU is to keep records of liabilities relating to debtors, creditors electronically. These would collect, collate, authenticate and disseminate financial information to facilitate insolvency proceedings.

Q16: Explain the concept "Ease of doing business includes easy exit by investors and creditors that prompts national policy makers' constant endeavour to reform law relating to Insolvency or Bankruptcy". (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Every stakeholder especially investors and creditors chose to get early return on their investments for sustenance. Hence, policy makers constantly reform law relating to insolvency

for ease of doing business that includes easy exit also. During last two and half decades, Indian financial system has undergone tremendous transformation. Several financial reforms have been initiated to promote an efficient, well diversified and competitive financial system with ultimate objective of improving the allocative efficiency of resources so as to accelerate economic development. There are reforms in laws and systems to be at par with International Standards and to incentivise the foreign investors to invest in the Indian economy. Committees were formed to find ways to improve the law relating to Insolvency resulting into framing of Insolvency and Bankruptcy Code, 2016.

Q17: While adjudication was available for each kind of insolvency and bankruptcy, do you feel the necessity of a single code in the name of Insolvency and Bankruptcy Code, 2016 — Discuss with relevant background. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Before the enactment of the Insolvency and Bankruptcy Code, there were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution. The legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system.

Prior to the enactment of the Insolvency and Bankruptcy Code, the provisions relating to insolvency and bankruptcy for companies were made in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statutes provided for creation of multiple fora such as Board of Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and their respective Appellate Tribunals. Liquidation of companies was handled by the High Courts. Individual bankruptcy and insolvency was dealt with under the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920.

The liquidation of companies was handled under various laws and different authorities such as High Court and Debt Recovery Tribunal had overlapping jurisdiction which was adversely affecting the debt recovery process.

The objective of the Insolvency and Bankruptcy Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. An effective legal framework for timely resolution of insolvency and bankruptcy will not only encourage entrepreneurship but will also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

Q18: Why was the Insolvency and Bankruptcy Code, 2016 introduced in India?

Answer: The IBC, 2016 was introduced because India's existing legal and institutional framework for handling debt defaults was outdated, fragmented, and ineffective. Laws like

the RDDBFI Act, 1993; SARFAESI Act, 2002; SICA, 1985; and the Companies Act, 1956 failed to facilitate timely recovery or restructuring of distressed entities. Individual insolvency laws like the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 were nearly a century old. These inefficiencies weakened lender confidence and impeded credit access, necessitating a comprehensive and modern insolvency framework.

Q19: Who drafted the Insolvency and Bankruptcy Code, 2016, and what was the legislative process for its enactment?

Answer: The Insolvency and Bankruptcy Code Bill was drafted by the Bankruptcy Law Reforms Committee (BLRC) constituted under the Ministry of Finance. It was introduced in the Lok Sabha on 21 December 2015 and referred to a Joint Committee of Parliament. After reviewing the recommendations, the modified Code was passed by the Lok Sabha on 5 May 2016, the Rajya Sabha on 11 May 2016, and it received Presidential assent on 28 May 2016.

Q20: What is the main objective of the Insolvency and Bankruptcy Code, 2016?

Answer: The main objective of the IBC is to promote entrepreneurship, enhance credit availability, and balance the interests of all stakeholders by consolidating and amending laws related to the reorganization and insolvency resolution of corporate persons, partnership firms, and individuals. It also aims to maximize the value of assets in a time-bound manner.

Q21: What are the key features of the Insolvency and Bankruptcy Code, 2016?

- Answer:**
- i. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.
 - ii. Two distinct processes for resolution of individuals, namely- “Fresh Start” and “Insolvency Resolution”.
 - iii. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.
 - iv. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.
 - v. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.
 - vi. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.
 - vii. Enabling provisions to deal with cross border insolvency.

Q22: “The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation”. Enumerate applicability of the Code as per Insolvency and Bankruptcy Code (Amendment) Act, 2018. What is the existing limit to initiate an insolvency process for corporate debtors? (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Section 2 of the Insolvency and Bankruptcy Code, 2016 as amended vide the Insolvency and Bankruptcy Code (Amendment) Act, 2018 provides that the provisions of the Code shall apply to—

- a. any company incorporated under the Companies Act, 2013 or under any previous company law,
- b. any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act,
- c. any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,
- d. such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,
- e. personal guarantors to corporate debtors,
- f. partnership firms and proprietorship firms, and
- g. individuals, other than persons referred to in clause (e) in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

To initiate an insolvency process for corporate debtors, the default should be at least INR 1,00,00,000. This limit was increased from INR 1,00,000 to INR 1,00,00,000 vide MCA notification dated 24th March, 2020.

Q23: The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms in India. Comment. Also, state key objectives and preamble of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: The Insolvency and bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms). The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic jump in the ease of doing business rankings by consolidating the law and providing for resolution of insolvencies in a time-bound manner.

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism.
2. To ensure maximisation of value of assets,
3. To promote entrepreneurship,

4. To increase availability of credit,
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues, and
6. To establish an Insolvency and Bankruptcy Board of India as a regulatory body,
7. To provide procedure for connected and incidental matters.

Q24: Explain the key features and institutional framework established under the Insolvency and Bankruptcy Code, 2016 in India. How does the Code address insolvency resolution for corporate entities and individuals?

Answer:

1. **Uniform Law for Insolvency:** The IBC, 2016 is a single law that deals with insolvency and bankruptcy for companies, partnerships, and individuals. However, it does not apply to financial service providers like banks and insurance companies.

2. **Structured and Timely Process:** To handle insolvency quickly and efficiently, the Code sets up a system that includes: Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authorities (AAs), Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and Information Utilities (IUs).

3. Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs):

- The Code introduces Insolvency Professionals (IPs)—qualified, regulated individuals who manage the insolvency resolution process.
- These professionals must meet certain ethical and professional standards.
- **Insolvency Professional Agencies (IPAs)** are responsible for:
 - Enrolling IPs
 - Providing training and educational courses
 - Enforcing a code of conduct
 - Issuing authorisation for assignments to IPs

3. Designated IPAs under the Code:

1. Indian Institute of Insolvency Professionals of ICAI
2. ICSI Institute of Insolvency Professionals
3. Insolvency Professional Agency of Institute of Cost Accountants of India

Role and Regulation of Insolvency Professionals (IPs)

- **Insolvency Professionals (IPs)** take control of the debtor's assets during the insolvency process.
- Their key duties include:
 - Verifying creditor claims
 - Forming the Committee of Creditors (CoC)
 - Running the debtor's business during the moratorium period
 - Helping creditors prepare a revival plan
 - Ensuring the debtor follows all applicable laws
- During liquidation, IPs act as liquidators or bankruptcy trustees.

- The IBBI (Insolvency Professional) Regulations, 2016 govern their work and are updated as needed by the Insolvency and Bankruptcy Board of India (IBBI).

4. Information Utilities (IUs)

- Information Utilities (IUs) play a key role in the insolvency process by handling financial data.
- Their main tasks are to collect, verify, store, and share financial information about debtors in a centralized electronic system.
- This helps in quick and accurate decision-making during insolvency resolution.
- The IBBI (Information Utilities) Regulations, 2017 regulate their functioning and are updated by the Insolvency and Bankruptcy Board of India (IBBI) as needed.

7. Insolvency and Bankruptcy Board of India (IBBI)

- The Insolvency and Bankruptcy Code established a new regulator called the Insolvency and Bankruptcy Board of India (IBBI).
- IBBI oversees and regulates the work of:
 - Insolvency Professionals (IPs)
 - Insolvency Professional Agencies (IPAs)
 - Information Utilities (IUs)
- It also regulates the insolvency resolution process itself.
- The Board includes members from the Central Government and the Reserve Bank of India (RBI).
- IBBI frames and enforces regulations under the Code.
- It also acts as the authority for regulating valuers under the Companies (Registered Valuers and Valuation) Rules, 2017.

8. Adjudicating Authorities under the Code

- The Code sets up two tribunals to handle insolvency cases:
 - For companies and LLPs: the National Company Law Tribunal (NCLT)
 - For individuals and partnership firms: the Debts Recovery Tribunal (DRT)
- The insolvency process begins when the NCLT or DRT verifies the claim made by the applicant.
- **Appeal process:**
 - From NCLT → National Company Law Appellate Tribunal (NCLAT) → Supreme Court
 - From DRT → Debt Recovery Appellate Tribunal (DRAT) → Supreme Court

9. Minimum Default Amount for Initiating Insolvency

- To start an insolvency process for corporate debtors, the minimum default must be ₹1 crore (INR 1,00,00,000).
- For pre-packaged insolvency resolution (under Chapter III-A), the Central Government can set a different minimum limit, but not more than ₹1 crore.
- As per Notification S.O. 1543(E) dated 9th April 2021, the minimum default for pre-pack cases was set at ₹10 lakh.

10. Two Stages of Corporate Insolvency Process

The Code outlines **two main stages** for resolving insolvency of corporate persons:

1. Insolvency Resolution Process

- Creditors assess the financial health of the debtor.
- They explore options to rescue and revive the business.

2. Liquidation

- If resolution fails or creditors choose to wind up, the company's assets are sold and distributed to settle debt

11. Insolvency Resolution Process for Individuals and Unlimited Partnerships

The Code provides two separate processes for individuals and unlimited partnerships:

1. **Automatic Fresh Start** – A simplified process for those with low debt and no assets to clear their debts quickly.
2. **Insolvency Resolution** – A more detailed process for resolving insolvency when debts are higher or more complex.

12. Fresh Start Process for Individuals

- The Code allows individuals to get a debt waiver up to ₹35,000 under the Fresh Start Process.
- Eligibility is subject to limits set by the Code.
- Through this automatic fresh start, eligible debtors can apply to the Debt Recovery Tribunal (DRT) to be discharged from certain debts below the threshold, helping them to start fresh financially

13. Initiation of Insolvency Resolution Process

- Who can initiate?
 - Financial creditors (for unpaid financial debt)
 - Operational creditors (for unpaid operational debt)
 - The defaulting corporate debtor, its shareholders, or employees can also initiate voluntarily.
- For corporate debtors, the NCLT is the adjudicating authority.
- For individuals and unlimited partnerships, the process involves:
 - The debtor prepares a repayment plan.
 - If creditors approve, the DRT issues an order binding all parties to the plan.
 - If rejected or failed, the debtor or creditors can apply for a bankruptcy order.

14. Time-bound Insolvency Resolution Process

- Insolvency resolution for companies and individuals must be completed within 180 days.
- A one-time extension of 90 days is allowed, making the maximum duration 330 days from the start of insolvency.
- This period includes time spent in legal proceedings related to the resolution.
- If a resolution plan is not finalized or is rejected by the NCLT or DRT, the debtor's assets are liquidated (sold) to repay creditors.

15. Priority of Claims in Liquidation

In liquidation, the debtor's assets are distributed in this order:

1. Fees of insolvency professionals and resolution costs
2. Workmen's dues for the last 24 months and secured creditors
3. Employee wages
4. Unsecured creditors
5. Government dues and any remaining secured creditor claims

6. Any other remaining debts

7. Shareholders

16. Insolvency and Bankruptcy Fund

- The Code sets up an Insolvency and Bankruptcy Fund.
- This Fund receives:
 - Grants from the Central Government
 - Contributions from individuals or entities
 - Income from investments made from the Fund
 - Any other sources of money
- Contributors can apply to withdraw an amount (up to what they contributed) during insolvency proceedings to:
 - Pay workmen
 - Protect assets
 - Cover incidental costs during the process
 - Or other prescribed purposes

17. Penalties under the Code

- The Code imposes strict penalties for offences like concealing property during corporate insolvency.
- Punishment can be up to 5 years imprisonment, or a fine up to ₹1 crore, or both.

18. Cross-Border Insolvency

- The Central Government can make agreements with other countries for handling cross-border insolvency cases.
- These agreements help enforce the Code's provisions internationally

Q25: Sect on 81 of the IBC 2016 provides for the imposition of an interim moratorium. The purpose of the interim moratorium is to provide a conducive environment for the debtor to initiate a fresh start process. The interim moratorium provisions shall have effect from the date of filing of such application up to the date on which such application is admitted or rejected by the adjudicating authority. Mention the information that is required to be provided in the application as per sect on 81(4) of the Code. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: According to Sect on 81(4) of the Insolvency and Bankruptcy Code, 2016, the application under Sect on 81(3) shall contain the following information supported by an affidavit, namely:

- (a) a list of all debts owed by the debtor as on the date of the said application along with details relating to the amount of each debt, interest payable thereon and the names of the creditors to whom each debt is owed;
- (b) the interest payable on the debts and the rate thereof stipulated in the contract;
- (c) a list of security held in respect of any of the debts,
- (d) the financial information of the debtor and his immediate family for up to two years prior to the date of the application;

- (e) the particulars of the debtor's personal details, as may be prescribed;
- (f) the reasons for making the application;
- (g) the particulars of any legal proceedings which, to the debtor's knowledge has been commenced against him;
- (h) the confirmation that no previous fresh start order under this Chapter has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application.

Q26: Who are disentitled to make an application to initiate corporate insolvency resolution process under IBC, 2016? (3 marks)

PAST YEAR QUESTION DECEMBER 2021

OR

Roco Ltd. is undergoing Corporate Insolvency Resolution Process (CIRP). In order to achieve the objective of value maximisation, the Resolution Professional of Roco Ltd. is contemplating filing an application against the debtors, who have not paid their dues from last 1 year, under section 9 of the Insolvency and Bankruptcy Code, 2016 (Code). However, his lawyer has opined that there exists no provision under the Code to initiate CIRP against another company by a company which itself is undergoing CIRP. Examine whether the opinion given by the lawyer is correct. (3 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Section 11 of the Insolvency & Bankruptcy Code lists out the persons who are not eligible to make an application to initiate the corporate insolvency resolution process.

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under Chapter II of Part II, namely:

- (a) a corporate debtor undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process.
- (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application;
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application; or
- (d) a corporate debtor in respect of whom a liquidation order has been made

However, Explanation II provides that for the purposes of this section, it is hereby clarified that nothing in this section shall prevent a corporate debtor referred to in clauses (a) to (d) from initiating corporate insolvency resolution process against another corporate debtor.

Since there exists a provision in accordance with which a corporate debtor may initiate corporate insolvency resolution process against any other corporate debtor, the opinion of the lawyer is not correct.

Q27: Who are entitled and who are not eligible to make application to adjudicating authority for corporate insolvency resolution process as per Insolvency & Bankruptcy Code, 2016? (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

There are certain persons who are not entitled to make application to NCLT for initiation of corporate insolvency resolution process. Explain. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: An application for initiation of Corporate Insolvency Resolution Process can be filed
 (a) by financial creditor, if there is default in payment of installment or interest; or
 (b) by an operational creditor for failure to pay the dues for supply of goods, providing services or salary or wages to employees in spite of service of 10 days' notice or
 (c) by corporate debtor itself in case of occurrence of default in repayment of debt.
 However, in the following cases no application for Corporate Insolvency Resolution process can be initiated :

- (a) A corporate debtor undergoing a corporate insolvency resolution process; or
- (b) A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (c) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months preceding the date of making application; or
- (d) A corporate debtor in respect of whom a liquidation order has been passed so that finality of the liquidation order is ensured.

Q28: State any five laws that were amended by Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: The Insolvency and Bankruptcy Code, 2016 amended the following 11 Acts: • The Indian Partnership Act, 1932,
 • The Central Excise Act, 1944,
 • The Income-Tax Act, 1961 • The Customs Act, 1962,
 • The Recovery of Debts Due to Banks and Financial Institutions Act, 1993,
 • The Finance Act, 1994,
 • The Securitisation and Reconstruction of Financial Assets and Enforcement of "Security Interest Act, 2002,
 • The Sick Industrial Companies (Special Provisions) Repeal Act, 2003,
 • The Payment and Settlement Systems Act, 2007,
 • The Limited Liability Partnership Act, 2008, and
 • The Companies Act, 2013

Q29: Explain the establishment, structure, and functions of the Insolvency and Bankruptcy Board of India (IBBI) as per the Insolvency and Bankruptcy Code, 2016. Also, state the tenure and eligibility for reappointment of its Chairperson and members as per the Code.

Answer: The Insolvency and Bankruptcy Board of India (IBBI) was established on 1st October 2016 under the Insolvency and Bankruptcy Code, 2016. It serves as the regulator for the insolvency and bankruptcy processes in India. Uniquely, the IBBI regulates both professionals (such as insolvency professionals and agencies) and processes under the Code.

The Board oversees the functioning of:

- Insolvency professionals (IPs)
- Insolvency professional agencies (IPAs)
- Information utilities (IUs)

Its main responsibilities include the implementation of the Code, which aims to consolidate and amend laws related to insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner. The IBBI is also empowered to frame and enforce rules for:

- Corporate insolvency resolution
- Corporate liquidation
- Individual insolvency resolution
- Individual bankruptcy

As per Section 188(2) of the Code, the IBBI is a body corporate with perpetual succession and a common seal. It has the power to acquire, hold, and dispose of both movable and immovable property, enter into contracts, and sue or be sued in its own name.

According to Section 189(4), the Chairperson and members (other than ex officio members) of the IBBI hold office for a term of five years or until they attain the age of sixty-five years, whichever is earlier. They are also eligible for reappointment.

Q30: State the grounds under which the Central Government can remove a member of the Insolvency and Bankruptcy Board of India (IBBI) from office as per Section 190 of the Insolvency and Bankruptcy Code, 2016. Mention any procedural safeguard provided for removal under specific circumstances.

Answer: Section 190 empowers the Central Government to remove a member from office if he-

- (a) is an undischarged bankrupt as defined under Part III;
- (b) has become physically or mentally incapable of acting as a member;
- (c) has been convicted of an offence, which in the opinion of the Central Government involves moral turpitude;
- (d) has, so abused his position as to render his continuance in office detrimental to the public interest.

Section 190 mandates that no member shall be removed under clause (d) unless he has been given a reasonable opportunity of being heard in the matter.

Q31: Enumerate the powers and functions of the Insolvency and Bankruptcy Board of India (IBBI) as provided under Sect on 196(1) of the Insolvency and Bankruptcy Code, 2016.

Answer: Sect on 196(1) of the Insolvency and Bankruptcy Code provides that the Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:

- (a) Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.
- (aa) promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code.
- (b) Specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities.
- (c) Levy fee or other charges for carrying out the purposes of this Code, including fee for registration and renewal of insolvency professional agencies, insolvency professionals and information utilities.
- (d) Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities.
- (e) Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies.
- (f) Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder.
- (g) Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued hereunder.
- (h) Call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities.
- (i) Publish such information, data, research studies and other information as may be specified by regulations.
- (j) Specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data.
- (k) Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.
- (l) constitute such committees as may be required including in particular the committees laid down in Sect on 197.
- (m) Promote transparency and best practices in its governance.
- (n) Maintain websites and such other universally accessible repositories of electronic information as may be necessary.
- (o) Enter into memorandum of understanding with any other statutory authorities.
- (p) Issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities.

(q) Specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued hereunder.

(r) Conduct periodic study, research and audit the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board.

(s) Specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations.

(t) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for timely disposal of the assets of the corporate debtor or debtor.

(u) Perform such other functions as may be prescribed.

Q32: What powers are granted to the Insolvency and Bankruptcy Board of India (IBBI) under Sect on 196(2) of the Insolvency and Bankruptcy Code, 2016 regarding the making of model bye-laws for insolvency professional agencies?

Answer: Sect on 196(2) of the Code further provides that the Board may make model bye-laws to be adopted by insolvency professional agencies which may provide for:

(a) The minimum standards of professional competence of the members of insolvency professional agencies.

(b) The standards for professional and ethical conduct of the members of insolvency professional agencies.

(c) Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.

Explanation.— For the purposes of this clause, the term “non-discriminatory” means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified.

(d) The manner of granting membership.

(e) Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.

(f) The information required to be submitted by members including the form and the time for submitting such information.

(g) The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.

(h) The grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof.

(i) A fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies.

(j) The grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies.

- (k) The quantum of fee and the manner of collecting fee for inducing persons as its members.
- (l) The procedure for enrolment of persons as members of insolvency professional agency.
- (m) The manner of conducting examination for enrolment of insolvency professionals.
- (n) The manner of monitoring and reviewing the working of insolvency professional who are members.
- (o) The duties and other activities to be performed by members.
- (p) The manner of conducting disciplinary proceedings against its members and imposing penalties.
- (q) The manner of utilizing the amount received as penalty imposed against any insolvency professional.

Q33: What quasi-judicial powers are vested in the Insolvency and Bankruptcy Board of India (IBBI) under Sect on 196(3) of the Insolvency and Bankruptcy Code, 2016?

Answer: Sect on 196(3) states that the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:

1. The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board.
2. Summoning and enforcing the attendance of persons and examining them on oath.
3. Inspection of any books, registers and other documents of any person at any place.
4. Issuing of commissions for the examination of witnesses or documents.

Q34: Define an Insolvency Professional (IP) as per the Insolvency and Bankruptcy Code, 2016, and explain the key roles played by an IP under the Code.

Answer: An Insolvency Professional (IP) is a regulated private professional who meets minimum standards of professional and ethical conduct under the Insolvency and Bankruptcy Code, 2016. According to Sect on 3(19) of the Code, an IP is a person who is enrolled as a member of an Insolvency Professional Agency (IPA) under Sect on 206 and registered with the Insolvency and Bankruptcy Board of India (IBBI) under Sect on 207.

The key roles of an Insolvency Professional include:

1. Acting as an Interim Resolution Professional (IRP) and/or a Resolution Professional (RP) in the corporate insolvency resolution process under Part II of the Code (which deals with corporate persons).
2. Acting in the fresh start process or insolvency resolution process for individuals and partnership firms under Part III of the Code.
3. Serving as a liquidator during the liquidation process of corporate entities under Part II.
4. Acting as a bankruptcy trustee for managing the estate of a bankrupt individual as per Sect on 125 in Part III of the Code.

Insolvency Professionals play a crucial role in ensuring the smooth and fair resolution or liquidation of insolvent entities, thereby protecting stakeholders' interests in a time-bound manner.

Q35: Explain the steps to be followed for the “Corporate Insolvency Resolution Process with timelines. (8 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Steps to be followed for the Corporate Insolvency Resolution Process (CIRP) are as under :

(a) A financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor (through Corporate applicant i.e. corporate debtor itself; or an authorised member, partner of corporate debtor; or a person who has control and supervision over the financial affairs of the corporate debtor) may initiate corporate insolvency resolution process in case a default is committed by corporate debtor. The financial creditor/operational creditor or corporate debtor as the case may be initiate the CIRP by making an application to NCLT under sections 7, 8 and 10 respectively.

(b) Financial creditor on default and operational creditor after ten days from the date of delivery of demand notice can initiate CIRP.

(c) A financial creditor and corporate debtor shall propose the name of IRP and operational creditor may propose the name of IRP.

(d) NCLT within 14 days of receipt of application by order shall admit or reject application. Before rejecting, it should give notice to rectify the defects within 7 days of receipt of notice.

(e) NCLT to declare moratorium, appoint Interim Resolution Professional (IRP) for a term not exceeding thirty days from the date of appointment and cause public notice.

(f) An Insolvency Professional shall make a Public Announcement in newspaper in one English language and regional Language not later than three days from the date of his appointment. Public announcement shall contain the information such as name and address of the corporate debtor under CIRP, name of the authority with which corporate debtor is registered. The last date for submission of claims and date on which CIRP will be closed.

(g) ‘Insolvency commencement date’ starts from the date of admission of application and it is to be completed within 180 days of commencement which can be extended by ninety days only one time by NCLT.

(h) Interim Resolution professional to constitute Committee of Creditors comprising of financial creditors within 30 days from the date of his appointment.

(i) Management of affairs of corporate debtors as a going concern, powers of Board of directors or the partner of debtor shall stand suspended and exercised only by the IRP.

(j) Committee of creditors within 7 days of the constitution either resolve to appoint IRP as resolution professional (RP) or replace IRP with another RP.

(k) All decisions of Committee of Creditors shall be taken by vote not less than 75% of voting share of financial creditors. All financial creditors shall be part of Committee of Creditors and if any financial creditor is a related party of corporate debtor, then such financial creditor will not have any right of representation, participation or voting. If 75% of voting share of financial creditors consider the case complex and require extension of time beyond 180 days, the NCLT can grant a one-time extension of up to 90 days.

- (l) Preparation of information memorandum by IRP for formulating Resolution Plan by resolution applicant. A resolution applicant means any person who submits resolution plan to the resolution professional. Upon receipt of resolution plans, Resolution Professional shall place it before the Committee of Creditors for its approval.
- (m) Resolution Applicant prepares the Resolution Plan based on the information memorandum.
- (n) Submission of Resolution Plan by Resolution Applicant to the Committee of Creditors by IRP and to be approved by 75% of voting share of financial creditors.
- (o) IRP to submit approved Resolution Plan to NCLT which shall approve or reject it and order liquidation.
- (p) The approved plan shall be binding on the corporate debtor, and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.
- (q) Moratorium ends on the date of approval.
- (r) Appeal may be made to NCLAT against the order passed by NCLT within 30 days from date of an order approving or rejecting the resolution plan.

Q36: On or after promulgation of Insolvency and Bankruptcy Code, 2016 only the qualified person can be appointed as a Resolution Professional or a Liquidator of a Corporate Body — Discuss briefly. (3 marks)

PAST YEAR QUESTION JUNE 2019

Answer: As per section 206 of the Insolvency and Bankruptcy Code, 2016 no one can render services of an Insolvency Professional (IP) without being enrolled as a member of an Insolvency Professional Agency (IPA) and registered with Insolvency and Bankruptcy Board of India (IBBI). Thus, only persons with requisite qualifications and registered as Insolvency Professional can take-up the roles of Resolution Professional or Liquidator including Voluntary Liquidation. IBBI (Insolvency Professionals) Regulations, 2016 require a person to complete a pre-registration educational course, as may be required by the Board, from an insolvency professional agency after his enrolment as a professional member. Section 207(2) of the Code empowers the IBBI to state eligibility criteria for the persons having exposure in finance, law, management, insolvency or such other field, as it deems fit.

Q37: Section 208 (1) of the Insolvency and Bankruptcy Code 2016 says that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take actions as may be necessary. What are the functions and obligations of Insolvency Professionals? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The functions and obligations of Insolvency Professional has been enumerated under Section 208 (1) of Insolvency and Bankruptcy Code, 2016 are as under:

- (1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely: –

- (a) a fresh start order process under Chapter II of Part III;
 - (b) individual insolvency resolution process under Chapter III of Part III;
 - (c) corporate insolvency resolution process under Chapter II of Part II;
 - (a) (ca) pre-packaged insolvency resolution process under Chapter III-A of Part II;
 - (d) individual bankruptcy process under Chapter IV of Part III; and
 - (e) liquidation of a corporate debtor firm under Chapter III of Part II.
- (1A) Where the name of the insolvency professional proposed to be appointed as a resolution professional, is approved under clause (e) of sub-section (2) of section 54A, it shall be the function of such insolvency professional to take such actions as may be necessary to perform his functions and duties prior to the initiation of the pre-packaged insolvency resolution process under Chapter III-A of Part II.
- (2) Every insolvency professional shall abide by the following code of conduct: –
- (a) to take reasonable care and diligence while performing his duties;
 - (b) to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
 - (c) to allow the insolvency professional agency to inspect his records;
 - (d) to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
 - (e) to perform his functions in such manner and subject to such conditions as may be specified.

Q38: Insolvency Professional Agencies (IPAs) play a crucial role in regulation and educating Insolvency Professionals'. Elucidate the functions of the IPAs as enshrined in the Code. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Section 3(20) of the Insolvency and Bankruptcy Code, 2016, "Insolvency Professional Agency" means any person registered with the Board under section 201 as an insolvency professional agency.

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning.

They also issue 'authorisation for assignment' to the IPs enrolled with them. In exercise of powers conferred by the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations to regulate the working of Insolvency Professional Agencies (IPAs):

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and
- The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.

According to Section 204 of the Code, insolvency professional agencies perform the following functions, namely:

- a) grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;
- b) lay down standards of professional conduct for its members;
- c) monitor the performance of its members;
- d) safeguard the rights, privileges and interests of insolvency professionals who are its members;
- e) suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;
- f) redress the grievances of consumers against insolvency professionals who are its members; and
- g) publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

Q39: Who is the Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016 for corporate persons, individuals, and partnership firms? Discuss the jurisdiction of the Adjudicating Authority and the role of civil courts in insolvency proceedings.

Answer: Under the Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority (AA) responsible for insolvency resolution and liquidation differs based on the type of debtor:

1. For Corporate Persons:

- The National Company Law Tribunal (NCLT) is designated as the Adjudicating Authority as per Section 5(1) of the Code.
- The NCLT is constituted under Section 408 of the Companies Act, 2013.

2. Jurisdiction of the NCLT: According to Section 60(5) of the Code, the NCLT has exclusive jurisdiction to entertain or dispose of:

- Any application or proceeding by or against the corporate debtor or corporate person.
- Any claims made by or against the corporate debtor, including claims involving its subsidiaries located in India.
- Any questions of priorities or questions of law or fact arising from the insolvency resolution or liquidation proceedings concerning the corporate debtor.

3. Exclusion of Civil Courts:

- Section 63 clearly excludes the jurisdiction of civil courts and other authorities. It states that no civil court or authority can entertain any suit or proceedings on matters where the NCLT or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under the Code.

4. For Individuals and Partnership Firms:

- The Debt Recovery Tribunal (DRT) is the Adjudicating Authority, as specified in Section 79(1) of the Code.
- The DRT is constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Thus, the Code establishes specialized tribunals for different classes of debtors to ensure speedy and expert handling of insolvency and bankruptcy cases, while also limiting interference from civil courts.

Q40: Discuss the jurisdiction of Debt Recovery Tribunal as per section 179 (2) of the IBC, 2016. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Section 179(2) of the Insolvency and Bankruptcy Code, 2016 provides that the Debt Recovery Tribunal shall, have jurisdiction to entertain or dispose of –

- a. any suit or proceeding by or against the individual debtor;
- b. any claim made by or against the individual debtor;
- c. any question of priorities or any other question of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

Q41: 'Insolvency and Bankruptcy Code, 2016 cast upon certain obligations on Information Utilities' – Justify with your views. (5 marks)

PAST YEAR QUESTION AUGUST 2021

OR

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the IBC, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. Explain the purpose of formation of Information Utility highlighting its obligations under Section 214 of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

OR

"While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information." Enumerate the obligations of information utility as per provision of section 214 of IBC. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Section 3(21) of the Insolvency and Bankruptcy Code, 2016 defines an "information utility" as a person who is registered with the Board as an information utility under section 210.

Obligations of Information Utilities are created pursuant to Section 214 of the Insolvency and Bankruptcy Code, 2016. Accordingly, the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 have been framed.

In short, Information Utility is a depository to create and store financial information through electronic means from financial or operational creditors on payment of prescribed fee. Section 215 made it obligatory for financial creditor and optional for operational creditor to submit the details to Information Utility.

All prescribed precautions are taken before storing information that is accessible to anyone on payment of fee. Further it is obliged to publish statistical data as required by Regulations. There needs to be interoperability with other information Utilities so that the person accessing the data make sure as to authenticity. Section 216 enables the person who has fed

original data to approach with reasons the Information Utility to update or modify the information.

Alternate Answer,

Section 3(21) of the Insolvency & Bankruptcy Code defines an "information utility" as a person who is registered with the Board as an information utility under section 210.

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination of financial information of debtors is to facilitate swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017.

Obligations of information utility (Section 214)

For the purposes of providing core services to any person, every information utility shall –

- (a) create and store financial information in a universally accessible format;
- (b) accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;
- (c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;
- (d) meet such minimum service quality standards as may be specified by regulations;
- (e) get the information received from various persons authenticated by all concerned parties before storing such information;
- (f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;
- (g) publish such statistical information as may be specified by regulations;
- (h) have inter-operability with other information utilities.

Q42: Sun Finserve Ltd., a financial-cum-operational creditor to a corporate debtor is aggrieved by the act on of the resolution professional. Suggest the measures available to the company under the Insolvency and Bankruptcy Code, 2016. (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q43: Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.

Def ne creditor and cit ng relevant case laws express your opinion regarding legal tenability of f ling of CIRP by decree holder. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: According to Sect on 3(10) of the Insolvency & Bankruptcy Code, “Creditor” means any person to whom a debt is owed and includes a f nancial creditor, an operat onal creditor, a secured creditor, an unsecured creditor and a decree holder.

A f nancial creditor’ has been def ned at Sect on 5(7) of the Insolvency & Bankruptcy Code as follows:

“Any person to whom a f nancial debt is owed and includes any person to whom such debt has been legally assigned or transferred.” (Emphasis supplied)

An ‘operat onal creditor’ has been def ned at Sect on 5(20) of the of the Insolvency & Bankruptcy Code as follows:

“a person to whom an operat onal debt is owed and includes any person to whom such debt has been legally assigned or transferred.”

Sect on 3 is in Part I of I&B Code. Part II of I&B Code deals with “Insolvency Resolut on and Liquidat on for Corporate Person” & has its own def nit ons in Sect on 5.

Sect on 3 (10) of the Insolvency & Bankruptcy Code def nit on of “Creditor” includes “f nancial creditor”, “operat onal creditor” “decree-holder” etc. But Sect on 7 or Sect on 9 dealing with “Financial Creditor” and “operat onal creditor” do not include “decree-holder” to init ate CIRP in Part II.”

In the mat er of Digamber Bhondwe Vs. JM Financial Asset Reconstruct on [CA(AT)(Ins) No. 1379 of 2019] it was held “..... We further reject the submission that because in Sect on 3(10) of I&B Code in def nit on of “Creditor” the “decree holder” is included it shows that decree gives cause to init ate applicat on under Sect on 7 of IBC

Sh. Sushil Ansal Vs Ashok Tripathi and Ors, the Nat onal Company Law Appellate Tribunal, Delhi (NCLAT) held that no decree holder who is covered within the def nit ons of creditor given under Sect on 3(10) of the Insolvency and Bankruptcy Code (IBC) can come within the ambit of the class of a f nancial creditor. The Tribunal has opined as follows:

We further reject the submission that because in Sect on 3(10) of I&B Code in def nit on of “Creditor” the “decree holder” is included it shows that decree gives cause to init ate applicat on under Sect on 7 of I&B Code. Sect on 3 is in Part I of I&B Code. Part II of I&B Code deals with “Insolvency Resolut on and Liquidat on for Corporate Person”, & has its own set of def nit ons in Sect on 5. But Sect on 7 or Sect on 9 dealing with “Financial Creditor” and “operat onal creditor” do not include “decree-holder” to init ate CIRP in Part II.

This implies that a decree holder is not permit ed to init ate any corporate insolvency resolut on process (CIRP) against any corporate debtor with the object ve of execut ng a decree under it.

Q44: Explain the following term Def nit ons under Sect on 5:

Sect on 5(1): “Adjudicat ng Authority”, for the purposes of Part II, means Nat onal Company Law Tribunal const tuted under sect on 408 of the Companies Act, 2013 [].

Sect on 5(4): “Constitutional Document”, in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership.

Sect on 5(5): “Corporate Applicant” means –

- (a) corporate debtor; or
- (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process or the pre-packaged insolvency resolution process as the case may be, under the constitutional document of the corporate debtor; or
- (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
- (d) a person who has the control and supervision over the financial affairs of the corporate debtor

Sect on 5(5A): “Corporate guarantor” means a corporate person who is the surety in a contract of guarantee to a corporate debtor.

If CIRP has been initiated against the CD, the insolvency and bankruptcy process against the personal guarantor can be filed under sect on 60(2) before the same NCLT and not before the DRT. (State Bank of India Vs. D. S.

Rajender Kumar [CA (AT) (Ins.) No. 87 to 91 of 2018] NCLAT judgement dated 18.04.2018)

Without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under sect on 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor. (Rai Bahadur Shree Ram and Company Pvt. Ltd. Vs. Rural Electrification Corporation Ltd. & Ors. [Civil Appeal No. 1484 of 2019] SC judgement dated 11.02.2019)

The principal debtor (CD) is discharged under the Code not on the instance of a creditor but due to operation of law, i.e., approval of resolution plan. Hence, the guarantor is not discharged of its liability merely because the creditor consented to a resolution plan of the principal debtor. (State Bank of India Vs. Sungrowth Shares & Stocks Ltd. [CP (IB) No. 796/KB/2018] NCLT, Kolkata judgement dated 04.09.2019)

The corporate guarantees given by the CD can be invoked only in the event of a default on the part of the borrower. (Export Import Bank of India Vs. CHL Ltd. [CA (AT) (Ins.) 51 of 2018] NCLAT judgement dated 16.01.2019)

It makes no difference as to whether the corporate person stood as guarantor to an individual or a corporate person, and as long as the obligation in respect of a claim is due from a corporate person falling within the definition of ‘financial debt’, then it is obvious that the creditor can proceed under Sect on 7 of the Code against such corporate person. (The Karur Vysya Bank Ltd. Vs. Maharaja Theme Parks and Resorts Pvt. Ltd. [CP/1314/ IB/2018] NCLT, Chennai judgement dated 08.04.2019)

The Code is at a nascent stage and it is better that the interpretation of the provisions is taken up by the SC to avoid any confusion and to authoritatively settle the law. It directed that no further petitions involving the challenge to the notification dated November 15, 2019, which brought into force certain provisions relating to the personal guarantors (PGs) to CDs, shall be

entertained by any High Court (Insolvency and Bankruptcy Board of India Vs. Lalit Kumar Jain & Ors. [TP (Civil) No.(s) 1034/2020 with other TPs] SC judgement dated 29.10.2020)

Neither sect on 14 nor sect on 31 of the Code place any fetters on a bank/financial institution from initiation and continuation of proceedings against the guarantor for recovering of their dues. The liability of the principal borrower and guarantor remain coextensive and a bank/financial institution is entitled to initiate proceedings against the personal guarantor under the SARFAESI Act during the continuation of the CIRP against the principal borrower. (Kiran Gupta Vs. State Bank of India & Anr. [W.P.(C) 7230/2020 & CM.APPL. 24414/2020 (stay)] HC, New Delhi judgement dated 02.11.2020)

CIRP can be proceeded against the principal borrower as well as guarantor. (State Bank of India Vs. Athena Energy Ventures Pvt. Ltd. [CA (AT) (Ins.) No. 633 of 2020] NCLAT judgement dated 24.11.2020)

Sect on 5(6): “Dispute” includes a suit or arbitration proceedings relating to –

- (a) the existence of the amount of debt;
- (b) the quality of goods or service; or
- (c) the breach of a representation or warranty.

Any observations with regard to individual officer made by a court of law or in any communication made by the operational creditor, the same cannot be treated to be an existence of dispute. (Yogendra Yasupal Vs. Jigsaw Solutions & Anr. [CA (AT) (Ins.) No. 222 of 2017] NCLAT judgement dated 16.10.2017)

The test of existence of a dispute is: (a) whether the corporate debtor has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence (b) whether the defence is not spurious, mere bluster, plainly frivolous or vexatious (c) a dispute, if it truly exists in fact between the parties, which may or may not ultimately succeed. (Mobilox Innovations Pvt. Ltd. Vs. Kirusa Software Pvt. Ltd. [Civil Appeal No.9405 of 2017] SC judgement dated 21.09.2017)

The dispute should not be a mere eyewash and attempt to derail the OC's entitlement to initiate the proceedings under sections 8 and 9 of the Code. (Simplex Infrastructures Ltd. Vs. Agrante Infra Ltd. [IB No. (IB)- 167(ND)/2017] NCLT, New Delhi judgement dated 10.08.2017)

A unilateral transfer of liability does not constitute a 'dispute' within the meaning of sect on 5(6) and an inter-se dispute between two groups of shareholders of the CD does not constitute a 'dispute' in reference to OCs. The 'dispute' under sect on 5(6) of the Code must be between the CD and the OCs. (Chetan Sharma Vs. Jai Lakshmi Solvents (P) Ltd. & Anr. [CA (AT) (Ins.) No. 66 of 2017 and other appeals] NCLAT judgement dated 10.05.2018)

On the 'existence of a dispute', it was observed that sect on 5(6) is an inclusive provision and does not confine the AA from considering the existence of a dispute from a broader angle. Therefore, dispute in terms of sect on 8(2)(a) of the Code shall not be limited to instances specified in the definition under sect on 5(6). (Anuj Khanna Vs. Wishwa Naveen Traders & Anr. [CA (AT) (Ins.) No. 555 of 2020] NCLAT judgement dated 25.11.2020)

Sect on 5(7): “Financial Creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

Essential criteria for being an FC: (i) A person to whom a financial debt is owed and includes a person whom such debt has been legally assigned or transferred to (ii) The debt along with interest, if any, is disbursed against the consideration for the time value of money and include any one or more mode of disbursed as mentioned in clause (a) to (i) of sub-section (8) of Section 5. (B.V.S. Lakshmi Vs. Geometrix Laser Solutions Pvt. Ltd. [CA (AT) (Ins.) No. 38 of 2017] NCLAT judgement dated 22.12.2017)

The allottees/home buyers were included in the main provision, i.e., section 5(8)(f) with effect from the inception of the Code. The Explanation was added in 2018 merely to clarify doubts that had arisen. The deeming fiction that is used by the Explanation is to put beyond doubt the fact that allottees are to be regarded as financial creditors within section 5(8)(f) of the Code. (Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India & Ors. [WP (C) No. 43 of 2019 with other appeals] SC judgement dated 09.08.2019)

Q45: Explain the term 'Financial Debt' as defined under the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

Your company has received recovery not ce from a Creditor with whom receivables of the Company are discounted with Chief Financial Officer (CFO) of your Company is of the view that this is not covered as 'Financial Debt' under Insolvency and Bankruptcy Code, 2016 as the receivables are sold on non-recourse basis. Referring the relevant provisions comment whether the content on of CFO is correct. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Section 5(8) of Insolvency & Bankruptcy Code, 2016 "Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes —

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) Receivables sold or discounted other than any receivables sold on nonrecourse basis,
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

In view of definition "Financial Debt" and as per the Insolvency & Bankruptcy Code receivables discounted other than any receivables on non-recourse basis is only covered has financial debt, hence the content on of the CFO is not correct in the given case as the receivables are sold on non-recourse basis.

- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause [Section 5(8)].

Q46: "The word 'Insolvency' and 'Bankruptcy' are generally used interchangeably in common parlance, but there is marked difference between the two." Explain. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but here is a marked distinction between the two. Insolvency and Bankruptcy are not synonymous.

The term "insolvency" notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word "bankruptcy" is the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose.

The debtor's assets are then evaluated and used to pay the creditors in accordance with law. Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion.

Section 5(9): "Financial Position" in relation to any person, means the financial information of a person as on a certain date.

Section 5(10): "Information Memorandum" means a memorandum prepared by resolution of a professional under sub-section (1) of section 29.

Section 5(11): "Initiation Date" means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process or the pre-packaged insolvency resolution process as the case may be.

Sect on 5(12): “Insolvency Commencement Date” means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.

“Insolvency Resolution Process Period” means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day [Sect on 5(14)].

It is always open to the NCLT/NCLAT to exclude certain period for the purpose of counting the total period of 270 days. The grounds include the following:

- (i) If the CIRP is stayed by a court of law or the NCLT/NCLAT/ Supreme Court
- (ii) If no RP is functioning for one or other reason during the CIRP
- (iii) The period between the date of order of admission/moratorium is passed and the actual date on which the RP takes charge for completing the CIRP
- (iv) On hearing a case, if order is reserved by the NCLT/NCLAT/Supreme Court and finally pass order enabling the RP to complete the CIRP
- (v) If the CIRP is set aside by the NCLAT or order of the NCLAT is reversed by the Supreme Court and CIRP is restored
- (vi) Any other circumstances which justify exclusion of certain period. (Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. & Ors. [CA (AT) (Ins.) No. 185 of 2018] NCLAT judgement dated 08.05.2018)

“Interim Finance” means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre packaged insolvency resolution process Period, as the case may be, and such other debt as may be notified [Sect on 5(15)].

“Interim Finance” means any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor during the pre packaged insolvency resolution process Period, as the case may be, and such other debt as may be notified [Sect on 5(15)].

“Liquidation Cost” means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board [Sect on 5(16)].

“Liquidation Commencement Date” means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be [Sect on 5(17)].

“Liquidator” means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be [Sect on 5(18)].

“Officer” for the purposes of Chapter VI and Chapter VII of this Part, means an officer who is in default, as defined in clause (60) of section 2 of the Companies Act, 2013, or a designated partner as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, as the case may be [Section 5(19)].

“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 [Section 5(20)].

It is clear that an OC who has assigned or legally transferred any operational debt to an FC, the assignee or transferee shall be considered as an OC to the extent of such assignment or legal transfer. (Cooperat ve Rabobank U.A. Singapore Branch Vs. Shailendra Ajmera [CA (AT) (Ins.) No. 261 of 2018] NCLAT judgement dated 29.04.2019)

The workmen of a Company come within the meaning of an OC in terms of section 5(20) r/w section 5(21) of the Code. (Suresh Narayan Singh Vs. Tayo Rolls Ltd. [CA (AT) (Ins.) No. 112 of 2018] NCLAT judgement dated 26.09.2018)

An OC means a person to whom an operational debt is owed, and an operational debt under section 5(21) means a claim in respect of provision of goods or services. (Innovent ve Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

A Trade Union or Association of workmen/employee does not come within the meaning of OC as no services is rendered by the Workmen's Association/Trade Union to the CD to claim any dues which can be termed to be debt as defined in sub-section (11) of section 3. (JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlapat Jute Mills Co. Ltd. [CA (AT) (Ins.) No. 82 of 2017] NCLAT 12.09.2017)

Sect on 5(21): “Operational Debt” means a claim in respect of the provision of goods or services including employment or debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.

Operational debt would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)

The property seized by Kolkata Municipal Corporation (KMC) towards recovery of municipal tax dues from CD, can be the subject matter of the CIRP under the Code as the claim of KMC had attained finality and fastened a liability upon the CD, thus constituting an 'operational debt' under section 5(21) of the Code. (Kolkata Municipal Corporation and Anr. Vs. Union of India and Ors. [WPA No.977 of 2020] HC, Calcutta, judgement dated 29.01.2021)

Chipsan Aviation Pvt. Ltd. Vs. Punj Lloyd Aviation Ltd. [Company Appeal (AT) (Insolvency) No. 261 of 2022] On an assurance from the CD, a sum of Rs. 60 lakh was advanced for aviation related services. The advance payment was reflected in the balance sheet of the CD. However,

there was no contract between the parties for providing aviation services. The issue for consideration was whether such the advance paid will fall within the definition of 'operational debt' under the Code. The AA rejected the application holding that advance payment made by OC to the CD does not fall within operational debt. On appeal, the NCLAT observed that the expression 'in respect of' in section 5(21) of the Code has to be interpreted in a broad and purposive manner and held that the advance payment of Rs. 60 lakh was clearly an operational debt.

The Supreme Court in its order dated August 09, 2019 in the case of Pioneer Urban Land and Infrastructure Ltd. v. Union of India, held that "a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt".

Q47: What does the 'Insolvency Resolution Process Costs' mean under the Insolvency and Bankruptcy Code, 2016? Elaborate. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: According to section 5(13) of the Insolvency and Bankruptcy Code, the "insolvency resolution process costs" means: -

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
- (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
- (e) any other costs as may be specified by the Board.

Q48: X Ltd., a corporate debtor owes to Y Ltd. Rs. 100 lakh on account of unsecured loan @ 10% per annum and Rs.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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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 owed 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.

“Personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor [Sect on 5(22)].

“Personnel” includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor [Sect on 5(23)].

“Preliminary Information Memorandum” means a memorandum submitted by the corporate debtor under clause (b) of sub-section (1) of section 54G [Sect on 5(23A)].

“Pre-Packaged Insolvency Commencement Date” means the date of admission of an application for initiating the pre-packaged insolvency resolution process by the Adjudicating Authority under clause (a) of sub-section (4) of section 54C [Sect on 5(23B)].

“Pre-Packaged Insolvency Resolution Process Costs” means-

- (a) the amount of any interim finance and the costs incurred in raising such finance;
- (b) the fees payable to any person acting as a resolution professional and any expenses incurred by him for conducting the pre-packaged insolvency resolution process during the pre-packaged insolvency resolution process period, subject to sub-section (6) of section 54F;
- (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern pursuant to an order under sub-section (2) of section 54J;
- (d) any costs incurred at the expense of the Government to facilitate the prepackaged insolvency resolution process; and
- (e) any other costs as may be specified [Sect on 5(23C)].

“Pre-Packaged Insolvency Resolution Process Period” means the period beginning from the pre-packaged insolvency commencement date and ending on the date on which an order under sub-section (1) of section 54L, or sub-section (1) of section 54N, or sub-section (2) of section 54-O, as the case may be, is passed by the Adjudicating Authority [Sect on 5(23D)].

“Related Party”, in relation to a corporate debtor, means –

- (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
- (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;
- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;

- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;
- (j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;
- (k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;
- (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
- (m) any person who is associated with the corporate debtor on account of –
 - (i) participation in policy making processes of the corporate debtor; or
 - (ii) having more than two directors in common between the corporate debtor and such person; or
 - (iii) interchange of managerial personnel between the corporate debtor and such person; or
 - (iv) provision of essential technical information to, or from, the corporate debtor [Sect on 5(24)].

“Related Party”, in relation to an individual, means –

- (a) a person who is a relative of the individual or a relative of the spouse of the individual;
- (b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;
- (c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;
- (d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;
- (e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- (f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;
- (g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, direct ons or instruct ons, the individual is accustomed to act;
 (i) a company, where the individual or the individual along with its related party, own more than f f y per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanat on. For the purposes of this clause, –

(a) “relat ve”, with reference to any person, means anyone who is related to another, in the following manner, namely: –

(i) members of a Hindu Undivided Family, (ii) husband, (iii) wife, (iv) father, (v) mother, (vi) son, (vii) daughter, (viii) son’s daughter and son, (ix) daughter’s daughter and son, (x) grandson’s daughter and son, (xi) granddaughter’s daughter and son, (xii) brother, (xiii) sister, (xiv) brother’s son and daughter, (xv) sister’s son and daughter, (xvi) father’s father and mother, (xvii) mother’s father and mother, (xviii) father’s brother and sister, (xix) mother’s brother and sister; and

(b) wherever the relat on is that of a son, daughter, sister or brother, their spouses shall also be included. [Sect on 5(24A)].

In *Swiss Ribbons Pvt. Ltd. & Another Vs. Union of India & Others* [(2019) 4 SCC 17], a const tut onal challenge was raised against sect on 29A(j) (connected part es) read with the def nit on of related party under the IBC.

The Supreme Court examined the def nit on of “related party” and observed that persons who act jointly or in concert with others are connected with the business act vity of the resolut on applicant. Similarly, all the categories of persons ment oned in sect on 5(24A) (def nit on of related party to an individual) show that such persons must be “connected” with the resolut on applicant within the meaning of sect on 29A(j). This being the case, the categories of persons who are collect vely ment oned as a “relat ve” need to have a connect on with the business act vity of the resolut on applicant. If this cannot be shown such person cannot be disqualif ed under sect on 29A(j). All the categories in this subsect on deal with persons, natural as well as art fcial, who are connected with the business act vity of the resolut on applicant. The expressions “related party” and “relat ve” contained in the def nit on sect ons must be read noscitur a sociis (the meaning of an unclear word or phrase should be interpreted within the context it is being used) with the categories of persons ment oned in Explanat on I. So read, they would include only persons who are connected with the business act vity of the resolut on applicant.

“Resolut on Applicant” means a person, who individually or jointly with any other person, submits a resolut on plan to the resolut on professional pursuant to the invitat on made under clause (h) of sub- sect on (2) of sect on 25 or pursuant to the sect on 54K, as the case may be [Sect on 5(25)].

A resolut on applicant whose resolut on plan stands approved by CoC, cannot be permit ed to alter his posit on to the detriment of various stake holders af er pushing out all potent al rivals during the bidding process, and the same fraught with disastrous consequences for the CD which may be pushed into liquidat on, as the CIRP period may by then be over thereby set ng

at naught all possibilities of insolvency resolution and protection of a CD, more so, when it is a going concern. (Kundan Care Products Ltd. Vs. Amit Gupta and Ors. [CA (AT) (Ins.) No. 653 of 2020] NCLAT judgement dated 30.09.2020)

A successful resolution applicant cannot be permitted to withdraw the approved resolution plan, coupled with the fact in the instant case being the sole RA in the CIRP, which is an MSME and having knowledge of the financial health of the CD as a promoter or as a connected person cannot be permitted to seek revision of the approved plan, on the ground which would not be a material irregularity within the ambit of section 61(3) of the Code. (Seroco Lighting Industries Pvt. Ltd. Vs. Ravi Kapoor, RP for Arya Filaments Pvt. Ltd. & Ors. [CA (AT) (Ins.) No. 1054 of 2020] NCLAT judgement dated 10.12.2020)

“Resolution Plan” means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It may be noted that a resolution plan may include provision the restructuring of the corporate debtor, insolvency by way of merger, amalgamation and demerger [Section 5(26)].

“Resolution Professional” for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process or the prepackage insolvency resolution process, as the case may be and includes an interim resolution professional [Section 5(27)].

“Voting Share” means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor [Section 5(28)].

Definitions in Section 79 of the Code

Section 79 belongs to Part III of the Code which lays down procedure for insolvency resolution and bankruptcy for **individuals and partnership firms**. Section 79 states that unless the context otherwise requires:

“Adjudicating Authority” means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [Section 79(1)].

“Associate” of the debtor means –

- (a) a person who belongs to the immediate family of the debtor;
- (b) a person who is a relative of the debtor or a relative of the spouse of the debtor;
- (c) a person who is in partnership with the debtor;
- (d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;

- (e) a person who is employer of the debtor or employee of the debtor;
- (f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor; and
- (g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. Of the share capital of the company or control the appointment of the board of directors of the company.

Explanation – For the purposes of this sub-section, “relative”, with reference to any person, means anyone who is related to another, if –

- (i) they are members of a Hindu Undivided Family;
- (ii) one person is related to the other in such manner as may be prescribed [Sect on 79(2)].

Q49: Define “bankrupt” under Insolvency and Bankruptcy Code, 2016. (3 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Sect on 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term ‘bankruptcy’ as the state of being bankrupt.

According to sect on 79(3) of the Insolvency and Bankruptcy Code, 2016 ‘bankrupt’ means:

- (a) a debtor who has been adjudged as bankrupt by a bankruptcy order under sect on 126;
- (b) each of the partners of a firm, where a bankruptcy order under sect on 126 has been made against a firm; or
- (c) any person adjudged as an undischarged insolvent.

Q50: A Bank has initiated insolvency proceedings against the personal guarantors of a Corporate Debtor, in the list of assets of a personal guarantor, one of the asset is ‘pension plan’ taken in the name of spouse of the personal guarantor.

The Insolvency Professional has sought your opinion as to whether the above pension plan can be included as assets of the personal guarantor. Clarify referring relevant provisions of the Insolvency and Bankruptcy Code, 2016. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per Sect on 79(14) of Insolvency & Bankruptcy Code, “excluded assets” includes-

- (a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,
- (b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;
- (c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;
- (d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and
- (e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed;

As per aforesaid provisions of the Insolvency & Bankruptcy Code the pension plan in the name of spouse, who is the immediate family of the personal guarantor falls within the list of excluded assets and hence, the same cannot be included in the list of assets of the personal guarantor.

Q51: What do you mean by 'Excluded Debt'? (3 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: According to Sect on 79(15) of the Insolvency and Bankruptcy Code, 2016, an "Excluded debt" means –

- a. liability to pay fine imposed by a court or tribunal;
- b. liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- c. liability to pay maintenance to any person under any law for the time being in force;
- d. liability in relation to a student loan; and
- e. any other debt as may be prescribed.

Q52: Under sect on 80 of Insolvency and Bankruptcy Code, 2016, a person unable to pay a "Qualifying Debt" can apply for "fresh start process" subject to fulfilment of certain conditions. What do you mean by "Qualifying Debt" and "Excluded Debt" under IBC, 2016? (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

OR

Explain the concept of 'Qualifying Debt' and 'Excluded Debt' under The Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: A debtor may either personally or through a Resolution Professional may apply for "fresh start process" only on fulfilling specified conditions. Sect on 80 of the Insolvency and Bankruptcy Code, 2016 states that a debtor who is unable to pay his debt, if conditions are fulfilled, shall be entitled to make an application for a fresh start for discharge of his qualifying debt.

"Qualifying Debt" means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time but does 'not' include:

1. An excluded debt;
2. A debt to the extent it is secured;
3. Any debt which has been incurred three months prior to the date of the application for fresh start process.

"Excluded debt" means-

1. Liability to pay fine imposed by a court or tribunal;
2. Liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;

3. Liability to pay maintenance to any person under any law for the time being in force;
4. Liability in relation to a student loan; and
5. Any other debt as may be prescribed.

Q53: State the eligibility requirement for a debtor for the purpose of making an application for a fresh start process under the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Section 80 of the Insolvency & Bankruptcy Code, 2016, lays down the eligibility criteria for the debtor for the purposes of making an application for a fresh start process.

Section 80(1) lays down that a debtor, who is unable to pay his debt and fulfils the conditions specified in section 80(2), shall be entitled to make an application for a fresh start for discharge of his qualifying debt under Chapter II part III of the Code.

Conditions for filing application for fresh start process:

Section 80(2) provides that a debtor may apply, either personally or through a resolution professional, for a fresh start under Chapter II of Part III of the Code in respect of his qualifying debts to the Adjudicating Authority if -

- (a) The gross annual income of the debtor does not exceed Rs. 60,000;
- (b) The aggregate value of the assets of the debtor does not exceed Rs. 20,000;
- (c) The aggregate value of the qualifying debts does not exceed Rs. 35,000;
- (d) He is not an undischarged bankrupt;
- (e) He does not own a dwelling unit, irrespective of whether it is encumbered or not;
- (f) A fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and
- (g) No previous fresh start order under this chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start.

Q54: Describe the general duties of a debtor under Fresh Start Process. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

OR

Explain the general duties of a debtor under the Fresh Start Process. (3 marks)

PAST YEAR QUESTION JUNE 2023

OR

What are the general duties of a debtor under the Fresh Start Process under the Insolvency and Bankruptcy Code 2016. (3 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: Section 88 of the Insolvency and Bankruptcy Code, 2016 lists out the general duties of the debtor. According to section 88, the debtor shall –

- a. make available to the resolution professional all information relating to his affairs, at meetings and comply with the requests of the resolution professional in relation to the fresh start process.
- b. inform the resolution professional as soon as reasonably possible of –

- i. any material error or omission in relation to the information or document supplied to the resolution professional; or
- ii. any change in financial circumstances after the date of application, where such change has an impact on the fresh start process.

Q55: In a case of Individual Insolvency, creditors resolved to replace the Resolution Professional and approached you for an advice. Offer your views for replacing the Resolution Professional. (3 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Section 98 of the Insolvency and Bankruptcy Code 2016 provides for the grounds and the manner in which a resolution professional can be replaced with another resolution professional in an insolvency resolution process initiated under section 94 of the Code on an application by the debtor or under section 95 of the Code if applied for by a creditor. The debtor or creditor may apply to Adjudicating Authority for such replacement. Within seven days, the Adjudicating Authority shall make a reference to Insolvency and Bankruptcy Board of India (IBBI) for replacement. IBBI in turn within ten days shall recommend the name of Resolution Professional against whom no disciplinary proceedings are pending.

Q56: "A discharge order in case of individual or firm insolvency permits the debtor to start business afresh having freed from the qualifying debts of the insolvent past". Explain briefly the provisions relating to discharge order. (3 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: According to Section 79(2)(13) of the Insolvency and Bankruptcy Code, 2016 "discharge order" means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be.

Section 92 of the Insolvency and Bankruptcy Code, 2016 provides for the passing of a discharge order by the adjudicating authority at the end of the moratorium period for discharge of the debtor from the qualifying debts. Further, the discharge order shall also provide for the discharge of penalties, penal interest and other sums owed under any contract, in respect of the qualifying debts, from the date of the application for fresh start to the date of the discharge order. A discharge order discharges only the debtor. Such discharge order is recorded in the financial history of the debtor.

Section 92 does not discharge the debtor from any debt not included in 92(2) and from any liability not included in Section 92(3).

Q57: Briefly comment on the rights of Secured Creditors in a Repayment Plan under Section 105 of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Section 105 of the Insolvency & Bankruptcy Code, 2016 deals with repayment plan. According to Section 105 the debtor shall prepare, in consultation with the resolution

professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs.

The repayment plan may authorise or require the resolution professional to –

- (a) carry on the debtor's business or trade on his behalf or in his name; or
- (b) realise the assets of the debtor; or
- (c) administer or dispose of any funds of the debtor.

The repayment plan shall include the following, namely: -

- (a) justification for preparation of such repayment plan and reasons on the basis of which the creditors may agree upon the plan;
- (b) provision for payment of fee to the resolution professional;
- (c) such other matters as may be specified.

Q58: “Any modification suggested by creditors need consent of the debtor in respect of Repayment plan in case of individual or firm insolvency”. Comment briefly on the statement narrating the provisions in respect of conducting meetings and rights of secured creditors to attend. (3 marks), (5 marks)

PAST YEAR QUESTION AUGUST 2021

PAST YEAR QUESTION JUNE 2024

Answer: Section 108 of the Insolvency and Bankruptcy Code, 2016 provides for the conduct of meeting of creditors by the resolution professional. In the meeting, the creditors may decide to approve, modify or reject the repayment plan.

If modifications are suggested by the creditors, the Resolution Professional ensure that consent of the debtor is obtained for each modification.

The meeting of the creditors shall be conducted in accordance with the provisions of sections 108 to 111 of the Code. In the meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan. A secured creditor if attends any such meeting shall be deemed to have relinquished the security unless submits an affidavit for unsecured part of the debt, if any.

Alternate Answer,

Answer: Part III of the Insolvency and Bankruptcy Code, 2016 (IBC) provides separate insolvency resolution process for individuals/partnership firms.

- Application to Debt Recovery Tribunal (DRT) for initiating Insolvency Resolution Process may be made by a creditor or the debtor (individual or firm) who has committed default. Such application may be made either personally or through a resolution professional.
- The Debtor shall prepare a Repayment Plan, in consultation with the Resolution Professional.
- The Repayment plan consists of justification for preparation of repayment plan and reasons on the basis of which the creditors may agree upon the plan.
- It shall be noted that the creditors are not involved in the preparation of the repayment plan. However, creditors have the right to approve, reject or modify the repayment plan.

- The Resolution Professional shall verify the repayment plan for its validity and legal compliance. Further, the Resolution Professional may summon a meeting of creditors to consider the plan.
- Where creditors' meeting is needed, the Resolution Professional shall consider the convenience of creditors in fixing the date and venue of the meeting of the creditors (not less than 14 days and not more than 28 days from the date of submission of report).
- The Resolution Professional shall conduct the meeting of creditors. In the meeting, the creditors may decide to approve, modify or reject the repayment plan. Where modifications are suggested by the creditors, the Resolution Professional shall ensure that consent of the debtor is obtained for each modification.
- A creditor shall be entitled to vote at every meeting of the creditors in respect of the repayment plan as per the voting share assigned to him. A creditor shall not be entitled to vote in respect of a debt for an indeterminate amount.
- However, a creditor shall not be entitled to vote in a meeting of the creditors if he-
 - is not a creditor mentioned in the list of creditors; or
 - is an associate (i.e., related party) of the debtor.

DEFINITION UNDER SECTION 79 OF THIS CODE

Sect on 3(1): "Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188.

Sect on 3(2): "Bench" means a bench of the Adjudicating Authority

Sect on 3(3): "Bye-laws" mean the bye-laws made by the insolvency professional agency under section 205

Sect on 3(4): "Charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage

Sect on 3(6): "Claim" means –

- (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
- (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured.

Claim' gives rise to 'debt' only when it is due and 'default' occurs only when debt becomes due and payable and is not paid by the debtor. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019).

'Claim' under sect on 3(6) of the Code means a right to payment, even if it is disputed. (Innovent ve Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

Sect on 3(7): "Corporate Person" means a company as def ned in clause (20) of sect on 2 of the Companies Act, 2013, a limited liability partnership, as def ned in clause (n) of sub-sect on (1) of sect on 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the t me being in force but shall not include any f nancial service provider.

Nat onal Highway Authority of India (NHAI) is a statutory body which funct ons as an extended limb of the Central Government and performs Governmental funct ons which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ult mately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the def nit on of 'corporate person' in sect on 3(7) of the Code to include NHAI. (Hindustan Construct on Company Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) No. 1074 of 2019 with other Civil Appeals] SC judgement dated 27.11.2019)

Sect on 3(9): "Core Services" means services rendered by an informat on ut lity for –

- (a) accept ng electronic submission of f nancial informat on in such form and manner as may be specif ed;
- (b) safe and accurate recording of f nancial informat on;
- (c) authent cat ng and verifying the f nancial informat on submit ed by a person; and
- (d) providing access to informat on stored with the informat on ut lity to persons as may be specif ed.

Sect on 3(11): "Debt" means a liability or obligat on in respect of a claim which is due from any person and includes a f nancial debt and operat onal debt.

Sect on 3(12): "Default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.

'Default' is def ned in sect on 3(12) of the Code in very wide terms as non-payment of a 'debt' once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. (Innovent ve Industries Ltd. Vs. ICICI Bank & Anr. [Civil Appeal Nos. 8337-8338 of 2017] SC judgement dated 31.08.2017)

The context of sect on 3(12) of the Code is actual non-payment by the CD when a 'debt' has become due and payable. (B. K. Educat onal Services Pvt. Ltd. Vs. Parag Gupta and Associates [Civil Appeal No. 23988 of 2017 and other appeals] SC judgement dated 11.10.2018)

Sect on 3(13): “Financial Informat on”, in relat on to a person, means one or more of the following categories of informat on, namely:—

- (a) records of the debt of the person;
- (b) records of liabilit es when the person is solvent;
- (c) records of assets of person over which security interest has been created;
- (d) records, if any, of instances of default by the person against any debt;
- (e) records of the balance sheet and cash-f ow statements of the person; and
- (f) such other informat on as may be specif ed

Sect on 3(14): “Financial Inst tut on” means –

- (a) a scheduled bank;
- (b) f nancial inst tut on as def ned in sect on 45-I of the Reserve Bank of India Act, 1934;
- (c) public f nancial inst tut on as def ned in clause (72) of sect on 2 of the Companies Act, 2013; and
- (d) such other inst tut on as the Central Government may by not f cat on specify as a f nancial inst tut on.

Sect on 3(15): “Financial Product” means securit es, contracts of insurance, deposits, credit arrangements including loans and advances by banks and f nancial inst tut ons, ret rement benef t plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be set led immediately, or any other instrument as may be prescribed [Sect on 3(15)].

Sect on 3(16): “Financial Service” includes any of the following services, namely:—

- (a) accept ng of deposits;
- (b) safeguarding and administering assets consist ng of f nancial products, belonging to another person, or agreeing to do so;
- (c) ef ect ng contracts of insurance;
- (d) of ering, managing or agreeing to manage assets consist ng of f nancial products belonging to another person;
- (e) rendering or agreeing, for considerat on, to render advice on or solicit ng for the purposes of –
 - (i) buying, selling, or subscribing to, a f nancial product;
 - (ii) availing a f nancial service; or
 - (iii) exercising any right associated with a f nancial product or f nancial service.
- (f) establishing or operat ng an investment scheme;
- (g) maintaining or transferring records of ownership of a f nancial product;
- (h) underwrit ng the issuance or subscript on of a f nancial product; or
- (i) selling, providing, or issuing stored value or payment instruments or providing payment services.

Sect on 3(17): “Financial Service Provider” means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator

Sect on 3(18): “Financial Sector Regulator” means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government.

Sect on 3(19): “Insolvency Professional” means a person enrolled under sect on 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under sect on 207.

Sect on 3(20): “Insolvency Professional Agency” means any person registered with the Board under sect on 201 as an insolvency professional agency [Sect on 3(20)].

Sect on 3(21): “Information Utility” means a person who is registered with the Board as an information utility under sect on 210.

“Person” includes –

- (a) an individual;
- (b) a Hindu Undivided Family;
- (c) a company;
- (d) a trust;
- (e) a partnership;
- (f) a limited liability partnership; and

(g) any other entity established under a statute, and includes a person resident outside India. A sole proprietary concern, not being a ‘person’ under sect on 3(23) of the Code and also when there is a preexisting dispute, cannot file application under sect on 9. (R.G. Steels Vs. Berrys Auto Ancillaries (P) Ltd. [IB722/ ND/2019] NCLT, New Delhi judgement dated 23.09.2019)

A ‘trade union’ is an entity established under a statute i.e. the Trade Unions Act, 1926 and is therefore, a ‘person’ under sect on 3(23) of the Code. (JK Jute Mill Mazdoor Morcha Vs. Juggilal Kamlatpat Jute Mills Company Ltd. & Ors. [Civil Appeal No. 20978 of 2017] SC judgement dated 30.04.2019)

A proprietorship concern does not fall within the purview of “person” as per sect on 3(23) for the purpose of filing an application under sect on 9 of the Code. Proprietorship concern cannot sue and be sued unless it is represented by a proprietor. (Shri Shakt Dyeing Works Vs. Berawala Textiles Pvt. Ltd. [CP (IB) No. 854/NCLT/ AHM/2019] NCLT, Ahmedabad judgement dated 25.01.2021)

Sect on 3(27): “Property” includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.

Sect on 3(30): “Secured Creditor” means a creditor in favour of whom security interest is created.

The State Tax Officer does not come within the meaning of ‘secured creditor’ as defined under sect on 3(30) read with sect on 3(31) of the Code. (Tourism Finance Corporation of India Ltd. Vs. Rainbow Papers Ltd. & Ors. [CA (AT) (Ins.) No. 354 of 2019 and other appeals] NCLAT judgement dated 19.12.2019)

In the matter of Rainbow Papers Ltd., Hon’ble SC held that the State is a secured creditor as per the Gujarat Value Added Tax Act, 2003 and are to be ranked equally with secured debts under sect on 53(1)(b). As per sect on 3(30) of the Code, secured creditor means a creditor in favour of whom security interest is created. Such security interest could be created by operation of law. The definition of secured creditor in the Code does not exclude any Governmental Authority. Therefore, the resolution plan ignores the statutory dues payable to any State Government or legal authority, the Adjudicating Authority is bound to reject the resolution plan.

Sect on 3(31): “Security Interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;

‘Security Interest’ does not include ‘Performance Bank Guarantee’ and it is not covered by sect on 14 of the Code. (Indian Overseas Bank Vs. Arvind Kumar [CA (AT) (Ins.) No. 558 of 2020] NCLAT judgement dated 28.09.2020)

Sect on 3(33): “Transaction” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor].

Sect on 3(34): “Transfer” includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien.

Sect on 3(35): “Transfer of Property” means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property.

DEFINITION UNDER SECTION 79 OF THIS CODE

Sect on 79(4): “Bankruptcy” means the state of being bankrupt.

Sect on 79(5): “Bankruptcy Debt” in relation to a bankrupt, means –

- (a) any debt owed by him as on the bankruptcy commencement date;
- (b) any debt for which he may become liable after bankruptcy commencement date but before his discharge by reason of any transaction entered into before the bankruptcy commencement date; and
- (c) any interest which is a part of the debt under section 171.

Sect on 79(6): “Bankruptcy Commencement Date” means the date on which a bankruptcy order is passed by the Adjudicating Authority under section 126.

Sect on 79(7): “Bankruptcy Order” means an order passed by an Adjudicating Authority under section 126.

Sect on 79(8): “Bankruptcy Process” means a process against a debtor under Chapters IV and V of this Part.

Sect on 79(9): “Bankruptcy Trustee” means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125.

Sect on 79(11): “Committee of Creditors” means a committee constituted under section 134.

Sect on 79(12): “Debtor” includes a judgment-debtor.

Sect on 79(13): “Discharge Order” means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be.

Sect on 79(16): “Firm” means a body of individuals carrying on business in partnership whether or not registered under section 59 of the Indian Partnership Act, 1932.

Sect on 79(17): “Immediate Family” of the debtor means his spouse, dependent children and dependent parents.

Sect on 79(18): “Partnership Debt” means a debt for which all the partners in a firm are jointly liable.

Sect on 79(20): “Repayment Plan” means a plan prepared by the debtor in consultation with the resolution professional under sect on 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs.

Sect on 79(21): “Resolution Professional” means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process.

Sect on 79(22): “Undischarged Bankrupt” means a bankrupt who has not received a discharge order under sect on 138.

CASE STUDY:

Financial Debt: The Joint Development Agreement entered, is a contract of reciprocal rights and obligations, both parties are admittedly Joint Development Partners, who entered into a consortium of sorts for developing an Integrated Township and for any breach of terms of contract, Sect on 7 Application is not maintainable as the amount cannot be construed as financial debt as defined under sect on 5(8) of the Code. (Vipul Limited Vs. Solitaire Buildmart Pvt. Ltd. [CA (AT) (Ins.) No. 550 of 2020] NCLAT judgement dated 18.08.2020)

A financial debt is a debt together with interest, if any, which is disbursed against the consideration for the time value of money. (Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) Nos. 99, 100, 115, 459, 598, 775, 822, 849, and 1221 of 2018, SLP (Civil) No. 28623 of 2018 and WP (Civil) 37 of 2019] SC judgement dated 25.01.2019)

The Supreme Court in the case of Phoenix Arc Pvt. Ltd. Vs. Spade Financial Services Ltd. & Ors. [Civil Appeal No. 2842 of 2020 with 3063 of 2020] SC judgement dated 01.02.2021 held that

(a) The collusive commercial arrangements between FCs and the CD would not constitute a ‘financial debt’;

(b) The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as to ensure that the CoC is not sabotaged by related parties of the CD. The purpose of excluding a related party of a CD from the CoC is to obviate conflicts of interest;

(c) Exclusion under the first proviso to sect on 21(2) is related not to the debt itself but to the relationship existing between a related party FC and the CD.; and

(d) The FC, who in present is not a related party, would not be debarred from being a member of the CoC. However, in case where the related party FC divests itself of its shareholding or ceases to become a related party in a business capacity with the sole intent on of participating in the CoC and sabotage the CIRP, it would be in keeping with the object and purpose of the first proviso to sect on 21(2), to debar the former related party creditor.

Advance amount paid as Security Deposit bearing interest is Financial Debt. NCLT, New Delhi Bench vide its order dated 11th October 2021 in case of Magicon Impex Pvt. Ltd observed that, the amount which has been released pursuant to Agreement in the form of Security

Deposit and the same is interest bearing, which means it is carrying consideration of the value of money having commercial effect of a borrowing. Therefore, in our view the “debt” claimed is a “Financial Debt” within the definition of Section 5(8)(f) of IBC, 2016.

Notification:

The Ministry of Corporate Affairs vide notification dated 18th March, 2020 notified that a debt raised from the Special Window for Affordable and Middle-Income Housing Investment Fund I, for the purposes of the said clause.

Explanation.— For the purposes of this notification, the expression “Special Window for Affordable and Middle-Income Housing Investment Fund I” shall mean the fund sponsored by the Central Government for providing priority debt financing for stalled housing projects, as an alternate investment fund and registered with the Securities and Exchange Board of India, established under sub-section (1) of section 3 of the Securities and Exchange Board of India Act, to provide financing for the completion of stalled housing projects that are in the affordable and middle-income housing sector.

Case Law 1: Innovent vs Industries Ltd. v. ICICI Bank

Key Legal Principle

- The Insolvency and Bankruptcy Code, 2016 (IBC) overrides any other law in case of a conflict due to its non-obstante clause (Section 238).

Facts of the Case

- ICICI Bank filed a case in NCLT against Innovent vs Industries Ltd. for loan default.
- NCLT ruled in favour of the bank.
- The company appealed to NCLAT, but the decision was the same.
- The company then went to the Supreme Court, arguing that it should get protection under the Maharashtra Relief Undertaking Act, 1958 (MRUA), which offers support to sick industries.

Supreme Court Judgment

- The Supreme Court said IBC will prevail over MRUA.
- Reason: Both laws offer moratoriums (temporary suspensions), but the IBC is a central law and intended to uniformly regulate insolvency.
- The non-obstante clause in IBC gives it overriding power.
- So, any protection under MRUA cannot stop proceedings under IBC.

Case Law 2: Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.

Key Legal Principle

- The Supreme Court held that IBC has overriding effect even over the Income Tax Act, 1961.

Facts & Decision

- The Income Tax Department tried to recover dues during insolvency proceedings.
- The Supreme Court stated that once the IBC process begins, it overrides all other inconsistent laws, including tax laws.

- The aim is to give priority to resolution or liquidation process under IBC without interference from other authorities.

Important Takeaways for Students

- IBC has a **special overriding provision (Section 238)**.
- Once insolvency proceedings start under IBC, no other law can interrupt or delay the process.
- Even laws like MRUA and the Income Tax Act are subordinate to the IBC if there's any conflict.

Case: Arun Kumar Jagatramka vs. Jindal Steel and Power Ltd.

[CA 9664 of 2019, Supreme Court Judgment dated March 15, 2021]

Key Theme: IBC – A Quantum Shift in Corporate Governance and Rule of Law

Simple Points:

Major Reform in Corporate Law

The IBC has brought a big change in the way companies are governed and how insolvency cases are handled.

1. Focus on Good Corporate Governance

The IBC promotes ethical practices, transparency, and compliance with laws in resolving insolvency.

2. Public Interest is Key

Insolvency is not seen as a private problem of a single company. IBC aims to balance the interests of all stakeholders (creditors, employees, government, etc.) for economic growth.

3. Creditors Are in Control

Business decisions are taken by the Committee of Creditors (CoC), not promoters. IBC gives importance to the collective decisions of creditors to ensure fast and effective resolution.

4. Promoters ≠ Company

The IBC makes it clear that promoters and companies are separate. Promoters cannot misuse the process to regain control unfairly.

5. Integrity of Process is Most Important

The resolution process must be honest and fair. No loopholes or clever tricks should be allowed to defeat the purpose of the IBC.

6. Reorganisation > Liquidation

The goal of IBC is to revive and reorganize companies, not to shut them down. Liquidation should happen only as a last resort.

7. Purposeful Interpretation by Courts

Courts must interpret the IBC in a way that supports its goals and prevents misuse. The mistakes of the old system must not be allowed under the new IBC.

Important Takeaway:

The IBC is not just about resolving debts—it is a tool to improve business ethics, ensure accountability, and safeguard the economy by protecting all stakeholders and discouraging promoter misuse.

Case: Gujarat Urja Vikas Nigam Ltd. vs. Amit Gupta & Others

[Civil Appeal No. 9241 of 2019, Supreme Court Judgment dated 8th March 2021]**Key Theme: Revival of Corporate Debtor is the Main Goal of IBC****Main Aim of IBC: Revival, Not Liquidation**

The IBC focuses on bringing the corporate debtor (company) back to life, rather than shutting it down.

1. Management Interests Separated from Company

The interests of promoters/managers are separate from the interests of the corporate debtor (CD). This helps in ensuring fair resolution without allowing mismanagement to continue.

2. Timely Resolution is Crucial

The strict timelines under IBC are meant to quickly revive the company and avoid value erosion.

3. IBC is a Break from the Past

The IBC was created because the old laws were slow, ineffective, and misused. Courts must ensure that the failures of the old system do not re-enter through faulty legal interpretation.

4. Interpretation Must Match IBC Objectives

○ Even if earlier legal interpretations (before IBC) are used, they must align with IBC's goals:

- Avoiding multiple legal forums
- Ensuring fast and fair insolvency resolution

5. Judicial Caution is Necessary

○ Courts should not misuse earlier laws or judgments in a way that goes against the purpose of the IBC.

○ IBC must be interpreted in a modern, purpose-driven way, focusing on resolution.

Important Takeaway: The revival and continuity of a distressed company is the core aim of IBC. Courts must ensure that time-bound and fair resolution is not derailed by outdated legal interpretations.

CASE: Swiss Ribbons Pvt. Ltd. & Anr. vs. Union of India & Ors.

[Various Writ Petitions, Supreme Court Judgment dated 25th January 2019]

Key Theme: Time-bound Reorganization is the Primary Objective of IBC**Simple Points:****1. Primary Goal of IBC: Reorganization and Resolution**

The main purpose of the IBC is to reorganize and resolve the debts of corporate debtors (CDs) in a time-bound manner.

2. Delays Lead to Loss of Value

If insolvency is not resolved quickly, the company's asset value decreases.

3. Maximizing Asset Value

IBC aims to maximize the value of assets so that the company can continue as a going concern.

4. Entrepreneurship Encouraged

Once promoters are removed during insolvency, new entrepreneurs can take over the company and run it efficiently.

5. Boost to Credit System

When companies repay their debts after resolution, banks recover their money, which strengthens the credit system.

6. Benefit to All Stakeholders

Workers get paid, creditors get repaid, and shareholders can recover investments. The company also benefits by returning to business.

7. Economic Growth Supported

A functioning IBC helps money return to the system, encouraging investment and economic growth.

8. Liquidation is a Last Option

The Code does not promote liquidation—it is used only if no resolution is possible. Even in liquidation, efforts are made to sell the business as a going concern.

CHAPTER 15 AS PER ICSI MODULE

APPLICATION FOR CORPORATE INSOLVENCY RESOLUTION PROCESS

Q1: What was the role of the Bankruptcy Law Reform Committee (BLRC) in framing the Insolvency and Bankruptcy Code, 2016?

Answer: The Bankruptcy Law Reform Committee (BLRC), chaired by Dr. T. K. Viswanathan, played a key role in designing the Insolvency and Bankruptcy Code (IBC), 2016. It submitted a two-volume report:

Volume I explained the rationale and design behind the Code.

Volume II contained the draft law for the proposed IBC. The Committee emphasized that insolvency resolution should aim at reviving viable firms to reduce societal costs rather than directly going for liquidation.

Q2: What were the key recommendations made by the Bankruptcy Law Reform Committee (BLRC) regarding the Corporate Insolvency Resolution Process (CIRP) under the proposed Insolvency and Bankruptcy Code, 2016?

Answer: The Bankruptcy Law Reform Committee (BLRC) made the following key recommendations to strengthen the CIRP framework under the proposed IBC:

1. Initiation by Any Creditor:

Both financial and operational creditors (including employees and workmen) should be allowed to initiate CIRP, unlike the restricted provisions under the Companies Act, 2013 and SARFAESI Act, 2002.

2. Protection for Operational Creditors:

Resolution plans must include protection for operational creditors to ensure quick settlement of their dues.

3. Strategy for CIRP:

Upon default, CIRP can be initiated and must be completed within 180 days.

4. Role of Insolvency Professional (IP):

The IP manages the CIRP, prevents asset siphoning, and investigates past transactions for any fraud or illegal diversion of assets.

5. Calm Period:

During CIRP, a calm period halts all legal actions against the debtor to facilitate resolution.

6. Time-Bound Resolution:

A revival plan approved by 75% of creditors within 180 days becomes binding. If no plan is agreed upon, liquidation follows.

7. Extension of 180-Day Period:

A one-time extension of up to 90 days is allowed with 75% creditor approval and adjudicator's consent, if the case complexity demands it.

Q3: What are the key object ves of the Insolvency and Bankruptcy Code, 2016 as laid out in its Preamble, and what was upheld by the Supreme Court in the Swiss Ribbons case? Also, brief y describe the scope of Part II of the Code.

Answer: The Preamble of the Insolvency and Bankruptcy Code, 2016 (IBC) outlines its key object ves as follows:

1. Reorganisat on and Insolvency Resolut on
2. Maximizat on of Value
3. Promot on of Entrepreneurship and Credit Availability
4. Balancing Stakeholders' Interests
5. Alterat on in Priority of Government Dues
6. Establishment of Regulatory Authority

Q4: How is the term “Corporate Insolvency Resolut on Process (CIRP)” def ned under the IBC framework.

Answer: Def nit on of CIRP:

The term “Corporate Insolvency Resolut on Process (CIRP)” is not explicitly def ned in the Insolvency and Bankruptcy Code, 2016.

However, it is def ned in:

Rule 3(1)(b) of the Insolvency and Bankruptcy (Applicat on to Adjudicat ng Authority) Rules, 2016, and

Regulat on 2(1)(c) of the IBBI (CIRP) Regulat ons, 2016.

As per these, CIRP means the insolvency resolut on process for corporate persons under Chapter II of Part II of the Code.

Q5: What is the impact of the Insolvency and Bankruptcy Code, 2016 on the winding up provisions under the Companies Act, 1956/2013, and which rules and regulat ons supplement the CIRP under the Code?

Answer: There were six modes of compulsory winding up of companies under the Companies Act, 1956. With the enactment of IBC, 2016, winding up of companies due to their inability to pay debt will be governed by the provisions of the Code, 2016 while remaining will cont nue to be governed by the Companies Act, 2013.

The Code contains the processes for start ng and running the Corporate Insolvency Resolut on Process (CIRP).

To supplement this:

(i) The Insolvency and Bankruptcy (Applicat on to Adjudicat ng Authority) Rules, 2016: The Central Government has issued the Applicat on to AA Rules, which detail the process and various steps involved in applying to the AA to init ate the CIRP.

(ii) The Insolvency and Bankruptcy Board of India (Insolvency Resolut on Process for Corporate Persons) Regulat ons, 2016 (hereinaf er referred as the IBBI(CIRP) Regulat ons, 2026): The IBBI has issued the CIRP Regulat ons, which detail the process and various steps involved in running a CIRP.

Q6: What is the meaning of “Adjudicating Authority” under Sect on 5(1) of the Insolvency and Bankruptcy Code, 2016?

Answer: Sect on 5(1) of the Insolvency and Bankruptcy Code, 2016 defines “Adjudicating Authority”, for the purposes of Part II, means National Company Law Tribunal constituted under sect on 408 of the Companies Act, 2013

Q7: Who can initiate the Corporate Insolvency Resolution Process (CIRP) under Sect on 6 of the Insolvency and Bankruptcy Code, 2016, and what is the trigger point for initiating the process?

Answer: As per Sect on 6 of the Insolvency and Bankruptcy Code, 2016, the following parties may initiate the Corporate Insolvency Resolution Process (CIRP) against a corporate debtor:

1. **Financial Creditor:** According to Sect on 5(7), a “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
2. **Operational Creditor:** According to sect on 5(20) 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 or
3. **The corporate debtor itself:** The Insolvency and Bankruptcy Code, 2016 permits the corporate debtor itself to initiate the insolvency resolution process once it has defaulted on a debt.

Mandatory Trigger – Default:

The trigger point for initiating CIRP is the occurrence of a “default” by the corporate debtor.

As per Sect on 4 of the Code:

CIRP can be initiated only when the default amount is ₹1 crore or more.

Definition of Key Terms:**Default [Sect on 3(12)]:**

"Default" means non-payment of debt when the whole or any part or instalment has become due and payable and is not paid by the debtor or corporate debtor.

Corporate Debtor [Sect on 3(8)]:

A "Corporate Debtor" refers to a corporate person who owes a debt to any person.

Q8: What is the meaning of “Initiation Date” under Sect on 5(11) of the Insolvency and Bankruptcy Code, 2016?

Answer: As per Sect on 5(11) of the Insolvency and Bankruptcy Code, 2016:

“Initiation Date” means the date on which a financial creditor, operational creditor, or corporate applicant, as the case may be, files an application with the Adjudicating Authority (NCLT) to initiate:

Corporate Insolvency Resolution Process (CIRP), or
Pre-Packaged Insolvency Resolution Process (PPIRP).

Q9: “The procedure for application to initiate Insolvency Resolution Process against a Corporate Debtor by operational creditor differs with application by financial creditors.” Explain briefly. (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) enables a Financial Creditor (FC) either alone or jointly with any other FC may file application for initiating Corporate Insolvency Resolution Process (CIRP). On the other hand an Operational Creditor (OC) may file application for CIRP only after serving 10 days' notice of demand under section 8 of IBC and apply for CIRP under Section 9.

(ii) In case of a Financial Creditor, proposing name of Resolution Professional is mandatory but in case of Operational Creditor it is optional.

(iii) Existence of default is required in case of Financial Creditor whereas nonexistence of dispute is necessary in case of Operational Creditor.

Q10: “Home buyers can initiate corporate insolvency process.” Comment. (5 marks)

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Answer: The home buyer can initiate corporate insolvency process against the builders or developers as they have been included in the definition of Financial debt as per explanation to Section 5(8)(f) of Insolvency & Bankruptcy Code, 2016.

As per Section 7 of the Insolvency & Bankruptcy Code, 2016, financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

Q11: What types of financial creditors are covered under Section 21(6A) of the Insolvency and Bankruptcy Code (IBC), and how are their authorised representatives appointed?

Answer: Section 21(6A) of the Insolvency and Bankruptcy Code (IBC) provides for the appointment of authorised representatives for the following categories of financial creditors:

(a) Where the financial debt is in the form of securities or deposits, and the terms of the financial debt provide for the appointment of a trustee or agent to act as the authorised representative for all such financial creditors.

(b) Where the financial debt is owed to a class of creditors exceeding the specified number (i.e., more than ten), but:

- The debt does not fall under clause (a) (i.e., it is not in the form of securities or deposits with a trustee/agent), and
- The debt does not fall under Section 21(6), i.e., it is not part of a consortium or syndicated facility that already has a single trustee or agent acting for all financial creditors.

In such cases, the authorised representative is appointed to represent the interests of the respective class of financial creditors in the Committee of Creditors (CoC).

Q12: Define creditors in a class" under the Insolvency and Bankruptcy Code, 2016?

Answer: The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 defines in Regulation 2(1) (aa) "class of creditors" which means a class with at least ten financial creditors under clause (b) of sub-section (6A) of section 21 and the expression, "creditors in a class" shall be construed accordingly.

Q13: How are allottees in a real estate project treated under the IBC, 2016, and what is the minimum requirement for them to initiate a Corporate Insolvency Resolution Process (CIRP) against the developer?

Answer: Under the Insolvency and Bankruptcy Code (IBC), 2016, the treatment of real estate allottees has been clarified as follows:

Recognition as Financial Creditors:

- As per the Explanation to Section 5(8)(f) of the IBC:

Any amount raised from an allottee under a real estate project shall be deemed to have the commercial effect of a borrowing.

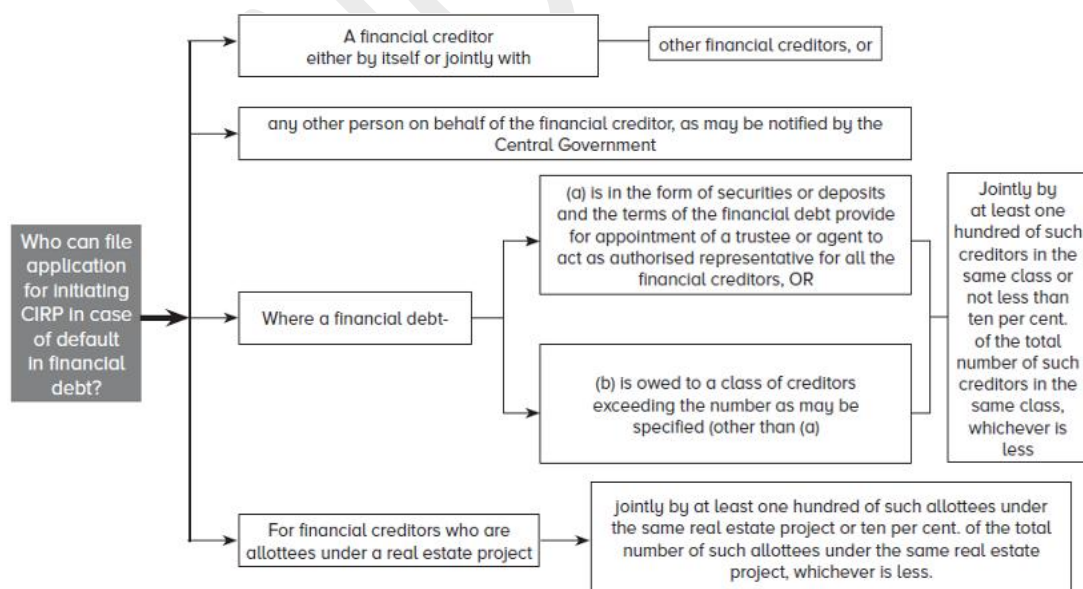
- Therefore, such allottees are treated as financial creditors under the Code.

Requirement for Initiation of CIRP:

- As per the proviso to Section 7(1) of the IBC:

A single allottee cannot independently file an application under Section 7.

- An application for initiation of CIRP against a real estate developer can only be filed jointly by:
 - At least 100 allottees, or
 - Not less than 10% of the total number of allottees under the same real estate project, whichever is less.

**Q14: What are the procedural requirements for a financial creditor to initiate a Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Insolvency and Bankruptcy Code, 2016?**

Answer: Under Sect on 7(2) of the Insolvency and Bankruptcy Code, 2016, a f nancial creditor init at ng a Corporate Insolvency Resolut on Process (CIRP) against a corporate debtor must comply with the following procedural requirements:

(1) A f nancial creditor, either by itself or jointly along with prescribed fee shall make an applicat on for init at ng the corporate insolvency resolut on process against a corporate debtor under sect on 7 of the Code in Form 1, accompanied with documents and records required therein and as specif ed in the Insolvency and Bankruptcy Board of India (Insolvency Resolut on Process for Corporate Persons) Regulat ons, 2016.

(2) Where the applicant under sub-rule (1) is an assignee or transferee of a f nancial contract, the applicat on shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentat on to demonstrate the assignment or transfer.

(3) The applicant shall serve a copy of the applicat on to the registered of ce of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before f ling with the Adjudicat ng Authority.

(4) In case the applicat on is made jointly by f nancial creditors, they may nominate one amongst them to act on their behalf.

Fee payable: The f nancial creditor should submit the applicat on to the Adjudicat ng Authority as per the applicable rules/procedures of the relevant Adjudicat ng Authority, along with prescribed fee of 25,000 Indian rupees in favour of the Pay and Accounts Of cer, Ministry of Corporate Af airs, payable in Mumbai, New Delhi, Kolkata, or Chennai.

Q15: “The Insolvency Profession of ers a challenging opportunity to the professional members as an Insolvency Professional plays a central role in the ef ect ve implementat on of the Insolvency Law.” Discuss this statement from the view that the success of an Insolvency/Bankruptcy case depends primarily on the quality of the professional at ending it. (5 marks)

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Answer: The insolvency professional occupies a pivotal posit on and acts as an intermediary between the corporate debtor & creditor on one hand and the Adjudicat ng Authority on the other and funct ons under the watchful eyes of the Agency and the Insolvency Bankruptcy Board of India. This is a posit on of trust and conf dence.

In terms of work, the insolvency professional has to carry a heavy work workload - secretarial, legal, f nance, management of business of debtor, valuat on and sale of assets etc., fall under the care of the insolvency professional. This calls for the insolvency professional to be more than adequate knowledge in the f eld of human relat ons, f nance, taxat on etc.

It goes without saying that the more endowed and equipped is the bet er are the chances of the resolut on of the insolvency. An insolvency process cannot be imagined without the act ve involvement of an insolvency professional who is in many respects, the lynch pin of the same. He does play a central role and assumes many diverse funct ons like stakeholder management, business dynamics, strategic foresight, business resolut on etc. It is therefore rightly said that

the success of the insolvency/bankruptcy case primarily depends on the professional at ending it.

Q16: What documents must a financial creditor submit along with an application under Sect on 7 of the Insolvency and Bankruptcy Code, 2016, and what constitutes valid evidence of default?

Answer: Sect on 7(3) of the Code provides that the financial creditor shall, along with the application furnish:

- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and
- (c) any other information as may be specified by the Board.

The IBBI (CIRP) Regulations, 2016 provides in Regulation 2A for record or evidence of default by financial creditor. It states that for the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely: -

- (a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891);
- (b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired.

Q17: What are the conditions under which the Adjudicating Authority may admit or reject an application filed by a financial creditor under Sect on 7 of the IBC, 2016?

Answer: According to section 7(5), where the Adjudicating Authority is satisfied that –

- (a) a default has occurred and the application under sub-section (2) 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 under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application:

Provided that the Adjudicating Authority shall, before rejecting the application under clause (b) of sub-section (5), 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.

Q18: What is the timeline for the Adjudicating Authority to communicate its order of admission or rejection of an application under Sect on 7 of the IBC, 2016?

Answer: Section 7(7) of the Insolvency and Bankruptcy Code, 2016, mandates that the Adjudicating Authority (NCLT) must communicate its decision on an application filed under Section 7 within a strict timeline of 7 days from the date of the decision. Specifically:

If the application is admitted under Section 7(5)(a), the order of admission must be communicated within 7 days of the decision to both the financial creditor and the corporate debtor.

If the application is rejected under Section 7(5)(b), the order of rejection must be communicated within 7 days of the decision to only the financial creditor.

Q19: 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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q20: Case: There are three financial creditors AM Bank, BN financial institution, CP Bank of XYZ Limited. An application for initiation of CIRP has to be made against XYZ Limited as it has made default in repaying debt of AM Bank of Rs 70 Lakhs and BN financial institution of Rs 50 Lakhs. However, there is no default in repayment of debt of CP Bank having outstanding of Rs. 30 Lakhs. Answer the following queries:

1. Can Corporate Insolvency Resolution Process (CIRP) be initiated against XYZ Limited?
2. Can CP Bank initiate CIRP against XYZ Limited?
3. Whether AM Bank and BN financial institution have to file joint application or they may file it individually?
4. Whether a Power of Attorney holder of Financial Creditor can initiate insolvency proceedings under the Code?

5. Whether NCLT, in exercise of its inherent powers, can convert an application under section 9 of the Code by an operational creditor to an application under section 7 of the Code by a Financial Creditor?

6. Whether NCLT, in exercise of its inherent powers, can convert an application under section 9 of the Code by an operational creditor to an application under section 7 of the Code by a Financial Creditor?

Answer:

1. Yes, CIRP can be initiated against XYZ Limited by the financial creditor as it has committed default in repayment of debt worth Rs. 1.2 crore (70+50 Lakhs) whereas section 4 of the Code provides that CIRP can be initiated against a corporate debtor if it commits default of Rs. 1 crore or more.

Section 7(1) of the Code states that a financial creditor, either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating a CIRP against a corporate debtor before the Adjudicating Authority when a default has occurred in payment of financial debt by the financial creditor. For the purpose of section 7(1), a default includes a default on a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

Therefore, as joint application is permitted, default of both financial creditors will be clubbed for knowing whether it has committed default in repayment of debt of Rs 1 crore or more.

2. Yes, CP Bank can initiate CIRP against XYZ Limited as Explanation to section 7(1) provides that for the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

3. Pursuant to provisions of section 7(1) of the Code, AM Bank and BN financial institution can file application to initiate CIRP individually or jointly too.

4. Legal Provision

- Entry 5 & 6 (Part I) of Form 1 mandates the Financial Creditor to submit name and address of person authorized to submit application. Further, the particulars shall be signed by person authorized to act on behalf of financial creditor at the end.
- Similar provision is made with regard to application by Operational Creditor and corporate applicant i.e., the application must be signed by a person authorized.
- Rule 23(1) of NCLT Rules reads as under:

“23. Presentation of petition or appeal –

(1) Every petition, application, caveat, interlocutory application, documents and appeal shall be presented in triplicate by the appellant or applicant or petitioner or respondent, as the case may be, in person or by his duly authorised representative or by an advocate duly

appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

In **Palogix Infrastructure Pvt. Ltd. v. ICICI Bank Ltd. [Company Appeal (AT) (Insol.) No. 30 of 2017]**, NCLAT held that a 'Power of Attorney Holder' is not competent to file an application on behalf of a 'Financial Creditor' or 'Operational Creditor' or 'Corporate Applicant'. NCLAT held that a power of attorney holder is not authorised to present application for CIRP under sections 7, 9 and 10 of the Code. It is only authorised representatives, duly authorised by board resolution, who are eligible to present the same.

5. In **Sanjeev Jain vs. M/s Eternity Infracon Pvt. Ltd. [Company Petition no. (IB) 113(ND)/2017]**, the NCLT observed as under:

16... The Code prescribes stipulated time frame to be followed at every relevant stage of the resolution proceedings. Besides the insolvency resolution process has serious civil consequences, which suggests for a cautious approach strictly in accordance with the procedure prescribed by the Code.

17. ...It is also pertinent to note that the provisions and scope of Section 9 including the applicable rules, forms and procedure are totally distinct and separate from that of Section 7 of the Code. There is no provision in the Code to convert a section 9 application into a section 7 as prayed. On the contrary, the Code provides that applications filed under section 7, 9 or 10 as the case may be, should either be admitted or rejected in accordance with respective provisions.

Q21: What are the requirements and procedure for serving a demand notice under Section 8 of the Insolvency and Bankruptcy Code, 2016?

Answer: Section 8(1) of the Insolvency and Bankruptcy Code, 2016 provides that an operational creditor, upon the occurrence of a default, may deliver to the corporate debtor either:

- A demand notice of the unpaid operational debt, or
- A copy of the invoice demanding payment of the amount involved in the default, in such form and manner as may be prescribed.

Furthermore, the Explanation to Section 8 clarifies that a "demand notice" refers to a notice served by the operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

Q22: What are the requirements under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for serving a demand notice by an operational creditor to a corporate debtor?

Answer: Under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, an operational creditor must serve a demand notice to the corporate debtor in the following manner:

Demand notice by operational creditor (Rule 5)—

(1) An operational creditor shall deliver to the corporate debtor, the following documents, namely. -

- (a) a demand notice in Form 3; or
- (b) a copy of an invoice attached with a notice in Form 4.

(2) The demand notice or the copy of the invoice demanding payment referred to in sub-section (2) of section 8 of the Code, may be delivered to the corporate debtor,

(a) at the registered office by hand, registered post or speed post with acknowledgement due; or

(b) by electronic mail service to a whole-time director or designated partner or key managerial personnel, if any, of the corporate debtor.

(3) A copy of demand notice or invoice demanding payment served under this rule by an operational creditor shall also be filed with an information utility, if any.

In most cases, the demand notice is delivered through registered post/hand delivery, or via an email. Acknowledgment/proof of delivery of the demand notice must be provided to the Adjudicating Authority as part of the application by the operational creditor under section 9 of the Code.

Q23: What is required of a corporate debtor under Section 8(2) of the Insolvency and Bankruptcy Code upon receiving a demand notice or invoice from an operational creditor?

Answer: Under Section 8(2) of the Insolvency and Bankruptcy Code, a corporate debtor must respond within ten days of receiving the demand notice or invoice by:

- (a) Informing the operational creditor about the existence of a dispute, if any, or providing records showing that a suit or arbitration proceeding relating to the dispute was filed before receiving the notice or invoice; or
- (b) Providing evidence of payment of the unpaid operational debt, which may include:
 - (i) An attested copy of the record of electronic transfer of the unpaid amount from the corporate debtor's bank account; or
 - (ii) An attested copy of the record showing that the operational creditor has encashed a cheque issued by the corporate debtor.

Q24: What are the conditions and procedure for an operational creditor to initiate Corporate Insolvency Resolution Process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016?

Answer: The Insolvency and Bankruptcy Code, 2016 (Section 9):

(i) Application to initiate CIRP by Operational Creditor: After the expiry of the period of ten days

from the date of delivery of the notice or invoice demanding payment under sub-section (1) of section 8, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8, the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency

resolut on process in such form and manner and accompanied with such fee, as may be prescribed.

The Insolvency and Bankruptcy (Applicat on to Adjudicat ng Authority) Rules, 2016: Rule 6 of the Rules prescribes that:

(1) An operat onal creditor, shall make an applicat on for init at ng the corporate insolvency resolut on process against a corporate debtor under sect on 9 of the Code in **Form 5**, accompanied with documents and records required therein and as specif ed in the Insolvency and Bankruptcy Board of India (Insolvency Resolut on Process for Corporate Persons) Regulat ons, 2016.

(2) The applicant under sub-rule (1) shall serve a copy of the applicat on to the registered of ce of the corporate debtor and to the Board, by registered post or speed post or by hand or by electronic means, before f ling with the Adjudicat ng Authority.

Q25: PL Enterprise, an Operat onal Creditor to XYZ Ltd., a corporate debtor is in the process of making an applicat on to NCLT for init at ng the insolvency resolut on process. Advise PL enterprise about the enclosures to such an applicat on. (5 marks)

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Answer: Sect on 9(3) of the Insolvency and Bankruptcy Code, 2016 lays down that an applicat on by the operat onal creditor shall, be accompanied with the following documents:

- (a) a copy of the invoice demanding payment or demand not ce delivered by the operat onal creditor to the corporate debtor;
- (b) an af davit to the ef ect that there is no not ce given by the corporate debtor relat ng to a dispute of the unpaid operat onal debt;
- (c) a copy of the cert fcate from the f nancial inst tut ons maintaining accounts of the operat onal creditor conf rming that there is no payment of an unpaid operat onal debt by the corporate debtor, if available;
- (d) a copy of any record with informat on ut lity conf rming that there is no payment of an unpaid operat onal debt by the corporate debtor, if available; and
- (e) any other proof conf rming that there is no payment of any unpaid operat onal debt by the corporate debtor or such other informat on, as may be prescribed.

Q26: What documents must an operat onal creditor submit under Regulat on 2B of the Insolvency and Bankruptcy Board of India (Insolvency Resolut on Process for Corporate Persons) Regulat ons, 2016, when applying under Sect on 9 of the Insolvency and Bankruptcy Code?

Answer: An operat onal creditor must submit:

- **Copies of relevant extracts of Form GSTR-1 and Form GSTR-3B** f led under the Goods and Services Tax (GST) laws.
- **Copy of the e-way bill**, wherever applicable.

These documents serve as evidence of transact ons, debts, and defaults, helping to establish the creditor's claim in the insolvency resolut on process.

However, the provisions of Regulation 2B do not apply to:

- **Operational creditors who are not required to obtain GST registration.**
- **Goods and services that are not covered under any law relating to Goods and Services Tax.**

In such cases, the operational creditor should provide alternative evidence to support their claim, such as invoices, contracts, correspondence, or payment receipts.

Q27: What annexures must be filed along with Form 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016?

Answer: When filing Form 5 under Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the following annexures must be submitted:

1. Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.
2. Copies of all documents referred to in this application.
3. Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available.
4. Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
5. Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. [WHERE APPLICABLE]
6. Proof that the specified application fee has been paid.

Q28: Is it mandatory for an operational creditor to recommend the name of an Interim Resolution Professional (IRP) when initiating a Corporate Insolvency Resolution Process (CIRP) under Section 9 of the Insolvency and Bankruptcy Code, 2016?

Answer: No, it is not mandatory. Under Section 9(4) of the Insolvency and Bankruptcy Code, 2016, an operational creditor initiating a CIRP may propose the name of an Interim Resolution Professional (IRP). However, if the operational creditor does not propose a name, the Adjudicating Authority (typically the National Company Law Tribunal or NCLT) will appoint an IRP, usually from the panel maintained by the Insolvency and Bankruptcy Board of India (IBBI).

Q29: Whether the Principal and Interest amounts can be clubbed together to reach the minimum threshold of Rs. 1 Crore for operational debt as stipulated under Section 4 of IBC, 2016?

Answer: NCLT Chandigarh Bench in the matter of M/s. Wanbury Ltd. Vs. M/s. Panacea Biotech Ltd. in CP No. 8/2016 dated 18.04.2017 held that –

“There is a marked difference between the definition of the term ‘financial debt’ and the ‘operational debt’.

Under Section 5(8) the term ‘financial debt’ means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and that is an inclusive

definition. In the definition of the term 'operational debt' under section 5(21) the word 'interest' has not been mentioned..."

In the light of the above decision, it was held by NCLT, New Delhi Bench in *CBRE South Asia Private Limited vs. M/s. United Concepts and Solutions Private Limited*, (IB)-797(ND)2021, that the Interest amount cannot be clubbed with the principal amount of operational debt to arrive at the minimum threshold of Rs.1 Crore for complying with the provision of Section 4 of IBC, 2016.

Q30: Whether two or more operational creditors can file a joint application under section 9 of the Code?

Answer: In the case of *Utam Galva Steels Limited vs. DF Deutsche Forfait AG & Anr.* (Company Appeal (AT) (Insolvency) 39 of 2017), decided on 28th July 2017, the National Company Law Appellate Tribunal (NCLAT) ruled that two or more operational creditors cannot jointly file an application under Section 9 of the Insolvency and Bankruptcy Code (IBC). The tribunal noted that while Section 7 of the IBC explicitly allows financial creditors to file individually or jointly, Section 9 does not contain a similar provision for operational creditors. Therefore, each operational creditor must file a separate application, even if the debt arises from the same transaction or is assigned among them.

Q31: What are the conditions under which the Adjudicating Authority (AA) shall admit or reject an application filed under Section 9 of the Insolvency and Bankruptcy Code (IBC)?

Answer: As per Section 9(5) of the IBC, the Adjudicating Authority (AA) must admit or reject an application filed by an operational creditor within 14 days of its receipt, provided the following conditions are met:

Admission Conditions (Clause i): The AA shall admit the application if:

- (a) the application made under sub-section (2) is complete;
- (b) there is no payment of the unpaid operational debt;
- (c) the invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;
- (d) no notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility; and
- (e) there is no disciplinary proceeding pending against any resolution professional proposed under sub-section (4), if any.

Reject on Conditions (Clause ii): The AA shall reject the application if: (a) the application made under sub-section (2) is incomplete;

- (b) there has been payment of the unpaid operational debt;
- (c) the creditor has not delivered the invoice or notice for payment to the corporate debtor;
- (d) notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility; or
- (e) any disciplinary proceeding is pending against any proposed resolution professional.

Before rejecting an application due to incompleteness, the AA must notify the applicant to rectify the defect within seven days.

The AA must communicate its decision to both the operational creditor and the corporate debtor.

Q32: What are the key provisions of Regulation 20 and Regulation 21 of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017?

Answer:

1. Regulation 20

2. – Submission of Default Information

- Creditors must submit financial information to an Information Utility (IU) using **Form C**.
- Form C includes details of the debt and default, along with supporting documents as specified by the Board.
- An amendment on **14th June 2022** introduced Sub-regulation (1A), making it mandatory for creditors to file default information with the IU before initiating a Corporate Insolvency Resolution Process (CIRP) under Sections 7 or 9 of the Insolvency and Bankruptcy Code (IBC).

3. Regulation 21 – Record of Default

- After recording the default information, the IU must communicate the status of authentication—indicating whether the default is authenticated or disputed.
- This is done by issuing a **Record of Default in Form D** to registered users, including:
 - Creditors of the debtor who has defaulted in payment of a debt.
 - Parties and sureties, if any, to the debt in respect of which the information of default has been received.

These provisions aim to ensure transparency and provide a clear record of defaults, which is crucial for the initiation and progression of the CIRP under the IBC.

Q33: What is the procedure for initiating the Corporate Insolvency Resolution Process (CIRP) by a corporate applicant under Section 10 of the Insolvency and Bankruptcy Code (IBC)?

Answer: Under Section 10 of the IBC, a corporate debtor (the corporate applicant) may initiate the CIRP by filing an application with the National Company Law Tribunal (NCLT). The procedure is as follows:

The process for initiating CIRP by a corporate applicant under Section 10 is as follows:

- 1. Default by Corporate Debtor (CD):** The corporate debtor must have committed a default of Rs. 1 crore or more.
- 2. Internal Resolution:** A special resolution must be passed by:
 - The shareholders of the corporate debtor, or
 - At least three-fourths of the total number of partners (in case of a partnership firm), approving the filing of the application to initiate CIRP under Section 10.
- 3. Filing Application:** The corporate applicant files an application to the Adjudicating Authority (AA) using Form 6.

4. **Timeline for AA:** The AA is required to act on the application within 14 days of its submission.
5. **Decision by AA:** The AA may:
 - Admit the application, thereby initiating the CIRP, or
 - Reject the application.
6. **Opportunity to Rectify:** Before rejecting, the AA must provide the applicant 7 days' time to rectify any incomplete or defective application.

Q34: What is the detailed process for initiating Corporate Insolvency Resolution Process (CIRP) by a corporate applicant under Section 10 of the Insolvency and Bankruptcy Code, 2016?

Answer: The process for initiating CIRP by a corporate applicant under **Section 10** of the Insolvency and Bankruptcy Code (IBC), 2016 is as follows:

1. Voluntary Application by Corporate Debtor

- Section 10(1): A corporate debtor that has committed a default (minimum of ₹1 crore) may itself initiate CIRP by filing an application with the Adjudicating Authority (AA).
- This allows the corporate debtor to proactively seek resolution, not just creditors.

2. Form, Manner, and Fee of Application

- Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:
 - The application must be made in Form 6.
 - It must be accompanied by documents as specified in the relevant regulations.
 - A copy must be served to the IBBI before filing with the AA.
 - The application must be submitted along with a demand draft of ₹25,000, payable to the Pay and Accounts Officer, Ministry of Corporate Affairs, at designated metro cities.

3. Required Documents with Application (Section 10(3))

The corporate applicant must submit the following:

- (a) Information from books of account and other specified documents.
- (b) Details of the proposed Interim Resolution Professional (IRP).
- (c) A special resolution passed by shareholders (or 3/4th of partners in case of partnership), approving the filing of the application.

4. Timeline for AA's Decision (Section 10(4))

- The Adjudicating Authority must decide within 14 days from the receipt of the application to either:
 - (a) Admit the application – if it is complete and no disciplinary proceedings are pending against the proposed IRP.
 - (b) Reject the application – if it is incomplete or the proposed IRP is facing disciplinary proceedings.
- Proviso: Before rejecting, the AA must give the applicant 7 days to rectify defects in the application.

5. Commencement of CIRP (Section 10(5))

- The CIRP commences from the date of admission of the application by the AA.

Q35: A default in financial debt has arisen on September 20, 2020. Can an application be filed in May, 2023 for the same? Explain the legal provision with the help of decided case law. (3 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Section 10A of the Insolvency and Bankruptcy Code provides that notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period.

Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020."

In the case of *Ramesh Kymal Vs. M/s Siemens Gamesa Renewable Power Pvt Ltd judgement dated February 9, 2021* Hon'ble Supreme Court observed that Section 10A does not contain any requirement that the Adjudicating Authority must launch into an enquiry into whether, and if so to what extent, the financial health of the corporate debtor was affected by the onset of the Covid-19 pandemic. Parliament has stepped in legislatively because of the wide spread distress caused by an unheralded public health crisis. It was cognizant of the fact that resolution applicants may not come forth to take up the process of the resolution of insolvencies which would lead to instances of the corporate debtors going under liquidation and no longer remaining a going concern.

Q36: What are the provisions related to initiation of insolvency applications to the Information Utility (IU) as per IBBI Circular No. IBBI/IU/51/2022 dated 15th June 2022?

Answer: As per IBBI Circular No. IBBI/IU/51/2022 dated 15th June 2022, the Insolvency and Bankruptcy Board of India (IBBI) directed that all applications received for initiation of insolvency proceedings shall be forwarded to the Information Utility (IU). The IU has the following responsibilities:

- (a) inform other creditors of the CD by sharing the application;
- (b) issue notice to the applicant, requiring it to file 'information of default' as per IU Regulations; and
- (c) process the 'information of default' for the purpose of issuing ROD as per the IU.

Q37: What does Section 65 of the IBC provide regarding the fraudulent or malicious initiation of corporate insolvency resolution proceedings?

Answer: Section 65 of the IBC penalizes any person who fraudulently or with malicious intent initiates a CIRP or liquidation process for purposes other than the genuine resolution of insolvency.

If proven, the Adjudicating Authority may impose a penalty ranging from ₹1 lakh to ₹1 crore. It serves as a deterrent against misuse or abuse of the IBC process.

Q38: What is the relevance of the Limitation Act, 1963, in insolvency proceedings under the Insolvency and Bankruptcy Code, 2016?

Answer: Section 238A makes the Limitation Act, 1963 applicable to proceedings under the IBC, including those before the NCLT, NCLAT, DRT, and DRAT.

Introduced via the 2018 Amendment, it ensures that applications under Sections 7, 9, or 10 cannot be filed for time-barred debts.

The limitation period is typically three years from the date of default, as per Article 137 of the Limitation Act.

Q39: What did the Supreme Court hold in *B.K. Educational Services Pvt. Ltd. vs. Parag Gupta and Associates* regarding the applicability of the Limitation Act to insolvency proceedings under the IBC?

Answer: In this case, the Supreme Court held that the Limitation Act, 1963 applies to applications under Sections 7 and 9 of the IBC from the outset.

Section 137 of the Limitation Act applies — i.e., a 3-year limitation period from the date of default.

Delay beyond 3 years can only be condoned under Section 5 of the Limitation Act if justified.

Section 238A ensures limitation provisions apply “as far as may be,” even overriding conflicting provisions elsewhere.

Q40: What did the Supreme Court hold in *Dena Bank (now Bank of Baroda) vs. C. Shivakumar Reddy* regarding acknowledgment of debt?

Answer: The Supreme Court held that entries in books of accounts or balance sheets of a corporate debtor constitute acknowledgment of debt under Section 18 of the Limitation Act, 1963.

Such acknowledgment can extend the limitation period for initiating CIRP under the IBC.

This was reaffirmed by NCLT, New Delhi in *M/s SKC Infratech Pvt. Ltd vs M/s EOS Hospitality Pvt. Ltd.*

Q41: What was the Supreme Court's ruling in *Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd.* regarding limitation under Section 7 of the IBC?

Answer: The Supreme Court ruled that:

- Article 137 of the Limitation Act applies to Section 7 IBC applications, providing a 3-year limitation from the date of default.
- The right to apply accrues on the actual date of default, not from 01.12.2016 (when IBC came into force).
- Article 62 (relating to mortgage enforcement) does not apply.
- In this case, since default occurred on 08.07.2011 and no acknowledgment was shown, the application was time-barred.

- The court annulled the CIRP as the debt was not enforceable due to the lapse of the limitation period.

Key Point: Section 7 applications must be within 3 years from default unless a valid acknowledgment extends the period.

Q42: What are the excluded categories of corporate persons under the IBC, and how are they classified?

Answer: Under the Insolvency and Bankruptcy Code (IBC), 2016, certain corporate persons are excluded either from:

1. Initiation of Corporate Insolvency Resolution Process (CIRP) against them, or
2. Filing an application to initiate CIRP.

Q43: Against whom cannot a Corporate Insolvency Resolution Process (CIRP) be initiated under the Insolvency and Bankruptcy Code (IBC), 2016?

Answer: CIRP cannot be initiated against financial service providers such as banks, NBFCs, insurance companies, etc.

This is because the IBC allows CIRP only against a corporate debtor, defined as a corporate person owing a debt. As per Section 3(7) of the IBC, corporate persons exclude financial service providers, so they are outside the scope of CIRP under Sections 7, 9, and 10.

Q44: "Insolvency codes are not applicable to financial services." Examine this statement. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Section 227 of the Insolvency and Bankruptcy Code (IBC) empowers the Central Government, in consultation with the appropriate financial sector regulators, to notify financial service providers or categories of financial service providers about their insolvency and liquidation proceedings, which may be conducted under the IBC with such modifications and in such manner as may be prescribed.

Pursuant to its powers, Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Financial Service Provider Rules empower the government to commence the CIRP in terms of the IBC against financial service providers, in consultation with the appropriate financial sector regulator as prescribed by the law. In terms of the notification dated November 18, 2019, issued by the MCA, the Financial Service Provider Rules would apply to non-banking finance companies with a prescribed asset size with the RBI as the appropriate financial service regulator.

Q45: TERO Ltd. entered into supply contract with Telecom Regulatory Authority of India (TRAI) for supply of fibre optic cables. TRAI has defaulted in paying invoice value as per

demand not ce issued to them. TERO Ltd. f led CIRP applicat on in NCLT fled against TRAI. The said CIRP applicat on was rejected. Discuss the legal status of NCLT order and advise TERO Ltd. (5 marks)

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OR

SPM bank extended credit facilit es to Anuj Construct ons (The Principal Borrower), a proprietary frm, in 2023. Gita Steel Limited (The Guarantor) provided guarantee for credit facilit es provided to Anuj Construct ons by the SPM bank. Anuj Construct ons (The Principal Borrower), defaulted in the repayment of credit facilit es and hence the facilit es were declared as Non-Performing Assets. Anuj Construct ons repeatedly assured the bank to repay the outstanding amount of ` 11,45,23,535, but failed and SPM bank issued not ce to Anuj Construct ons.

SPM bank also issued not ce to Gita Steel Limited (The Guarantor) under Sect on 4(1) of the Insolvency and Bankruptcy Code (IBC), 2016, demanding the outstanding amount.

Failing to receive any posit ve response from either of the part es, the bank proceeded to fle an applicat on before NCLT under Sect on 7 of the Code for init at ng CIRP proceedings against Gita Steel Limited.

The Board of Directors of Gita Steel Limited argued that under Sect on 7 of the Insolvency and Bankruptcy Code (IBC), 2016, an applicat on can be fled by f nancial creditor only against the Corporate person.

Sect on 7 of the Code cannot be legit mately invoked by the bank against Gita Steel Limited (being a Corporate Debtor) concerning guarantee of ered by it in respect of a credit facility of Anuj Construct ons (The Principal Borrower), who had commit ed default and is not a corporate person within the meaning of the Code.

In the background of the mat er, discuss “Corporate Person” and “Corporate Debtor” under the provisions of IBC and referring to the relevant case law, discuss the tenability of arguments put forward by the Board of Directors of Gita Steel Limited. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: According to Sect on 3(7) of Insolvency & Bankruptcy Code, “Corporate Person” means a company as def ned in clause (20) of sect on 2 of the Companies Act, 2013, a limited liability partnership, as def ned in clause (n) of sub-sect on (1) of sect on 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the t me being in force but shall not include any f nancial service provider

In *Hindustan Construct on Company Limited & Another Vs. Union of India & Others [WP (Civil) No. 1074/2019 with other Civil Appeals]*, a CIRP was sought to be init ated against the Nat onal Highway Authority of India. The Supreme Court held that the Nat onal Highway Authority of India is a statutory body that funct ons as an extended limb of the Central Government and performs governmental funct ons that cannot be taken over by an RP under the Insolvency & Bankruptcy Code or by any other corporate body. Nor can such authority ult mately be wound

up under the Insolvency & Bankruptcy Code. For all these reasons, it is not possible to either read in or read down the definition of “corporate person” in section 3(7) of the IBC.

Therefore, TRAI is not a corporate debtor for the purposes of the Insolvency & Bankruptcy Code and, consequently, a Corporate Insolvency Resolution Process against TRAI cannot be initiated under section 7, 9, or 10 of the IBC. Hence, TERO Limited will not succeed in CIRP application against TRAI.

Alternate Answer,

“Corporate Person” means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider [Section 3(7) of the IBC, Code].

National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb of the Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can NHAI ultimately be wound up under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of ‘corporate person’ in section 3(7) of the Code to include NHAI. (*Hindustan Construction Company Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) No. 1074 of 2019 with other Civil Appeals] SC judgement dated 27.11.2019*)

“Corporate Debtor” means a corporate person who owes a debt to any person [Section 3(8) of IBC, 2016].

The facts of the present case are similar to the facts in *“Laxmi Pat Surana Vs. Union Bank of India & Anr.”*.

In the above-mentioned case, the Hon’ble Supreme Court held that:

If a corporate person extends guarantee for the loan transaction concerning a principal borrower not being a corporate person, it would still be covered within the meaning of expression “corporate debtor” in section 3(8) of the Code.

Hence in this particular case, the status of a guarantor, Gita Steel Limited, who is a corporate person, metamorphoses into corporate debtor, when the principal borrower Anuj Constructions (The Principal Borrower), a proprietary firm (regardless of not being a corporate person) commits default in the payment of debt which had become due and payable.

Thus, the action under Section 7 of the Code can be legitimately invoked against a (corporate) guarantor being a corporate debtor and the contention of the Board of Directors of Gita Steel Limited is not tenable.

Q46: Who are the persons not entitled to initiate a Corporate Insolvency Resolution Process (CIRP) under Section 11 of the IBC?

Answer: Section 11 of the Code states that certain persons are not entitled to make applications for initiating a Corporate Insolvency Resolution Process. These are:

a) a corporate debtor already undergoing a corporate insolvency resolution process or a pre-packaged insolvency resolution process; or

- (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- (b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
- (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- (d) a corporate debtor in respect of whom a liquidation order has been made.

Q47: In the case of *M/s. Surendra Trading Company vs. M/s. Juggilal Kamptat Jute Mills Company Ltd. (2017)*, what did the Supreme Court hold regarding the 7-day period to rectify defects in a CIRP application?

Answer: The Supreme Court held that the 7-day period given to rectify defects in a CIRP application is directory, not mandatory.

This means:

- Applicants should try to remove errors within 7 days.
- If they fail, they must submit written reasons explaining the delay.
- The tribunal may still accept the application if satisfied with the explanation; otherwise, it can dismiss the application.

The Court also clarified that the 14-day period for the tribunal to admit or reject applications under Sections 7, 9, and 10 is also directory.

Q48: Is the 14-day period for admitting/rejecting a CIRP application and the 7-day period for rectifying defects mandatory under the IBC? Does a Corporate Debtor have a right to be heard before the admission of a CIRP application?

Answer: No, both the 14-day period for the Adjudicating Authority (NCLT) to admit or reject a CIRP application and the 7-day period for rectifying defects are directory, not mandatory, under the IBC. This means that while these timelines should be followed as a guideline, a delay with valid reasons does not invalidate the process.

Yes, the Corporate Debtor has a right to be heard before the admission of a CIRP application. As per Rules 4(3), 6(2), and 7(2) of the Application to Adjudicating Authority Rules, a copy of the application must be served to the Corporate Debtor and the Insolvency and Bankruptcy Board of India (IBBI) before filing it with the NCLT. This ensures that the debtor has an opportunity to respond or oppose the application. The NCLT may also require proof of service (a service affidavit) if the debtor fails to appear.

Q49: Can an application admitted under Section 7, 9, or 10 of the IBC be withdrawn? If yes, under what conditions?

Answer: Yes, an application admitted under **Sect on 7, 9, or 10** of the IBC can be withdrawn, but the procedure varies depending on the stage of the process:

1. **Before Admission:** Under Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the applicant can withdraw the application before it is admitted by the Adjudicating Authority (NCLT) by simply making a request.
2. **After Admission but Before CoC Formation:** Withdrawal can still be requested, subject to the Adjudicating Authority's discretion.
3. **After Constitution of the Committee of Creditors (CoC):** Under Sect on 12A of the IBC, the application can be withdrawn only with the approval of 90% voting share of the CoC. This must be done in accordance with Regulation 30A of the CIRP Regulations.

Q50: The Committee of Creditors (CoC) of Golconda Industries approved a resolution plan by voting share of 100% in voting held on 17.1.2024. Thereafter, X (the Resolution Professional) submitted the application for the approval of resolution plan before the Adjudicating Authority (AA). During the pendency of the application for approval of resolution plan before the AA, ex-promoter of Golconda industries submitted revised settlement proposal under Sect on 12 A of the Code and filed an application to NCLT seeking to keep the resolution in abeyance. The application filed by the ex-promoter was rejected by the NCLT. Hence, he filed an appeal before NCLAT against the NCLT order.

In the light of the provisions of the Insolvency and Bankruptcy Code, 2016, whether an application under sect on 12A of the Insolvency and Bankruptcy Code (IBC), 2016, can be entertained by NCLT after the approval of resolution plan by CoC and filing of application before NCLT for approval of resolution plan by the Resolution Professional? Citing the relevant case law, discuss as to what will be the merit of appeal filed by the ex-promoter of Golconda Industries against the order of NCLT. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Regulation 30A of the CIRP Regulations specifies deals with provisions relating to withdrawal of application under sect on 12A of the Code. It provides as under: -

(1) An application for withdrawal under sect on 12A may be made to the Adjudicating Authority –

(a) before the constitution of the committee, by the applicant through the interim resolution professional;

(b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:

Provided that where the application is made under clause (b) after the issue of invitation for expression of interest under regulation 36A, the applicant shall state the reasons justifying withdrawal after issue of such invitation.

In *Hem Singh Bharana Vs. Pawan Doot Estate Pvt. Ltd. & Ors.* [CA (AT) (Ins.) No. 1481 of 2022], During pendency of approval of the resolution plan before the AA, ex-promoter submitted revised settlement proposal under sect on 12A of the Code and filed an application seeking to keep the resolution in abeyance. As the AA rejected the said application, an appeal was filed

before the NCLAT on the ground that there is no bar on CoC in accepting the settlement proposal under section 12A even if they have already approved a resolution plan. The NCLAT dismissed the appeal while relying on the judgment of SC in *Ebix Singapore Pvt. Ltd. V. Committee of Creditors of Educomp Solutions Limited and Anr.*, wherein it was held that after approval of a resolution plan by the CoC, it itself is bound by its decision and cannot be allowed to go back from its decision.

Hence in the present case, an application under section 12 A of IBC cannot be entertained after the approval of a resolution plan by the CoC and filing of application before NCLT for approval of resolution plan. The appeal filed by the ex-promoter of Golconda Industries against the order of NCLT will not be entertained by NCLAT.

Q51: An application filed before National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code, 2016 can be withdrawn before admission but not after admission. Discuss. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: The statement is not correct. Application can be withdrawn before or after admission.

It is possible that the compromise formula may be evolved either before or after application is filed before National Company Law Tribunal (NCLT).

Application can be withdrawn with the permission of adjudicating authority under Rule 8 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016. According to Section 12A of Insolvency & Bankruptcy Code, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

Q52: What did the Supreme Court hold in *Swiss Ribbons Pvt. Ltd. vs. Union of India* regarding withdrawal of a CIRP application after issuance of Expression of Interest (EOI)?

Answer: In *Swiss Ribbons Pvt. Ltd. vs. Union of India* [(2019) 4 SCC 17], the Supreme Court held that the provision for withdrawal of a CIRP application before issuance of Expression of Interest (EOI) is directory, not mandatory. In exceptional cases, withdrawal may also be permitted after EOI is issued, provided 90% of the Committee of Creditors (CoC) agree to the withdrawal.

Q53: "Corporate Insolvency Resolution Process (CIRP) shall be mandatorily completed within 330 days". Comment. (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

OR

Corporate Insolvency Resolution Process (CIRP) against XYZ Ltd. was initiated on application by its Financial Creditors on September 21, 2019 but the process was not completed within the time limit prescribed in terms of Section 12(1) of the Insolvency and Bankruptcy Code,

2016. Before completion of CIRP timeline, the Committee of Creditors in its meeting held on January 31, 2020, passed resolution with 60 percent voting share in favour of a proposal seeking extension for a period of 60 days. Whether Resolution Professional can file application seeking extension of CIRP on the basis of voting results so obtained? Give reasons with the help of legal provisions. (5 marks)

PAST YEAR QUESTION JUNE 2023

OR

Corporate Insolvency Resolution Process (CIRP) against A Ltd. was initiated on application by its financial creditors but the process was not completed within the time limit prescribed in terms of Section 12(1) of the Insolvency and Bankruptcy Code, 2016 (IBC). Before completion of CIRP timeline, Committee of Creditors in its meeting voted at 70 per cent voting share in favour of a proposal to seek extension for a period of 60 days. Can the Resolution Professional file application seeking extension of CIRP on the basis of voting results so obtained? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: The preamble to the Insolvency and Bankruptcy Code, 2016 (IBC) gives a thrust to provide an effective legal framework for timely resolution of insolvency and bankruptcy. Hence, Section 12 of IBC lays down a time limit for completion of insolvency resolution process.

As per Section 12 (1) of IBC, normally any insolvency resolution process needs to be completed within one hundred and eighty days from the date of commencement of Corporate Insolvency Resolution Process (CIRP)

However, as expected no one and even legislation can bind the time. Keeping this in view Section 12 (2) of IBC enables the resolution professional to seek extension after obtaining instructions by a resolution passed at a meeting of the Committee of Creditors by a vote of sixty-six per cent of the voting share.

Section 12 (3) of IBC enables the Adjudicating Authority to consider such application to grant extension of CIRP duration for further maximum ninety days. It is provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

It is further provided that the CIRP shall mandatorily be completed within three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Though, the word 'mandatorily' has been struck down by the Court in the decision in Committee of Creditors of Essar Steel India Limited, Supreme Court has only balanced the interest of all concerned, by permitting an enlargement of the time, only in those cases, where the delay occurs not on account of the fault of the players concerned and it is based on the principle of *actus curiae neminem gravabit*, which means that the act of Court shall prejudice no one. The Court has not undermined the timeline fixed by the Legislature and, in fact, it has

underlined the importance of conforming to the time limit. Speed, indeed, continues to be of the essence of the Code.

Alternate Answer,

Section 12(1) of the Insolvency and Bankruptcy Code provides that subject to sub-section (2), the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. Section 12(2) states that the resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 1 [sixty-six] per cent. of the voting shares.

Section 12(3) stipulates that on receipt of an application under sub-section (2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

In view of the above legal provisions, there is a resolution by Committee of Creditors with 60% voting shares which is less than minimum 66% voting share as required and hence the Resolution Professional can not file application for extension.

Alternate Answer,

(i) Section 12 (1) of the Insolvency and Bankruptcy Code, 2016 (IBC) stipulates that the Corporate Insolvency Resolution Process (CIRP) must be completed within 180 days of the initiation.

(ii) In the extreme circumstances if CIRP is not completed the Resolution Professional (RP) shall file an application to Adjudicating Authority for extension of time, only when instructed by the Committee of Creditors resolve with 66% voting shares.

(iii) Section 12(3) provides that on receipt of an application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days: Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once.

Provided further that the Corporate Insolvency Resolution Process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including

any extension of the period of corporate insolvency resolution process granted and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

(iv) In the given case, there is a resolution by the Committee of Creditors with 70% voting share and hence the RP can file application but for extension of only 60 days as resolved.

On the application, the Adjudicating Authority will grant extension only when it is satisfied, in other words the application need to be drafted with cogent reason and mere annexing the resolution is not sufficient.

Q54: Committee of Creditors of ABC Limited undergoing CIRP have approved a Resolution Plan with 75% vote. The Resolution Plan has been presented to NCLT for its approval thereof. However, an Operational Creditor (OC) raised objection on that provision for repayment of Financial Creditor under resolution plan has ignored the interests of OCs and thus not viable. In the light of judicial pronouncement/(s), discuss whether NCLT can disapprove a Resolution Plan on grounds of lack of viability and question on the commercial wisdom of the Committee of Creditors. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Hon'ble Apex Court in the case of *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta & Ors*, while upholding the constitutional validity of the Code made, inter alia, important ruling with regard to the role of the Committee of Creditor in the CIRP process. It had emphasized the primacy of the commercial wisdom of the committee of Creditors in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility and viability" of the resolution plan, which takes into account "all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case-to-case basis.

Further, in the case of *Kalparaj Dharamshi and another vs Kotak Investment Advisors Ltd and another*, the Supreme Court observed that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, restructuring of debt, etc., are required to be taken by the Committee of the Financial Creditors. The Apex Court further observed that it has been provided, that the choice of the solution to keep the entity as a going concern will be voted upon by the Committee and there are no constraints on the proposals that the resolution professional can present to the Committee. It was held that the NCLT or the NCLAT cannot interfere with the commercial wisdom of the Committee of Creditors, except within the limited scope under Sections 30 and 31 of the Code. It was further held that the commercial wisdom of the Committee has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. The Court further held that there is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan.

They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. It was further held that the opinion expressed by the Committee after due deliberations in the meetings through voting, as per voting shares, is a collective business decision.

In view of the above, NCLT cannot reject a Resolution Plan on the basis of viability thus questioning the commercial wisdom of the Committee of Creditors as long as the Resolution Plan is within the scope of section 30 and 31 of the Insolvency & Bankruptcy Code.

Q55: Whether National Company Law Tribunal or National Company Law Appellate Tribunal has a right to interfere with the decision of Committee of Creditors (CoC). Discuss in view of some decided case law. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: The Insolvency and Bankruptcy Code, 2016 has provided the Committee of Creditors (CoC) with exclusive access to negotiations along with the ultimate authority to deal and finalise the business and commercial decisions. Thereby the Committee of Creditors is also ended with the mammoth responsibility of evaluating resolution plans and thereafter voting and approving the best resolution plan. Commercial Wisdom of the CoC has been held to be sacrosanct by various judicial precedents.

In the case of *'Kalparaj Dharamshi and another vs. Kotak Investment Advisors Ltd. And mother*, the Apex Court observed that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, restructuring of debt etc., are required to be taken by the Committee of the Financial Creditors. The Apex Court further observed that it has been provided, that the choice of the resolution to keep the entity as a going concern will be voted upon by the Committee and there are no constraints on the proposals that the resolution professional can present to the Committee. It was held that the NCLT or the NCLAT cannot interfere with the commercial wisdom of the Committee of Creditors, except within the limited scope under section 30 and 31 of the Code.

It was further held that the commercial wisdom of the Committee has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. The court further held that there is an intrinsic assumption that the financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan.

In another notable judgement, the Hon'ble Supreme court in the matter of *K. Sashidhar vs. Indian Overseas Bank* curtailed the jurisdiction of the NCLT by observing that the NCLT has no jurisdiction and authority to analyse or evaluate the commercial decision of the Committee of Creditors and to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. The Hon'ble Supreme Court in *M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder* had disregarded the technicality of noncompliance of non-publication of Form G and instead assigned primacy to the commercial wisdom of the CoC. Hence, based on the above, NCLT or NCLAT do not have a right to interfere with the decision of CoC.

Q56: “Resolut on Plan needs approval of not only the Commit ee of Creditors but also by the Adjudicat ng Authority to make it legally binding.” Comment the statement briefly detailing the law enabling Adjudicat ng Authority to approve the Plan. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: At f rst instance the Resolut on Plan is approved by the Commit ee of Creditors with a Vot ng share of not less than sixty six percent as per Sect on 30 (4) of the Insolvency & Bankruptcy Code, 2016 (IBC). Af er approval, the Resolut on Applicant shall make an Applicat on to the Adjudicat ng Authority in terms of Sect on 30 (6) of IBC.

According to Sect on 31 of the IBC, If the Adjudicat ng Authority is sat sf ed that the resolut on plan as approved by the commit ee of creditors under sect on 30(4) meets the requirements as referred to in sect on 30(2), it shall by order approve the resolut on plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the t me being in force, such as authorit es to whom statutory dues are owed, guarantors and other stakeholders involved in the resolut on plan. However, the Adjudicat ng Authority shall, before passing an order for approval of resolut on plan, sat sfy that the resolut on plan has provisions for its ef ect ve implementat on.

Where the Adjudicat ng Authority is sat sf ed that the resolut on plan does not conf rm to the requirements, it may, by an order, reject the resolut on plan.

Q57: Dist nguish between Insolvency Commencement Date and Init at on of CIRP cit ng relevant case law(s). (3 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Hon’ble Supreme Court in the case of Ramesh Kymal vs. M/s Siemens Gamesa Renewable Power Pvt Ltd judgement dated February 9, 2021 observed that the date of the init at on of the CIRP is the date on which a f nancial creditor, operat onal creditor or corporate applicant makes an applicat on to the adjudicat ng authority for init at ng the process.

On the other hand, the insolvency commencement date is the date of admission of the applicat on. This dist nct on is also evident from the provisions of sub-sect on (6) of Sect on 7, sub-sect on (6) of Sect on 9 and sub-sect on (5) of Sect on 10. Sect on 7 deals with the init at on of the CIRP by a f nancial creditor; Sect on 8 provides for the insolvency resolut on by an operat onal creditor; Sect on 9 provides for the applicat on for init at on of the CIRP by an operat onal creditor; and Sect on 10 provides for the init at on of the CIRP by a corporate applicant.

Q58: What does Regulat on 40A of the CIRP Regulat ons, 2016 provide in relat on to the t melines under the Corporate Insolvency Resolut on Process?

Answer: Regulat on 40A provides a model t meline in tabular form for complet ng the Corporate Insolvency Resolut on Process (CIRP) within 180 days, assuming the interim resolut on professional is appointed on the commencement date.

[Sect on / Regulat on]	Descript on of Act vity	Norm	Latest Timeline
Sect on 16(1)	Commencement of CIRP and appointment of IRP		T
Regulat on 6(1)	Public announcement invit ng claims	Within 3 Days of Appointment of IRP	T+3
Sect on 15(1)(c) / Regulat ons 6(2)(c) and 12 (1)	Submission of claims	For 14 Days from Appointment of IRP	T+14
Regulat on 12(2)	Submission of claims	Up to 90th day of Commencement	T+90
Regulat on 13(1)	Verif cat on of claims received under regulat on 12(1)	Within 7 days from the receipt of the claim	T+21
	Verif cat on of claims received under regulat on 12(2)		T+97
Sect on 21(6A) (b) / Regulat on 16A	Applicat on for appointment of AR	Within 2 days from verif cat on of claims received under regulat on 12(1)	T+23
Regulat on 17(1)	Report cert fying const tut on of CoC		T+23
Sect on 22(1) / Regulat on 19(2)	1st meet ng of the CoC	Within 7 days of f ling of the report cert fying const tut on of the CoC, but with f ve days' not ce	T+30
Sect on 22(2)	Resolut on to appoint RP by the CoC	In the f rst meet ng of the CoC	T+30
Sect on 16(5)	Appointment of RP	On approval by the AA	
Regulat on 17(3)	IRP performs the funct ons of RP t ll the RP is appointed.	If RP is not appointed by 40th day of commencement	T+40
Regulat on 27	Appointment of valuer	Within 7 days of appointment of RP, but not later than 47th day of commencement	T+47
Sect on 12(A) / Regulat on 30A	Submission of applicat on for withdrawal of applicat on admit ed	Before issue of EoI	W

	CoC to dispose of the application	Within 7 days of its receipt or 7 days of constitution of CoC, whichever is later.	W+7
	Filing application of withdrawal, if approved by CoC with 90% majority voting, by RP to AA	Within 3 days of approval by CoC	W+10
Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of the commencement	T+75
	RP to make a determination on preferential and other transactions	Within 115 days of commencement	T+115
	RP to file applications to AA for appropriate relief	Within 130 days of commencement	T+130
Regulation 36 (1)	Submission of IM to CoC	Within 95 days of commencement	T+95
Regulation 36A	Publish Form G	Within 60 days of commencement	T+60
	Invitation of EoI		
	Submission of EoI	At least 15 days from issue of EoI (Assume 15 days)	T+75
	Provisional List of RAs by RP	Within 10 days from the last day of receipt of EoI	T+85
	Submission of objections to provisional list	For 5 days from the date of provisional list	T+90
	Final List of RAs by RP	Within 10 days of the receipt of objections	T+100
Regulation 36B	Issue of RFRP, including Evaluation Matrix and IM	Within 5 days of the issue of the provisional list	T+105
	Receipt of Resolution Plans	At least 30 days from issue of RFRP (Assume 30 days)	T+135
Regulation 39(4)	Submission of CoC approved Resolution Plan to AA	As soon as approved by the CoC	T+165
Section 31(1)	Approval of resolution plan by AA		T+180
Terms used in Table: RP –Resolution Professional AA-Adjudicating Authority			

CoC-Committee of Creditors
 IRP-Interim Resolution Professional
 IM- Information Memorandum
 RAs- Resolution Applicants
 EOI-Expression of Interest
 RFRP- Request For Resolution Plan
 IM- Information Memorandum
 AR-Authorised Representative
 CIRP-Corporate Insolvency Resolution Process.

Q59: Explain the process of initiation and commencement of the Corporate Insolvency Resolution Process (CIRP) as per the IBC.

Answer: The initiation and commencement of the Corporate Insolvency Resolution Process (CIRP) involves the following steps:

1. Application to Adjudicating Authority (AA):

CIRP can be initiated by Operational Creditor, Financial Creditor and Corporate Applicant. The application is submitted to the Adjudicating Authority (AA), which is the National Company Law Tribunal (NCLT).

2. Decision by AA (within 14 days):

The AA must decide on the application within 14 days. It may Admit the application, or Reject the application.

3. If Application is Admitted – CIRP Commencement Date (T):

Once the application is admitted, the CIRP officially commences (this date is known as T).

The following actions take place immediately:

- Appointment of Interim Resolution Professional (IRP)
- Declaration of moratorium (a temporary halt on legal proceedings and asset transfers)
- Public announcement of the CIRP within 3 days by the AA

Q60: Explain how control shifts during the Corporate Insolvency Resolution Process (CIRP) under the IBC and list the actions taken by the Adjudicating Authority under Section 13 of the IBC, 2016 after admitting a CIRP application.

Answer: Under the Insolvency and Bankruptcy Code (IBC), 2016, the regime for corporate debtors undergoing the Corporate Insolvency Resolution Process (CIRP) has shifted from a “debtor in possession” model to a “creditor in control” model.

- From the Insolvency Commencement Date (ICD), the powers of the Board of Directors or partners of the corporate debtor are suspended.
- These powers, along with the management of the corporate debtor, are exercised by the Interim Resolution Professional (IRP), and later by the Resolution Professional (RP).
- The IRP runs the company as a going concern, and this continues until the Adjudicating Authority (AA) (i.e., NCLT) passes an order for either:
 - Approval of the resolution plan, or

○ Liquidation of the corporate debtor.

The IRP also constitutes the Committee of Creditors (CoC) based on claims received from creditors after the public announcement. The CoC can either confirm the IRP as the RP or replace him/her with another insolvency professional.

Additionally, from the ICD:

- A moratorium is declared over the corporate debtor and its assets for the entire CIRP period.
- The IRP/RP functions under the supervision of the Committee of Creditors.

As per Section 13 of the IBC, 2016:

Once an application under Section 7, 9, or 10 is admitted, the Adjudicating Authority (AA) shall pass an order to:

1. Declare a moratorium under Section 14;
2. Cause a public announcement of the CIRP and call for submission of claims under Section 15;
3. Appoint an Interim Resolution Professional as per the Code.

The public announcement must be made immediately after the appointment of the Interim Resolution Professional.

Q61: What is the significance of the moratorium during the Corporate Insolvency Resolution Process (CIRP), and what did the Bankruptcy Law Reforms Committee recommend in this regard?

Answer: The moratorium during the Corporate Insolvency Resolution Process (CIRP) is a crucial provision introduced under the Insolvency and Bankruptcy Code (IBC) based on the recommendations of the Bankruptcy Law Reforms Committee (BLRC). It is designed to provide a “calm period” for effective resolution of the corporate debtor.

Significance of Moratorium:

- It ensures that the corporate debtor is not subjected to additional legal or financial stress during the resolution process.
- It preserves the value of the business and protects the interests of all stakeholders.
- It enables the insolvency professional to manage and operate the corporate debtor efficiently, free from the pressure of ongoing recovery actions.

Recommendations of the Bankruptcy Law Reforms Committee:

The BLRC proposed two phases of resolution:

1. Calm Period:

- A dedicated period during which the viability of the corporate debtor is evaluated.
- A moratorium is imposed on all enforcement and recovery actions to allow uninterrupted functioning of the business.
- This period is meant to preserve creditors' rights while enabling a resolution professional to find a sustainable solution.

2. Liquidation (Last Resort):

- If no viable resolution plan emerges during the calm period, liquidation may be initiated.
- The focus should be on maximizing the value of the debtor's assets.

- The Committee of Creditors and the Resolution Professional must work together to balance stakeholder interests before moving to liquidation.

Q62: Discuss the effect of moratorium under sect on 14 of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION JUNE 2023

OR

“Initiation of Corporate Insolvency Resolution Process puts brake on any other legal Proceedings against Corporate Debtor (CD) undergoing CIRP during the process.” Offer your views on the statement. (5 marks)

PAST YEAR QUESTION AUGUST 2021

OR

Explain the term “Insolvency Commencement Date” as defined under sect on 5(2) of The Insolvency and Bankruptcy Code, 2016. What are the acts prohibited on the insolvency commencement date as per provisions of the sect on 14(1) of the Code? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Sect on 14(1) of the Insolvency & Bankruptcy Code provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

- the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
- transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- any act on to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any act on under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Sect on 14(2) states that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

As per Sect on 14(2A) of the Act, where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

Sect on 14 (3) provides that the provisions of sub-section (1) shall not apply to –

- (a) such transaction, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;
- (b) a surety in a contract of guarantee to a corporate debtor.

According to Section 14(4), the order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

Alternate Answer,

Section 14 of the Insolvency and Bankruptcy Code, 2016 empowers the adjudicating authority to declare moratorium while passing the orders for initiating Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor (CD).

On the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. The effect of moratorium are deferred till conclusion of CIRP.

Thus, the statement is true to the extent stated above.

Alternate Answer,

According to Section 5(12) of the Insolvency & Bankruptcy Code, "Insolvency Commencement Date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.

Section 14(1) of the Insolvency & Bankruptcy Code provides for moratorium. It provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority,
- (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein,
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (d) the

recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

Q63: Upon commencement of the Corporate Insolvency Resolution Process (CIRP) in ABC Ltd. under IBC, a complaint was found to be pending under section 138 of the Negotiable Instruments Act, 1881 against Mr. X, Chairman and Managing Director of ABC Ltd. In the matter, NCLT also approves the resolution plan with a change in management and control in the company. Thereupon, Mr. X sought to quash the prosecution under section 138 of the Negotiable Instruments Act, 1938 in terms of the protection available to him under Section 14 of the IBC. Discuss the possibility of getting the aforesaid prosecution quashed, citing relevant case laws under IBC. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Section 14 of the Insolvency & Bankruptcy Code details the moratorium protection given to the corporate debtor. The entire period of corporate insolvency resolution process is covered under this moratorium, during which all suits, legal proceedings, and recovery actions against the corporate debtor are held in abeyance to give time to the corporate debtor to resolve its status.

However, the proceedings in moratorium do not include criminal prosecution. In *Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other* [Criminal Original Petition No. 34996 of 2019], the corporate debtor underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the corporate debtor was approved with a change in management and control. The Managing Director (MD) of the erstwhile corporate debtor sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include criminal prosecution.

In *Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited* [(2018) 16 SCC 94], the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the corporate debtor is non-est (does not exist) in law.

The Hon'ble Supreme Court in the case of *P. Mohanraj & Ors vs Shah Brothers Ispat Pvt. Ltd.* [AIR 2021 SC 1308] was concerned with the question whether the institution or continuation of a proceeding under Section 138 of Negotiable Instruments Act, 1881 for dishonor of cheque can be said to be covered by the moratorium provision under Section 14 of the IBC.

- The Supreme Court after exhaustively dealing with various provisions of the IBC and the judicial precedents, authoritatively held that the proceedings under Section 138 of NI Act against the corporate debtor were covered by Section 14(1)(a) of the IBC.

- In essence, the Supreme Court held that during the subsistence of the moratorium period as envisaged under Section 14 of the IBC, the proceedings for cheque dishonor, which are quasi-criminal in nature, would be liable to be stayed. One of the reasons for such a finding was that in a proceeding for dishonor of cheques, the corporate debtor, if convicted, may be directed to pay compensation which can amount to twice the amount of the cheque which has bounced.

- Accordingly, payment of such compensation would in fact lead to depletion of the assets of the corporate debtor thereby directly impacting the corporate insolvency resolution process.

- One clarification provided by the Supreme Court in the above case was that though the moratorium would be applicable to the corporate debtor but that would not absolve the directors/persons in charge of and responsible for the conduct of the business of the corporate debtor from being prosecuted for the offence of dishonor of cheque.

The Hon'ble Supreme Court in the matter of **Ajay Kumar Radheyshyam Goenka vs tourism Finance Corporation of India [MANU/SC/0244/2023]** was concerned with a case where the managing director of a company (for which the resolution plan was approved by the NCLT) sought to seek his discharge from the proceedings under section 138 of the Negotiable Instruments Act.

- The seminal question of law framed by the Supreme Court was whether after the approval of the resolution plan of the corporate debtor, the managing director who signed the cheque, would stand discharged from the penal liability under Section 138 of the NI Act.

- The Supreme Court answered the question in the negative and held that the person who signed the cheque would continue to remain liable for the offence.

Another pertinent observation made by the Court was as under-

"...16.. In fact, a bare reading of Section 14 of IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings, which is the nature of proceedings under Section 138 of the N.I. Act..."

In view of the above, Mr. X will not be able to get the prosecution quashed under Section 14 of IBC.

Q64: Define "Essential Supplies" under Regulation 32 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. How did the NCLAT interpret the applicability of the moratorium to current charges for essential services in the case of *Dakshin Gujarat Viji Company Ltd. vs. ABG Shipyard Ltd.*?

Answer: As per Regulation 32, essential supplies include:

1. Electricity
2. Water
3. Telecommunication services
4. Information technology services

These are considered essential only if not used as direct inputs to the corporate debtor's output.

Example: Water is essential for drinking/sanitization, but not for generating hydro-electricity.

Judgment in Dakshin Gujarat VII Company Ltd. vs. ABG Shipyard Ltd.:

The NCLAT held that:

- Payment of current charges for essential services like water and electricity is not barred by the moratorium under Section 14 of the IBC.
- These services are not to be provided free of cost.
- The Resolution Professional (RP) must pay for these services, and the amount shall be treated as part of the CIRP cost.

Q65: 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)

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Answer: 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.

Q66: What are the punishments for contravention of the moratorium under Section 74(1) and 74(2) of the Insolvency and Bankruptcy Code, 2016?

Answer:

Sect on of the Code	Who Violates	Who is Liable for Punishment	Punishment
Sect on 74(1)	Corporate debtor or any of its officers	Of cer who knowingly or wilfully committed, authorised, or permitted the contravention	Imprisonment: 3 to 5 years Fine: ₹1 lakh to ₹3 lakh, or both
Sect on 74(2)	Any creditor	Any person who knowingly and wilfully authorised or permitted such contravention	Imprisonment: 1 to 5 years Fine: ₹1 lakh to ₹1 crore, or both

Q67: What are the rules regarding filing of application and application fee under Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016?

Answer: Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 lays down the following provisions for filing an application to initiate Corporate Insolvency Resolution Process (CIRP):

- Procedure for Filing:** Applications under Sections 7(1), 9(1), or 10(1) of the Code shall be filed before the Adjudicating Authority as per Rules 20, 21, 22, 23, 24, and 26 of Part III of the NCLT Rules, 2016.
- Disclosure of Winding-Up Petition:** The applicant must notify the Adjudicating Authority **immediately** if they become aware of any winding-up petition filed against the corporate debtor.
- Application Fee:** The application must be accompanied by a fee as specified in the Schedule.
- Mode of Filing Documents:**
Documents shall be filed in electronic form when the facility is made available by the Adjudicating Authority.
Until then, bulky documents may be submitted in scanned, legible PDF format in a CD or USB drive acceptable to the Authority.

Q68: Explain the procedure for filing a petition before the National Company Law Tribunal (NCLT) as per Rule 20 and Rule 21 of the NCLT Rules, 2016.

Answer: The procedure for filing a petition with the NCLT is governed by Rule 20 and Rule 21 of the NCLT Rules, 2016. The key points are as follows:

A. Rule 20 – Procedure for Filing Petition:

- Language and Format:**
 - Petition must be in English; if in another Indian language, an English translation must be attached.
 - Typed or printed on one side of standard paper with double spacing.
 - Margins: Top – 4 cm, Right – 2.5 cm, Left – 5 cm.

- The petition must be duly paginated, indexed, and stitched in paper book form.

2. Cause Title:

- Must state "Before the National Company Law Tribunal".
- Mention the Bench to which it is addressed and the order/proceedings it challenges.

3. Content Structure:

- Divide into numbered paragraphs; each paragraph should state a distinct fact, allegation, or point.

4. Date Format:

- If Saka or other calendars are used, corresponding Gregorian calendar dates must also be given.

5. Party Details:

- Mention full name, parentage, age, and address of each party at the beginning.
- If suing in a representative capacity, this should be clearly stated.

6. Numbering of Parties:

- Parties must be numbered consecutively, each on a separate line.
- If a party dies, legal heirs are listed with sub-numbers.
- New parties are added with new consecutive numbers under the relevant category.

7. Legal Provision:

- The relevant legal provision under which the petition is filed must be stated immediately after the cause title.

B. Rule 21 – Particulars in Address for Service:

The address for service must include:

1. Street Details: Road, street, lane, ward, door number.
2. Location: Name of town or village.
3. Postal Info: Post office, postal district, and PIN code.
4. Contact Details: Mobile number, fax, and valid email address.

Q69: What does Rule 22 of the NCLT Rules, 2016 state about alterations in a petition or application?

Answer: Rule 22 of the NCLT Rules, 2016 states that:

Every interlineation, eraser, correction, or deletion in any appeal, petition, application, or document must be initialed by the party or their authorised representative who is presenting it.

This ensures authenticity and avoids tampering with the documents submitted to the Tribunal.

Q70: What are the procedural requirements for filing a petition or application with the NCLT under Rule 23?

Answer: According to Rule 23 of the NCLT Rules, 2016, the procedure for filing a petition is as follows:

1. Triplicate Filing: Every petition, application, caveat, or appeal must be filed in triplicate by the concerned party or their authorised representative/advocate.

2. **Certified Documents:** Documents should be certified by the authorised representative or advocate and verified from the originals.
3. **Index & Fee:** An index in triplicate must be filed with details of documents and fee paid.
4. **Copies for Opposite Party:** Sufficient copies must be filed for service to the opposite party.
5. **Advance Serving:** In pending matters, applications must be served in advance to the opposite party or their representative.
6. **Processing Fee & Envelopes:** The processing fee, notice forms, and required envelopes must be filed with the memorandum of appeal.

Q71: What are the requirements regarding the number of copies to be filed and the endorsement/verification of petitions under Rules 24 and 26 of the NCLT Rules, 2016?

Answer: Rule 24 – Number of Copies to be Filed:

1. The petitioner/appellant/respondent must file three authenticated copies of the appeal/petition/application/counter.
2. One copy must be delivered to each of the opposite parties.

Rule 26 – Endorsement and Verification:

1. The name and signature of the authorised representative must appear at the bottom (foot) of every petition or pleading.
2. Every petition or appeal must be signed and verified by the concerned party as per the prescribed rules.

CASE LAWS:

Q72: What were the key observations of the Supreme Court in the Swiss Ribbons case [(2019) 4 SCC 17] regarding the objective of the Insolvency and Bankruptcy Code (IBC)?

Answer: Judicial Support – Swiss Ribbons Case [(2019) 4 SCC 17]:

In this case, the Supreme Court upheld the constitutionality of the IBC, confirming that the primary objective of the Code is resolution and reorganization, not liquidation.

The Court emphasized that liquidation should be treated as the last resort.

It reaffirmed that timely resolution is crucial to preserving asset value and supporting the credit ecosystem.

Q73: What were the key legal clarifications made by the Supreme Court in the case of Macquarie Bank Ltd. vs. Shilpi Cable Technologies Ltd. [(2018) 2 SCC 674] with respect to operational creditors under the IBC?

Answer: Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd. [(2018) 2 SCC 674]

No Bank Certificate Required: An operational creditor does **not** need to provide a certificate from their financial institution (as per Section 9(3) of the Insolvency and Bankruptcy Code) to initiate the Corporate Insolvency Resolution Process (CIRP). Instead, other documents can be used to prove the debt and default.

Authorized Agent or Lawyer Can Issue Demand Notice: An authorized agent or a lawyer acting on behalf of the operational creditor can issue the demand notice under Section 8(2) of the Insolvency and Bankruptcy Code.

Proposal of Interim Resolution Professional (IRP): Under Section 9(4) of the Insolvency and Bankruptcy Code, the operational creditor may propose an insolvency professional to act as the Interim Resolution Professional (IRP). If no proposal is made, the Adjudicating Authority will appoint an IRP, usually from the panel formed by the Insolvency and Bankruptcy Board of India (IBBI).

Q74: What principles did the Supreme Court lay down in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* [(2018) 1 SCC 353] regarding the admission of applications under Section 9 of the Insolvency and Bankruptcy Code (IBC)?

Answer: In the landmark judgment of *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.* [(2018) 1 SCC 353], the Supreme Court provided clarity on the conditions for admitting applications under Section 9 of the Insolvency and Bankruptcy Code (IBC). The Court emphasized that:

1. **Operational Debt Threshold:** The application must pertain to an operational debt exceeding ₹1 lakh.
2. **Evidence of Debt:** The operational creditor must furnish documentary evidence demonstrating that the debt is due and has not been paid.
3. **Existence of Dispute:** If the corporate debtor issues a notice of dispute under Section 8(2) of the IBC, it must bring to the operational creditor's attention the existence of a dispute or the fact that a suit or arbitration proceeding relating to the dispute is pending between the parties. Importantly, the dispute must predate the receipt of the demand notice.

Definition of 'Dispute': The term 'dispute' under Section 5(6) of the IBC is inclusive and encompasses:

- (a) The existence of the amount of debt.
- (b) The quality of goods or services.
- (c) The breach of a representation or warranty, either directly or indirectly.

If any of these conditions are not satisfied, the application under Section 9 will be rejected by the Adjudicating Authority.

Q75: What is the difference between initiating Corporate Insolvency Resolution Process (CIRP) by a financial creditor and an operational creditor, as laid down by the Supreme Court in *Innovent Industries Ltd. v. ICICI Bank & Another* [(2018) 1 SCC 407]?

Answer: In the landmark judgment of *Innovent Industries Ltd. v. ICICI Bank & Another* [(2018) 1 SCC 407], the Supreme Court clarified the differences between initiating the Corporate Insolvency Resolution Process (CIRP) by a financial creditor and an operational creditor under the Insolvency and Bankruptcy Code (IBC):

1. Initiation by Financial Creditor (Section 7):

- A financial creditor can initiate CIRP under Section 7 of the IBC for a default of a financial debt owed by the corporate debtor to any financial creditor.

- The application is admitted if the Adjudicating Authority is satisfied that a default has occurred, unless the application is incomplete.
- The concept of “default” is broad and includes non-payment of even a part of the debt, irrespective of whether the debt is disputed.

2. Initiated by Operational Creditor (Section 9):

- An operational creditor can initiate CIRP under Section 9 of the IBC if there is an operational debt exceeding ₹1 lakh.
 - The application is admitted if the Adjudicating Authority is satisfied that a default has occurred, and there is no notice of dispute or record of dispute in the information utility.
 - If a notice of dispute is received before the demand notice, the application is inadmissible.
- The Supreme Court emphasized that entrenched managements are no longer allowed to continue in management if they cannot pay their debts, marking a paradigm shift in insolvency law.

Q76: M/s SHIKSHA Pvt. Ltd (Operational Creditor) provided digital classroom services to M/s ABC Pvt Ltd. (Corporate Debtor) between 16th April 2015 and 23rd June, 2020 and accordingly the Operational Creditor raised 219 invoices. In light of the non-payment by Corporate Debtor, the Operational Creditor issued Demand Notice under Section 8 of the IBC, 2016 wherein date of default was mentioned as 16th April 2015 (the date of first invoice) and subsequently initiated proceedings under Section 9 of the IBC, 2016 wherein the date of default was mentioned as 23rd June, 2020 (the date of last invoice). As a company secretary of M/s SHIKSHA Pvt. Ltd. (Operational Creditor) advise whether ground of claim is time barred or not citing relevant case laws. (5 marks)

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Answer: Supreme Court (SC) division bench in the case of *M/s. Next Education India Pvt. Ltd. Vs. M/s. K12 Techno Services Pvt. Ltd* has settled the law regarding the determination of the limitation period where the Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (I&B Code) has been filed on the basis of several invoices. Supreme Court (SC) division bench held that when a petition is filed under Section 9 of the I&B Code based on several invoices wherein some of the invoices are time-barred, the Adjudicating Authority must consider invoices raised at least three years preceding the date of filing of Section 9 petition to determine limitation. The Supreme Court set aside the orders of the NCLT and NCLAT and while considering the starting point of limitation as 12th March 2011 categorically stated that the NCLT should have taken into consideration the subsequent invoices raised up till at least three years preceding the date of the Company Petition rather than considering the starting point of limitation as 12th March 2011.

Earlier, NCLT had dismissed the Company Petition on the ground of the claim being time barred. The NCLAT after lengthy consideration decided that as the section 9 petition emanates from the Demand Notice issued under section 8, considered the date of default shall in the matter be 12th March 2011 which is time barred as the limitation period expired on 12th

March 2014. The said NCLAT order was challenged by way of the present appeal in Supreme Court.

In the given case last date of invoice i.e., 23rd June, 2020 will be considered at least three years preceding date of filing up petition in NCLT for ascertaining limitation period for filing petition.

Q77: Mr. G. (Appellant) filed an application under Section 7 of the IBC, 2016 with the National Company Law Tribunal (NCLT) seeking to initiate the Corporate Insolvency Resolution Process (CIRP) against BW Private Limited. On 26th August, 2022, NCLT dismissed the application. Subsequently, on 2nd September, 2022, the Appellant applied for a certified copy of the NCLT order, which the NCLT's registry received on 5th September, 2022. On September 15, 2022, the certified copy of order was provided to the Appellant. Following this, on 10th October, 2022, the Appellant e-filed an appeal with the National Company Law Appellate Tribunal (NCLAT) against the NCLT order along with an application for condonation of a five-day delay. As a Company Secretary of petitioner company [appellant] advise about the barred issues/ admissibility of appeal before NCLAT. (5 marks)

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Answer: Section 61 of the IBC specifies a 30-day deadline for filing an appeal against an NCLT order, and the NCLAT can only condone a delay of up to 15 days if sufficient cause is shown. Section 61 of the IBC does not require the appellant to wait for the receipt of a certified copy of the order before filing an appeal.

In recently decided case of *Sanket Kumar Agarwal vs. APG Logistics Private Limited (2023)*, Hon'ble Supreme Court of India held that the date of pronouncement of the order and time taken to provide certified copy by the Adjudicating Authority would stand excluded from limitation period for filing an appeal before the National Company Law Appellate Tribunal under Section 61(2) of the Insolvency and Bankruptcy Code, 2016.

It was noted that the appeal was filed through the e-portal on 10 October 2022, which was the 46th day following the NCLT order. The Court relied on Section 12(2) of the Limitation Act, 1963 (Limitation Act). Since the certified copy was received by the Appellant on 15th September 2022, the time taken by the court between 5th September 2022 and 15th September 2022 to provide the certified copy should have been excluded when calculating the limitation under Section 61(2) of the IBC. As a result, the Supreme Court allowed the appeal thereby setting aside the NCLAT's order. Here G [Appellant] can file appeal in NCLAT.

Q78: What did the Supreme Court observe in *Swiss Ribbons Pvt. Ltd. v. Union of India* [(2019) 4 SCC 17] regarding the distinction between financial creditors and operational creditors under the Insolvency and Bankruptcy Code (IBC)?

Answer: In *Swiss Ribbons Pvt. Ltd. v. Union of India* [(2019) 4 SCC 17], the Supreme Court emphasized the need to distinguish between financial creditors and operational creditors under the Insolvency and Bankruptcy Code (IBC). The Court noted that:

1. **Definition of Financial Debt:** A financial debt is a debt along with any interest disbursed

against the consideration for the time value of money. It includes money borrowed or raised in any manner prescribed in Section 5(8) of the IBC or otherwise, as Section 5(8) provides an inclusive definition.

2. Definition of Operational Debt: An operational debt includes a claim for the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law, and payable to the government or any local authority.

3. Distinction Between Creditors: The Court observed that financial creditors, particularly banks and financial institutions, are typically secured creditors, whereas most operational creditors are unsecured. Financial creditors generally lend finance on a term loan or for working capital, whereas contracts with operational creditors relate to the supply of goods and services in the operation of the business.

4. Nature of Debts: Financial contracts generally involve large sums of money, whereas the dues of operational creditors are generally lower. Operational debts are also recurring in nature, and the possibility of genuine disputes in the case of operational debts is much higher compared to financial debts.

5. Role in Corporate Restructuring: Financial creditors are involved with assessing the viability of the corporate debtor from the very beginning. They can engage in restructuring the loan and reorganizing the corporate debtor's business when there is financial stress. Operational creditors do not have such involvement.

The Court concluded that distinguishing between financial and operational creditors is essential to preserve the corporate debtor as a going concern while ensuring maximum recovery for all creditors, aligning with the objectives of the IBC.

Q79: What did the NCLAT hold regarding the scope of discretion available to the Adjudicating Authority in admitting or rejecting a Section 10 application in the case of *M/s. Unigreen Global Private Limited Vs. Punjab National Bank and Others*?

Answer: In *M/s. Unigreen Global Private Limited Vs. Punjab National Bank and Others [Company Appeal (AT) (Insolvency) No. 81 of 2017]*, the NCLAT examined the scope of discretion available to an Adjudicating Authority in admitting or rejecting a section 10 application. The NCLAT held that the Adjudicating Authority must admit an application filed by a Corporate Debtor to initiate a CIRP if it is satisfied that:

- the default has occurred
- the application is complete, and
- the Corporate Debtor is not barred under section 11 of the IBC.

Facts unrelated to or beyond the requirement of the IBC or the forms prescribed cannot amount to suppression of facts and cannot be looked at by the AA for denying admission.

Q80: What observation did the Supreme Court make regarding Regulation 40A of the CIRP Regulations in the *ArcelorMittal India Pvt. Ltd. vs. Satish Kumar Gupta* case [2018 (13) SCALE]?

Answer: In *ArcelorMittal India Private Limited vs. Satish Kumar Gupta and Others* [2018 (13) SCALE], the Supreme Court referred to regulation 40A of the CIRP Regulations and observed that “it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible.”

Q81: What were the key issues and findings of the NCLAT in the case *Nirej Vadakkedathu Paul & Ors. vs. Sunstar Hotels & Estate Pvt. Ltd. & McDowell Holdings Ltd.* (Company Appeal (AT)(CH)(Ins) No. 142/2022)?

Answer: Issues before the NCLAT:

1. Whether shareholders of a corporate debtor have *locus standi* in a Section 7 IBC application filed by a financial creditor?
2. Whether shareholders can settle the debt of a financial creditor to prevent initiation or continuation of CIRP?

NCLAT's Key Findings:

- **No Locus of Shareholders:** Once a Section 7 application is admitted and CIRP is initiated, shareholders have no legal standing (*locus*) to object, even if they are foreign portfolio investors.
- **Debt and Default are Sufficient:** Once debt and default are established before the Adjudicating Authority (NCLT), shareholders cannot challenge the initiation of CIRP.
- **No Right to Derail CIRP:** Shareholders cannot derail the CIRP by claiming to be aggrieved.
- **Third-Party Payment Not Permitted Without Consent:** A third party cannot settle the debt of a financial creditor without the corporate debtor's consent and against the creditor's opposition.
- **No Directions in Appeal under Section 61:** In an appeal under Section 61 of the IBC, the NCLAT cannot direct a third party to perform any act to facilitate settlement.

Supporting Precedent:

- Relied on *Anant Kajare vs. Eknath Aher* (CA (AT)(Insolvency) No. 296 of 2017): An investor cannot be treated as an aggrieved person for preferring an appeal, though they may file a claim with the Resolution Professional.

Q82: Summarize the facts and key legal issue in the case of *Sabarmat Gas Limited vs. Shah Alloys Limited*, Civil Appeal No. 1669 of 2020, decided by the Supreme Court on 4th January, 2023.

Answer: Facts of the Case:

• **Parties Involved:**

- *Appellant:* Sabarmat Gas Ltd. (Operational Creditor)
- *Respondent:* Shah Alloys Ltd. (Corporate Debtor)

• **Background:**

- The respondent entered into a **Gas Sales Agreement (GSA)** with the appellant for the commercial supply of natural gas.
- The respondent **defaulted in payment**, making only partial and irregular payments.

○ During this period, the respondent also approached **BIFR** under **SICA**, claiming it was a sick unit.

• **IBC Proceedings:**

○ After the **enactment of the IBC**, the appellant issued a **demand notice under Sect on 8** for recovery of **operational debt**.

○ The respondent replied denying liability, claiming **short all in gas supply** led to losses and disconnection, thereby refusing to pay.

○ The appellant then filed a **Sect on 9 application under IBC** before the NCLT for initiation of **Corporate Insolvency Resolution Process (CIRP)** against the respondent.

Key Legal Issue:

• Whether a dispute raised by the corporate debtor in response to a Sect on 8 demand notice (regarding alleged deficiency in gas supply) is a **pre-existing dispute**, sufficient to **reject initiation of CIRP** under Sect on 9 of the IBC.

Q83: XYZ Limited, was undergoing a Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC), 2016. While the company was in CIRP, the Bombay Stock Exchange (BSE) sought to take a legal action against the company for non-compliance with the listing regulations. BSE wanted to recover the penalty amount from the Company failing which, the BSE warned the company of potential delisting and also suspending the trading of shares of XYZ Limited.

As the Resolution Professional (RP) of the XYZ limited (the Corporate Debtor), discuss, citing a relevant case law and provisions of the Insolvency and Bankruptcy Code (IBC), 2016, whether the BSE, as a stock exchange, could exercise its regulatory powers against a company undergoing insolvency proceedings? How can the Bombay Stock Exchange recover the amount of penalty from XYZ Limited? (5 marks)

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Answer: Moratorium also applies on the Regulatory Authorities: In the matter of *Ms. Anju Agarwal Resolution Professional for Shree Bhawani Paper Mills Ltd. Vs Bombay Stock 19 Exchange & Ors.*, the NCLAT observed that Sect on 28A of the SEBI Act, 1992 being inconsistent with Sect on 14 of IBC, it held that Sect on 14 of IBC will prevail over Sect on 28A of the SEBI Act, 1992 and SEBI cannot recover any amount including the penalty from the Corporate Debtor (CD). The 'Bombay Stock Exchange' cannot suspend trading of shares of CD for the same reason.

Penalty imposed by Regulator may be claimed as Operational Creditor but cannot be recovered during the Resolution Process: In the matter of *Maharashtra Seamless Ltd. Vs. Shri Padmanabhan Venkatesh & Ors.*, the NCLAT held that the statutory dues i.e. the dues to Central Government or the State Government arising under any law for the time being in force and payable come within the meaning of 'Operational Debt'.

If penalty is imposed or amount is payable to the 'Securities Exchange Board of India' in such case, it may claim as an 'Operational Creditor' but cannot recover the same during the 'Resolution Process'.

Thus, the Bombay Stock exchange cannot recover the amount of penalty against a company undergoing insolvency proceedings.

CASE LAWS RELATED TO SECTION 14(1)(A)

- In **Alchemist Asset Reconstruct on Company Limited Vs. Hotel Gaudavan Private Limited [(2018) 16 SCC 94]**, the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the corporate debtor is non-est (does not exist) in law.
- Powers of High Court under Article 226 and of Supreme Court under Article 32 of the Constitution are not affected by Moratorium: In **Canara Bank Vs. Deccan Chronicle Holdings Limited [Company Appeal (AT) (Insolvency) No. 147 of 2017]**, the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.
- **Proceeding in moratorium do not include prosecution:** In **Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other [Criminal Original Petition No. 34996 of 2019]**, the corporate debtor underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the corporate debtor was approved with a change in management and control. The Managing Director (MD) of the erstwhile corporate debtor sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include prosecution.
- **Moratorium does not apply to criminal proceedings:** In the matter of **Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement [Company Appeal (AT) (Insolvency) No. 493 of 2018]**, the Resolution Professional (RP) had sought de-attachment of properties attached with the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002, a considerable time prior to the initiation of corporate insolvency resolution process. The NCLAT had held that section 14 of the IBC is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having the essence of crime or crime proceedings.
- The Supreme Court also upheld the order passed by the NCLAT **[Varrsana Ispat Limited Vs. Deputy Director, Directorate of Enforcement, Civil Appeal No. 5546 of 2019]**. While the bar under IBC is automatic, practically the IRPs/RPs may need to file an application before various forums where proceedings against the corporate debtor is continuing, bringing to their attention on the commencement of CIRP and the moratorium declared by the AA under section 14 of the IBC, and requesting the relevant forums to pass an order staying proceedings.

CASE LAWS RELATED TO SECTION 14(1)(D)

In the matter of **Rajendra K. Bhuta Vs. Maharashtra Housing and Area Development Authority (MHADA) and 17 Another**, the Supreme Court held that Section 14(1)(d) of the IBC,

when it speaks about recovery of property “occupied”, does not refer to rights or interests created in property but only actual physical occupation of the property:

In **M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka and Others [2019 SCC Online SC 1542]**, one of the issues before the Supreme Court was whether the AA had the power under the IBC to review the order passed by the Government of Karnataka during the moratorium period, rejecting the auto extension of a mining lease granted by it to the Corporate Debtor. The Supreme Court observed, among other things, that the moratorium under section 14 did not impact the right of the government to refuse extension of the lease. It observed that the purpose of section 14 was to preserve the status quo and not to create a new right. Even section 14(1)(d), which prohibits, during the period of moratorium, the recovery of any property by the owner/ lessor will not go to the rescue of the corporate debtor since what is prohibited is only right not to be dispossessed, but not the right to have renewal of the lease of such property. It was further observed that this right not to be dispossessed will have nothing to do with the rights conferred by a mining lease especially on government land. It was noted that what was granted to the Corporate Debtor was not an exclusive possession of the land in question so as to enable the RP to invoke section 14(1)(d) of the IBC.

CHAPTER 16 AS PER ICSI MODULE

ROLE, FUNCTIONS AND DUTIES OF INSOLVENCY PROFESSIONAL, INTERIM RESOLUTION PROFESSIONAL AND RESOLUTION PROFESSIONAL

Q1: What is the significance of the role of Insolvency Professionals (IPs) as explained in the Banking Law Reform Committee (BLRC) Report – Volume I, and what roles can an IP perform under the Insolvency and Bankruptcy Code (IBC)?

Answer: Significance of the Role of Insolvency Professionals:

According to the Banking Law Reform Committee (BLRC) Report – Volume I, Insolvency Professionals (IPs) are a vital institutional pillar in the effective implementation of the Insolvency and Bankruptcy Code (IBC), 2016. The report outlines the two-phase structure of the resolution process:

1. Phase 1 – Insolvency Resolution:

This is the time-bound phase where insolvency is assessed and attempts are made to arrive at a resolution plan. If successful, the entity can continue operations.

2. Phase 2 – Bankruptcy or Liquidation:

If resolution fails within the stipulated period, the entity is taken to the second phase:

- Liquidation for companies.
- Bankruptcy resolution for individuals.

Role of Insolvency Professionals:

- The entire process is administered by Insolvency Professionals, who are regulated, licensed, and appointed by the Adjudicating Authority (NCLT/NCLAT).
- They ensure the process is legally compliant, professionally managed, and free from conflicts of interest.
- IPs ensure the credibility, timeliness, and orderly conduct of insolvency proceedings.

Q2: Who are Insolvency Professionals (IPs) under the IBC, 2016, and why are they considered a crucial pillar in the insolvency and bankruptcy process?

Answer: An IP is defined in section 3(19) of the IBC as a person enrolled under section 206 with an IPA as a member and registered with the IBBI as an IP under section 207.

Under the Insolvency and Bankruptcy Code (IBC), 2016 Insolvency Professionals (IPs) are regulated and licensed individuals responsible for managing and overseeing:

- The Corporate Insolvency Resolution Process (CIRP) and liquidation of corporate debtors (CDs), and
- The resolution and bankruptcy process for individuals and partnerships.

IPs form the first and one of the most crucial pillars of the IBC's institutional infrastructure. The entire insolvency and bankruptcy mechanism heavily relies on the integrity, expertise, and efficiency of IPs.

To maintain high ethical and professional standards among IPs:

- The Insolvency and Bankruptcy Board of India (IBBI) has established a Disciplinary Committee, and
- Insolvency Professional Agencies (IPAs) also play a regulatory and supervisory role.

Together, these institutions ensure that IPs adhere to the Code of Conduct and act in a manner that upholds the objectives of the Code.

Q3: What is the regulatory framework governing Insolvency Professionals (IPs) under the Insolvency and Bankruptcy Code, 2016?

Answer: The Insolvency and Bankruptcy Code, 2016

1. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
2. The IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016
3. The IBBI (Insolvency Professionals) Regulations, 2016
4. The IBBI (Grievance and Complaint Handling Procedure) Regulations, 2017
5. The IBBI (Inspection and Investigation) Regulations, 2017

Q4: Explain the role and significance of the Resolution Professional (RP) in the Corporate Insolvency Resolution Process (CIRP) under the IBC, 2016.

Answer: The Resolution Professional (RP) plays a central role in conducting the Corporate Insolvency Resolution Process (CIRP).

- Acts as a bridge between the corporate debtor (CD) and the creditors, helping align their interests.
- Functions as an officer of the Adjudicating Authority (AA) and carries out the resolution process with statutory powers and duties.
- Communicates with the AA on behalf of the Committee of Creditors (CoC), ensuring smooth coordination and compliance.

Q5: Who is an Insolvency Professional (IP) under the IBC, 2016, and what is their role and regulatory framework?

Answer: An Insolvency Professional (IP) is a person enrolled with an Insolvency Professional Agency (IPA) as a member and registered with the Insolvency and Bankruptcy Board of India (IBBI) after qualifying the Limited Insolvency Examination.

Eligible professionals such as chartered accountants, cost accountants, company secretaries, advocates, and managerial persons can seek registration after meeting the prescribed requirements.

An IP is a crucial pillar of the insolvency and bankruptcy resolution process, responsible for its effective, timely, and credible functioning. The IP performs legal, management, and finance-related functions and must adhere to a strict code of conduct.

The regulatory framework is two-tiered:

- (i) First-tier – IPAs: Administer registration and supervise continuous development.
- (ii) Second-tier – IBBI: Maintains a panel of IPs with no disciplinary issues and who are authorized or have consented for assignments.

Part IV of the Code regulates IPs, Agencies, and Information Utilities; Chapter IV deals with their registration, functions, and obligations.

Q6: What are the eligibility criteria for appointment as a Resolution Professional (RP) under Regulation 3 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016?

Answer: As per **Regulation 3(1)** of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an Insolvency Professional (IP) is eligible to be appointed as an Interim Resolution Professional (IRP) or Resolution Professional (RP) if:

The IP and all partners/directors of the Insolvency Professional Entity (IPE) to which he belongs are independent of the corporate debtor.

A person is considered independent if:

- (a) He is eligible to be appointed as an independent director under section 149 of the Companies Act, 2013;
- (b) He is not a related party of the corporate debtor;
- (c) He is not an employee, proprietor or partner of:
 - (i) The audit or secretarial audit or cost audit firm of the corporate debtor, or
 - (ii) A legal or consulting firm having transactions with the corporate debtor amounting to 5% or more of the gross turnover in the last three financial years.

Additional provisions:

Reg. 3(1A): The written consent of the proposed RP must be obtained in Form AA.

Reg. 3(2): The IRP/RP must make disclosures at the time of appointment and thereafter as per the Code of Conduct.

Reg. 3(3): If the IPE or any of its partners/directors represent any other stakeholder in the same CIRP, the IP must not continue as IRP/RP.

Q7: What are the provisions regarding the appointment and tenure of an Interim Resolution Professional (IRP) under Section 16 of the Insolvency and Bankruptcy Code, 2016?

Answer: As per Section 16 of the IBC, 2016, the provisions for appointment and tenure of an Interim Resolution Professional (IRP) are as follows:

1. **Who appoints IRP:** The Adjudicating Authority (AA) shall appoint the IRP on the insolvency commencement date.

2. Appointment of IRP in case of application made by financial creditor or corporate applicant: If the application is made under Section 7 or 10, the proposed resolution professional shall be appointed as the IRP, provided no disciplinary proceedings are pending.

3. Appointment of IRP in case of application made by operational creditor:

(a) **No proposal made:** AA shall refer to the IBBI for recommending an IP as IRP.

(b) **Proposal made:** The proposed RP shall be appointed as IRP if no disciplinary proceedings are pending.

4. Recommendation by the Board: The IBBI must recommend a name within 10 days of receiving reference from AA, ensuring that no disciplinary proceedings are pending against the professional.

5. Term of IRP: The IRP shall hold office until the appointment of the Resolution Professional (RP) under Section 22.

Q8: What does Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provide regarding the written consent of an Insolvency Professional for appointment as Interim Resolution Professional (IRP)?

Answer: As per Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016:

1. The applicant, when required or choosing to propose an Insolvency Professional for appointment as an Interim Resolution Professional (IRP) while filing an application under Section 7, 9, or 10, must:

- Obtain a written communication in Form 2 from the proposed Insolvency Professional.
- Enclose this communication with the application filed under Rule 4, 6, or 7, as applicable.

2. The application must also be accompanied by a certificate confirming the eligibility of the proposed Insolvency Professional for appointment as per the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Q9: Managing Director of Nimbo Ltd. (undergoing CIRP) states that since the powers of the Board of directors are suspended, he cannot be forced to perform duties as included in his employment contract with the company. Examine the correctness of the statement in light of the relevant provisions of Insolvency and Bankruptcy Code, 2016 along with relevant case law(s). (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Section 17(1) of the Insolvency & Bankruptcy Code provides that from the date of appointment of the Interim Resolution Professional the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional. It is pertinent to note that only powers are suspended; however, the directors can continue to work and provide assistance to the Resolution Professional.

In the case of *M/s. Subasri Realty Private Limited v. Mr. N. Subramanian & Anr*, the NCLAT directed that after the appointment of the Resolution Professional and declaration of

moratorium, the Board of Directors stands suspended, but that does not amount to a suspension of Managing Director, or any of the directors or officers or employees of the Corporate Debtor (CD). To ensure that the CD remains a going concern, all the directors/employees are required to function and to assist the RP who manages the affairs of the CD during the moratorium. If one or other officer or employee had the power to sign a cheque on behalf of the CD prior to the order of moratorium such power does not stand suspended on suspension of Board of Directors nor can it be taken away by the RP. If the person empowered to sign cheque refuses to function on the direction of the RP or misuse the power it is always open to the RP to take away such power, after issuing notice to the person concerned.

Therefore, the statement made by Managing Director is not in accordance with the Code.

Q10: Ram is appointed as Interim Resolution Professional of CoCo Ltd. During the first meeting of the Committee of Creditors, he has stated that being a person from engineering background he cannot ensure compliances under all the laws applicable to the company. Examine the statement made by Ram in light of the relevant provisions of Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Section 17(2)(e) of the Insolvency & Bankruptcy Code mandates the Interim Resolution Professional (IRP) / Resolution Professional (RP) to comply with the requirements under any law for the time being in force on behalf of the Corporate Debtor (CD). Any non-compliance has a cost to the CD and its stakeholders and attracts penal consequences. For example, a listed company has several continuing obligations under the securities laws. Failure to discharge these obligations compromises the interests of investors in securities. This amounts to contravention not only of securities laws, but also of the provisions of the Code. The IRP/RP is responsible for the non-compliance of the provisions of the applicable laws if it is on account of his conduct. There are, however, instances where an IRP/RP failed to comply with requirements of various laws. This reflects lack of competence and professionalism of the IP, compromises the interests of stakeholders, and burdens the CD with the liabilities for failure of the IP to make compliances.

Therefore, the statement made by Ram is not in accordance with the Code.

Q11: Deepak was appointed as Interim Resolution Professional (IRP) by Adjudicating Authority on 1st July 2019 in respect of Corporate Debtor Bingo Ltd. Bingo Ltd. failed to file returns regarding Tax Deducted at Source for Quarter 1 for the Financial Year 2019-20. Suspended Directors argued that they are not managing the affairs of the Company and hence the responsibility of compliance lies with IRP. Offer your views referring to provisions of Section 17(2) of Insolvency and Bankruptcy Code, 2016 and clarify whether the content of the suspended directors is justified. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) Sect on 17 of the Insolvency and Bankruptcy Code 2016 (IBC) lists out the powers of an Interim Resolut on Professional (IRP) to do all acts and execute documents in the name of corporate debtor (CD) for ef ect ve discharge of his responsibilities.

(ii) Sect on 17 (2) (e) of IBC specif es that the IRP is responsible for complying with the requirements under the law for the t me being in force for the CD.

(iii) However Sect on 17 (1) (c) requires the of cers and mangers of the CD shall report to IRP for accessing documents and records. Of cers include Directors that are suspended in terms of Sect on 17 (1) (b).

(iv) Although responsibility lies with IRP for compliance yet the suspended directors need to discharge their dut es at the instruct ons of IRP.

(v) Thus in the given case the directors cannot claim their responsibility and they are duty bound to extend all cooperat on to IRP for t mely compliance.

Q12: What are the powers and dut es of the Interim Resolut on Professional (IRP) with respect to the management of the corporate debtor under Sect on 17 of the Insolvency and Bankruptcy Code, 2016?

Answer: As per Sect on 17 of the Insolvency and Bankruptcy Code, 2016, from the date of appointment, the Interim Resolut on Professional (IRP) is vested with the management of the corporate debtor. The key provisions are:

(1) From the date of appointment of the interim resolut on professional, -

(a) the management of the af airs of the corporate debtor shall vest in the interim resolut on professional;

(b) the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolut on professional;

(c) the of cers and managers of the corporate debtor shall report to the interim resolut on professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolut on professional;

(d) the f nancial inst tut ons maintaining accounts of the corporate debtor shall act on the instruct ons of the interim resolut on professional in relat on to such accounts and furnish all informat on relat ng to the corporate debtor available with them to the interim resolut on professional.

(2) The interim resolut on professional vested with the management of the corporate debtor, shall-

(a) act and execute in the name and on behalf of the corporate debtor all deeds, receipts, and other documents, if any;

(b) take such act ons, in the manner and subject to such restrict ons, as may be specif ed by the Board;

(c) have the authority to access the electronic records of corporate debtor from informat on ut lity having f nancial informat on of the corporate debtor;

- (d) have the authority to access the books of account, records and other relevant documents of corporate debtor available with government authorities, statutory auditors, accountants and such other persons as may be specified; and
- (e) be responsible for complying with the requirements under any law for the time being in force on behalf of the corporate debtor.

Q13: What are the duties of the Interim Resolution Professional (IRP) under Section 18 of the Insolvency and Bankruptcy Code, 2016?

Answer: As per **Section 18** of the **Insolvency and Bankruptcy Code, 2016**, the **Interim Resolution Professional (IRP)** shall perform the following duties:

- (a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—
 - (i) business operations for the previous two years;
 - (ii) financial and operational payments for the previous two years;
 - (iii) list of assets and liabilities as on the initiation date; and
 - (iv) such other matters as may be specified.
- (b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;
- (c) constitute a committee of creditors;
- (d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
- (e) file information collected with the information utility, if necessary; and
- (f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including –
 - (i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;
 - (ii) assets that may or may not be in possession of the corporate debtor;
 - (iii) tangible assets, whether movable or immovable;
 - (iv) intangible assets including intellectual property;
 - (v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;
 - (vi) assets subject to the determination of ownership by a court or authority;
- (g) to perform such other duties as may be specified by the Board.

Q14: An interim resolution professional appointed under the provisions of the Insolvency and Bankruptcy Code, 2016 shall take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor. What are the assets that cannot be taken over? (3 marks)

PAST YEAR QUESTION JUNE 2023

Answer: According to Sect on 18 of the Insolvency and Bankruptcy Code the following assets shall not include, namely: -

- (a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;
- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

Q15: What does Sect on 19 of the Insolvency and Bankruptcy Code, 2016, provide regarding cooperation with the Interim Resolution Professional (IRP)?

Answer: As per Sect on 19 of the Insolvency and Bankruptcy Code, 2016:

1. The personnel, promoters, and any person associated with the management of the corporate debtor must extend all assistance and cooperation to the Interim Resolution Professional (IRP) as required in managing the affairs of the corporate debtor.
2. If any such person fails to assist or cooperate, the IRP may apply to the Adjudicating Authority (NCLT) for necessary directions.
3. Upon receiving such an application, the Adjudicating Authority shall pass an order directing the concerned person(s) to comply with the instructions of the IRP and cooperate in the collection of information and management of the corporate debtor.

Q16: An application filed by an operational creditor under Sect on 9 of the Insolvency and Bankruptcy Code (IBC), 2016, was admitted by National Company Law Tribunal (NCLT) and Mr. Goel has been appointed as the Interim Resolution Professional (IRP). Sect on 20 of the Code mandates Mr. Goel (IRP) to run management of operations of corporate debtor as a going concern. In the light of provisions of the Insolvency and Bankruptcy Code (IBC), 2016, mention the authorities available to IRP to run the business as a going concern in the above matter. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Sect on 20 of the Insolvency Bankruptcy Code (IBC), 2016 mandates IRP to run management of operations of corporate debtor as going concern:

1. The Interim Resolution Professional (IRP) must make every effort to protect and preserve the value of the property of the corporate debtor and manage its operations as a going concern.
2. For this purpose, the IRP is empowered to:
 - (a) Appoint accountants, legal or other professionals as required.
 - (b) Enter into, amend, or modify contracts on behalf of the corporate debtor, including those entered before commencement of CIRP.
 - (c) Raise interim finance, ensuring that:
 - No security interest is created on encumbered property without consent of secured creditors, unless the property's value is at least twice the amount of debt.

(d) Issue instructions to personnel of the corporate debtor as necessary to maintain it as a going concern.

(e) Take all actions necessary to ensure the corporate debtor continues as a going concern.

Q17: What is the role of the Interim Resolution Professional (IRP) under Section 21 of the IBC, 2016 with regard to the Committee of Creditors?

Answer: As per Section 21 of the Insolvency and Bankruptcy Code, 2016:

The Interim Resolution Professional (IRP) shall, after collating all claims received and determining the financial position of the corporate debtor, constitute a Committee of Creditors (CoC).

The Resolution Professional (RP) shall, if required by the CoC during the CIRP, provide any financial information requested by the CoC within seven days of such request.

Q18: "One of the main functions of the committee of creditors (constituted by the Interim Resolution Professional under section 21 of the Code) is the appointment of the Resolution Professional." Explain the provisions relating to the appointment of Resolution Professional as per section 22 of the Code. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Appointment of Resolution Professional

One of the main functions of the committee of creditors (constituted by the Interim Resolution Professional under section 21 of the Code) is the appointment of the Resolution Professional. Appointment of Interim Resolution Professional — Section 22 provides that at the first meeting of the committee of creditors which is held within seven days of its constitution, the committee of creditors by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, may either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

[Section 22(1) and Section 22(2)]

Communication of decision — According to clause (a) of sub-section 3 of section 22, where the committee of creditors resolves to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority. The appointment of interim resolution professional as resolution professional will be subject to a written consent from the interim resolution professional in the specified form.

Application before Adjudicating Authority — In case, if the committee of creditors resolves to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form. [Section 22(3)(b)]

Confirmation by Insolvency and Bankruptcy Board — The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the

Board for its confirmation and shall make such appointment after confirmation by the Board. [Sect on 22(4)]

If the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional. [Sect on 22(5)]

Q19: Laxmi Bank Ltd. acquired 10 per cent convertible debentures in Bhaskar Ltd. In terms of the issue in the year 2012 these debentures were converted into the equity shares in Bhaskar Ltd. Consequent to conversion Laxmi Bank Ltd. became the owner of 5 per cent equity holding in Bhaskar Ltd. Further Laxmi Bank Ltd. provided a loan of Rs. 10 Crore to Bhaskar Ltd. that became due in the year 2018. Bhaskar Ltd. became defaulter in repayment of loans not only to Laxmi Bank Ltd. but also some other Banks. On the application by ICID Bank, the Adjudicating Authority initiated Corporate Insolvency Resolution Process (CIRP) and appointed an Interim Resolution Professional (IRP). Committee of Creditors constituted by IRP include Laxmi Bank Ltd. ICID Bank objected on the ground that Laxmi Bank Ltd. is a related party that should not have any right of representation, participation or voting. Examine the issue and offer your views. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) As per first proviso to Sect on 21 (2) of the Insolvency and Bankruptcy Code, 2016 (IBC) no related party to the Corporate Debtor, even it is a financial creditor, has any right of participation, representation or voting at the meeting of Committee of Creditors.

(ii) However, second proviso to Sect on 21 (2) clarifies that the restriction does not apply in case a financial creditor is governed by a financial sector regulator is not considered as a related party solely on account of conversion or substitution of debt into equity or instruments convertible into equity shares or completion of such transactions as may be prior to the Insolvency commencement date.

Clarification is inserted pursuant to amendment to IBC in 2018.

(iii) Financial Sector Regulator is defined as per Sect on 3 (18) of IBC that refers to Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority (IRDA), Pension Fund Regulatory Authority (PFRA) and such other bodies as may be notified.

(iv) In the given case, the shares were allotted to Laxmi Bank Ltd was on account of conversion of debt into equity and being a Bank regulated by RBI, Laxmi Bank Ltd is not considered as a related party.

(v) Thus, the objection raised by ICID bank is not tenable.

Q20: How is the Resolution Professional appointed under Sect on 22 of the IBC, 2016?

Answer: As per Sect on 22 of the Insolvency and Bankruptcy Code, 2016, the Resolution Professional (RP) is appointed by the Committee of Creditors (CoC) in the following manner:

(i) When CoC resolves to appoint IRP as resolut on professional or replace IRP by another resolut on professional:

The commit ee of creditors, may, in the f rst meet ng, by a majority vote of not less than sixty-six per cent. of the vot ng share of the f nancial creditors, either resolve to appoint the interim resolut on professional as a resolut on professional or to replace the interim resolut on professional by another resolut on professional.

(ii) When CoC resolves to cont nue IRP as resolut on professional: Subject to a writ en consent from the interim resolut on professional in the specif ed form, it shall communicate its decision to the interim resolut on professional, the corporate debtor and the Adjudicat ng Authority.

(iii) When CoC resolves to replace the interim resolut on professional: It shall fle an applicat on before the Adjudicat ng Authority for the appointment of the proposed resolut on professional along with a writ en consent from the proposed resolut on professional in the specif ed form.

(iv) Forwarding name of new proposed RP to the AA: The Adjudicat ng Authority shall forward the name of the resolut on professional proposed to replace IRP to the Board for its conf rmat on and shall make such appointment af er conf rmat on by the Board.

(v) IRP to cont nue as RP: Where the Board does not conf rm the name of the proposed resolut on professional within ten days of the receipt of the name of the proposed resolut on professional, the Adjudicat ng Authority shall, by order, direct the interim resolut on professional to cont nue to funct on as the resolut on professional unt l such t me as the Board conf rms the appointment of the proposed resolut on professional

Q21: What does Sect on 23 of the Insolvency and Bankruptcy Code, 2016, provide regarding the role of the Resolut on Professional (RP)?

Answer: Sect on 23 of the Code provides that:

The Resolut on Professional (RP) shall conduct the ent re Corporate Insolvency Resolut on Process (CIRP) and manage the operat ons of the corporate debtor during the CIRP period, subject to Sect on 27.

The RP shall cont nue to manage the operat ons even af er the CIRP period unt l the Adjudicat ng Authority passes an order:

- approving the resolut on plan under Sect on 31(1), or
- appoint ng a liquidator under Sect on 34.

The RP shall exercise the same powers and dut es as the Interim Resolut on Professional (IRP). If the RP is appointed in place of the IRP by the Commit ee of Creditors under Sect on 22(4), the IRP must provide all informat on, documents, and records related to the corporate debtor to the RP.

Q22: The Resolut on Professional of Arc Private Limited has to issue not ce of meet ng of Commit ee of Creditors. Specify:

- Category of persons ent tled to receive not ce of the meet ng.
- Category of persons not ent tled to vote at the meet ng. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Sect on 24 of the Insolvency and Bankruptcy Code, 2016 (IBC) lays down the procedure for conducting the meetings of the Committee of Creditors (CoC).

The resolution professional shall give notice of each meeting of the committee of creditors to:

- a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5),
- b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be,
- c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt [Sect on 24(3)].

The directors, partners and one representative of operational creditors, as referred to in sub-section (3), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings. The absence of any such director, partner or representative of operational creditors, as the case may be, shall not invalidate proceedings of such meeting.

Section 21 of the Code states that the committee of creditors shall comprise all financial creditors of the corporate debtor. It is provided that a financial creditor or the authorised representative of the financial creditor referred to in sub-section (6) or sub-section (6A) or sub-section (5) of section 24, if it is a related party of the corporate debtor, shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

Q24: Operational Creditors of Joy Ltd moved a petition to NCLT against RP for directions under section 60(5) of the IBC, 2016 to direct the RP to give notice of all CoC meetings, to provide minutes of the meeting and to permit to attend the meetings of CoC. As per the operational creditors, their debt is more than 10% of the operational debt and hence, as per the Code they must be allowed to attend the meetings. Are operational creditors legally entitled to attend and vote at meeting of CoC? Discuss by giving relevant case laws. (5 marks each)

PAST YEAR QUESTION JUNE 2024

Answer: Section 24(3) of the Insolvency & Bankruptcy Code provides that the resolution professional shall give notice of each meeting of the committee of creditors to-

- (a) members of committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);
- (b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
- (c) operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

In Consolidated Engineering Company & Another vs. Golden Jubilee Hotels Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 501 of 2018], the NCLAT held that the AA has rightly held that 10 percent of total debt for the purpose of representation in the committee of creditors is to be calculated on the basis of the claim as collated and not certified by the RP. It cannot be based on the amount claimed by all the operational creditors until it is verified and compared. If the

claim of operational creditors on verification is found to be less than 10 percent, the operational creditors have no right to claim representation in the meeting of the committee of creditors.

However, taking into consideration facts and circumstances of the case, NCLAT allowed the representative of operational creditor only to watch proceedings of the CoC as agreed by the learned counsel for the RP.

So, claims of operational creditors are to be verified by resolution professional and if it is less than 10%, they [operational creditors] will not be given representation in meeting.

Operational Creditors are not legally entitled to attend and vote at CoC if there are two or more than two unrelated Financial Creditors in the Corporate Debtor. They can only watch proceedings if the amount of their aggregated dues is not less than 10% of the debt of the Corporate Debtor.

Q25: 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. (3 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q26: What rights and duties are conferred upon the Interim Resolutor Professional (IRP) or Resolutor Professional (RP) under Regulation 4 of the IBBI (Insolvency Resolutor Process for Corporate Persons) Regulations, 2016?

Answer: The IBBI (Insolvency Resolutor Process for Corporate Persons) Regulations, 2016 confer several rights and impose key duties on the Interim Resolutor Professional (IRP) and the Resolutor Professional (RP) to ensure effective management and transparency during the Corporate Insolvency Resolutor Process (CIRP). The relevant provisions under Regulations 4, 4B, and 4C are explained as follows:

Regulation 4: Right to Access Information and Duty of Stakeholders**Right of Access to Information**

The IRP or RP is entitled to access the books of account, records, and relevant documents and information of the corporate debtor that are necessary for performing duties under the Code. This includes documents held with:

- Depositories of securities
- Professional advisors of the corporate debtor
- Information utilities
- Registries that maintain records of asset ownership
- Members, promoters, partners, directors, and joint venture partners
- Contractual counterparties of the corporate debtor

This ensures that the IRP/RP has a comprehensive understanding of the corporate debtor's assets, obligations, and financial health.

Duty of Personnel to Provide Information

The personnel of the corporate debtor, its promoters, and any other associated persons are required to provide the requested information to the IRP/RP within the time and format specified. This obligation supports the IRP/RP in carrying out their functions smoothly and without undue delays.

Regulation 4B: Disclosure of Change in Name or Registered Office

To promote transparency and traceability, Regulation 4B mandates that:

If the corporate debtor has changed its name or registered office address in the two years preceding the insolvency commencement date,

The IRP or RP must disclose:

- All former names and former registered office addresses, and
- The current name and current registered office address

This disclosure must be made in every communication, record, proceeding, or document issued during the CIRP. This helps creditors, authorities, and stakeholders clearly identify the corporate debtor and avoid confusion due to recent changes.

Regulation 4C: Process Email Management

This regulation ensures continuity and traceability in digital communication during CIRP.

Use of Dedicated Email Account

The IRP must open and use a specific email account for all correspondence with stakeholders during the CIRP.

Transfer of Credentials

Upon replacement:

- The IRP must hand over the email credentials to the appointed RP.
- Similarly, the RP must hand over the credentials to the next RP or to the liquidator, as applicable.

This provision ensures that all communications remain accessible and that there is no loss or disruption of critical information during transitions in insolvency professionals.

Q27: "Resolution Professional may be replaced at any time during the corporate insolvency process by the committee of creditors". Comment. (3 marks)

PAST YEAR QUESTION DECEMBER 2024 OLD

OR

The Committee of Creditors of a Corporate Debtor by passing a resolution with fifty-five per cent of voting shares, wants to remove Mr. B as a Resolution Professional after taking his consent in writing in advance. Please examine keeping in view of the provisions of the IBC Code that whether the COC can remove the RP by passing a resolution with fifty-five per cent voting shares. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: Section 27 provides that a resolution professional may be replaced at any time during the corporate insolvency resolution process by the committee of creditors by a sixty-six percent majority of voting shares.

Section 27 of the Code reads as follows:

- (1) Where, at any time during the corporate insolvency resolution process, the committee of creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.
- (2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.
- (3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.
- (4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.
- (5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section."

Alternate Answer,

As per Section 27 of the Insolvency & Bankruptcy Code 2016:

(1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

Hence, approval of 66% voting rights shares of CoC is required for replacing the resolution professional. So, Mr. B cannot be removed as RP with CoC passing resolution constituting 55% voting shares.

Q28: "An Information Memorandum in respect of affairs of the Corporate Debtor undergoing Corporate Insolvency Resolution Process is to be prepared in such a manner that incites the Resolution Applicant, but the facts stated therein need be true without any suppression or misinformation"— Would you amplify with your views? Also discuss, if there is a need for taking a confidentiality undertaking from prospective Resolution Applicant while accessing any detailed information. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Section 29 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down the preparation of an information memorandum as one of the main functions of the resolution professional.

An information memorandum is envisaged to be prepared in order for the resolution applicants to provide solutions for resolving the insolvency of the corporate debtor.

Hence contents need to be filled in with correct facts without any suppression. At the same time, the contents need to be impressive so that the Resolution Applicant is motivated to put in funds and efforts for revival of the Corporate Debtor.

Section 29(2) further indicates authorisation to the Resolution Applicant to access detailed information only after receipt of confidentiality undertaking from such applicant.

Thus, the information memorandum and further details are confidential to the Resolution Professional, Resolution Applicant and of course Adjudicating Authority.

Q29: YM Auto Ltd sends expression of interest as a Resolut on Applicant and has been shortlisted by the Resolut on Professional. Now YM Auto Ltd writes to Resolut on Professional to provide Informat on Memorandum. The Resolut on Professional seeks your guidance in this regard. Give your views. (3 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Sect on 29(2) of the of Insolvency and Bankruptcy Code, 2016 provides that the resolut on professional shall provide to the resolut on applicant access to all relevant informat on in physical and electronic form, provided such resolut on applicant undertakes:

- (a) to comply with provisions of law for the t me being in force relat ng to conf dent ality and insider trading;

- (b) to protect any intellectual property of the corporate debtor it may have access to; and
- (c) not to share relevant informat on with third part es unless clauses (a) and (b) above are complied with.

On submission of the undertaking by YM Auto Ltd. can be shared with the Informat on Memorandum prepared by the Resolut on Professional.

Q30: What are the dut es of the Resolut on Professional regarding the submission and approval of the resolut on plan under Sect on 30 of the Insolvency and Bankruptcy Code, 2016?

Answer: Under Sect on 30 of the IBC, 2016, the Resolut on Professional (RP) plays a central role in vet ng, present ng, and submit ng the resolut on plan during the Corporate Insolvency **Resolut on Process (CIRP)**. The dut es of the RP under this sect on can be summarized as follows:

Submission of resolut on plan. – Sect on 30(2) of the Code states that it is the duty of the resolut on professional to conf rm that each resolut on plan –

- (a) provides for the payment of insolvency resolut on process costs in a manner specif ed by the Board in priority to the payment of other debts of the corporate debtor;
- (b) provides for the payment of debts of operat onal creditors and f nancial creditors, who do not vote in favour of the resolut on plan in the manner specif ed in the sect on.

Submission of resolut on professional to CoC: Sect on 30(3) provides that the resolut on professional shall present to the commit ee of creditors for its approval such resolut on plans which conf rm the condit ons referred to in sub-sect on (2).

Duty of the resolut on professional to submit approved resolut on plan to AA: According to sect on 30(6), the resolut on professional shall submit the resolut on plan as approved by the commit ee of creditors to the Adjudicat ng Authority.

Q31: What are the requirements for registrat on of Insolvency Professionals under Sect on 207 of the IBC, 2016?

Answer: Sect on 207 of the Insolvency and Bankruptcy Code, 2016 lays down the requirements for registrat on of Insolvency Professionals (IPs) as follows:

1. Enrolment with an Insolvency Professional Agency (IPA): An individual must first enrol as a member of an IPA to be eligible for registration as an IP.
2. REGISTRATION with the Insolvency and Bankruptcy Board of India (IBBI): After enrolment, the individual must register with the IBBI in the manner, within the time, and upon payment of such fees as may be specified by the IBBI.
3. Power of the Board (Sect on 207(2)): The IBBI has the authority to specify the categories of professionals or persons who may be eligible, based on their qualifications and experience in fields such as finance, law, management, or insolvency.

Q32: Explain the different functions of Insolvency professionals. (6 marks)**PAST YEAR QUESTION JUNE 2017**

Answer: Sect on 208 of the Code prescribes functions and obligations of insolvency professionals:

(1) Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely: –

- (a) a fresh start order process under Chapter II of Part III;
- (b) individual insolvency resolution process under Chapter III of Part III;
- (c) corporate insolvency resolution process under Chapter II of Part II;
- (ca) pre-packaged insolvency resolution process under Chapter III-A of Part II;
- (d) individual bankruptcy process under Chapter IV of Part III; and
- (e) liquidation of a corporate debtor firm under Chapter III of Part II.

(1A) Where the name of the insolvency professional proposed to be appointed as a resolution professional, is approved under clause (e) of sub-section (2) of section 54A, it shall be the function of such insolvency professional to take such actions as may be necessary to perform his functions and duties prior to the initiation of the pre-packaged insolvency resolution process under Chapter III-A of Part II.

(2) Every insolvency professional shall abide by the following code of conduct: –

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

Q33: What are the key elements of the Code of Conduct for Insolvency Professionals under the First Schedule of the IBBI (Insolvency Professionals) Regulations, 2016?

Answer: The First Schedule to the IBBI (Insolvency Professionals) Regulations, 2016, prescribed under Regulation 7(2)(h), lays down the Code of Conduct for all Insolvency Professionals (IPs). It ensures that IPs act with integrity, competence, and professionalism, and

uphold the object ves of the Insolvency and Bankruptcy Code, 2016. The Code of Conduct includes the following key principles:

1. Integrity and Object vity

IPs must maintain honesty, fairness, and transparency in all professional relat onships. They must not allow personal bias or interests to inf uence their dut es.

2. Independence and Impart ality

IPs should maintain independence in judgment and avoid any conf ict of interest. They must disclose any potent al conf ict and recuse themselves if impart ality is compromised.

3. Professional Competence

IPs must possess and maintain adequate knowledge, skills, and expert se. They are expected to update their knowledge regularly and carry out dut es with due diligence.

4. Representat on of Correct Facts and Correct ng Misapprehensions

They must present facts accurately and take steps to correct any misrepresentat on or misunderstanding.

5. Timeliness

IPs should perform dut es in a prompt and ef cient manner, adhering to statutory t melines.

6. Informat on Management

Maintain orderly records and ensure that informat on is accessible when required by stakeholders or authorit es.

7. Conf dent ality

IPs must maintain conf dent ality of all informat on received in the course of their professional dut es, unless legally obligated to disclose it.

8. Occupat on, Employability, and Restrict ons

An IP should not engage in any employment or business that is likely to interfere with independence or create conf ict with the dut es as an IP.

9. Remunerat on and Costs

Fees and expenses should be reasonable, just f ed, and disclosed. IPs must not accept any payment or benef t from any stakeholder other than what is approved under the Code or Regulat ons.

10. Gif s and Hospitality

IPs must not accept gif s, hospitality or benef ts that could impair independence or appear to inf uence professional decisions.

Q34: What do Integrity and Object vity mean under the Code of Conduct for Insolvency Professionals, and how should an Insolvency Professional adhere to them in pract ce?

Answer:

Integrity

- IPs must be honest, straight orward, and fair in all professional and business dealings.
- Integrity is essent al for being considered 'f t and proper' for registrat on under Regulat on 4.

- Only individuals with high moral character should be entrusted with managing insolvency processes.

Objectivity

- IPs must make decisions free from bias, coercion, conflict of interest, or undue influence.
- They must demonstrate impartiality by:
 - Being transparent in interactions.
 - Being collaborative with CoC members.
 - Ensuring decisions are made through active consensus.

No Misrepresentation

IPs must not misstate facts or be involved in activities that could damage the profession's reputation.

Disclosure of Conflict of Interest

IPs must promptly disclose any conflict of interest to stakeholders. It may require CoC approval to continue if conflict is discovered during the assignment.

Restriction on Acquisition of Debtor's Assets

IPs and their relatives must not acquire the debtor's assets, directly or indirectly.

Q35: What are the key expectations regarding Independence and Impartiality for Insolvency Professionals under the IBBI Code of Conduct, and how should they be followed in practice?

Answer:

Maintain Independence

IPs must conduct the process independently, free from any external influence in their professional relationships.

Asset Acquisition Restriction

IPs and their relatives must not acquire assets of the debtor during liquidation/bankruptcy without Board approval and proof of no compromise to independence or objectivity.

Disqualification due to Conflict

IPs must not accept assignments if:

They, their relatives, or

Their firm's partners/directors

Are not independent with respect to the corporate debtor and related parties, as per the Code.

Disclosure of Relationships

Must disclose any personal or financial relationship with stakeholders (under section 53 or 178) or the corporate debtor immediately upon becoming aware.

8A. Past Employment or Panel Membership

If the IP was employed by or on the panel of any financial creditor of the corporate debtor, it must be disclosed to CoC and the IPA, which will publish it on their website.

8B. Relationship Disclosure Requirement

Must disclose any relationship with the corporate debtor, other professionals, financial creditors, interim finance providers, or resolution applicants to the IPA within the prescribed time.

Relationship of the insolvency professional with	Disclosure to be made within three days of
(1)	(2)
Corporate debtor	his appointment.
Registered valuers / accountants/ legal professionals/ other professionals appointed by him	appointment of the professionals
Financial creditors	the constitution of committee of creditors
Interim finance providers	the agreement with the interim finance provider
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant.
If relationship with any of the above, comes to not exist or arises subsequently	of such notice or arising

8C: Disclosure of Relationships by Engaged Professionals:

An insolvency professional must ensure disclosure of any relationship between professionals engaged by him and key stakeholders like the IP, corporate debtor, creditors, or resolution applicants, to the IPA within the specified time, to maintain transparency and avoid conflicts of interest.

Relationship of the other professional with	Disclosure to be made within three days of
(1)	(2)
Insolvency professional	the appointment of the other professional
Corporate debtor	the appointment of the other professional
Financial creditors	the constitution of committee of creditors
Interim finance providers	the agreement with the interim finance provider or three days of the appointment of the other professional, whichever is later.
Prospective resolution applicants	the supply of information memorandum to the prospective resolution applicant or three days of the appointment of the other professional, whichever is later.
If relationship with any of the above, comes to not exist or arises subsequently	of such notice or arising

Explanat on: For the purposes of clause 8B and 8C above, ‘relat onship’ shall mean any one or more of the following four kinds of relat onships at any t me or during the three years preceding the appointment of other professionals:

Kind of Relat onship	Nature of Relat onship
A	Where the insolvency professional or other professional has derived 5% or more of gross revenue in a year from professional services to the related party.
B	Where the insolvency professional or other professional is a shareholder, director, key managerial personnel (KMP), or partner of the related party.
C	Where a relat ve (spouse, parents, parents of spouse, sibling of self and spouse, and children) of the insolvency professional or other professional has a relat onship of kind A or B with the related party.
D	Where the insolvency professional or other professional is a partner or director of an ent ty (like an IP ent ty or registered valuer), and any partner or director of that ent ty has a relat onship of kind A, B or C with the related party.

8D – Disclosure and Arm’s Length Relat onship

An insolvency professional (IP) is required to ensure that all disclosures made by themselves and by any other professionals they appoint are t mely and accurate. Addit onally, the IP must conf rm to their Insolvency Professional Agency (IPA) that every professional engaged during the process has been appointed on an arm’s length basis, meaning there is no undue inf uence, bias, or close relat onship af ect ng the decision. This ensures transparency and fairness in the insolvency process.

9 – No Undue Inf uence or Improper Conduct

An insolvency professional (IP) must not inf uence the decisions or act ons of the Commit ee of Creditors (CoC), debtor, or any stakeholders to secure unlawful or unfair advantage for themselves, their relat ves, or any other person. The IP is also prohibited from using any illegal or improper methods to achieve dishonest or unethical goals. This provision ensures the integrity, neutrality, and fairness of the insolvency process.

Q36: What does the Code of Conduct say about the professional competence of an Insolvency Professional (IP)?

Answer: As per the Code of Conduct under the IBBI (Insolvency Professionals) Regulat ons, 2016, an insolvency professional must maintain and cont nuously upgrade his professional knowledge and skills to ensure the delivery of competent and ef ect ve services. Given that insolvency professionals act as the regulator’s “eyes and ears” during insolvency proceedings, they bear signif cant responsibility and accountability not only to their clients but also to a broader group of stakeholders, including regulators and society at large. This high standard of

professional competence is essential for maintaining trust and integrity in the insolvency process.

Q37: Who can be an Interim Resolution Professional (IRP), a Resolution Professional (RP), a Liquidator or a Voluntary Liquidator under Insolvency and Bankruptcy Code, 2016 ? Briefly enumerate eligibility conditions. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 makes provisions for the examination and registration of Insolvency Professionals who can be appointed as an Interim Resolution Professional (IRP), Resolution Professional (RP), Liquidator or Voluntary Liquidator under relevant regulations.

According to Regulation 4 of the IBBI (Insolvency Professionals) Regulations, 2016, no individual shall be eligible to be registered as an insolvency professional if he -

- a) is a minor;
- b) is not a person resident in India;
- c) does not have the qualification and experience specified in regulations 5 or 9 of the IBBI (Insolvency Professionals) Regulations, 2016, as the case may be;
- d) has 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. 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;
- e) he is an undischarged insolvent, or has applied to be adjudicated as an insolvent;
- f) he has been declared to be of unsound mind; or
- g) he is not a fit and proper person.

Explanation: For determining whether an individual is fit and proper under these Regulations, the Board may take account of any consideration as it deems fit, including but not limited to the following criteria-

- i) integrity, reputation and character;
- ii) absence of convictions and restraint order; and
- iii) competence, including financial solvency and net worth.

No insolvency professional entity, recognised by the Board under regulation 13 shall be eligible to be registered as an insolvency professional, if the entity and/or any of its partner or director, as the case may be, is not fit and proper person.

Q38: What are the obligations of an Insolvency Professional regarding the representation of facts and correction of misapprehensions?

Answer: Under the Code of Conduct in the IBBI (Insolvency Professionals) Regulations, 2016, an Insolvency Professional (IP) is obligated to:

1. Inform relevant parties under the Insolvency and Bankruptcy Code (IBC) about any misapprehension or wrongful consideration of facts that comes to their attention, as soon as practicable.

2. Avoid concealing material information or making misleading statements to the Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authority, Committee of Creditors (CoC), or any other stakeholders.

In practice, if an IP or Resolution Professional (RP) discovers such errors—either through personal analysis or external audits like a forensic report—they must report it transparently to the concerned parties. Upholding these duties ensures that the IP functions with integrity, transparency, and fairness, maintaining their role as an **officer of the court** and a neutral facilitator of the insolvency process.

Q39: What are the obligations of an Insolvency Professional with respect to timelines under the Code of Conduct?

Answer: An Insolvency Professional (IP) is required to adhere strictly to timelines prescribed under the Insolvency and Bankruptcy Code (IBC) and related rules, regulations, and guidelines. The obligations regarding timelines include:

1. **Planning and Prompt Communication:** The IP must carefully plan actions and communicate efficiently with all stakeholders to ensure timely completion of insolvency resolution, liquidation, or bankruptcy processes.
2. **Avoiding Delay and Negligence:** The IP must not act negligently or with mala fide intent while performing their duties.
3. **Efficiency and Reasonableness:** As per Bye-law 13 of the Model Bye-laws of an Insolvency Professional Agency (IPA), the IP must perform duties as quickly and efficiently as is reasonable, within the legally.

Q40: What are the responsibilities of an Insolvency Professional regarding information management under the Code of Conduct?

Answer: An Insolvency Professional must adhere to the following practices to ensure proper information management:

1. **Clear Communication (Clause 15):** IPs must ensure that all communication (e.g., notices, reports, updates) to stakeholders is shared well in advance, and is simple, clear, and understandable.
2. **Disclosure in Communication (Clause 15A):** Every communication must include: Name of IP, Address, Email ID, IBBI Registration Number and Validity of Authorisation for Assignment (if applicable)
3. **Proper Record Keeping (Clause 16):** IPs must maintain written records of every decision, including the rationale and supporting evidence, to allow others to assess the appropriateness of the action taken.
4. **No Private Communications (Clause 17):** IPs must not communicate privately with stakeholders unless required by the Code, regulations, or Adjudicating Authority orders.

5. **Compliance with Inspect ons (Clause 18):** IPs must appear, cooperate, and be available for inspect ons and invest gat ons by the IBBI, its authorized representat ves, or the IPA.

6. **Informat on Submission (Clause 19):** IPs must provide all informat on and records as required by the IBBI or the IPA.

7. **Support for Research & Audit (Clause 20):** IPs must assist and provide data for any research, audit, or study conducted by the IBBI.

Q41: What are the conf dent ality obligat ons of an Insolvency Professional (IP)?

Answer: An Insolvency Professional must strictly maintain the conf dent ality of all informat on related to the insolvency resolut on, liquidat on, or bankruptcy process. This conf dent ality must be upheld at all t mes, except:

- When disclosure is required by law, or
- When consent is obtained from the relevant part es.

This ensures trust among stakeholders and protects sensit ve commercial and f nancial informat on from misuse or unauthorized access.

Q42: What occupat onal and ethical restrict ons must an Insolvency Professional (IP) adhere to under the Code of Conduct?

Answer: An Insolvency Professional must observe the following restrict ons and condit ons to maintain professional integrity and avoid conf icts of interest:

1. **Assignment Limit (Clause 22):** An IP should not accept more assignments than he can manage ef ect vely. Clarif cat on:

- Max 10 concurrent CIRP assignments as Resolut on Professional (RP)
- Out of these, only 3 assignments can involve claims exceeding ₹1,000 crore.

2. **No Employment While Holding Valid Authorizat on (Clause 23):** An IP must not take up any employment if he holds a valid Authorisat on for Assignment (AFA) or is currently handling an assignment.

3. **Post-CIRP Cooling-Of Period (Clause 23A):** Af er concluding a CIRP, an IP or their relat ves: Cannot take up employment or provide non-Code-related services to the successful resolut on applicant, corporate debtor, or a creditor with over 10% vot ng power For 1 year, unless through open compet t ve recruitment.

4. **No Engagement of Relat ves (Clause 23B):** An IP must not appoint or engage any of his relat ves or related part es for any task related to his assignments.

5. **No Reciprocal Assignments (Clause 23C):** An IP must not of er services for an assignment that is being handled by his relat ve or related party.

Explanat on: "Related party" as per Sect on 5(24A) of the Code, excluding IP ent t es where the IP is a partner or director.

6. **Upholding Reputat on (Clause 24):** An IP must not engage in any business or act vity that, in the opinion of the IBBI, damages the reputat on of the profession.

Q43: A director of a company in CIRP had moved the Hon'ble NCLT, Mumbai Bench, seeking the right to participate in the meetings of the Committee of Creditors (CoC) and access all the documents and/or information including the resolutions plans being discussed in the meetings of the CoC, for effective participation in the meetings. The Hon'ble NCLT on August 1, 2018 held that the directors have the right to attend the CoC meetings as per Section 24 of the Code. However, the directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans. In the first appeal, the decision of the NCLT was upheld by the appellate tribunal on August 9, 2018. The director then moved the Supreme Court, challenging the decision of the appellate tribunal. Discuss citing relevant case law. (5 marks)

PAST YEAR QUESTIONS DECEMBER 2024 OLD

OR

A director of a company in CIRP had moved the Hon'ble NCLT, Mumbai Bench, seeking the right to participate in the meetings of the CoC and access all the documents and/or information including the resolutions plans being discussed in the meetings of the CoC, for effective participation in the meetings.

The Hon'ble NCLT on August 1, 2018 held that the directors have the right to attend the CoC meetings as per Section 24 of the Code, however, the directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans.

Thereafter, the Directors filed appeal before NCLAT for treating the papers as confidential by the RP. In the appeal, the decision of the NCLT was upheld by the NCLAT on August 9, 2018.

The director then moved the Supreme Court, challenging the decision of the appellate tribunal.

Decide the matter with reference to relevant case law. (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: *Vijay Kumar Jain v. Standard Chartered Bank and Others*

The Hon'ble Supreme Court held that the scheme of the Code makes it clear that the directors, though not members of the CoC, have a right to participate in every meeting of the CoC. In addition, for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the CoC. The Hon'ble Supreme Court also clarified that under Regulation 21(3) (iii) of the CIRP Regulations, the notice of the CoC meeting, which is required to be given to the directors as well, must contain copies of all the documents relevant for matters to be discussed, including the resolution plans.

The Hon'ble Supreme Court considered the directors to be vitally interested on two counts:

1. Such directors are of guarantors and bound by the approved plan, which may scale down their own debts.

2. The directors, being well versed in the affairs of the company, may be able to assist the COC on determining whether the resolution plan addresses the cause of default by the company (a mandatory requirement for resolution plans).

The Hon'ble Supreme Court also clarified that any concerns over breach of confidentiality may be alleviated by the resolution professional obtaining a confidentiality undertaking from the directors, which may also contain an indemnity to the resolution professional against any breach. Thus, based on the decision by the Hon'ble Supreme Court, the director may be given copies of the resolution plan and other related documents, provided he is ready to sign the confidentiality agreement.

Q44: What are the key principles an Insolvency Professional must follow regarding remuneration and costs?

Answer: An Insolvency Professional (IP) must:

1. Charge remuneration transparently, which reflects the work properly and necessarily undertaken.
2. Disclose fees payable to itself, its entity, and other professionals to its Insolvency Professional Agency (IPA), which must publish the disclosures.
3. Raise invoices in its own name and ensure payments are made via banking channels.
4. Ensure professionals and the IP entity engaged also raise and receive fees in their own names through proper banking channels.
5. Accept only approved and disclosed fees; must not share fees with professionals or service providers appointed in the process.
6. Disclose all costs of the process to stakeholders and ensure such costs are not unreasonable.
7. Exercise due diligence to ensure compliance with applicable laws during the process.
8. Not include penalties or losses due to non-compliance of laws by the corporate person in insolvency or liquidation costs.

Q45: What are the restrictions on gifts and hospitality for an Insolvency Professional (IP)?

Answer: An Insolvency Professional must:

1. Not accept gifts or hospitality (either personally or through relatives) if it affects or undermines their independence.
2. Not offer gifts, hospitality, or any financial advantage to public servants or others to obtain or retain assignments or professional advantages.

Q46: Write a short note on the role of Insolvency and Bankruptcy Board of India. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Role of the Insolvency and Bankruptcy Board of India (IBBI) is as under:

1. Regulating all matters related to insolvency and bankruptcy process.
2. Setting out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.

3. Regulating entry, registration and exit of insolvency intermediaries.
4. Making model bye laws for Insolvency Professional Agencies.
5. Setting our regulatory standards for Insolvency Professionals.
6. Specifying the manners in which information utilities can collect and store data.

CASE STUDY ON INTEGRITY AND OBJECTIVITY:

In Asset Reconstruction company Ltd. vs. Shivam Water Treaters Pvt Ltd, CP(IB) 1882/MB/2018, 16.01.2019, NCLT, Mumbai Bench vide its order dated 2nd Jan, 2019 had clarified that IRP is acting as a Court Officer and any hindrance in the work of CIRP will amount to contempt of Court. The NCLT directed the promoter/ director, officers and auditor the Corporate Debtor Company to fully co-operate the RP in the completion of CIRP. Further, in the aforesaid matter, the NCLT ordered that Police assistance to be given to the Resolution Professional so that the RP can take full control of the company without any interference from Ex-Director's or his officers. The Police Commissioner, Ahmadabad is directed to provide police assistance to RP and his team, so that the Resolution Professional can take control of the entire unit.

In Sanjay Kumar Ruia Vs. Catholic Syrian Bank Ltd. & Anr, Company Appeal (AT) (Insolvency) No. 876 of 2019, 11.09.2019, NCLAT, New Delhi remitted the matter to the Liquidator, in view of the fact that liquidation proceeding has already been started. Hon'ble NCLAT further held that if the amount based on bills and ledger have been approved by the Committee of Creditors, the Liquidator cannot reject, the same being the 'resolution cost' and not claim of any creditor. NCLAT disposed of the appeal and made it clear that the fee of the Resolution Professional and the cost incurred by Resolution Professional, will be treated as 'resolution cost'. Further, allowed the Liquidator to determine the claim under Section 40 of the Code. Once the amount is shown as 'fees' and 'resolution cost' the same to be paid in terms of Section 53 of the Code.

In BMW India Financial Services Private Limited v. SK Wheels Private Limited, MA NO. 2319/2019 in C.P. (IB) 4301/2018, 16.10.2019 Hon'ble NCLT held:

"15. It is trite law that this tribunal has been provided with vast powers under section 60 (5) of the Code. Therefore, based on the above this bench is of the view that the actions or rather inaction on the part of the Resolution Professional in not taking a decision with respect to the claim of the Applicant is an abuse of the powers given to him under the code and contrary to justice and public policy. His actions are nothing more but an abuse of his dominant position.

18. This kind of injustice carried out by the Resolution Professional herein is completely unacceptable. The landowner is just not entitled to receive the license fee but also, he has to right to receive the possession of the said premises. The tenancy rights automatically get terminated, the moment default in payment of rent is committed."

In Ruchita Modi v. Mrs. Kanchan Ostwal & Anr, Company Appeal (AT) (Ins) No.1000 of 2019, 15.11.2019,

Hon'ble NCLAT held:

"As the IRP is functioning since 18th September, 2019 on admission of Section 9 Application, we compute the fees of IRP @ Rs.1,50,000/-. The IRP would be entitled to also recover CIRP costs as may have been incurred.

The Appellant – for CD undertakes to contact IRP and pay fees as above and CIRP costs as may have been incurred by the IRP in 3 weeks, after deducting amount already received by IRP under the Impugned Order. In case IRP has any difficulty regarding CIRP costs, he would be entitled to move the Adjudicating Authority and the Appellant will be bound to pay the CIRP costs concerned, as may be directed by Adjudicating Authority."

Hon'ble NCLAT vide its order dated 04.11.2019 set aside the impugned order dated 18th September, 2019 passed by NCLT, Jaipur bench for initiation of CIRP and disposed of application u/s 9 of the code as withdrawn.

Further, NCLAT also directed that if there is default in payment in terms of the settlement, it will be open for the Operational Creditor to move to the Appellate Tribunal for recall of this Order and to revive the CIRP process against the CD"

CASE STUDY ON INDEPENDENCE AND IMPARTIALITY

In the case of **State Bank of India Vs. M/s. Metenere Ltd., C.P. No.IB-639(PB)/2018** an appeal was preferred by State Bank of India, financial creditor against the order of Hon'ble NCLT wherein it was observed that there is an apprehension of bias against the appointment of proposed Interim Resolution Professional, as he was ex-employee of financial creditor and has been drawing pension from the financial creditor. Therefore, Hon'ble NCLT directed financial creditor to substitute name of Interim Resolution Professional.

Hon'ble NCLAT held that:

"the Adjudicating Authority was perfectly justified in seeking substitution of Mr. Shailesh Verma to ensure that the 'Corporate Insolvency Resolution Process' was conducted in a fair and unbiased manner. This is notwithstanding the fact that Mr. Shailesh Verma was not disqualified or ineligible to act as an 'Interim Resolution Professional'.

Viewed thus, we find no legal flaw in the impugned order which is free from any legal infirmity and has to be upheld. It goes without saying that the Appellant- 'Financial Creditor' should not have been aggrieved of the impugned order as the same did not cause any prejudice to it."

The Disciplinary Committee of IBBI vide an order dated November, 2019 found that an Insolvency Professional:

Failed to make disclosures with respect to appointment of an LLP (in which he was a partner) as an IPE contravening the directions under the Circular issued by IBBI;

Allowed charging fee of Rs. 12,09,90,185/- payable to lender's legal counsel as an IRPC and abdicated his authority in favour of CoC. He paid expenses of third party from CD and included in IRPC. He deliberately in connivance with some stakeholders squandered the assets (money) for unlawful purpose;

Shared the fee, which can be paid only to an individual acting as an IP, with an LLP (in which he was a partner) against the provisions of the Code and the Regulations.

The Disciplinary Committee of IBBI observed that there was understanding between CoC and RP to contravene a law and willingness to remedy the situation only if they are caught. Thus, the RP has deliberately compromised his independence. The Disciplinary Committee Imposed penalty of ten percent of the RP's fee and Directed the RP to make good the loss by securing reimbursement and deposit the amount of Rs. 12,09,90,185/- in the account of Corporate Debtor.

CASE STUDY ON TIMELINESS

In the matter of **M/s. Surendra Trading Company V. M/s. Juggilal Kamalpat Jute Mills Company Limited and Others, Civil Appeal No. 8400 of 2017**, the Hon'ble Supreme Court held that the timelines provided in sections 7, 9 and 10 of the Code, for deciding a matter within 14 days as well as the time to remove a defect within 7 days, are directory and not mandatory.

In the matter of **Committee of Creditors of Essar Steel India Limited V. Satish Kumar Gupta & Ors, Civil Appeal No. 8766-67 of 2019**, the Hon'ble Supreme Court held that "ordinarily the time taken in CIRP must be completed within the time limit of 330 days from the insolvency commencement date, including the time taken in litigation process. However, in few cases where it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short time is left in completion of corporate insolvency resolution process beyond 330 days, and it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days."

CASE STUDY ON CONFIDENTIALITY

In the matter of **Rajputana Properties Pvt. Ltd. Vs. Ultra Tech Cement Ltd. & Ors.**, NCLAT vide its order dated 15th May 2018 held that the Resolution Professional is required to examine whether resolution plan confirms the provisions as mentioned therein but he cannot disclose it to any other person including Resolution Applicant(s), who has submitted the resolution

plan. The resolution plan submitted by one or other Resolution Applicant being confidential cannot be disclosed to any competitor Resolution Applicant nor any opinion can be taken or objection can be called for from other Resolution Applicants with regard to one or other resolution plan.

CASE STUDY ON OCCUPATION, EMPLOYABILITY AND RESTRICTIONS

In the matter of **IDBI Bank Ltd. v. Lanco Infratech Ltd, C.P.(IB)No. 111/7/HDB/2017**, the Hon'ble NCLT Hyderabad Bench in its order dated 7th August, 2017 stated that "Therefore, we agreed with the submissions of the respondents considering his previous three assignments to large companies and the current corporate debtor itself is a large company we are of the prima facie view that the proposed IRP would not find sufficient time to act as IRP for the respondent company."

In the matter of **Anil Goel v. LML Ltd., C P No. (IB) 55/ALD/2007 with CA No.73/2018**, the Hon'ble NCLT Allahabad Bench in its order dated 23rd March, 2018 stated that ".....He is also appointed the Liquidator in another two matters..."

"In the case in hand, the Resolution Profession Process was to be completed within the extended period of CIRP, by dated 25.02.2018. But the Resolution Professional failed to submit the progress report/ the resolution plan within the statutory period i.e. 270 days. The Resolution Professional has filed this application on 19.03.2018, after the issuance of notice by order of this Tribunal dated 13.03.2018 for submission of progress report/ Resolution Plan against him. The RP was also directed to remain present in the Court in person on 19.03.2018. The above act of the RP shows that he was not careful in following the timeline prescribed under the Insolvency and Bankruptcy Code."

CASE STUDY ON REMUNERATION AND COSTS

In **Anurag Nirbhaya Vs. Anuj Maheshwari & Ors, Order dated 14.10.2019, NCLT**, IRP claimed Rs. 12 Lakhs for the first month and Rs. 11 Lakhs per month for the period of rest of the two and half months and he was paid Rs. 6 Lakhs for the total period of three and half months. The AA observed that the exorbitant fee has been claimed by the IRP and stated that generally they allow fee @ Rs. 1 Lakh per month to the professionals.

In **Punjab National Bank Vs. Divyajyot Sponge Iron Pvt. Ltd NCLT, Order dated 13.03.2018**, the AA took notice of fixation of exaggerated insolvency resolution cost, inclusive of fixation of fee of RP in a lump sum manner by the CoC without applying its mind as regards to the fate of CD, the volume, nature and complexity of CIRP.

It is observed that it is time to have legitimate guidelines or regulation in this regard so as to safeguard and to ensure the prospects and revival of a dying CD not be at the highest cost which cannot be affordable by the CD. It hoped that IBBI would frame necessary regulations/guidelines for fixation of fees and resolution cost by a RP.

An IP should not charge abnormally high fee in relation to the services: The Disciplinary Committee of IBBI found that an IP attempted to charge abnormally high fee in relation to the services. Besides, he acted mala fide by seeking increase of his fee after approval of fee by the AA and displayed professional incompetence by using stale information for decision making. He, then IRP signed the term sheet with the applicant, who is not legally competent to appoint RP or fix his fee, and thereby attempted to deprive the CoC of its legitimate right to appoint a RP of its choice and fix his fee. The Disciplinary Committee suspended the registration of the IP for two years, directed the IP to undergo the pre-registration educational course and work for at least six months as an intern with a senior insolvency professional, at any time during the period of suspension.

Fee paid to the professionals appointed on the direction of CoC should not be included as IRPC: The Disciplinary Committee of IBBI observed that Despite the IBBI Circular dated 12.06.2018 clearly stating that Insolvency Resolution Process Cost (IRPC) shall not include any expense incurred by a member of CoC or a professional engaged by them, the RP charged the fee of lender's legal counsel from the Insolvency Resolution Process Cost. Resolution Professional, on the direction of CoC, finalized the appointment of a Professional to conduct second forensic audit. The fees should have been borne by the CoC members themselves but the same was included as IRPC. The Disciplinary Committee suspended the registration of IP for six months, directed to secure reimbursement of the amount which was paid to lender's legal counsel and professional for conducting second forensic audit and charged to IRPC.

In Re: V Nagarajan Vs. SKS Ispat and Power Ltd. & Ors, Civil Appeal No. 3327 of 2020 order dated 22.10.2021, Hon'ble Supreme Court inter alia observed that "The Resolution Professional is responsible for ensuring the timeliness of the process and has to file several forms, as detailed under Regulation 40B, and explain all delays that occur in the intervening period, when filing the final Form H upon submitting a successful resolution plan under Section 30 of the IBC.

In Re.: Sandeep Khaitan, Resolution Professional for National Plywood Industries Ltd. Vs. JSVM Plywood Industries Ltd. & Anr. Criminal Appeal No.447 of 2021 Order dated 22.04.2021, Supreme Court inter alia observed that "With the appointment of Committee of Creditors, a Resolution Professional is to be appointed. The Resolution Professional is thereafter to conduct the resolution process and manage the operations. Section 23 (2) makes it clear that his power is the same as the powers of the Interim Resolution Professional. Undoubtedly, the Resolution Professional is bound to seek prior approval of the Committee of Creditors in matters covered by Section 28."

"The IRP/RP must take a decision guided purely by the object of the IBC and the provisions and the factual matrix."

"The role of the insolvency professional is neatly carved out. From the date of admission of application and the appointment of Interim Resolution Professional, the management of the affairs of the Corporate Debtor is to vest in the Interim Resolution Professional. With such

appointment, the powers of the Board of Directors or the partners of the Corporate Debtor as the case may be are to stand suspended. Sect on 17 further declares that the powers of the Board of Directors or partners are to be exercised by the Interim Resolut on Professional. The f nancial inst tut ons are to act on the instruct ons of the Interim Resolut on Professional. Sect on 14 is emphat c, subject to the provisions of sub sect on (2) and (3). The impact of the moratorium includes prohibit on of transferring, encumbering, alienat ng or disposing of by the Corporate Debtor of any of its assets.”

In Re.: Manish Kumar Vs. Union of India & Anr., Writ Pet t on (C) No.26 of 2020 with other writ pet t ons order dated 19.01.2021, Hon’ble Supreme Court inter alia observed that “The resolut on professional has to examine each resolut on plan received by him on the basis of the invitat on made by the resolut on professional under Sect on 25(h) and ascertain whether the plan is in conformity with the various criteria ment oned in Sect on 30(2) of the Code.”

“The IRP may or may not cont nue as the Resolut on Professional (RP) but a RP is, undoubtedly, to be appointed under the scheme of the Code. The management passes into the hands of the RP. Thereaf er, depending upon the receipt of the Resolut on Plan and its acceptability to the Commit ee of Creditors and f nally the approval by the Adjudicat ng Authority of the Resolut on Plan, which is approved by the Commit ee of Creditors, depends the Resolut on of the Insolvency.”

“In short, the show is run by the Resolut on Professional, subject to the control of the Commit ee of Creditors.”

In Re.: Arcelor Mit al India Private Limited Vs Sat sh Kumar Gupta & Ors. Civil Appeal Nos. 9402-9405 -2018, Order dated 04.10.2018, Hon’ble Supreme Court inter alia observed as:

“However, it must not be forgot en that a Resolut on Professional is only to “examine” and “conf rm” that each resolut on plan conforms to what is provided by Sect on 30(2).”

“A conspectus of all these provisions would show that the Resolut on Professional is required to examine that the resolut on plan submit ed by various applicants is complete in all respects, before submit ng it to the Commit ee of Creditors.”

“The Resolut on Professional is not required to take any decision, but merely to ensure that the resolut on plans submit ed are complete in all respects before they are placed before the Commit ee of Creditors, who may or may not approve it. The fact that the Resolut on Professional is also to conf rm that a resolut on plan does not contravene any of the provisions of law for the t me-being in force, including Sect on 29A of the Code, only means that his prima facie opinion is to be given to the Commit ee of Creditors that a law has or has not been contravened.”

“Sect on 30(2)(e) does not empower the Resolut on Professional to “decide” whether the resolut on plan does or does not contravene the provisions of law.”

“Thus, the importance of the Resolut on Professional is to ensure that a resolut on plan is complete in all respects, and to conduct a due diligence in order to report to the Commit ee of Creditors whether or not it is in order.”

“Even though it is not necessary for the Resolut on Professional to give reasons while submit ng a resolut on plan to the Commit ee of Creditors, it would be in the f tness of things if he appends the due diligence report carried out by him with respect to each of the resolut on plans under considerat on, and to state briefly as to why it does or does not conform to the law.”

CSANOOPLAN

CHAPTER 17 AS PER ICSI MODULE

RESOLUTION STRATEGIES

Q1: The Insolvency and Bankruptcy Code, 2016 read with Regulation 37 of CIRP Regulations provides for various measures to resolve the insolvency of corporate debtor? Explain those measures. (5 marks)

PAST YEAR QUESTION JUNE 2024

OR

Enumerate the measures under Regulation 37 of CIRP that can be provided under a Resolution Plan for maximization of value of assets of the Corporate Debtor. Can a Resolution Plan envisage corporate restructuring of the Corporate Debtor under Corporate Insolvency Resolution Process (CIRP)? (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

OR

“A resolution plan shall provide for the measures, as may be necessary for insolvency resolution of a corporate debtor for maximization of values of its assets.” Discuss the measures provided in Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

OR

‘A resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets’. Discuss the measures provided in Regulation 37 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Insolvency and Bankruptcy Code, 2016 read with Regulation 37 of CIRP Regulations provides for various measures to resolve the insolvency of the corporate debtor. These measures are detailed as follows:

- i. Transfer of all or part of the assets of the corporate debtor to one or more persons.
- ii. Sale of all or part of the assets whether subject to any security interest or not.
- iii. Restructuring of the corporate debtor, by way of merger, amalgamation and demerger.
- iv. The substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons.
- v. Cancellation or delisting of any shares of the corporate debtor, if applicable.
- vi. Satisfaction or modification of any security interest.
- vii. Curing or waiving of any breach of the terms of any debt due from the corporate debtor.
- viii. Reduction in the amount payable to the creditors.
- ix. Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor.
- x. Amendment of the constitutional documents of the corporate debtor.

- xi. Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose.
- xii. Change in portfolio of goods or services produced or rendered by the corporate debtor
Change in technology used by the corporate debtor.
- xiii. Obtaining necessary approvals from the Central and State Governments and other authorities.
- xiv. Sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets and manner of dealing with remaining assets.

Alternate Answer,

The Insolvency and Bankruptcy Board of India (IBBI) framed IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP) to regulate insolvency resolution process. Corporate Restructuring process may be governed by the Regulation 37 of the CIRP Regulations. Measures, which the resolution plan may provide, for insolvency resolution of the corporate debtor for maximization of value of its assets including but not limited to the following:

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;
- (ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- (ca) cancellation or delisting of any shares of the corporate debtor, if applicable;
- (d) satisfaction or modification of any security interest
- (e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- (f) reduction in the amount payable to the creditors;
- (g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
- (h) amendment of the constitutional documents of the corporate debtor;
- (i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;⁵¹
- (j) change in portfolio of goods or services produced or rendered by the corporate debtor,
- (k) change in technology used by the corporate debtor; and
- (l) obtaining necessary approvals from the Central and State Governments and other authorities.

Regulation 37 of the CIRP Regulations was amended and clauses (ba), and (ca) were inserted facilitating corporate restructuring such as merger, demerger or amalgamation of the Corporate Debtor and cancellation or delisting of any shares, if applicable.

Section 5(26) of the Code defines "resolution plan" which means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II. It is provided in the Explanation to the definition that for removal of

doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger

Therefore, a resolution plan can include corporate restructuring of the corporate debtor as part of the corporate insolvency resolution process.

Q2: Debt for Equity swaps can be used as a tool not only for 230-231 of Companies Act, 2013 but for resolution plans formulated under Insolvency and Bankruptcy Code, 2016 — Present your views briefly. (3 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Regulation 37 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that a resolution plan shall provide for the measures for maximisation of value of assets. Thus, one of the best methods of corporate debt restructuring is debt-equity swap where specified shareholders shall have right to exchange stock for a predetermined amount of debt in the same company. In debt-equity swap debt/bonds are exchanged with shares/stock of the company. However, the resolution plan needs to be placed before Committee of Creditors for approval before the same is placed for sanction by the NCLT.

Q3: How is corporate restructuring categorized under the Insolvency and Bankruptcy Code, and how are internal and external restructuring applied in insolvency resolution?

Answer: Corporate restructuring under the IBC is broadly categorized into:

Type	Explanation
External Restructuring	Involves merger, amalgamation, demerger, acquisition of controlling stake through purchase of majority shares, and conversion of debt into equity.
Internal Restructuring	Includes operational and financial restructuring undertaken within the company.

A practical example is the acquisition of Bhushan Steel Ltd. (TBSL) by Bambal Steel Ltd., a Tata Steel subsidiary. Under the approved Resolution Plan, Bambal subscribed to 72.65% equity for ₹158.89 crore and infused ₹35,073.69 crore via debt/convertible debt to repay the dues of the corporate debtor.

Both types of restructuring can be used together based on the needs of the corporate debtor. The Resolution Plan, approved by the Committee of Creditors (CoC) and Adjudicating Authority, should choose restructuring strategies based on:

- Nature and size of the business
- Industry and market situation
- Type of financial creditors
- Internal policies and stakeholder relationships
- Applicable legal provisions

As per Regulation 37 of CIRP Regulations, resolution applicants may include external as well as internal (operational and financial) restructuring strategies to resolve insolvency.

Q4: What are the types of external restructuring strategies under insolvency proceedings, and how are they applied through resolution plans?

Answer: External restructuring refers to significant structural changes involving multiple entities and includes the following key strategies:

(i) Restructuring through mergers, amalgamation, and demerger

- This involves merging or demerging companies to enhance operational and financial efficiency.
- In insolvency, the resolution plan may propose a merger of the corporate debtor with the resolution applicant or its group companies, or demerger of units for better asset utilization.
- Consideration is usually in the form of equity shares issued based on a valuation-determined share exchange ratio.
- The merged/transferee company's resources—brands, technology, funds, and managerial input—support improved profitability and debt resolution.
- **Edelweiss ARC v. Synergies Dooray Automot ve Ltd.** confirmed that merger/amalgamation can be included in resolution plans as IBC has overriding effect under Section 238.

(ii) Restructuring through acquisition of controlling stake / purchase of shares

- The resolution applicant may acquire control by reducing/cancelling existing share capital and recapitalizing with new equity, or buying existing shares at nominal value.
- Funds can be infused as equity, debt, or both.
- The resolution applicant assumes control by reconstituting the board and appointing key management.

(iii) Restructuring through conversion of debt into issuance of securities

- Debt default is the core reason for insolvency. To address this, the applicant may convert debt into securities like equity shares, preference shares, or debentures.
- This reduces unsustainable debt levels and alters the debt's nature and terms.
- The converted debt provides creditors with equity while a substantial part of unsustainable debt may be waived.

These methods are part of a resolution plan that aims to revive the corporate debtor effectively by altering its structure and financial obligations.

Q5: What is internal restructuring under insolvency resolution, and how are operational and financial restructuring implemented within a resolution plan?

Answer: Internal restructuring focuses on improving the internal operations and financial structure of a corporate debtor to resolve insolvency. It includes operational and financial restructuring, which may be applied independently or alongside external restructuring.

Illustrative Example:

In the case of Bhushan Steel Ltd. (now Tata Steel BSL Ltd.), acquired by Bambal Steel Ltd. (a Tata Steel subsidiary), the resolution plan involved:

- Subscription to 72.65% equity for ₹158.89 crore.
 - Additional funds of ₹35,073.69 crore by way of debt/convertible debt to repay dues.
- This showcases a mix of both financial and operational restructuring strategies.

Components of Internal Restructuring:

Operational restructuring involves enhancing the operational efficiency of a corporate debtor to improve business receipts and profitability. It may include:

- Creating new departments to serve emerging markets,
- Downsizing or eliminating unproductive departments,
- Refocusing on core competencies,
- Making the organization lean and efficient.

This type of restructuring can affect employees through layoffs or skill upgrades via third-party collaboration.

Under the CIRP, the resolution applicant must submit a strategy and business plan detailing operational changes to resolve the insolvency. As per Regulation 37, methods may include:

- Modifying the product or service portfolio,
- Adopting new technology,
- Restructuring internal operations as needed.

These changes aim to restore the viability of the corporate debtor and ensure a successful resolution.

Q6: What does Regulation 38(3) of the CIRP Regulations mandate in relation to a Resolution Plan, and why is operational restructuring considered an essential element?

Answer: Regulation 38(3) of the CIRP Regulations mandates that a Resolution Plan must:

- (a) Address the cause of default,
- (b) Be feasible and viable,
- (c) Contain provisions for effective implementation,
- (d) Include required approvals and their timelines, and
- (e) Demonstrate the capability of the resolution applicant to implement the plan.

This regulation ensures that the Resolution Plan is comprehensive and actionable. It must include details of corporate restructuring, particularly operational restructuring, wherever necessary, to effectively resolve the insolvency of the corporate debtor.

Thus, operational restructuring is not optional—it is a key element of the Resolution Plan, outlining the future strategy for the business operations and ensuring its sustainable revival.

Q7: What is financial restructuring in the context of corporate insolvency, and what are its objectives and key components?

Answer: Financial restructuring refers to the reorganization of a company's financial structure, primarily involving its equity capital and debt capital. It is undertaken either:

- Compulsorily, to recover from financial distress, or
- As part of a strategic initiative to improve financial performance.

Financial restructuring may be triggered by several reasons, both financial and non-financial, and involves actions like negotiating with stakeholders (banks, financial institutions, creditors) to reduce liabilities.

Its objectives include:

- Overcoming poor financial performance by reducing debt and interest costs,
- Addressing external competition,
- Regaining market share,
- Seizing emerging market opportunities, and
- Developing core competencies.

The two key components of financial restructuring are:

1. Equity restructuring: Alteration or reduction or conversion of capital, buy-back.
2. Debt restructuring: Restructuring of the debt being secured long term borrowing, long term unsecured borrowing, short term borrowing.

This process of reorganization plays a vital role in a Resolution Plan under insolvency, helping restore the corporate debtor's financial stability and viability.

Q8: What is debt restructuring. What are the different ways in which a resolution plan can provide for the restructuring of the debt of a corporate debtor under the Corporate Insolvency Resolution Process (CIRP)? Briefly explain the various strategies such as payment of dues, conversion of debt into securities, waiver of amounts, modification in security and credit limits, and restructuring of short-term and long-term borrowings.

Answer: A resolution plan may include **multiple strategies** to restructure the debt of the corporate debtor, aiming to ensure **viability, feasibility**, and timely recovery for creditors. The key approaches are:

(a) Modification in Payment Period

- Partial upfront/immediate payment of dues to financial creditors.
- Balance amount to be paid over an agreed extended period.
- While creditors prefer maximum upfront recovery, they may accept staggered payments considering the debtor's situation.

(b) Conversion of Debt into Other Instruments

- Debt (or part of it) may be converted into: Equity shares, Redeemable debentures, Preference shares, Optional convertible instruments
- Creditors may accept part equity to benefit from future upside if the debtor revives.
- Creditors generally avoid full conversion into equity and prefer a mix of quick settlement & equity.

(c) Waiver of Principal, Interest, or Charges

- The resolution applicant may seek a waiver of:
 - Part of the outstanding principal
 - Accrued interest
 - Other charges
- Balance payable in short term along with some equity participation to compensate creditors in the long run.

(d) Modification in Security Arrangement

- Financial creditors' security interests may be altered:
 - Released or disposed of to settle claims partially/fully.

- New investor may be brought in, and some securities may be transferred to the new party.

(e) Modification in Credit Limits

- Restructuring of fund-based and non-fund-based limits like cash credit, term loans, bank guarantees.
- Limits are adjusted based on the post-resolution working capital needs.
- Continuation of credit depends on the creditworthiness of the resolution applicant.

(f) Restructuring of Secured Long-Term Borrowings

- Focuses on: Reducing cost of capital, Improving liquidity, Increasing cash flows
- Achieved through: Modification of terms, Conversion into equity/debentures and Extension of tenure

(g) Restructuring of Unsecured Long-Term Borrowings

- Applies to: Public deposits, Private unsecured loans, Unsecured debentures
- Objective:
 - Lower interest burden
 - Synchronize cash inflows and outflows
 - Modify or extend repayment terms

(h) Restructuring of Short-Term Borrowings

- Restructuring methods include:
 - Conversion to long-term debt
 - Reduction in interest rate
 - Adjustment of existing dues
 - Renegotiation of existing terms

Q9: What were the major debt restructuring mechanisms available prior to June 2019, and what changes were introduced by the Reserve Bank of India (RBI) through its circular dated 07.06.2019 regarding the resolution of stressed assets?

Answer: Prior to June 2019, several debt restructuring mechanisms were in place to help resolve the financial distress of corporate debtors. These mechanisms were based on circulars and frameworks issued by the Reserve Bank of India (RBI) and included:

- Corporate Debt Restructuring Scheme (CDR)
- Framework for Revitalizing Distressed Assets
- Joint Lenders' Forum (JLF)
- Flexible Structuring of Existing Long-Term Project Loans
- Strategic Debt Restructuring Scheme (SDR)
- Change in Ownership outside SDR
- Scheme for Sustainable Structuring of Stressed Assets (S4A)

These schemes allowed financial institutions to restructure loans of companies facing temporary financial difficulties, often outside of formal insolvency proceedings.

Q10: What is equity restructuring, and how is it implemented under the Insolvency and Bankruptcy Code, 2016? Describe the key methods of equity restructuring such as alteration of share capital, reduction of share capital, and buy-back of shares, along with the relevant legal provisions.

Answer: Equity restructuring refers to the reorganization of a company's equity capital, which is often undertaken as part of a broader corporate restructuring strategy—either operational, financial, or both. In the context of the Insolvency and Bankruptcy Code (IBC), 2016, equity restructuring may form an essential component of the approved resolution plan to revive a distressed corporate debtor.

The following are the key methods of equity restructuring along with their legal provisions:

1. Alteration of Share Capital:

Description: This includes changes such as increase, consolidation, subdivision, or cancellation of shares.

Legal Provisions:

- Sections 61 to 64, read with Sections 13 and 14 of the Companies Act, 2013.
- Companies (Share Capital and Debentures) Rules, 2014.
- National Company Law Tribunal Rules, 2016.

2. Reduction of Share Capital:

Description: This refers to reducing issued, subscribed, or paid-up share capital, typically to adjust accumulated losses or return excess capital.

Legal Provisions:

- Section 66 of the Companies Act, 2013.
- Rules 2 to 6 of the National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016.
- Relevant provisions under SEBI (LODR) Regulations, 2015 (for listed companies).

3. Buy-back of Shares:

Description: This allows a company to repurchase its own shares to restructure capital, enhance shareholder value, or consolidate ownership.

Legal Provisions:

- Sections 68 to 70 of the Companies Act, 2013.
- Rule 17 of the Companies (Share Capital and Debentures) Rules, 2014.
- SEBI (Buyback of Securities) Regulations, 2018 (for listed entities).

Conclusion:

Equity restructuring plays a crucial role in the revival of stressed companies under the IBC framework. By optimizing capital structure through one or more of the above methods, resolution applicants can enhance financial viability and investor confidence while aligning with regulatory compliance.

Q11: Discuss about the acquisition of Bhushan Steel Ltd. by Tata Steel Ltd. (5 marks)**PAST YEAR QUESTION JUNE 2023**

Answer: The acquisition of Bhushan Steel Ltd (BSL) for Rs. 35,200 crore by Barnipal Steel Ltd (BNL), a subsidiary of Tata Steel Ltd. in May 2018, has been the first major case of acquisition of a major stressed asset under the Insolvency and Bankruptcy Code.

BNL completed the acquisition of controlling stake of 72.65 per cent in BSL in accordance with the approved resolution plan under the Corporate Insolvency Resolution Process (CIRP) of the IBC. Tata Steel has paid Rs.35,200 crore in cash to acquire Bhushan Steel. It would pay another Rs.1,200 crore over next 12 months to operational creditors.

The promoters of BSL approached the National Company Law Appellate Tribunal (NCLAT) over issue of ineligibility of Tata Steel to acquire BSL. L&T, an operational creditor also approached the Hon'ble NCLAT over issue of unfair distribution of settlement amount for its claim under the provisions of IBC, 2016.

NCLAT upheld the acquisition of Bhushan Steel, rejecting allegations of its ineligibility by the promoters of the company. The NCLAT also rejected the claims of L&T, an operational creditor of Bhushan Steel Ltd, opposing Tata Steel's resolution plan seeking a higher priority in debt settlement.

The NCLAT said that Tata Steel UK, a foreign subsidiary of Tata Steel, which was fined by an English Court in February 2018 under UK act, had a provision of 'imprisonment for a term not exceeding twelve months, or a fine, or both'. While, the provision in section 29A(d) of the Code, which deals with eligibility, stipulates "has been convicted for any offence punishable with imprisonment for two years or more", cannot be equated with Section 33(1)(a) of the U.K Act, said NCLAT. Section 29A of the IBC mandates that a person convicted for any offence punishable with imprisonment for two years or more is ineligible for submitting a resolution plan.

Over the claims of L&T, which had supplied goods and machineries over Rs.900 crore, NCLAT said that Tata Steel's resolution plan was fair towards operational creditors of Bhushan Steel which has a total demand of Rs.1,422 crore. The NCLAT observed that the company has allotted Rs.1,200 crore for them and L&T plea for a higher priority could not be accepted.

Moreover, it also declined the plea of the promoter's family, contending Tata Steel's 'Resolution Plan' was illegal as it purports to transfer shares of the 'preference shareholders' of Bhushan Steel without their consent for a fixed consideration of Rs.100 as against Rs.2,269 crore.

Q12: What is the significance of the exemption from the SEBI Takeover Code in acquisitions made under the Insolvency and Bankruptcy Code (IBC), 2016?

Answer: The provision is envisaged to boost acquisitions of such companies. The acquisition of Bhushan Steel Ltd. by Tata Steel Ltd., acquisition of Electrosteel Steels Ltd. by Vedanta Resources Ltd., and acquisition of Monnet Ispat & Energy Ltd. by JSW Steel Ltd. under IBC were exempted from the open offer requirements.

The acquirers of distressed companies are not under the obligation to make an offer. The relaxation is granted with an intention to ease the additional burden on the acquirer from infusing an additional capital pursuant to acquiring the stake in the company. Moreover, in majority of the distressed companies under CIRP or where process is over, the dues of even the secured creditors have not been paid in full and as a result the liquidation value in respect of equity shareholders is Nil.

Q13: What are the resolution measures available under the Insolvency and Bankruptcy Code, 2016?

Answer: As per Section 30(2) of the IBC and Regulation 37 of the CIRP Regulations, the resolution measures include:

- Transfer of all or part of the assets of the corporate debtor to one or more persons
- Sale of all or part of the assets whether subject to any security interest or not
- Restructuring of the corporate debtor, by way of merger, amalgamation and demerger
- The substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons
- Cancellation or delisting of any shares of the corporate debtor, if applicable
- Satisfaction or modification of any security interest
- Curing or waiving of any breach of the terms of any debt due from the corporate debtor:
- Reduction in the amount payable to the creditors
- Extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor
- Amendment of the constitutional documents of the corporate debtor
- Issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose
- Change in portfolio of goods or services produced or rendered by the corporate debtor
- Change in technology used by the corporate debtor
- Obtaining necessary approvals from the Central and State Governments and other authorities
- Sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets

Q14: What are the provisions for cancellation or delisting of shares of the corporate debtor under a resolution plan as per the IBC?

Answer:

- Equity restructuring may involve cancellation, reduction, or delisting of shares.
- This helps avoid time-consuming transfer procedures.
- SEBI (Delisting of Equity Shares) Regulations, 2009 do not apply if:
 1. The resolution plan includes a specific delisting procedure, or

2. The plan of offers an exit option to public shareholders at a price:

- Not less than the liquidation value under Regulation 35 of CIRP Regulations.
- Not less than the price offered to promoters, if any.
- If promoters are given an exit under the resolution plan, the delisting price must be at least equal to the exit price offered to them.

Q15: What are the provisions under Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 regarding the sale of a corporate debtor as a going concern during liquidation?

Answer: Acquisition of Corporate Debtor under Liquidation through Sale as a Going Concern – Key Points (Regulation 32A):

1. **Priority to Going Concern Sale:** Liquidator must first attempt sale as a going concern if CoC recommends or if it maximizes value (Reg. 32(e) or (f)).
2. **Asset-Liability Grouping:** The group of assets and liabilities identified by CoC (under Reg. 39C(2) of CIRP Regulations) will be sold as a going concern.
3. **Consultation in Absence of CoC Grouping:** If CoC hasn't identified assets/liabilities, the liquidator must do so in consultation with the Stakeholder Consultation Committee.
4. **Timeline for Sale:** If not sold within 90 days from Liquidation Commencement Date, the liquidator must proceed to sell assets under Reg. 32(a) to (d).

Regulation 32 of liquidation regulations provides as below: The liquidator may sell:

- a) an asset on a standalone basis;
- b) the assets in a slump sale;
- d) the assets in parcels;
- c) a set of assets collectively;
- e) the corporate debtor as a going concern; or
- f) the business(s) of the corporate debtor as a going concern

An asset under security interest can only be sold under clauses (a) to (f) of Regulation 32 if the secured creditor has relinquished the security interest to the liquidation estate.

Q16: "In terms of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 the liquidator can dispose of the assets only through online auction or spot Auction in a traditional manner". Do you agree? (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Normally, liquidator has to dispose the assets of the Corporate Debtor through auction in a transparent manner and hence many liquidators resort to online auctions. However, Regulation 32 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 enables the liquidator to dispose either on standalone basis, Slump sale, as set of assets or in parcels, as a going concern either the Corporate Debtor or its businesses. Further, Regulation 33 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 prescribes the mode of Sale as specified in Schedule I to the Regulations. It need not be sale by auction but a private sale could be done in cases of perishable assets,

assets value may deteriorate requiring immediate sale, assets may fetch more than reserve price in case of failed Auction or permission is obtained from the adjudicating authority.

Q17: 'E-auction i.e. Auction on an online portal is fool proof method.' Discuss and describe the steps taken for auction under the Insolvency and Bankruptcy Code, 2016. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: According to Schedule I read with Regulation 33 of Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 -

1. Where assets are to be sold through auction, the Liquidator shall do so in the manner specified herein
2. Prepare strategy with the help of professional. The strategy may include -
 - a. Release of Advertisement
 - b. Information & Description of Assets
 - c. Preparing a Notice of Sale and
 - d. Liaisoning with Agents. Terms and Conditions of Sale
 - f. Reserve Price, Earnest Money Deposit
 - g. Reserve Price shall be the value arrived in accordance with Regulation
 - h. If auction fails, the reserve price can be reduced upto 25% in subsequent auction
 - i. Public announcement
 - j. Liquidator shall provide all assistance for conduct of due diligence by interested buyers
 - k. Sale through an electronic auction as an online portal
 - l. For physical auction, the Liquidator shall obtain approval of NCLT
 - m. Highest bid at any time shall be visible to other bidders
 - n. The highest bidder shall be directed to provide balance amount within the time prescribed in Sale Notice
 - o. On receipt of payment, Liquidator shall execute certificate of sale or sale deed to transfer the assets and deliver the assets as per the terms of sale.

Q18: "Debt restructuring involves a reduction of debt and an extension of payment terms or change in terms and conditions" – analyse the statement indicating that any Resolution plan need to be consented by the Committee of Creditors and approved by the National Company Law Tribunal (NCLT). (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Corporate Restructuring is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resources, and fulfilment of stakeholders' expectations.

Debt restructuring involves a reduction of debt and an extension of payment tenure or change in terms and conditions. Debt restructuring is more commonly used as a financial tool than compared to equity restructuring. As such in Corporate Insolvency Resolution Process the Committee of Creditors primarily consists of financial creditors.

Sect on 30(4) of Insolvency and Bankruptcy Code, 2016 envisages approval of the Resolut on Plan by the Commit ee of Creditors before f nal approval by the Adjudicat ng Authority i.e., Nat onal Company Law Tribunal in terms of Sect on 33 of the Code.

Q19: “Debt restructuring involves a reduct on of debt and an extension of payment terms or change in terms and condit ons.” Analyze the statement indicat ng that any resolut on plan needs to be consented by the Commit ee of Creditors and approved by the Nat onal Company Law Tribunal (NCLT). (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: In case of Corporate Insolvency Resolut on Process (CIRP), corporate restructuring strategies include organizat onal restructuring and f nancial restructuring.

- Financial restructuring is the process of reorganizing the f nancial structure, which primarily comprises of equity and debt capital f nancial restructuring is undertaken either to recover from f nancial distress or as part of company’s general f nancial strategy, such as gaining higher market share, seize emerging market opportunit es, risk reduct on, bet er debt management.
- Debt restructuring is the process of reorganizing the whole debt capital of the company in negot at on with bankers, creditors, vendors. It involves a reduct on of debt and an extension of payment terms of change in terms and condit ons.
- Restructuring includes alterat on of the repayment period, repayable amount, the amount of instalments, rate of interest, sanct on of addit onal credit facility, enhancement of exist ng credit limits, compromise set lements etc.
- One of the best methods for corporate debt restructuring is debt-equity swap where specif ed shareholders have right to exchange stock for a predetermined amount of debt in the same company. In debt-equity swap, borrowings are exchanged with shares of the company.
- The resolut on plan shall be submit ed by a resolut on applicant. The Commit ee of Creditors shall approve a resolut on plan by a vote of not less than 66% majority of the f nancial creditors, af er considering its feasibility and viability, and such other requirements as may be specif ed by the Insolvency and Bankruptcy Board of India.
- Once the resolut on plan is approved by the Commit ee of Creditors, it is presented to the Adjudicat ng Authority (NCLT) for its approval.
- Thus, under the Insolvency and Bankruptcy Code, a resolut on plan requires the consent of the Commit ee of Creditors and thereaf er the approval of the Adjudicat ng Authority (NCLT).
- As per sect on 31, the NCLT shall review the resolut on plan sanct oned by the Commit ee of Creditors. If NCLT is sat sf ed that the resolut on plan as approved by the Commit ee of Creditors meets the requirements, it shall approve the resolut on plan.
- Af er NCLT approval, the resolut on plan shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in resolut on plan.

Q20: 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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Provided that the liquidator shall not sell the assets, without prior permission of the Adjudicating Authority, by way of private sale to-

- (a) a related party of the corporate debtor;
- (b) his related party; or
- (c) any professional appointed by him.

The liquidator shall not proceed with the sale of an asset if he has reason to believe that there is any collusion between the buyers, or the corporate debtor's related parties and buyers, or the creditors and the buyer, and shall submit a report to the Adjudicating Authority in this regard, seeking appropriate orders against the colluding parties.

Q21: What are the contents of the Asset Sale Report as required under Regulation 36 of the IBBI (Liquidation Process) Regulations, 2016?

Answer: As per Regulation 36 of the IBBI (Liquidation Process) Regulations, 2016, On sale of an asset, the liquidator shall prepare an asset sale report in respect of said asset, to be enclosed with the Progress Reports, containing –

1. the realized value;
2. cost of realization, if any;
3. the manner and mode of sale;
4. If the value realized is less than the value in the asset memorandum, the reasons for the same;
5. the person to whom the sale is made; and
6. any other details of the sale.

Q22: When shall the liquidator distribute the proceeds from realization to the stakeholders?

Answer: As per Regulation 42 of the IBBI (Liquidation Process) Regulations, 2016:

- The liquidator shall not commence distribution before filing the list of stakeholders and the asset memorandum with the Adjudicating Authority.
- The distribution shall be made within 90 days from the receipt of the amount.
- Insolvency resolution process costs and liquidation costs must be deducted before distribution.

Q23: Resolut on Professional (RP) of TMT Ltd. f led an applicat on seeking approval of the resolut on plan submit ed by a resolut on applicant, who is a Financial Creditor with 82.7% vot ng share in the CoC. The plan provided that the resolut on applicant will sell the corporate debtor in two years. It provides for generat on of income from ongoing operat ons and no upfront money is being brought in by the resolut on applicant. Comment in light of relevant case laws, will the resolut on plan be approved by NCLT? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The facts of the present case are similar to that of *Edelweiss Asset Reconstruct on Company Ltd. v. Bharat Defence and Infrastructure Ltd*, wherein the Resolut on Professional (RP) f led an applicat on seeking approval of the resolut on plan submit ed by a resolut on applicant, who is a Financial Creditor with 82.7% vot ng share in the CoC. The plan provided that the resolut on applicant will sell the corporate debtor in two years. NCLT, Mumbai Bench noted that the plan does not give due considerat on to the interest of all stakeholders, seeks several exempt ons, and contains a lot of uncertaint es and speculat ons. It provides for generat on of income from ongoing operat ons and no upfront money is brought in by the resolut on applicant. The NCLT Bench also noted that the resolut on applicant has proposed to hold majority equity in the corporate debtor, run its operat ons, enhance its value and over a period endeavour to f nd a suitable investor/buyer for the same.

Relying on the judgment in the mat er of *Binani Industries Limited*, the NCLT Bench observed: "... resolut on plan is for insolvency resolut on of the Corporate Debtor as a going concern and not for the addit on of value and intended to sale the corporate debtor". It observed that resolut on applicant is essent ally extending the CIRP period to f nd an investor, which is not the intent on of the legislature. It further observed: "if the ult mate object in the resolut on plan is to sell the company, then it can be achieved by sale as a going concern during the liquidat on process". Accordingly, it rejected the resolut on plan and ordered for liquidat on. Thus, it can be concluded that the resolut on plan will not be approved by NCLT.

CASE STUDY

In **Dr. Devaiah Pagidipat v. Southern Online Bio Technologies Limited**, NCLT Hyderabad held that sale of assets of Corporate Debtor undergoing liquidat on as a going concern does not require NCLT approval under IBC. However, given the lacuna in the IBC framework on measures that can be adopted in case of such sale, NCLT order may be needed to ef ectuate the sale of CD as a going concern and for claiming certain reliefs and concessions. Without grant ng addit onal reliefs that are essent al and required to operate the company as an ongoing concern, the simple purchase of the unit as a going concern is useless. To put it another way, buying the business/assets of business as a going business without giving the applicant the reliefs defeats the purpose of doing so.

In **M/s. Visisth Services Limited, v. S. V. Ramani,& Ors.**, NCLAT held that Regulat on 32 A of the IBBI (Liquidat on Process) Regulat ons, 2016 provides that Sale as a 'Going Concern' means

sale of assets as well as liabilities and not assets sans liabilities. It means sale of both assets and liabilities, if it is stated on 'as is where is' basis.

In **Bank of Baroda v. Topworth Pipes & Tubes Pvt. Ltd.**, NCLT held that successful bidder may not be held liable for any past liabilities of the Corporate Debtor prior to the effective date including liabilities arising in enquiries, investigations, assessments, claims, litigations, arbitrations or other judicial, regulatory, administrative proceedings in relation to or in connection with the Corporate Debtor during sale of corporate debtor as going concern during liquidation.

In **Alchemist Asset Reconstruct Co. Ltd. Vs. Moser Baer India Ltd. [CA-769(PB)/2019 in C.P. No. IB- 378(PB)/2017]** NCLT, New Delhi order dt. 16.07.2019

It was stated that the proper interpretation on clauses (a) and (b) of the regulation 33 of Liquidation Process Regulations would be that a liquidator is entitled to sell the assets without requirement of prior permission after reaching the conclusion that the assets are perishable and it is likely to deteriorate significantly in value if not sold immediately. Otherwise, the purpose of Regulation would be defeated if time is required to be spent in filing an application and taking permission, because the assets which are perishable may not remain available for sale and perish or it may deteriorate significantly in value, if not sold immediately.

In **MRG Estates LLP Vs. Akash Shinghal, Liquidator, Amira Pure Foods Pvt. Ltd. & Ors. [W.P.(C) 10023/2020]** HC, New Delhi order dt. 15.12.2020

The HC directed IBBI to consider the petition as a representation on the issue of adoption of Swiss Challenge method as a form of an auction under the Liquidation Process Regulations.

In the matter of **Y. Shivram Prasad & Ors. v. S. Dhanapal & Ors.**, the NCLAT passed the impugned order of liquidation as Committee of Creditors did not find any resolution plan viable and feasible. The promoters submitted that they should have been given an opportunity to settle the dues. While rejecting the said submission, the NCLAT clarified that settlement can be made only at three stages, i.e., before admission, before constitution of CoC and in terms of section 12A of the Code and such stages were over in this instant matter. It, however, observed that during the liquidation process, it is necessary to take steps for revival and continuance of the Corporate debtor by protecting it from its management and from a death by liquidation.

Wherein this appellate tribunal having not cited the decision of the Hon'ble Supreme Court in **"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra)** and **"Meghal Homes Pvt. Ltd."** observed and referring to the matter of **"Swiss Ribbon Pvt. Ltd. & Anr. v. Union of India & Ors. (Supra)** where Hon'ble Supreme Court observed that "What is interesting to note is that the Preamble does not, in any manner, refer to liquidation, which is only availed of as a last resort

if there is either no resolution plan or the resolution plans submitted are not up to the mark. Even in liquidation, the liquidator can sell the business of the corporate debtor as a going concern” and NCLAT in its matter further held that “in view of the provision of Section 230 and the decision of the Hon’ble Supreme Court in ‘Meghal Homes Pvt. Ltd.’ and ‘Swiss Ribbons Pvt. Ltd.’, we direct the ‘liquidator’ to proceed in accordance with law. He will verify claims of all the creditors; take into custody and control of all the assets, property, effects and actionable claims of the ‘corporate debtor’, carry on the business of the ‘corporate debtor’ for its beneficial liquidation, etc. as prescribed under Section 35 of the Code. If the members or the ‘Corporate debtor’ or the ‘creditors’ or a class of creditors like ‘Financial Creditor’ or ‘Operational Creditor’ approach the company through the liquidator for compromise or arrangement by making proposal of payment to all the creditor(s), the liquidator on behalf of the company will move an application under Section 230 of the Companies Act, 2013 before the adjudicating authority i.e. National Company Law Tribunal, Chennai Bench, in terms of the observations as made in above. On failure, as observed above, steps should be taken for outright sale of the ‘Corporate debtor’ so as to enable the employees to continue”.

CHAPTER 18 AS PER ICSI MODULE

CONVENING AND CONDUCT OF MEETINGS OF COMMITTEE OF CREDITORS

Q1: What is the significance of the "creditor-in-control" model under the Insolvency and Bankruptcy Code, 2016, as emphasized by the BLRC and upheld by the Supreme Court?

Answer:

- The Banking Law Reforms Committee (BLRC) emphasized the rights of creditors, recommending a "creditor-in-control" model in cases of default.
- Under this model, control shifts from the equity owners to creditors upon default, ensuring creditors manage the resolution process.
- The Supreme Court, in *Innovent v. Industries v. Union of India*, upheld this approach, stating control must move to creditors when a company defaults.
- The Committee of Creditors (CoC), as the main decision-making body, exercises commercial wisdom, assesses viability, and plays a key role in restructuring the Corporate Debtor.

Q2: What highlights the significance of creditors under the Insolvency and Bankruptcy Code, 2016?

Answer: Initiation of CIRP: A creditor (financial or operational) can initiate the Corporate Insolvency Resolution Process (CIRP).

- Constitution of CoC: As per Section 18(c), the Interim Resolution Professional (IRP) must constitute the Committee of Creditors (CoC).
- Management of affairs: Section 18(d) mandates the IRP to monitor assets and manage operations of the corporate debtor until the CoC appoints a Resolution Professional.

Q3: An application filed before National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code, 2016 can be withdrawn before admission but not after admission.

Discuss. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: The statement is not correct. Application can be withdrawn before or after admission.

It is possible that the compromise formula may be evolved either before or after application is filed before National Company Law Tribunal (NCLT).

Application can be withdrawn with the permission of adjudicating authority under Rule 8 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

According to Section 12A of Insolvency & Bankruptcy Code, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

Q4: Prabhu Polyesters Ltd. is undergoing Corporate Insolvency Resolution Process as per Insolvency and Bankruptcy Code, 2016. Committee of Creditors is constituted. In the meantime, the Corporate Debtor, Prabhu Polyesters Ltd. made a settlement with the applicant financial creditor and desires to get the application withdrawn. What will be your advice to Prabhu Polyesters Ltd. regarding the withdrawal of its application. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: As per new section 12A of the Insolvency & Bankruptcy Code, the Adjudicating Authority may allow the withdrawal of application, on making an application by the applicant with the approval of 90% voting share of the Committee of Creditors.

Pursuant to regulation 30 of the IBBI (Resolution Process of Corporate Persons), 2016, such an application for withdrawal after constitution of CoC can be made by the applicant through interim resolution professional or resolution professional as the case may be.

Sub-regulation (2) provides that the application shall be made in Form FA of the Schedule-I accompanied by a bank guarantee- (a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub-regulation (1); or (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

Such an application shall be considered by CoC within seven days of its receipt.

Where such an application is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval. The Adjudicating Authority may, by order, approve the application submitted pursuant to which the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined by the interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code.

Q5: An application under section 9 of the Insolvency and Bankruptcy Code (IBC), 2016 was filed by N, operational creditor of Delta Pvt. Ltd. and was admitted by the NCLT on 30th July, 2024. Later on, the parties amicably settled the dispute and executed a Memorandum of Understanding on 06th August, 2024. In light of the settlement, Form-FA was received by the IRP on 08th August, 2024 for withdrawal of the Application in terms of Section 12A of the IBC read with Regulation 30A. Accordingly, an Application for withdrawal was filed by the IRP on 09th August, 2024 before NCLT.

During pendency of said Application, a Committee of Creditors (CoC) was constituted consisting of two financial creditors and the 1st meeting of CoC was also held. One financial creditor having 20% of voting shares dissented to allow withdrawal. NCLT refused to

entertain the withdrawal applicat on on the ground that it is not supported by 90% vote of CoC. As a Company Secretary of the corporate debtor, advise whether the withdrawal applicat on is tenable cit ng relevant case laws? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Yes, the appeal is tenable.

The facts of the case are similar to the facts in *M/s. Ashish Ispat Pvt. Ltd. v. Primuss Pipes and Tubes Ltd.*

In case of *M/s. Ashish Ispat Pvt. Ltd. v. Primuss Pipes and Tubes Ltd.*, an applicat on under sect on 9 of the Insolvency & Bankruptcy Code was admit ed by the NCLT and af er issuance of Form-A, the part es amicably set led the dispute and executed a Memorandum of Understanding. In light of set lement, Form-FA was received by the IRP for withdrawal of the Applicat on in terms of Sect on 12A of the Code read with Regulat on 30A. Accordingly, an Applicat on for withdrawal was f led by the IRP before NCLT. During pendency of said Applicat on, a CoC was const tuted and the one meet ng of CoC was also held. Thereaf er, the NCLT observing that there being two Financial Creditors out of which one having 17% of vot ng shares has dissented to allow withdrawal, the Applicat on for withdrawal cannot be considered unless the consent from CoC as required under the statute, is obtained. Hence, the Appellants and the Suspended Director of Corporate Debtor both aggrieved by the said order f led two Appeals.

The Hon'ble NCLAT held that when the Applicat on under Sect on 12A was f led for withdrawal, the CoC was not const tuted and hence there was no requirement of approval of 90% of vot ng share of CoC. Further Regulat on 30A also makes it clear that when an applicat on is f led prior to const tut on of CoC, the requirement of 90% vote of CoC is not applicable and the NCLT has to consider the Applicat on without requiring approval by 90% vote of the CoC. Thus, the Hon'ble NCLAT relying on the judgment of the Hon'ble Supreme Court in the mat er of *Kamal K. Singh vs. Dinesh Gupta & Anr.* and its previous judgments in the mat ers of *Anuj Tejpal vs. Rakesh Yadav & Anr.* and *Sunil Tandon v Manoj Kumar Anand, IRP & Ors.* held that the NCLT without considering the facts and sequence of the events had refused to entertain the Applicat on on the ground that it is not supported by 90% vote of CoC. Thus, the present Appeals were allowed permit ng withdrawal of CIRP.

Q6: What is the procedure for holding the f rst meet ng of the Commit ee of Creditors (CoC) as per the IBBI (Insolvency Resolut on Process for Corporate Persons) Regulat ons, 2016?

Answer:

- An insolvency professional shall make a public announcement immediately on his appointment as an interim resolut on professional (IRP) i.e. within three days of his appointment. {Regulat on 6(1)}
- The public announcement shall state where claim forms can be downloaded or obtained from, as the case may be, provide the last date for submission of proofs of claim, which shall be fourteen days from the date of appointment of the interim resolut on professional. {Regulat on 6(2)}

- The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it. (Regulation 13(1))
- The interim resolution professional shall file a report certifying constitution of the committee to the Adjudicating Authority within two days of the verification of claims received under sub-regulation (1) of regulation 12. {Regulation 17(1)}
- The interim resolution professional shall hold the first meeting of the committee within seven days of filing the report under this regulation. {Regulation 17(2)}

Q7: Who shall constitute Committee of Creditors (CoC)

Answer: As per **Sect on 21(1)**, the **Interim Resolution Professional (IRP)** shall constitute the **Committee of Creditors (CoC)** after:

- Collation of all claims received
- Determination of the financial position of the corporate debtor

As per Regulation 13 of the CIRP Regulations, the IRP/RP shall:

- Verify each claim within 7 days from the last date of receipt of claims
- Maintain and update a list of creditors with:
 - Names of creditors
 - Amount claimed and admitted
 - Security interest, if any
- Present this list in the first CoC meeting.

Q8: What are the different types of Committee of Creditors under the Insolvency and Bankruptcy Code, 2016?

Answer: Types of Committee of Creditors (CoC):

1. Committee with Financial Creditors (Sect on 21(2)–

- Constituted when the corporate debtor has financial creditors.
- Both secured and unsecured financial creditors are members of Committee of Creditors.

2. Committee with only Operational Creditors – Formed when there are no financial creditors or all financial creditors are related parties.

3. Committee with only Creditors in a Class – Where the corporate debtor has only creditors in a class and no other financial creditor eligible to join the committee, the committee shall consist of only the authorised representative(s).

Q9: Under the Insolvency and Bankruptcy Code, 2016, a public announcement of the initiation of the corporate insolvency resolution process for the corporate debtor is required. What information is required to be given in the public announcement? (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: According to Sect on 15 of the Insolvency and Bankruptcy Code, the public announcement of the corporate insolvency resolut on process shall contain the following informat on, namely: –

- (a) name and address of the corporate debtor under the corporate insolvency resolut on process;
- (b) name of the authority with which the corporate debtor is incorporated or registered; (c) the last date for submission of claims, as may be specif ed;
- (d) details of the interim resolut on professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims;
- (e) penalt es for false or misleading claims; and
- (f) the date on which the corporate insolvency resolut on process shall close, which shall be the one hundred and eight eth day from the date of the admission of the applicat on under sect ons 7, 9 or sect on 10, as the case may be.

Q10: As an Interim Resolut on Professional (IRP) how could you const tute the Commit ee of Creditors of a Corporate Debtor (CD) having only operat onal creditors or all f nancial creditors, who submit ed their claims, are found to be related part es of the CD? (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Regulat on 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolut on Process for Corporate Persons) Regulat ons deals with the situat on where the Corporate Debtor (CD) has either no f nancial debt or all f nancial creditors are related part es of CD.

The commit ee formed shall consist of members as under –

- (a) eighteen largest operat onal creditors by value:

Provided that if the number of operat onal creditors is less than eighteen, the commit ee shall include all such operat onal creditors;

- (b) one representat ve elected by all workmen other than those included under subclause (a); and
- (c) one representat ve elected by all employees other than those employee included under subclause (a).

A member of the commit ee formed under this Regulat on shall have vot ng rights in proport on of the debt due to such creditor or debt represented by such representat ve, as the case may be, to the total debt.

A commit ee formed and its members shall have the same rights, powers, dut es and obligat ons as a commit ee comprising f nancial creditors and its members, as the case may be.

Q11: XY Tractors Ltd is undergoing Corporate Insolvency Resolut on Process. The Corporate Debtor does not have any f nancial creditors. Help the Interim Resolut on Professional in const tut ng the commit ee of Creditors. (3 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: The Interim Resolution Professional needs to refer to Regulation 16 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that deals with situations where either the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor.

Accordingly, in the present case, Committee of Creditors consists of maximum eighteen largest operational creditors in order of value, one each representing workers and employees. Each member of the committee shall have voting share in proportion to the debt due either as creditor or representative for whom they represent to the total debt as explained. The committee formed and its members shall have same right, power, duties and obligations as a committee comprising of financial creditors and its members as the case may be.

Q12: Mr. X, is a Director and holds 15 percent shares in HRK Limited and 1 percent equity share in ABC Limited, and his father, Mr. Y holds 3 percent equity shares in ABC Limited, subsequently insolvency proceedings are instituted against HRK Limited which owes a debt of Rs. 75 lacs to ABC Limited.

Discuss whether ABC Limited is a “related party” as per The Insolvency and Bankruptcy Code, 2016? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: According to section 5(24) of the Insolvency & Bankruptcy Code, a “related party”, in relation to a corporate debtor, means

- a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
- b) key managerial personnel of the corporate debtor or a relative of key managerial personnel of the corporate debtor;
- c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner,
- d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
- e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
- f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

- j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement,
 - k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;
 - l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor,
 - m) any person who is associated with the corporate debtor on account of-
 - i) participation in policy making processes of the corporate debtor; or
 - ii) having more than two directors in common between the corporate debtor and such person; or
 - iii) interchange of managerial personnel between the corporate debtor and such person; or
 - iv) provision of essential technical information to, or from, the corporate debtor
- Explanation to section 5(24A) of the Insolvency & Bankruptcy Code provides
- (a) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely: - (iv) father,
- In light of definition of relative and clause (e) above, ABC Limited is a "related party" of HRK Limited as Mr. X is a director in HRK Limited and Mr. X together with Mr. Y (father) holds more than 2 percent of the equity share capital of ABC Limited.

Q13: How is the representation of the Financial Creditor ensured in different cases under the Insolvency and Bankruptcy Code, 2016?

Answer:

1. **Consortium:** In case of lending by a consortium or group of financial creditors, each member is considered a separate financial creditor and is represented individually in the Committee of Creditors (CoC).
2. **Class of Creditors (Section 21(6A)):** When financial creditors belong to a large class (e.g., homebuyers or deposit holders), an *authorized representative* is appointed to represent the entire class in the CoC.
The representative is chosen from a panel proposed by the Insolvency and Bankruptcy Board of India (IBBI).
3. **Appointment of Authorized Representative by Individual Creditor (Section 24(5)):** An individual financial creditor in a class may choose to be represented through an *authorized representative* in CoC meetings.
The authorized representative represents the interests and votes on behalf of all creditors in that class.

Q14: What are the options available to a financial creditor in a consortium under Section 21(6) of the IBC, 2016 for representation in the Committee of Creditors (CoC)?

Answer: A financial creditor in a consortium may choose to:

1. **Authorize the trustee or agent** to act on their behalf in the CoC to the extent of their voting share.

2. **Represent themselves** in the CoC to the extent of their voting share.
3. **Appoint an insolvency professional** (other than the resolution professional) at their own cost for representation in the CoC.
4. **Exercise voting rights** jointly or severally with one or more financial creditors to the extent of their voting share.

Q15: Who can act as the Authorised Representative for a class of financial creditors under Sect on 21(6A) of the IBC, 2016?

Answer: The following can act as Authorised Representatives (ARs) for financial creditors (FCs):

Situation	Authorised Representative (AR)	Appointing Authority	Remuneration
(a) Financial debt in the form of securities or deposits with terms for trustee/agent	Trustee or Agent	As per terms of financial debt	As per terms of financial debt or relevant documentation
(b) Financial debt owed to a class of creditors exceeding a specified number (not covered under (a) or Sec 21(6))	Insolvency Professional (not IRP)	Appointed by Adjudicating Authority	As specified; forms part of insolvency resolution process costs (IRPC)
(c) Financial creditor represented by guardian, executor, or administrator	Such guardian, executor, or administrator	Automatically acts as AR	As per terms of financial debt or relevant documentation

Q16: What are the roles and responsibilities of an Authorised Representative (AR) under Sect on 25A of the IBC?

Answer:

1. **Right to Participate and Vote**

AR can participate and vote in CoC meetings based on prior instructions from the financial creditors.

2. **Circulation of Documents**

AR must circulate the agenda and minutes of CoC meetings to the creditors they represent.

3. **Act in the Interest of Creditors**

AR must not act against the interest of the financial creditors and must always follow their prior instructions.

4. **Filing Voting Instructions**

AR must file the voting instructions received from the creditors (physical or electronic) with the CoC.

5. Ensure Proper Recording

AR must ensure that the voting instructions are correctly recorded by the IRP/RP.

Q17: What are the provisions under Regulation 16A of the IBBI (CIRP) Regulations, 2016 regarding the selection, duties, and rights of Authorised Representatives (ARs)?

Answer:

1. Selection of Authorised Representative

The Interim Resolution Professional (IRP) selects the insolvency professional who is the choice of the highest number of financial creditors in a class (as per Form CA) submitted within the prescribed time in the public announcement.

Forms received after the deadline are not considered.

2. Application for Appointment

The IRP must apply to the Adjudicating Authority (AA) for the appointment of the selected AR within two days of claim verification under Regulation 12(1).

3. Delay in Appointment

Delay in AR's appointment does not affect the validity of CoC decisions.

4. Information and Communication to AR

IRP must provide the AR:

- The list of creditors in each class upon appointment.
- Updated lists as and when revised.
- Electronic communication means to interact with creditors in the class.
- Clarification: AR has no role in receiving or verifying claims.

5. Voting Share of Creditors in a Class

Voting share is in proportion to financial debt, including interest @ 8% per annum, unless otherwise agreed.

6. Fees Payable to AR (Per CoC Meeting)

No. of Creditors in the Class Fee per Meeting (INR)

10–100	₹15,000
101–1000	₹20,000
More than 1000	₹25,000

7. Duties of AR

- Circulate agenda to creditors in the class.
- Seek preliminary views on agenda items to participate effectively in CoC meetings.
- Provide at least 12-hour window for submission of views, which opens 24 hours after views are requested.
- Preliminary views are not voting instructions.

Q18: What are the provisions under Sect on 24 of the IBC and Regulat on 18 of the CIRP Regulat ons, 2016 regarding the Meet ng of the Commit ee of Creditors (CoC)?

Answer: 1. First Meet ng of CoC

The frst meet ng of the Commit ee of Creditors must be held within 7 days from its const tut on by the Interim Resolut on Professional (IRP). (As per Sect on 24 of the Code)

2. Place/Mode of Meet ng

Members of the CoC may meet: In person, or Through electronic means, as may be specif ed. (Sect on 24(1))

3. Who Conducts CoC Meet ngs

All meet ngs are conducted by the Resolut on Professional (RP). (Sect on 24(2))

4. Convening of CoC Meet ngs (Regulat on 18)

- The Resolut on Professional may convene a meet ng on his own, whenever necessary.
- The RP may convene a meet ng on request of any CoC member, and shall mandatorily convene it if members represent ng at least 33% of vot ng rights make the request.
- Such meet ngs can be convened unt l:
 - A resolut on plan is approved under Sect on 31(1), or
 - An order for liquidat on is passed under Sect on 33.

5. Placing of Proposals in CoC Meet ng

- The RP may place a proposal received from members of the CoC if he considers it necessary.
- The RP shall place the proposal if requested by members holding at least 33% of vot ng rights.

Q19: To whom shall the not ce of the Commit ee of Creditors (CoC) meet ng be served and what are the rights of at endees as per Sect on 24 of the IBC?

Answer:

1. Persons to Whom Not ce Must Be Given (Sect on 24(3))

The Resolut on Professional shall serve not ce of each CoC meet ng to the following:

(a) Members of the CoC, including:

Authorised Representat ves under:

Sect on 21(6) (Consort um creditors),

Sect on 21(6A) (Class of creditors), and

Sect on 24(5) (Individual f nancial creditors with appointed ARs).

(b) Members of the suspended Board of Directors or partners of the corporate debtor.

(c) Operat onal creditors (OCs) or their representat ves, if their aggregate dues $\geq$ 10% of the total debt.

2. Rights of At endees (Sect on 24(4))

- The suspended directors/partners and OC representat ves may at end CoC meet ngs.
- However, they do not have vot ng rights in the meet ngs.
- Their absence does not invalidate the proceedings of the meet ng.

Q20: What are the provisions for the notice period for meetings of the Committee of Creditors (CoC) as per Regulation 19 of the IBBI (CIRP) Regulations, 2016?

Answer: Standard Notice Period:

1. Minimum 5 days' notice must be given to every participant of the CoC meeting.
2. The notice must be in writing and sent to the address provided by the participant to the Interim Resolution Professional (IRP) or Resolution Professional (RP).
3. The notice can be sent by Hand delivery, Post, or Electronic means (mandatory as per Regulation 20).

Reduced Notice Period:

4. The CoC may reduce the 5-day notice period in two scenarios:

Without Authorised Representative (AR):

The notice period can be reduced to not less than 24 hours, as deemed fit by the CoC.

With Authorised Representative:

The notice period can be reduced to not less than 48 hours, if any Authorised Representative (AR) is involved.

Q21: The Resolution Professional (RP) of a company receives a request from a member of the Committee of Creditors (CoC) (holding 30% share in the CoC) on 1st July, 2022 at 5.30 PM to convene a meeting on an urgent basis to discuss the matter relating to raising interim finance. Considering the urgency and citing the reason that a request has come to convene a meeting, the RP circulates the notice of the meeting on 2nd July, 2022 in the morning itself at 11 AM. During the meeting, other members of the CoC have informed the RP that his act on of convening the meeting based on the request received and the duration of notice is not sufficient as per the provisions of the Insolvency and Bankruptcy Code, 2016. Discuss the validity of the act on taken by the RP. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: As per Regulation 18 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2022, a Resolution Professional (RP) may convene a meeting if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least 33% per cent of the voting rights.

A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least 33% of the voting rights.

Further, a meeting of the committee shall be called by giving not less than five days' notice in writing to every participant, at the address it has provided to the resolution professional and such notice may be sent by hand delivery, or by post but in any event, be served on every participant by electronic means. The committee may reduce the notice period from five days to such other period of not less than twenty-four hours, as it deems fit, however, if there is any authorised representative, the committee may reduce the period to not less than forty-

eight hours. (Regulation 19 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016).

Considering the above provisions, the RP has violated the provisions of the Code since he has called the meeting based on the request received from the CoC members holding less than 33% voting rights and the notice for the meeting is also less than 24 hours.

Q22: Bhawna Clothing Limited (The Corporate debtor) was placed under Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC), 2016 in Jan., 2024.

Mr. N was appointed as the Interim Resolution Professional (IRP) and the committee of creditors was also formed.

During the CIRP process, the IRP was required to send notices to the members of CoC, members of the suspended Board of Directors and other participants entitled to attend the meetings.

In April, 2024, Mr. Goswami, a participant other than member of CoC, raised an issue in the meeting of creditors that he had not received any prior notices of the CIRP meetings and questioned the legitimacy of decisions taken in the meetings he had missed.

Highlighting the provisions of Regulation 20 of the Corporate Insolvency Resolution Process Regulations relating to service of notice by electronic means, decide about the legitimacy of decisions taken in the meetings Mr. Goswami had missed. Is there any obligation on the part of IRP for updation of e-mail ID while serving notice by electronic means (5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Regulation 20 of the Corporate Insolvency Resolution Process Regulations deals with Service of notice by electronic means and states that

- A notice by electronic means may be sent to the participants through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice.
- The subject line in e-mail shall state the name of the corporate debtor, the place, if any, the time and the date on which the meeting is scheduled.
- If notice is sent in the form of a non-editable attachment to an e-mail, such attachment shall be in the Portable Document Format or in a non-editable format together with a 'link or instructions' for recipient for downloading relevant version of the software.
- When notice or notifications of availability of notice are sent by an e-mail, the resolution professional shall ensure that it uses a system which produces confirmation of the total number of recipients e-mailed and a record of each recipient to whom the notice has been sent and copy of such record and any notices of any failed transmissions and subsequent re-sending shall be retained as "proof of sending".
- The obligation of the resolution professional shall be satisfied when he transmits the e-mail and he shall not be held responsible for a failure in transmission beyond its control.
- The notice made available on the electronic link or Uniform Resource Locator shall be readable, and the recipient should be able to obtain and retain copies and the resolution

professional shall give the complete Uniform Resource Locator or address of the website and full details of how to access the document or information.

- If a participant, other than a member of the committee, fails to provide or update the relevant e-mail address to the resolution professional, the non-receipt of such notice by such participant of any meeting shall not invalidate the decisions taken at such meeting.

In view of above provisions, If Mr. Goswami, failed to provide or update the relevant e-mail address to the resolution professional, the non-receipt of such notice by Mr. Goswami of any meeting shall not invalidate the decisions taken at such meeting.

Q23: What are the contents of the notice for a meeting of the Committee of Creditors (CoC) as per Regulation 21 of the IBBI (CIRP) Regulations, 2016?

Answer: Regulation 21 of Corporate Insolvency Resolution Process Regulations provides for the content of notice of meeting of Committee of Creditors as follows:

(1) The notice shall inform the participants of the venue, the time and date of the meeting and of the option available to them to participate through video conferencing or other audio and visual means, and shall also provide all the necessary information to enable participation through video conferencing or other audio and visual means.

(2) The notice of the meeting shall provide that a participant may attend and vote in the meeting either in person or through an authorised representative. It is provided that such participant shall inform the resolution professional, in advance of the meeting, of the identity of the authorised representative who will attend and vote at the meeting on its behalf

“Video conferencing or other audio and visual means” means such audio and visual facility which enables the participants in a meeting to communicate concurrently with one another and to participate effectively in the meeting. (Regulation 2(1) (p) of Corporate Insolvency Resolution Process Regulations)

(3) The notice of the meeting shall contain the following

- (i) a list of the matters to be discussed at the meeting;
- (ii) a list of the issues to be voted upon at the meeting; and
- (iii) copies of all documents relevant to the matters to be discussed and the issues to be voted upon at the meeting.

(4) The notice of the meeting shall

- a) state the process and manner for voting by electronic means and the time schedule, including the time period during which the votes may be cast;
- b) provide the login ID and the details of a facility for generating password and for keeping security and casting of vote in a secure manner; and
- c) provide contact details of the person who will address the queries connected with the electronic voting.

Q24: What are the provisions related to quorum at a meeting of the Committee of Creditors (CoC) under Regulation 22 of the IBBI (CIRP) Regulations, 2016?

Answer: Regulation 22 of the Corporate Insolvency Resolution Process Regulations states that **Quorum for the meeting:** A meeting of the committee shall be quorate if members of the committee representing at least thirty three percent of the voting rights are present either in person or by video conferencing or other audio and visual means. It is also provided that the committee may modify the percentage of voting rights required for quorum in respect of any future meetings of the committee.

Meeting adjourned for want of quorum: Where a meeting of the committee could not be held for want of quorum, unless the committee has previously decided otherwise, the meeting shall automatically stand adjourned at the same time and place on the next day.

Quorum at the adjourned meeting: In the event a meeting of the committee is adjourned for want of quorum, the adjourned meeting shall quorate with the members of the committee at ending the meeting.

Q25: What are the provisions for participation of Committee of Creditors (CoC) members through Video Conferencing (VC) under Regulation 23 of the CIRP Regulations, 2016?

Answer: Regulation 23 of Corporate Insolvency Resolution Process Regulations provides for participation of the members of Committee of Creditors through video conferencing by laying down essentials of contents of notice and duties of RP in this regard as follows:

(i) Notice to provide option to attend meeting through video conferencing: The notice convening the meetings of the committee shall provide the participants an option to attend the meeting through video conferencing or other audio and visual means in accordance with this Regulation.

(ii) Duties of the Resolution Professional:

- The resolution professional shall make necessary arrangements to ensure uninterrupted and clear video or audio and visual connection.

- The resolution professional shall take due and reasonable care:

(a) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;

(b) to ensure availability of proper video conferencing or other audio and visual equipment or facilities for providing transmission of the communications for effective participation of the participants at the meeting;

(c) to record proceedings and prepare the minutes of the meeting;

(d) to store for safekeeping and marking the physical recording(s) or other electronic recording mechanism as part of the records of the corporate debtor;

(e) to ensure that no person other than the intended participants attends or has access to the proceedings of the meeting through video conferencing or other audio and visual means; and

(f) to ensure that participants attending the meeting through audio and visual means are able to hear and see, if applicable, the other participants clearly during the course of the meeting.

It is provided that the persons, who are differently abled, may make request to the resolution professional to allow a person to accompany him at the meeting.

(iii) Deemed Venue of the meeting: Where a meeting is conducted through video conferencing or other audio and visual means, the scheduled venue of the meeting as set forth in the notice convening the meeting, which shall be in India, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

Q26: What are the provisions regarding the conduct of meetings of the Committee of Creditors under Regulation 24 of the CIRP Regulations, 2016?

Answer: Regulation 24 of the Corporate Insolvency Resolution Process Regulations states that

- Chairman of the meeting: The resolution professional shall act as the chairman of the committee of creditors' meeting.

- Attendance at the commencement of the meeting:

At the commencement of a meeting, the resolution professional shall take a roll call when every participant attending through video conferencing or other audio and visual means shall state, for the record, the following,-

(a) his name;

(b) whether he is attending in the capacity of a member of the committee or any other participant;

(c) whether he is representing a member or group of members;

(d) the location from where he is participating;

(e) that he has received the agenda and all the relevant material for the meeting; and

(f) that no one other than him is attending or has access to the proceedings of the meeting at the location of that person.

- Confirmation of quorum: After the roll call, the resolution professional shall inform the participants of the names of all persons who are present for the meeting and confirm if the required quorum is complete.

- Quorum throughout the meeting: The resolution professional shall ensure that the required quorum is present throughout the meeting.

- Restricted access to the meeting: From the commencement of the meeting till its conclusion, no person other than the participants and any other person whose presence is required by the resolution professional shall be allowed access to the place where meeting is held or to the video conferencing or other audio and visual facility, without the permission of the resolution professional.

Q27: What are the provisions regarding voting by the Committee of Creditors under the IBC and CIRP Regulations?

Answer: The voting process in the Committee of Creditors (CoC) is governed by several provisions under the IBC and CIRP Regulations, as outlined below:

1. Voting right of creditor in Committee of Creditors: As per Section 24(6), each creditor votes in accordance with their voting share, which is based on the financial debt owed to them.

2. Definition of Voting Share:

Section 5(28): "Voting share" means the proportion of the financial debt owed to a creditor in relation to the total financial debt owed by the corporate debtor.

3. Who shall determine voting right:

Section 24(7): The Resolution Professional (RP) determines the voting share of each creditor as per IBBI regulations.

Special Situations:

4. Voting share in case of joint/consortium Loan: (Section 21(3)):

Each financial creditor in a consortium is part of the CoC. Their voting share is determined based on the debt owed individually to each.

5. Same person is operational as well as financial creditor (Section 21(4)):

If a person is both:

- **Financial Creditor:** They are part of CoC to the extent of financial debt owed.
- **Operational Creditor:** Recognized separately for operational debt owed.

6. Assignment of Operational Debt to financial creditor: (Section 21(5)):

If operational debt is assigned to a financial creditor, the assignee becomes an operational creditor for that portion.

7. Right to attend meeting of committee of creditors but not vote:

Persons Who May Attend but Cannot Vote: Section 24(4):

- Directors/Partners of the corporate debtor.
- One representative of operational creditors (if their dues $\geq$ 10% of total debt).
- They may attend meetings but have no voting rights.

8. Related Party Restrictions (First Proviso to Section 21(2)):

A financial creditor who is a related party of the corporate debtor has no right to vote or participate in CoC meetings.

Exception: If the related party is a regulated financial creditor and became related solely due to debt-equity conversion or prescribed transactions before the insolvency commencement date, it can participate.

Q28: How does voting by an Authorised Representative (AR) work in the Committee of Creditors under the Insolvency and Bankruptcy Code (IBC)?

Answer: Voting by an Authorised Representative (AR) is governed by Section 25A of the IBC, which lays down rules for representing multiple financial creditors, especially creditors in a class (like homebuyers). The provisions are as follows:

1. Voting by AR for Individual Creditors [Section 25A(3)]:

If the AR represents multiple financial creditors, they must vote individually on behalf of each creditor only:

In accordance with prior instructions (physical or electronic) received from each financial creditor.

If no instruction is received from a creditor, the AR must **abstain from voting** on behalf of that creditor.

2. Voting by AR for Creditors in a Class (e.g. Homebuyers) [Sect on 25A(3A)]:

Inserted via IBC (Amendment) Act, 2019 to resolve deadlocks caused by inactive voting from dispersed creditors like homebuyers.

In such cases:

- The AR does not vote individually per creditor's instructions.
- Instead, the AR votes collectively based on the majority:

The AR shall cast vote based on the decision taken by more than 50% of the voting share of those creditors who cast their vote.

- This ensures efficiency even if only a subset of the class participates.

3. Exception – Voting under Sect on 12A (Withdrawal of CIRP):

For voting on a withdrawal application under Sect on 12A, the AR must follow the procedure under Sect on 25A(3) (i.e., act strictly as per individual instructions).

This ensures withdrawal decisions are treated with greater individual control and precision.

Conclusion:

ARs ensure representation and voting on behalf of dispersed or non-participating financial creditors.

The IBC differentiates general voting (individual consent-based) from class-based voting (majority-based), especially to address issues in large, scattered creditor classes like homebuyers.

Q29: What are the voting procedures under Regulation 25 of the CIRP Regulations, and how do they relate to the mandatory actions under Sect on 28 of the IBC?

Answer: Regulation 25 of the Corporate Insolvency Resolution Process (CIRP) Regulations, 2016 lays down the voting procedures to be followed by the Committee of Creditors (CoC), particularly in relation to decisions that require approval during CIRP. These procedures are closely tied to Sect on 28 of the Insolvency and Bankruptcy Code (IBC), 2016, which mandates prior approval for certain critical actions.

(i) Mandatory Actions to be Considered in CoC Meetings:

Actions listed under Sect on 28(1) of the IBC must be placed before the CoC in its meeting for consideration and approval.

(ii) Prior Approval Required for Certain Actions (Sect on 28):

Sect on 28(1): The Resolution Professional (RP) shall not take specific actions (such as raising interim finance, transferring assets, amending capital structure, etc.) without prior CoC approval.

Sect on 28(2): The RP must convene a CoC meeting to seek approval before taking such actions.

Sect on 28(3): These actions require a minimum of 66% voting share of the CoC for approval.

(iii) Consequence of Non-compliance:

Sect on 28(4): Any action taken by the RP without such approval shall be void.

Sect on 28(5): The CoC may report the RP's conduct to the IBBI for appropriate act on under the Code.

Q30: What are the act ons that a Resolut on Professional is prohibited from taking during the Corporate Insolvency Resolut on Process without the prior approval of the Commit ee of Creditors, as per Sect on 28(1) of the IBC?

Answer: Raise any interim finance in excess of the amount as may be decided by the commit ee of creditors in their meet ng:

1. Create any security interest over the assets of the corporate debtor.
2. Change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company.
3. Record any change in the ownership interest of the corporate debtor.
4. Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the commit ee of creditors in their meet ng.
5. Undertake any related party transaction.
6. Amend any constitutional documents of the corporate debtor.
7. Delegate its authority to any other person. Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
8. Make any change in the management of the corporate debtor or its subsidiary.
9. Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.
10. Make changes in the appointment or terms of contract of such personnel as specified by the commit ee of creditors.
11. Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Q31: What is the procedure for announcing decisions by the Resolut on Professional after vot ng in a CoC meet ng, and what was the Supreme Court's view in the K. Shashidhar case regarding the calculation of votes?

Answer: At the conclusion of vot ng during a Commit ee of Creditors (CoC) meet ng, the Resolut on Professional (RP) is required to:

- Announce the decision taken on each agenda item, and
- Disclose the names of the CoC members who voted in favor, against, or abstained from vot ng.

Supreme Court Ruling – K. Shashidhar v. Indian Overseas Bank (2019)

The Hon'ble Supreme Court interpreted Regulation 25(5) of the CIRP Regulations alongside Section 30(4) of the IBC and held:

- The percentage of voting share of *all* financial creditors (not just those “present and voting”) must be considered while calculating approval for a resolution plan.
 - Hence, approval must meet the required threshold (66%) of total voting share of financial creditors, regardless of how many are present at the meeting.
- This interpretation rejected the concept of “present and voting” and emphasized that: Even absent members of the CoC have the right to review the minutes of the meeting and cast their vote electronically afterward, as per Regulation 25(5).

Q32: What are the provisions related to the preparation and circulation of minutes of the Committee of Creditors (CoC) meetings under the CIRP Regulations?

Answer: The Corporate Insolvency Resolution Process (CIRP) Regulations lay down detailed procedures regarding the minutes of CoC meetings, mainly under Regulations 24, 25, and 26, as outlined below:

1. Duty to Prepare and Circulate Minutes (Regulation 24)

- The Resolution Professional (RP) is responsible for preparing minutes of each CoC meeting.
- The minutes must include:
 - Names and details of participants,
 - Their mode of participation (in person, video conferencing, or other audio-visual means).
- The RP must circulate the minutes via electronic means within 48 hours of the meeting.

2. Circulation and Voting by Electronic Means (Regulation 25)

- The RP must:
 - Circulate minutes to all CoC members and authorised representatives (ARs) within 48 hours.
 - Seek votes from members who did not vote at the meeting via an electronic voting system.
 - Ensure the voting window remains open for at least 24 hours from the time of circulation of the minutes.

3. Circulation by Authorised Representative (Regulation 25(6))

- The Authorised Representative (AR) is required to:
 - Circulate the minutes received from the RP to creditors in a class (e.g., homebuyers).
 - Announce the voting window at least 24 hours before it opens.
 - Keep the voting window open for at least 12 hours to collect voting instructions.
- The RP must ensure transparency and timely communication through the preparation and circulation of detailed minutes.
- Electronic voting mechanisms allow participation even from absent members.
- Special procedures exist for creditors in a class, facilitated through their Authorised Representative.

Q33: What are the provisions under Regulation 26 of the CIRP Regulations regarding voting by electronic means in the Committee of Creditors (CoC)?

Answer: Regulation 26 of the Corporate Insolvency Resolution Process (CIRP) Regulations, 2016 prescribes the process for voting by electronic means in CoC meetings. The key provisions are:

1. The resolution professional shall provide each member of the committee the means to exercise its vote by either electronic means or through electronic voting system in accordance with the provisions of this Regulation.
2. At the end of the voting period, the voting portal shall forthwith be blocked.
3. At the conclusion of a vote held under this Regulation, the resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the committee who voted for or against the decision, or abstained from voting.
4. The resolution professional shall circulate a copy of the record made under sub-regulation (4) to all participants by electronic means within twenty four hours of the conclusion of the voting.

Explanation:

a) "voting by electronic means" or "electronic voting system" means

a) "secured system" based process of display of electronic ballots, recording of votes of the members of the committee and the number of votes polled in favour or against, such that the voting exercised by way of electronic means gets registered and counted in an electronic registry in a centralized server with adequate cyber security;

b) "secured system" means computer hardware, software, and procedure that

- (i) are reasonably secure from unauthorized access and misuse;
- (ii) provide a reasonable level of reliability and correct operation
- (iii) are reasonably suited to perform the intended functions; and
- (iv) adhere to generally accepted security procedures.

Q34: "What are the key provisions of Regulation 25 of the CIRP Regulations regarding the voting procedures of the Committee of Creditors during the corporate insolvency resolution process?"

Answer: Convening and Conduct of CoC Meetings & Voting Procedures

1. Actions Requiring Prior Approval of CoC (Section 28)

- The resolution professional (RP) cannot perform certain actions without prior approval of the Committee of Creditors (CoC).
- Section 28(1) begins with "Notwithstanding anything contained in any other law..."—giving it overriding effect.
- These actions include things like raising interim finance, changing capital structure, or transferring assets.
- Approval threshold: At least 66% of voting share of financial creditors.
- Section 28(4): If RP takes such actions without approval, the action is void.
- Section 28(5): CoC may report such conduct to IBBI for action.

2. Voting Procedures (Regulation 25)

- Mandatory matters (e.g., Section 28 items) must be included for CoC voting.

- Other matters requiring approval may also be placed before CoC.
- RP takes a vote after discussion on the agenda items.
- Voting members include all CoC members, even if not present, through later e-voting.
- At the end of the vote, RP must announce the result, including:
 - Who voted for
 - Who voted against
 - Who abstained
- Supreme Court ruling in K. Shashidhar case:
 - Voting is not based on members present and voting.
 - Voting share of creditors is the key basis.
 - Even absent members can vote later via e-voting, as per Regulation 25(5).

3. Minutes of the Meeting (Regulations 24 & 25)

- RP must prepare and circulate minutes for each CoC meeting.
- Disclosure in minutes must include: Names of participants, Mode of participation (in person, video/audio conferencing)
- Minutes must be circulated within 48 hours of the meeting.
- Regulation 25(5): RP must circulate minutes to: All CoC members, Authorised representative (AR), if any
- Members who were absent in the meeting still have the right to: Review minutes and Vote electronically after the meeting
- Regulation 25(6): The authorised representative (AR) must:
 - Circulate the minutes to creditors in a class
 - Announce voting window at least 24 hours before it opens
 - Keep the window open for minimum 12 hours

4. Voting by Electronic Means (Regulation 26)

- RP must provide means to vote via electronic voting system.
- Voting system must be a "secured system" that:
 - Prevents unauthorized access
 - Ensures accuracy and security
 - Follows standard cybersecurity practices
- Voting window must remain open for at least 24 hours from the time of minutes' circulation.
- After voting closes:
 - Portal is blocked
 - RP must announce the decision and record the vote summary:
 - Who voted for/against/abstained
 - This record must be circulated to all participants within 24 hours

5. Other Important Provisions

- Section 25(2) – Duties of Resolution Professional include:

- Maintain updated list of claims
- Convene and attend all CoC meetings
- Present all resolution plans to CoC
- Decision by Committee of Creditors: Unless otherwise stated in the Code, all CoC decisions require approval by at least 51% of the voting share of financial creditors.
- Section 30(4): Resolution plan must be approved by 66% of financial creditors.
- Right of Committee of Creditors to require information from RP: Section 21(9) & (10):
 - CoC has the right to demand any financial information during CIRP.
 - RP must furnish it within 7 days of request.
- Voting rights of members of Committee consisting of operational creditors: (if applicable under Reg 16):
 - Based on proportion of debt owed to them
 - Total debt includes amounts owed to: Operational creditors, Workmen and Employees

Q35: Under what conditions can the Committee of Creditors replace the Resolution Professional during the Corporate Insolvency Resolution Process?

Answer: As per Section 27 of the Insolvency and Bankruptcy Code, 2016, the Committee of Creditors (CoC) can replace the Resolution Professional (RP) appointed under Section 22 at any time during the Corporate Insolvency Resolution Process (CIRP) if it is of the opinion that such a replacement is necessary. This decision must be taken at a CoC meeting and approved by 66% of the voting shares. The CoC must also obtain written consent from the proposed new resolution professional in the specified form and forward the name to the Adjudicating Authority for confirmation.

Q36: In the third meeting of Committee of Creditors of ABC Company Ltd, the Interim Resolution Professional was replaced by another person as the Resolution Professional. The appellant wants to file an application before the Adjudicating Authority for confirmation of the RP's appointment. As legal advisor of ABC Company, advise with relevant case laws as to whether the Adjudicating Authority can reject the application on the basis that the Committee of Creditors' decision was taken in its third meeting (and not the first meeting, as prescribed in the IBC) and no reasons were given for not adopting the resolution to replace the Interim Resolution Professional in the first meeting? (5 marks)

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Answer: In the case of *Punjab National Bank Vs. Mr. Kiran Shah, Interim Resolution Professional of ORG Informatcs Ltd. [CA (AT) (Ins) No. 749/2019]*-NCLAT held that the Committee of Creditors is not required to record any reason for replacing the RP that may otherwise call for proceedings against such Resolution Professional. Having decided to remove the Resolution Professional with 88 percent of the voting share, the decision of Committee of Creditors was not open to the AA interfering with such decision, till it is shown that the decision of the Committee of Creditors is perverse or without jurisdiction.

*Further in case of **Bank of India vs. M/s Nithin Nutrit on Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 497 of 2020 (with connected appeals)]**-NCLAT observed that neither sect on 22 nor sect on 27 of the IBC requires the Commit ee of Creditors to give any reasons. The reason is that the relat onship between the RP and the Commit ee of Creditors is that of conf dence. If there is loss of conf dence and the RP cont nues in the role, the corporate debtor would be put to loss because of the bad relat onship between the Interim Resolut on Professional/RP and the Commit ee of Creditors NCLAT held that the Commit ee of Creditors has the requisite powers to propose changing the Interim Resolut on Professional even in meet ng/s subsequent to the frst one and there is no requirement that they should give part ular reasons for the change. Therefore, appointment of RP is valid/proper and Adjudicat ng Authority cannot reject the applicat on.*

Q37: What is the process and requirement for the approval of a resolut on plan by the Commit ee of Creditors under the IBC?

Answer: Under Sect on 30(4) of the Insolvency and Bankruptcy Code, 2016 and Regulat on 39 of the CIRP Regulat ons, the Commit ee of Creditors (CoC) may approve a resolut on plan by a vote of not less than 66% of the vot ng share of f nancial creditors. While approving the plan, the CoC must consider:

- The feasibility and viability of the resolut on plan,
- The manner of distribut on proposed, taking into account the priority among creditors as laid down under Sect on 53(1),
- The priority and value of security interests of secured creditors, and
- Any other requirements specif ed by the IBBI.

Further, under Sect on 30(5), the resolut on applicant may at end the CoC meet ng where their plan is discussed, but they cannot vote, unless they are also a f nancial creditor.

Q38: What is the process followed by the Commit ee of Creditors for vot ng on resolut on plans under the CIRP?

Answer: The Resolut on Professional (RP) submits all compliant resolut on plans to the Commit ee of Creditors (CoC).

The CoC must:

- (a) Evaluate plans as per the evaluat on matrix,
- (b) Record deliberat ons on feasibility and viability, and
- (c) Vote on all plans simultaneously.

Vot ng outcomes:

1. Single plan: Considered approved if it receives the requisite votes ($\geq 66\%$).
2. Mult ple plans: The plan with highest votes, meet ng the threshold, is approved.
3. Equal votes (all above threshold): CoC uses a t e-breaker formula (pre-declared) to approve one.

4. No plan gets requisite votes: CoC re-votes on the plan with highest votes, within prescribed timelines.

Finally, the RP must submit the approved plan to the Adjudicating Authority at least 15 days before the end of the CIRP period.

Q39: Under what circumstances and with what voting thresholds can the time period for a Corporate Insolvency Resolution Process (CIRP) or Fast Track CIRP be extended?

Answer: If the CIRP or Fast Track CIRP cannot be completed within the initial period, the Resolution Professional (RP) may apply for an extension to the Adjudicating Authority, only if instructed by the Committee of Creditors (CoC) through a resolution passed with the following thresholds:

1. **For CIRP (beyond 180 days)** – Requires approval by **66%** of the voting share of CoC. [Section 12(2)]
2. **For Fast Track CIRP (beyond 90 days)** – Requires approval by **75%** of the voting share of CoC. [Section 56(2)]

Q40: What is meant by the "commercial wisdom" of the Committee of Creditors (CoC) under the Insolvency and Bankruptcy Code, 2016?

Answer: The "commercial wisdom" of the CoC refers to its exclusive and supreme authority to decide on resolution plans during the Corporate Insolvency Resolution Process (CIRP). Once a resolution plan is approved by the CoC with the **requisite voting share**, its decision is:

- Binding on all stakeholders, including dissenting creditors.
- Not subject to judicial review on merits by courts or tribunals.

Courts have upheld the primacy of the CoC's commercial wisdom, consistently refusing to interfere with its decisions regarding feasibility, viability, or distribution under the plan.

Q41: The Committee of Creditors recommended the liquidation of the Gopi Ltd. i.e., corporate Debtor and the National Company Law Tribunal (NCLT) i.e., adjudicating authority did not concur with the decision of the Committee of Creditors. Adjudicating Authority discarded the recommendation of the CoC with 87.30% of vote share and gave its own directives overriding the commercial wisdom of the CoC. Citing relevant case laws, discuss as to what will be the merit of appeal filed by Gopi Ltd against National Company Law Tribunal (NCLT) decision in National Company Law Appellate Tribunal (NCLAT)? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The moot question to be decided in proposed appeal to be filed against the Impugned Order passed by the National Company Law Tribunal, as to whether the Adjudicating Authority can discard the recommendation of the Committee of Creditors (CoC) and rather give its own directives overriding the commercial wisdom of the Committee of Creditors.

The Supreme Court passed its order in the case of *K. Sashidhar v. Indian Overseas Bank & Ors.* (Civil Appeal No. 10673 of 2018) wherein the SC, inter alia, has held that

- The National Company Law Tribunal (“NCLT”) and the National Company Law Appellate Tribunal (“NCLAT”) have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the committee of creditors (“Committee of Creditors”).
- Non-recording of reasons for approving or rejecting the resolution plan by the concerned financial creditors during the voting in the meeting of Committee of Creditors, would not render the final collective decision of Committee of Creditors nullity per se.
- Concededly, if the objection to the resolution plan is on account of infracton of ground(s) specified in section 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For the approval of resolution plan by the Committee of Creditors can be challenged on those grounds.

However, if the objection to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, non-recording of any reason for taking such commercial decision will be of no avail.

The Hon’ble National Company Law Appellate Tribunal has held that the Committee of Creditors has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. (Ref: *Kannan Tiruvengandram Vs. M.K. Shah Exports Ltd. & Ors. in and Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors. E.*)

Decision of Appellate Tribunal’s earlier order in case of *Amit Bharana and Ors vs. Gian Chand Narang* Adjudicating Authority must consider/ rely on commercial wisdom of CoC.

The Resolution for Liquidation of the corporate Debtor decision of has been passed by the committee of Creditors was with a majority of by more than the required threshold of 66%. Thus, the decision of liquidation of the corporate Debtor is a valid and in order. The legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to evaluate the commercial decision of the CoC.

In the matter of *vallal RCK Vs. M/s Siva industries and Holdings limited and Ors.* the Hon’ble Supreme court in its judgement dated 3rd June, 2022, observed that when 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority find the decision of the CoC to be wholly capricious, arbitrary, and irrational and dehors the provisions of the statute or the Rules.

Q42: In the case *Jindal Stainless Ltd. v. Shailendra Ajmera & Ors.*, what did the NCLAT hold regarding the Committee of Creditors' (CoC) decision to vote on resolution plans submitted within the stipulated timeline and reject modifications submitted thereafter?

Answer: In *Jindal Stainless Ltd. v. Shailendra Ajmera & Ors.* [Comp. App. (AT) (Ins.) No. 1058 of 2022], decided on January 18, 2023, the NCLAT Delhi upheld the CoC’s decision to vote only

on those resolution plans that were amended and submitted within the prescribed timeline as per the Challenge Process.

Key holdings:

1. Regulation 39(1A) allows the CoC to negotiate and evaluate resolution plans through mechanisms like the Challenge Process.
2. As per Clause 7 of the Challenge Process, no further modification is allowed after the process concludes, and CoC retains the right to modify or cancel it at any stage.
3. The CoC's decision to proceed with voting after the Challenge Process without considering late modifications was within its commercial wisdom.
4. IBC timelines are critical, and once voting commenced, no interference was warranted in the CoC's process.
5. The NCLAT ruled that the CoC's autonomy in commercial decisions must be respected, and no fetters can be placed on their decision to reject plans modified after the deadline.

Q43: Consider the following scenarios and examine whether the following resolutions stand approved in the meeting of the Committee of Creditors?

S. No.	Agenda Item	% of members in value approving the item
1	Appointment of Valuers	50%
2	Replacement of the Resolution Professional	67%
3	Approval of the Resolution Plan	52%
4	Withdrawal of application u/s 12A of the Insolvency & Bankruptcy Code, 2016	85%
5	Appointment of technical consultant to assist the Resolution Professional	56%

(5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: As per the relevant applicable provisions of the Insolvency and Bankruptcy Code, 2016, status of the following resolution is as under:

S. No.	Agenda Item	% of members in value approving the item	Approved / Not Approved
1	Appointment of Valuers	50%	Not approved
2	Replacement of the Resolution Professional	67%	Approved
3	Approval of the Resolution Plan	52%	Not approved
4	Withdrawal of application u/s 12A of the Insolvency & Bankruptcy Code, 2016	85%	Not approved
5	Appointment of technical consultant to assist the Resolution Professional	56%	Approved:

Q44: With the help of decided case law, comment on the constitutional validity of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

CASE STUDY:

In **Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others [(2019) SCC Online SC 1479]**, the Supreme Court observed that-

The Interim Resolution Professional selected by the NCLT has to constitute a Committee of Creditors comprising all the financial creditors of the corporate debtor. This provision is aimed at creditors adopting a collective approach toward insolvency resolution instead of proceeding individually. Key decisions of the process and the resolution plan are approved by the Committee of Creditors if it is satisfied that the provisions of the most acceptable plan would ensure that their dues are cleared.

Hon'ble Supreme Court has in the matter of **Swiss Ribbon Pvt. Ltd. & Anr. Vs. Union of India & Ors. (date of judgment 25.01.2019)** held that the classification under IBC between financial creditors and operational creditors is based on an intelligible criteria and is neither discriminatory nor arbitrary nor violative of Article 14 of Constitution of India;

Home Buyers to be considered as Financial Creditors

The Supreme Court in the case of **Pioneer Urban Land & Infrastructure Ltd. & Anr. vs. Union of India & Ors.**, upheld the constitutional validity of the introduction of home buyers as "financial creditors" to the IBC, made by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, enabling home buyers to trigger IBC against the real estate developer.

Whether the relatedness of the related party could merely have existed in the past or whether they must continue in the present i.e. at the present time?

The Supreme Court in the matter of '**Phoenix Arc Private Limited Vs. Spade Financial Services Limited & Ors.**', clarified that while the default rule under the first proviso to Section 21(2) is that only those financial creditors that are related parties in the present would be debarred from the Committee, those related party financial creditors that cease to be related parties in order to circumvent the exclusion under the first proviso to Section 21(2), should also be considered as being covered by the exclusion thereunder. Thus, relatedness of related parties at the present time would be considered for exclusion from the Committee, in addition, any parties that were related in the past and cease to be related parties at present in order to become a member of the Committee must also be considered for exclusion from the Committee.

In **Vijay Kumar Jain Vs. Standard Chartered Bank & Others [(2019) SCC Online SC 103]**, the Supreme Court held that resolution plans need to be provided to members of the suspended board of directors of the corporate debtor, as they have a right to participate in the meetings of the committee of creditors. It was observed that a combined reading of the IBC and the Corporate Insolvency Resolution Process Regulations leads to the conclusion that members of the suspended board of directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of the documents that have to be furnished along with the notice of such meetings.

In **Consolidated Engineering Company & Another Vs. Golden Jubilee Hotels Pvt. Ltd. [Company Appeal (AT) (Insolvency) No. 501 of 2018]**, the NCLAT held that the AA has rightly held that 10 percent of total debt for the purpose of representation in the committee of creditors is to be calculated on the basis of the claim as collated and not ceded by the RP. It cannot be based on the amount claimed by all the operational creditors until it is verified and compared. If the claim of operational creditors on verification is found to be less than 10 percent, the operational creditors have no right to claim representation in the meeting of the committee of creditors.

CASE LAWS

The significance of "Commercial wisdom of Committee of Creditors" was discussed in details by Supreme Court in the case of **Committee of Creditors of Essar Steel India Ltd. V. Satish Kumar Gupta & Ors (2019)** where the

Apex Court held that-

At the outset it is important to be noted that the legislature in their wisdom under the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) have left the decision-making in respect of commercial matters completely in the domain of the Committee of Creditors.

In fact even the Bankruptcy Law Reforms Committee report (which formed the basis for the enactment of the Code) specifically notes the deliberate scheme of the Code, where the law does not prescribe any particular manner of insolvency resolution and leaves this commercial decision making process to the Committee Of Creditors without the interference of the legislature as well as judiciary. The Committee of Creditors does not act in any fiduciary capacity to any group of creditors. On the contrary, it is to take a business decision based upon ground realities by a majority, which then binds all stakeholders, including dissenting creditors.

The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside.

It is always open to the Committee Of Creditors to adjudge the commercial wisdom of the resolution plan while approving it. As pointed out by the Supreme Court in **K. Sashidhar vs Indian Overseas Bank & Ors.** (Civil Appeal No. 10673 of 2018), such commercial decision of the Committee Of Creditors is not subject to appeal under the Code.

The Hon'ble Apex Court specifically ruled that the NCLT must limit its judicial review to the parameters outlined in Section 30 (2) of IBC, while the NCLAT must adhere to the guidelines set forth in Section 32 in conjunction with Section 61(3) of the IBC.

The NCLT and NCLAT must never interfere with a commercial decision made by the majority of the Committee of Creditors.

CHAPTER 19 AS PER ICSI MODULE

PREPARATION & APPROVAL OF RESOLUTION PLAN

Q1: According to the Banking Law Reform Committee (BLRC) Report – Volume 1, what is the rationale behind not prescribing a fixed method of resolution in the Insolvency and Bankruptcy Code, and what are the key requirements that a resolution plan must fulfil?

Answer: The BLRC emphasized flexibility and market freedom in the resolution of insolvency cases. It believed the Code should not prescribe a fixed resolution method, as resolutions to keep an entity as a going concern would evolve with market development, time, and the specific situation.

However, the Code specifies three essential aspects that a resolution plan must satisfy:

1. **Process Requirements:**

The process must be transparent, time-bound, and based on adequate information reasonably available at the time of insolvency.

2. **Protection of Operational Creditors (OCs):**

- Since OCs do not have voting rights in the Committee of Creditors (CoC), their interests must be protected.

- The resolution plan must explicitly provide for payment of IRP costs and dues of operational creditors within a reasonable time.

- The Resolution Professional (RP) must ensure these conditions are met before presenting the plan to the CoC.

3. **Compliance with Applicable Laws:**

- The plan must comply with all relevant laws such as the Companies Act, 2013, and SEBI regulations (especially for listed companies).

- For example, a merger proposal must align with applicable legal provisions governing such corporate actions.

Additionally, when the RP submits a plan to the Adjudicating Authority, the RP must confirm:

- Payment of IRP costs and interim finance will be made in priority.

- All creditors not on the CoC will be paid within a reasonable period after plan implementation.

- The plan complies with applicable laws governing the entity's actions.

Thus, while the CoC exercises commercial discretion on the choice of plan, the Code sets out these minimum legal and procedural safeguards to ensure fairness, legality, and creditor protection.

Q2: What is a resolution plan and who is a resolution applicant under the Insolvency and Bankruptcy Code, 2016?

Answer: A resolution plan is a detailed proposal submitted during the Corporate Insolvency Resolution Process (CIRP) that outlines how the corporate debtor will be revived and its debts

repaid. It includes information about the applicant, proposed debt restructuring, and strategy for running the company as a going concern.

A resolution applicant is an eligible person who submits such a plan to take over the management and debt obligations of the corporate debtor. The resolution professional (RP) first examines the plan for compliance with the Code, and then places it before the Committee of Creditors (CoC) for evaluation and approval. The plan approved by the CoC is finally submitted to the Adjudicating Authority for approval.

Q3: What did the NCLAT observe regarding the objectives of the Insolvency and Bankruptcy Code in the case of *Binani Industries Ltd. vs. Bank of Baroda*?

Answer: In *Binani Industries Ltd. vs. Bank of Baroda*, the NCLAT emphasized that the primary objective of the IBC is resolution of the corporate debtor. The second priority is the maximization of value of assets, and the third objective is to promote entrepreneurship, ensure availability of credit, and balance the interests of all stakeholders. The tribunal clarified that resolution is not meant solely for the benefit of one class, like financial creditors, but must serve all creditors and stakeholders equitably, preserving the sacrosanct order of objectives laid out under the Code.

Q4: What did the Supreme Court highlight about the significance of resolution in *Swiss Ribbons Pvt. Ltd. v. Union of India*?

Answer: In *Swiss Ribbons Pvt. Ltd. v. Union of India* [WP (C) No. 99/2018], the Supreme Court emphasized that the primary focus of the IBC is resolution, not liquidation. It noted that the preamble of the Code does not mention liquidation, underscoring that liquidation is a last resort, used only when no viable resolution plan is received or approved. The Court upheld the legislative intent to preserve viable businesses and maintain them as going concerns through resolution.

Q5: Define the following terms:

- i) Resolution plan
- ii) Resolution applicant.
- iii) Fair value
- iv) Liquidation value
- v) Registered valuer

Answer:

i) According to section 5(26), a ‘**resolution plan**’ means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II”.

ii) As per Section 5(25) of the Code “**resolution applicant**” means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 or pursuant to section 54K, as the case may be.

iii) Regulation 2(1) (hb) of CIRP Regulations: **“Fair value”** means the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion.

iv) Regulation 2(1) (k) of CIRP Regulations: **“Liquidation value”** means the estimated realizable value of the assets of the corporate debtor, if the corporate debtor were to be liquidated on the insolvency commencement date.

v) As per regulation 2(1)(m), **“Registered valuer”** means a person registered as such in accordance with the Companies Act, 2013, and rules made thereunder

Q5: Who are the persons that shall not be appointed as registered valuers by the Resolution Professional under Regulation 27(3) of the CIRP Regulations, 2016?

Answer: As per Regulation 27(3), the Resolution Professional must appoint a registered valuer through an objective and transparent process, ensuring arm’s length dealings. However, the following persons cannot be appointed:

- (a) A relative of the resolution professional;
- (b) A related party of the corporate debtor;
- (c) An auditor of the corporate debtor during the five years prior to insolvency commencement;
- (d) A partner or director of the same insolvency professional entity as the resolution professional.

These restrictions aim to prevent conflict of interest and ensure independent and impartial valuation.

Q6: How is the fair value and liquidation value of the corporate debtor determined under Regulation 35 of the CIRP Regulations, 2016?

Answer: Under Regulation 35, the fair value and liquidation value of the corporate debtor are determined as follows:

1. **Valuation by Registered Valuers:** Two registered valuers (appointed under Regulation 27) submit estimates of fair and liquidation values based on internationally accepted valuation standards after physically verifying the inventory and fixed assets.
2. **Appointment of Third Valuer (if needed):** If the two estimates in a particular asset class are significantly different, or if the CoC proposes, the Resolution Professional may appoint a third registered valuer.
3. **Final Value:** The average of the two closest estimates is taken as the final fair value or liquidation value, as applicable.

Explanat on. - For the purpose of clause (b),

(i) “**Asset class**” means the def nit on provided under the Companies (Registered Valuers and Valuat on) Rules, 2017;

(ii) “**Signif cantly dif erent**” means a dif erence of twenty-f ve per cent in liquidat on value under an asset class and the same shall be calculated as $(L1-L2)/L1$, where, L1= higher valuat on of liquidat on value L2= lower valuat on of liquidat on value.

Q7: What are the dut es of the Resolut on Professional regarding the conf dent ality of fair value and liquidat on value under the CIRP Regulat ons?

Answer: The Resolut on Professional (RP) must maintain strict conf dent ality of the fair value and liquidat on value determined under CIRP. Key dut es include:

1. **Sharing with CoC Only Af er Receiving Resolut on Plans:** The RP can share these values with CoC members in electronic form only af er receiving resolut on plans.
2. **Undertaking of Conf dent ality:**
 - They will maintain conf dent ality of the values.
 - They will not misuse the values for undue gain or loss to anyone.
 - They will comply with Sect on 29(2) of the IBC.
3. **Conf dent ality by RP and Valuers:** RP and registered valuers are also required to maintain conf dent ality of the values.

Q8: “Sect on 29A was introduced in the Insolvency and Bankruptcy Code, 2016 to prevent certain persons from applying as resolut on applicant.” Comment. (5 marks)

PAST YEAR QUESTION JUNE 2024 OLD

OR

“A person convicted of any of ence punishable with imprisonment for f ve years under any Act specif ed in the Twelf h Schedule of the Insolvency and Bankruptcy Code, 2016 is not eligible to be a resolut on applicant under the Insolvency and Bankruptcy Code, 2016 (the Code).” Do you agree? Give at least f ve grounds which make a person not eligible to become a resolut on applicant under the Code. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: The Insolvency and Bankruptcy Code, 2016 was created to benef t the Financial and Operat onal Creditors, through the insolvency resolut on process. However, it was observed that exist ng promoters of the Corporate Debtor were directly or indirectly acquiring stake in their own assets through the resolut on plan, at a big discount.

Hence, through the resolut on process, the exist ng promoters were regaining control over their assets (directly or indirectly) af er a huge hair-cut (discount) from lenders. In other words, re-purchase the same assets at a much lower cost and get ng a back-door entry into their company.

To plug this loophole, the IBC was amended through the ordinance of the President of India. The amendment inserted sect on 29A, which provides for persons ineligible to be a Resolut on Applicant. The newly added sect on 29A declares certain persons ineligible to be a resolut on applicant and prohibits such persons from submit ng a resolut on plan.

As per Sect on 29A of the Insolvency and Bankruptcy Code, 2016 following persons are not eligible to submit a resolut on plan -

- (a) applicant is an undischarged insolvent,
- (b) wilful defaulters (as def ned by RBI and Banking Regulat on Act, 1949),
- (c) persons whose accounts are classif ed as NPA for one year or more and are unable to set le their overdue amount (incl. interest), at the t me of submission of the resolut on plan,
- (d) persons convicted for any of ence punishable with imprisonment for two years or more (for of ences of XII Schedule) or for seven years or more (under any other law) and a period of two years has not been expired from the date of his release from imprisonment
- (e) persons disqualif ed to act as director under the Companies Act, 2013,
- (f) persons prohibited by SEBI, from trading in securit es or accessing the securit es market,
- (g) person who has been a promoter or in the management or control of a corporate debtor in which a preferent al transact on, undervalued transact on, extort onate credit transact on or fraudulent transact on (PUFE) has taken place and in respect of which an order has been made by the Adjudicat ng Authority under this Code except when such PUFE transact ons has taken place prior to acquisit on of such corporate debtor by resolut on applicant and resolut on applicant has not contributed in those transact ons.
- (h) persons who have executed any guarantee to a creditor for the corporate debtor w.r.t. which CIRP applicat on init ated by such creditor has been admit ed by the Adjudicat ng Authority and such guarantee has been invoked by the creditor and remains unpaid in full or part
- (i) persons disqualif ed by any law of other country, for the condit ons ment oned in (a) to (h),
- (j) has connected person not eligible under clauses ment oned in (a) to (i).

Q9: Def ne connected Person

Answer:(i) any person who is the promoter or in the management or control of the resolut on applicant; or

(ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementat on of the resolut on plan; or

(iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii) except where such resolut on applicant is a f nancial ent ty and is not a related party of the corporate debtor.

Provided further that the expression “related party” shall not include a f nancial ent ty, regulated by a f nancial sector regulator, if it is a f nancial creditor of the corporate debtor and is a related party of the corporate debtor solely on account of conversion or subst tut on of debt into equity shares or instruments convert ble into equity shares or complet on of such transact ons as may be prescribed, prior to the insolvency commencement date.

Q10: Who is considered a "f nancial ent ty" for the purpose of determining ineligibility under Sect on 29A of the Insolvency and Bankruptcy Code, 2016, and what condit ons must such ent t es meet?

Answer:(a) a scheduled bank;

(b) any entity regulated by a foreign central bank or a securities market regulator or other financial sector regulator of a jurisdiction outside India which jurisdiction is compliant with the Financial Action Task Force Standards and is a signatory to the International Organisation of Securities Commissions Multilateral Memorandum of Understanding;

(c) any investment vehicle, registered foreign institutional investor, registered foreign portfolio investor or a foreign venture capital investor, where the terms shall have the meaning assigned to them in regulation 2 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 made under the Foreign Exchange Management Act, 1999;

(d) an asset reconstruction company registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(e) an Alternate Investment Fund registered with Securities and Exchange Board of India;

(f) such categories of persons as may be notified by the Central Government.

Q11: What is the stage at which ineligibility under Section 29A(c) of the IBC is assessed as per the Supreme Court in *Arcelormit al India Pvt. Ltd. vs. Sat sh Kumar Gupta & Others*, and how does this differ from ineligibility under Section 29A(g)?

Answer: In *Arcelormit al India Pvt. Ltd. vs. Sat sh Kumar Gupta & Others* [(2019) 2 SCC 1], the Supreme Court clarified that the **stage at which ineligibility under Section 29A(c)** of the Insolvency and Bankruptcy Code (IBC), 2016 is to be assessed is **when the resolution plan is submitted**, not from the insolvency commencement date or any earlier point in time.

Section 29A(c) disqualifies a person who, at the time of submission of the resolution plan, is a promoter or in management/control of a corporate debtor classified as a non-performing asset (NPA) for more than one year. However, **this ineligibility can be cured** if such a person **pays all overdue amounts**, including interest and charges related to the NPA, **before** submitting the resolution plan.

In contrast, **ineligibility under Section 29A(g)**—which pertains to persons involved in fraudulent or other undesirable transactions (e.g., preferential, undervalued, extortionate credit, or fraudulent transactions)—**cannot be cured** merely by paying of debts. A person disqualified under Section 29A(g) **remains ineligible** even if the dues of the corporate debtor are settled, because this clause reflects deeper misconduct linked to the resolution applicant's past conduct with the corporate debtor.

Q12: How did the Supreme Court interpret the term “related party” under Section 29A(j) of the IBC in *Swiss Ribbons Pvt. Ltd. v. Union of India*, and what was its conclusion regarding the constitutionality of this provision?

Answer: In *Swiss Ribbons Pvt. Ltd. & Another vs. Union of India & Others* [(2019) 4 SCC 17], the Supreme Court interpreted the term “related party” under Section 29A(j) of the

Insolvency and Bankruptcy Code (IBC), 2016, by emphasizing the need for a connect on with the business activity of the resolution applicant.

The Court noted that merely being a “related party” or falling within the categories listed in Section 5(24A) (definition of related party for an individual) is not sufficient for disqualification under Section 29A(j). For a person to be disqualified, there must be a demonstrable nexus or connect on with the resolution applicant’s business activity.

To support this interpretation, the Court applied the rule of construction *noscitur a sociis* (a word is known by the company it keeps), holding that the terms “related party” and “related” must be interpreted in the context of the categories of persons listed in Explanation I to Section 29A.

Moreover, the Court clarified that Explanation I ensures the inclusion of persons who are in management or control of the corporate debtor during the implementation of the resolution plan, making the scope of disqualification neither arbitrary nor vague.

Hence, the Supreme Court upheld the constitutionality of Section 29A(j), ruling that it is not overly broad or uncertain because it only applies to those with a genuine and substantial business connect on to the resolution applicant or to the corporate debtor in question.

Q13: A key duty of the RP under sect on 25(2)(h) of the IBC is to invite Prospect ve Resolution Applicants (PRAs), 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. The details pertaining to the steps for inviting, submitting, evaluating, and approving the resolution plan (and timelines in relation to them) are detailed in the CIRP Regulations.

Give the timelines for the following as provided in the CIRP regulations.

(i) Publish brief particulars of the invitation for expression of interest in Form G of the Schedule-I.

(ii) Last date for submission of expression of interest.

(iii) Object on for inclusion or exclusion of a PRA in the provisional list.

(iv) Issue of information memorandum, evaluation matrix and a request for resolution plans.

(v) Submission of resolution plans to the RP.

(vi) RP to issue a provisional list of eligible prospect ve resolution applicants.

(vii) Issue of final list of prospect ve resolution applicants (PRAs).

(5 marks)

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Answer: (i) Publish brief particulars of the invitation for expression of interest in Form G of the Schedule I

Not later than sixteenth day from the insolvency commencement date from interested and eligible prospect ve resolution applicants to submit resolution plans. (Regulation 36A (1) of CIRP Regulations)

(ii) Last date for submission of expression of interest-

Not less than fifteen days from the date of issue of detailed invitation. (Regulation 36A (3) of CIRP Regulations)

(iii) Object on for inclusion or exclusion of a PRA in the provisional list.

Within five days from the date of issue of the provisional list. Regulation 36A (11) of CIRP Regulations.

(iv) Issue of information memorandum, evaluation matrix and a request for resolution plans-

The resolution professional shall, within five days of the date of issue of the final list under sub-regulation (12) of regulation 36A, issue the information memorandum, evaluation matrix and a request for resolution plans to every resolution applicant in the final list. (Regulation 36B (1) of CIRP Regulations)

(v) Submission of resolution plans to the RP. -

The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s). (Regulation 36B (3) of CIRP Regulations)

(vi) RP to issue a provisional list of eligible prospective resolution applicants.

Within ten days of the last date for submission of expression of interest.

(vii) Issue of final list of prospective resolution applicants (PRAs).

Within ten days of the last date for receipt of objections, to the committee.

Q14: What is the process for inviting and submitting Expression of Interest (EOI) under Regulation 36A of the CIRP Regulations, 2016?

Answer: Under Regulation 36A of the CIRP Regulations, an Expression of Interest (EOI) is a formal declaration by a Prospective Resolution Applicant (PRA) showing intent to submit a resolution plan for a Corporate Debtor (CD). The EOI process is aimed at shortlisting eligible applicants before granting access to the Information Memorandum (IM) and other critical documents.

The **step-wise process** is as follows:

1. Publication of EOI (Form G) – [Reg. 36A(3)]

The Resolution Professional (RP) publishes an invitation for EOIs in Form G (Schedule I).

It includes:

- Basic details of the CD,
- Timelines for EOI submission,
- Eligibility criteria,
- RP contact information, and
- CIRP timelines.

2. The resolution professional shall publish Form G Reg. 36A(2)]

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the resolution professional, the corporate debtor conducts material business operations;

- (ii) on the website, if any, of the corporate debtor;
- (iii) on the website, if any, designated by the Board for the purpose; and
- (iv) in any other manner as may be decided by the committee.

3. Detailed Invitation for EOIs – [Reg. 36A(4)]

A detailed invitation must also be issued by the RP specifying criteria, conditions, and supporting documents required.

4. Modification of EOI – [Reg. 36A(4A)]

Any modification in the EOI invitation must follow the same method as the original. Only one modification is permitted.

5. Submission of EOI – [Reg. 36A(5)]

PRAs must submit EOIs within the timeline mentioned in Form G and satisfy eligibility criteria.

6. Rejection of Delayed EOIs – [Reg. 36A(6)]

EOIs submitted after the deadline shall be rejected.

7. Documents with EOI – [Reg. 36A(7)]

The EOI must be accompanied by:

- Applicant's identity and eligibility proof,
- Undertakings regarding Section 29A compliance,
- Affidavits or declarations as required.

8. Due Diligence by RP – [Reg. 36A(8)]

The RP shall verify if the PRA:

- Complies with Section 25(2)(h) (i.e., eligibility criteria set by CoC),
- Is not disqualified under Section 29A, and
- Meets all other conditions in the EOI invitation.

9. Clarifications or Additional Information – [Reg. 36A(9)]

RP may ask the PRA to submit additional information or clarifications during the due diligence process.

10. Provisional List of Eligible PRAs – [Reg. 36A(10)]

RP shall issue a provisional list of eligible PRAs:

- Within 10 days from the last date of EOI submission,
- Shared with CoC and all who submitted EOIs.

11. Objections to the Provisional List – [Reg. 36A(11)]

Objections (with supporting documents) can be submitted within 5 days of issuance of the provisional list.

12. Final List of PRAs – [Reg. 36A(12)]

Based on objections, the RP shall issue the **final list** of eligible PRAs within 10 days from the last date for receiving objections.

Q15: What are the mandatory components that must accompany an Expression of Interest (EOI) as per Regulation 36A(7) of the CIRP Regulations, 2016?

Answer: As per Regulation 36A(7) of the IBBI (CIRP) Regulations, 2016, an Expression of Interest (EOI) must be unconditional and accompanied by the following:

- (a) an undertaking by the prospective resolution applicant that it meets the criteria specified by the committee under clause (h) of sub-section (2) of section 25;
- (b) relevant records in evidence of meeting the criteria under clause (a);
- (c) an undertaking by the prospective resolution applicant that it does not suffer from any ineligibility under section 29A to the extent applicable;
- (d) relevant information and records to enable an assessment of ineligibility under clause (c);
- (e) an undertaking by the prospective resolution applicant that it shall intimate the resolution professional forthwith if it becomes ineligible at any time during the corporate insolvency resolution process;
- (f) an undertaking by the prospective resolution applicant that every information and records provided in expression of interest is true and correct and discovery of any false information or record at any time will render the applicant ineligible to submit resolution plan, forfeit any refundable deposit, and attract penal action under the Code; and (g) an undertaking by the prospective resolution applicant to the effect that it shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under sub-section (2) of section 29.

Q16: What are the key provisions under Regulation 36B of the CIRP Regulations, 2016 relating to the Request for Resolution Plans (RFRP), and how is the process structured after the finalisation of EOIs?

Answer: Regulation 36B of the IBBI (CIRP) Regulations, 2016 governs the process of inviting resolution plans from prospective resolution applicants (PRAs), following the EOI phase. Key provisions include:

1. **Issue of information memorandum, evaluation matrix and a request for resolution plans: [Reg. 36B(1)]:** Within 5 days of issuing the provisional list under Reg. 36A(10), the Resolution Professional (RP) must send the Information Memorandum (IM), Evaluation Matrix, and Request for Resolution Plans (RFRP) to:
 - All PRAs in the provisional list.
 - Any PRA who has contested their non-inclusion in the list.
2. **RFRP mandatory contents: [Reg. 36B(2)]:** The RFRP must specify:
 - Each step in the process,
 - Mode and purpose of interaction between the RP and PRAs,
 - Timelines for the process.
3. **Minimum Time to Submit Resolution Plan [Reg. 36B(3)]:** A minimum of 30 days must be given to PRAs for submission of their resolution plans.
4. **RFRP not to require non-refundable deposit [Reg. 36B(4)]:** RFRP cannot mandate a non-refundable deposit with or for submitting a plan. However, refundable performance guarantees may be used to ensure commitment.
5. **Performance Security [Reg. 36B(4A)]:** RFRP shall require the successful resolution applicant (whose plan is approved under Sec. 30(4)) to furnish a performance security.

○ This security will be forfeited if the resolution applicant fails to implement or contributes to failure of the plan after AA's approval.

Explanation— For the purposes of this sub-regulation, “**performance security**” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

6. Modification to RFRP or Evaluation Matrix [Reg. 36B(5)]:

- Any change is treated as a **fresh issue** and requires a **minimum 30-day** submission window.
- Modification can be made **only once**.

7. Extension of Time [Reg. 36B(6)]: The RP may extend the resolution plan submission deadline with **CoC approval**.

8. Asset-wise RFRP [Reg. 36B(6A)]: If no resolution plan is received in response to the RFRP, the RP may issue an RFRP for asset-wise sale, with CoC approval.

9. Reissue of RFRP [Reg. 36B(7)]: If received plans are unsatisfactory, the RP may re-issue the RFRP (with CoC approval) to all PRAs in the final list.

- The **30-day timeline** does **not apply** in such a reissue.

Q17: What was the key legal issue and ruling in the case of *Tata Steel Ltd. vs. Liberty House Group Pte Ltd. & Others* regarding the CoC's power to allow revised financial offers, and what did the NCLAT observe?

Answer: In the case of ***Tata Steel Ltd. vs. Liberty House Group Pte Ltd. & Others***, the central issue was whether the **Committee of Creditors (CoC)** could invite **improved financial offers** from resolution applicants (RAs) after receiving initial resolution plans.

Background:

- The CoC gave equal opportunity to all three resolution applicants to submit revised financial bids.
- Instead of participating, Tata Steel (the appellant) filed an application before the NCLAT seeking to restrain the RP and CoC from considering the improved offers of others.

NCLAT's Observations and Ruling:

- The process document (RFRP) did not limit the CoC's powers to seek value maximisation.
- As per the process document, the CoC had absolute discretion—though not obligation—to:
 - Update, amend, or supplement any part of the process.
 - Change or annul the resolution process at any time.
- The NCLAT held that allowing eligible RAs to revise their offers was

Q18: PQ Private Limited is under Corporate Insolvency Resolution Process (CIRP). The CIRP was initiated based on an application filed by Operational Creditor of PQ Private Limited. The Resolution professional appointed by National Company Law Tribunal is carrying out CIRP process has published advertisements for Expression of Interest (Eoi). In the meantime both PQ Private Limited and the Operational Creditor who has initiated the CIRP have arrived at settlement and would like to file withdrawal application. One of the other

Operational Creditor has contended that once CIRP has commenced and advertisement for EoI is given, the CIRP cannot be withdrawn. Referring relevant case law and suitable provisions of the Regulations answer whether the content of the other Operational Creditor is tenable. (5 marks)

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Answer: As per section 12A of Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

Regulation 30A(1)(b) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 also provides that application for withdrawal under section 12A of Code may be made to the Adjudicating Authority after the constitution of the committee, by the applicant through the resolution professional, subject to the applicant stating the reasons justifying withdrawal, if the application for withdrawal made after issue for expression of interest under regulation 36A.

In the matter of '*Brilliant Alloys Pvt. Ltd. vs. Mr. S. Rajagopal & Ors.*', Hon'ble Supreme Court held that Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 has to be read subject to Section 12A of the Insolvency and Bankruptcy Code, 2016 which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest. Thus, the Apex Court upheld withdrawal of CIRP even after the Resolution Professional issued invitation for expression of interest from resolution applicants to submit resolution plans under Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. A similar stand was taken by Apex Court in the matter of *Abhishek Singh vs Huhtamaki PPL Ltd.*

Hence, keeping in light the provisions of Insolvency and Bankruptcy Code and Regulations, the contentions of other operational creditor are not tenable.

Q19: What does Regulation 36C of the CIRP Regulations provide with respect to the strategy for marketing of the assets of the corporate debtor?

Answer:

1. Preparation of Marketing Strategy [Reg. 36C(1)]:

The Resolution Professional (RP) shall prepare a marketing strategy in consultation with the Committee of Creditors (CoC) if:

The total assets of the corporate debtor, as per the last available financial statements, exceed ₹100 crore.

The RP may prepare such a strategy even in other cases (where assets are ≤ ₹100 crore).

2. Approval for Implementation and Cost [Reg. 36C(2)]:

The decision to implement the marketing strategy, along with the cost involved, must be approved by the CoC.

3. Initiated by CoC Members [Reg. 36C(3)]:

Individual CoC members are also permitted to undertake or support marketing efforts independently for the assets of the corporate debtor.

Q20: What measures may a resolution plan include under Regulation 37 of the CIRP Regulations to achieve insolvency resolution and maximize the value of the corporate debtor's assets?

Answer: As per Regulation 37 of the IBBI (CIRP) Regulations, 2016, a resolution plan shall provide for measures that are necessary for the insolvency resolution of the corporate debtor and for maximization of the value of its assets. These measures may include, but are not limited to, the following:

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;
- (ba) restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- (ca) cancellation or delisting of any shares of the corporate debtor, if applicable;
- (d) satisfaction or modification of any security interest;
- (e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;
- (f) reduction in the amount payable to the creditors;
- (g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;
- (h) amendment of the constitutional documents of the corporate debtor;
- (i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;
- (j) change in portfolio of goods or services produced or rendered by the corporate debtor;
- (k) change in technology used by the corporate debtor; and
- (l) obtaining necessary approvals from the Central and State Governments and other authorities.
- (m) sale of one or more assets of corporate debtor to one or more successful resolution applicants submitting resolution plans for such assets; and manner of dealing with remaining assets.

Q21: What was the legal challenge raised in Edelweiss Asset Reconstruction Co. Ltd. vs. Synergies Dooray Automot ve Ltd. & Others regarding the resolution plan, and how did the NCLAT rule on the issue?

Answer: Case: *Edelweiss Asset Reconstruction Co. Ltd. vs. Synergies Dooray Automot ve Ltd. & Others*

Citation: Company Appeal (AT) (Insolvency) No. 169–173 of 2017

Date: 2nd August, 2017

Issue: The approved resolution plan was challenged on the ground that it proposed a **merger and amalgamation**, which was alleged to be in **violation of Sect on 30(2)(e)** of the IBC (which prohibits contravention of existing laws).

NCLAT's Observations:

- Regulation 37(1)(c) allows a resolution plan to include merger or consolidation of the corporate debtor.
- Section 238 of the IBC gives the Code an overriding effect over other laws in case of conflict.

Held:

The NCLAT held that merger/amalgamation provisions in the resolution plan are valid and do not violate Section 30(2)(e). The IBC prevails over any conflicting provision in other laws.

Conclusion:

A resolution plan can include merger or amalgamation under the IBC, and such provisions are legally valid by virtue of Reg. 37(1)(c) and Section 238.

Q22: What is the Evaluation Matrix under the CIRP Regulations, and what is its significance in the resolution plan approval process?

Answer: The Evaluation Matrix, as defined in Regulation 2(1)(ha) of the CIRP Regulations, refers to the parameters and method approved by the CoC for evaluating resolution plans. It is shared with prospective resolution applicants (PRAs) along with the RFRP. The matrix helps the CoC objectively compare resolution plans, promotes transparency, and reduces the risk of challenges. The CoC must ensure the matrix is clear, measurable, and not based on vague or subjective criteria.

Q23: What are the key requirements and provisions for submission and modification of a resolution plan under the IBC and CIRP Regulations?

Answer: After receiving the RFRP, Information Memorandum, and Evaluation Matrix, prospective resolution applicants (PRAs) conduct due diligence and submit their resolution plan to the resolution professional (RP) in line with the IBC and CIRP Regulations.

As per Section 30(1) of the IBC, the resolution plan must be accompanied by an affidavit confirming the applicant's eligibility under Section 29A.

According to Regulation 39(1A), if stated in the RFRP, the RP may:

- Allow the modification of the resolution plan (only once), or
- Use a challenge mechanism to enable PRAs to improve their plans.

Q24: You, acting as a Resolution Professional received a Resolution Plan. How will you satisfy yourself that the plan is in order for submission to the Committee of Creditors? (5 marks)

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Answer: Section 30(2) of the Insolvency and Bankruptcy Code, 2016 provides that the resolution professional shall examine each resolution plan received by him to confirm that each resolution plan -

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

(b) provides for the payment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than:

(i) the amount to be paid to such creditors in the event of a liquidation of a corporate debtor under section 53; or

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

Whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanat on 1: For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanat on 2 : For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor-

(i) Where a resolution plan has not been approved or rejected by the Adjudicating Authority;

(ii) Where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) Where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan.

(c) provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

Q25: IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, lists down the mandatory contents of the resolution plan. Explain. (3 marks)

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Answer: Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, lists down the mandatory contents of the resolution plan which are as follows:

(1) The amount payable under a resolution plan (a) to the operational creditors shall be paid in priority over financial creditors; and (b) to the financial creditors, who have a right to vote under sub-section (2) of section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

(1A) A resolution on plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

(1B) A resolution on plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution on plan approved by the Adjudicating Authority at any time in the past.

(2) A resolution on plan shall provide:

- the term of the plan and its implementation schedule;
- the management and control of the business of the corporate debtor during its term; and adequate means for supervising its implementation.

(3) A resolution on plan shall demonstrate that -

- it addresses the cause of default;
- it is feasible and viable;
- it has provisions for its effective implementation;
- it has provisions for approvals required and the timeline for the same; and
- the resolution applicant has the capability to implement the resolution on plan.

Q26: What is the process for approval of a resolution on plan by the Committee of Creditors (CoC) under the IBC and CIRP Regulations?

Answer: As per Section 30(3) of the IBC, the resolution professional (RP) presents to the CoC only those resolution plans that meet the requirements of Section 30(2).

Under Regulation 39(2) of the CIRP Regulations, the RP must also provide details of any:

- Preferential transactions (Section 43),
- Undervalued transactions (Section 45),
- Extortionate credit transactions (Section 50), and
- Fraudulent transactions (Section 66), along with relevant orders of the Adjudicating Authority, if any.

Regulation 39(1B) of CIRP Regulations provide for that the committee shall not consider any resolution on plan-

- (a) received after the time as specified by the committee under regulation 36B; or
- (b) received from a person who does not appear in the final list of prospective resolution applicants; or
- (c) does not comply with the provisions of section 30(1).

As per Regulation 39(3), the CoC shall:

- Evaluate the resolution plans using the evaluation matrix,
- Record its deliberation on their feasibility and viability of each resolution on plan, and
- Vote simultaneously on all compliant resolution on plans.

Q27: What are the provisions under Section 30(4) of the IBC regarding the approval of a resolution on plan by the Committee of Creditors (CoC)?

Answer: Under Section 30(4) of the IBC:

- The CoC may approve a resolution plan by at least 66% of the voting share of financial creditors.
- Approval is based on assessment of the feasibility and viability of the plan, manner of distribution (considering the order of priority under Section 53), and security interests of secured creditors.
- The CoC cannot approve a plan submitted before the 2017 Ordinance if the applicant is ineligible under Section 29A.
- If ineligible under clause (c) of Section 29A, the applicant may be granted up to 30 days to clear overdue dues.
- This 30-day window does not extend the CIRP timeframe under Section 12(3).
- The amended Section 29A (2018) applies to applicants who had not submitted plans before the 2018 Ordinance commencement.

Q28: From the following details, determine the order of priority payment out of the realization of liquidation estate assets :

- (i) Financial debts owed to unsecured creditors;**
- (ii) Wages and any unpaid dues owed to employees other than workmen for 24 months preceding the liquidation commencement date,**
- (iii) Liquidator's remuneration,**
- (iv) Debts owed to a secured creditor who has relinquished the security,**
- (v) Preference shareholders. (5 marks)**

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Answer: As per Sections 53 of the Insolvency and Bankruptcy Code, 2016, the proceeds from the sale of the liquidation assets shall be distributed in the order of priority and within such period as specified thereunder.

Accordingly, in the present question, the Order of priority payment is given as under:

- i. Liquidator's remuneration;
- ii. Debts owed to a secured creditor who has relinquished the security;
- iii. Wages and any unpaid dues owed to employees other than workmen for 24 months preceding the liquidation commencement date;
- iv. Financial debts owed to unsecured creditors;
- v. Preference shareholders

Q29: 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)

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Answer: 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."

Q30: What do Regulations 39(3A) and 39(3B) of the CIRP Regulations specify regarding the approval of resolution plans by the Committee of Creditors (CoC)?

Answer: Regulations 39(3A) and 39(3B) of the CIRP Regulations provide the voting criteria for CoC approval of resolution plans:

- Single Plan:** If only one resolution plan is put to vote and it receives the requisite votes (66%), it is approved.
- Multiple Plans:** Among two or more plans, the one with the highest votes ($\geq 66\%$) is considered approved.
- Tie with Requisite Votes:** If two or more plans get equal requisite votes, CoC shall use a pre-declared tiebreaker formula to choose one.
- No Plan Approved:** If none of the plans receive requisite votes, CoC shall re-vote on the plan that got the highest votes, within the permitted CIRP timelines.

Illustration. - The committee is voting on two resolution plans, namely, A and B, simultaneously. The voting outcome is as under:

Voting Outcome	% Votes in Favour of Plan A	% Votes in Favour of Plan B	Status of Approval
1.	55%	60%	No plan is approved, as neither received the requisite 66% votes. Committee shall vote again on Plan B, which received higher votes, within timelines.
2.	70%	75%	Plan B is approved, as it received the higher votes and meets the minimum 66% requirement.
3.	75%	75%	Committee shall approve either Plan A or Plan B based on the tie-breaker formula announced before voting.

Q31: Can resolut on applicant at end meet ng of CoC considering resolut on plan?

Answer: The resolut on applicant may at end the meet ng of the commit ee of creditors in which the resolut on plan of the applicant is considered. {Sect on 30(5)}

Provided that the resolut on applicant shall not have a right to vote at the meet ng of the commit ee of creditors unless such resolut on applicant is also a f nancial creditor.

Q32: What is the t meline and procedure for submission of the approved resolut on plan to the Adjudicat ng Authority under Sect on 30(6) and Regulat on 39(4) of the IBC?

Answer: As per Sect on 30(6) of the IBC, the resolut on professional (RP) must submit the CoC-approved resolut on plan to the Adjudicat ng Authority.

According to Regulat on 39(4) of the CIRP Regulat ons, the RP must endeavour to submit the approved plan at least 15 days before the maximum CIRP period under Sect on 12, along with:

- Form H (Compliance Cert f cate),
- Evidence of receipt of performance security as per Regulat on 36B(4A).

Q33: What is the role of the Adjudicat ng Authority (AA) in the approval of a resolut on plan under Sect on 31 of the IBC?

Answer: Under Sect on 31(1) of the IBC, the Adjudicat ng Authority (AA) shall approve the resolut on plan if it meets the requirements of Sect on 30(2) and has been approved by the CoC under Sect on 30(4). Before approval, the AA must ensure that the plan contains provisions for ef ect ve implementat on.

Once approved, the resolut on plan becomes binding on the:

- Corporate debtor
- Employees, members, creditors
- Central/State Governments, local authorit es
- Guarantors and other stakeholders

Q34: What are the provisions under Sect on 31 of the IBC regarding reject on of a resolut on plan, consequences of approval, and obligat ons of the resolut on applicant?

Answer: Reject on [Sect on 31(2)]: If the Adjudicat ng Authority (AA) f nds that the resolut on plan does not meet the requirements of Sect on 30(2), it may reject the plan.

Consequences of Approval [Sect on 31(3)]: Upon AA's approval of the resolut on plan:

- (a) Moratorium under Sect on 14 ends, and
- (b) The RP must forward all CIRP records to the IBBI.

Obligat on of Resolut on Applicant [Sect on 31(4)]: The resolut on applicant must obtain all statutory approvals (e.g., environmental, regulatory) within 1 year from AA's approval or within the period specif ed under the applicable law, whichever is later.

If the plan involves a combinat on (merger/acquisit on) under Sect on 5 of the Compet t on Act, CCI approval must be obtained before CoC approval of the plan.

Q35: What are the key provisions of Regulation 39 of the CIRP Regulations, 2016?**Answer:**

1. **Communication of AA's Order [Reg. 39(5)]:** RP must immediately send a copy of AA's order (approval or rejection) to all participants and the resolution applicant.
2. **Information to Claimants [Reg. 39(5A)]:** Within 15 days of plan approval, RP must inform each claimant the principle or formula for payment under the plan. *(Applicable to all CIRPs from the Fifteenth Amendment, 2020 onwards).*
3. **No Need for Consent [Reg. 39(6)]:** Provisions in a resolution plan that normally require shareholder or partner consent shall be effective even without such consent.
4. **No Proceedings Against IRP/RP [Reg. 39(7)]:** No proceedings can be initiated against the IRP/RP for actions of the CD before insolvency commencement.
5. **District Administration Assistance [Reg. 39(8)]:** Person in charge post-approval may apply to AA for district administration's help to implement the resolution plan.
6. **Relief for Non-Implementation [Reg. 39(9)]:** Aggrieved creditors may apply to AA for directions if the approved plan is not implemented.

Q36: Are there any grounds to appeal against the approval of Resolution Plan by the Adjudicating Authority in terms of Insolvency and Bankruptcy Code, 2016? (3 marks)**PAST YEAR QUESTION DECEMBER 2020**

Answer:(i) In terms of Section 32 of the Insolvency and Bankruptcy Code, 2016, read along with section 61(3), an appeal can be made against the order approving a resolution plan under the specified grounds.

- (ii) (a) The approved resolution plan is in contravention of the provisions of any law for the time being in force.
- (b) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
- (c) the debts owed to the operational creditors of the corporate debtor have not been provided for; (d) the insolvency resolution process costs have not been provided for repayment in priority to all other debts;
- (e) the resolution plan does not comply with any other criteria specified by the Board.

Q37: On what grounds can an appeal be filed against an approved resolution plan under Section 61(3) of the IBC?

Answer: An appeal against an order approving a resolution plan (under Section 31) may be filed on the following grounds:

1. Contravention of any law in force by the approved plan.
2. Material irregularity in the exercise of powers by the Resolution Professional during CIRP.
3. Non-compliance with provisions regarding operational creditors' dues as per IBBI.
4. IRP costs not provided for repayment in priority to other debts.
5. Non-compliance with criteria specified by the Board (IBBI).

Q38: EF LLP was under Corporate Insolvency Resolut on Process (CIRP) and NCLT has approved the Resolut on Plan submit ed by XY Private Limited, who is totally unrelated to the EF LLP or its Partners. Prior to init at ng of CIRP the EF LLP has entered into commercial agreement with Q Ltd to supply them the goods manufactured by EF LLP for a part cular period. But EF LLP did not supply as per the terms and Q Ltd suf ered huge loss due to breach of contract by EF LLP. Now af er Resolut on and successful commencement of business again by EF LLP, Q Ltd would like to claim damages for breach of contract. Referring relevant provisions answer whether Q Ltd can claim damages for breach of Contract. (5 marks)

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OR

A corporate debtor is provided immunity from the liability for of ences commit ed prior to init at on of Corporate Insolvency Resolut on Process. Explain the legal provision. (5 marks)

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Answer: As per sect on 32A (1) of the Insolvency & Bankruptcy Code the liability of a corporate debtor for an of ence commit ed prior to the commencement of the corporate insolvency resolut on process shall cease, and the corporate debtor shall not be prosecuted for such an of ence from the date the resolut on plan has been approved by the Adjudicat ng Authority under sect on 31.

According to sect on 32A (2) of the Insolvency & Bankruptcy Code no act on shall be taken against the property of the corporate debtor in relat on to an of ence commit ed prior to the commencement of the corporate insolvency resolut on process of the corporate debtor, where such property is covered under a resolut on plan approved by the Adjudicat ng Authority, if the resolut on plan results in the change in the management or control of the corporate debtor to a person who was not-

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant invest gat ng authority has, on the basis of material in its possession, reason to believe that he had abet ed or conspired for the commission of the of ence, and has submit ed or f led a report or a complaint to the relevant statutory authority or Court

It is further to be noted that if a prosecut on had been inst tuted during the corporate insolvency resolut on process against such corporate debtor, it shall stand discharged from the date of approval of the resolut on plan subject to requirements of this subsect on having fulf lled.

Apex Court in the case of *Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruct on Company Limited* stated that, on the date of approval of the Resolut on Plan by the Adjudicat ng Authority, all such claims which are not a part of the Resolut on Plan, shall stand ext nguished and no person will be ent tled to init ate or cont nue any proceedings in respect to a claim, which is not a part of the Resolut on Plan. The legislat ve intent behind this is to freeze all the claims so that the Resolut on Applicant starts on a clean slate and is not f ung with any surprise claims. Accordingly, Q Ltd cannot proceed against EF LLP whose

management is totally changed due to approval of Resolution plan of XY Private Limited, approved by the Adjudicating Authority. Hence, Q Ltd, cannot proceed against EF LLP or its present Partners for the breach done prior to CIRP.

Alternate Answer,

Section 32A of the Insolvency & Bankruptcy Code provides relief to the resolution applicant or the persons who shall be in charge of the management of the company in the future by way of immunity from the liability of offences that the promoters or the persons in charge of the corporate debtor had committed prior to the initiation of CIRP, subject to certain conditions.

Section 32A(1) states that notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

- (a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

According to Section 32A(2), no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

- (i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
- (ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court. 27

Section 32A (3) provides that subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person, who may be required to provide assistance under such law as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process.

Q39: “The Resolut on plan is not a sale or auct on or recovery or liquidat on but a resolut on of the Corporate Debtor as a going concern.” Referring relevant case law highlight on the importance of the statement. (3 marks)

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Answer: In the mat er of *Binani Industries Limited v. Bank of Baroda & Anr.*, the Nat onal Company Law Appellate Tribunal (NCLAT), not ced the object of the Insolvency & Bankruptcy Code, 2016 and laid down that the f rst order object ve is “resolut on”, the second order object ve is “maximisat on of value of assets of the ‘Corporate Debtor’” and the third order object ve is “promot ng entrepreneurship, availability of credit and balancing the interests of all the stakeholders.”

The Hon’ble Appellate Tribunal also held that the Insolvency & Bankruptcy Code def nes ‘Resolut on Plan’ as a plan for insolvency resolut on of the ‘Corporate Debtor’ as a going concern, and not as a sale, or auct on, or recovery or liquidat on.

The Tribunal held that the resolut on plan is:

- not an auct on: Each resolut on plan has a dif erent likelihood of turnaround depending on credibility and track record of ‘Resolut on Applicant’ and feasibility and viability of a ‘Resolut on Plan’ are not amenable to bidding or auct on. It requires applicat on of mind by the ‘Financial Creditors’ who understand the business well.
- not recovery: Recovery is an individual ef ort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. The ‘I&B Code’ prohibits and discourages recovery.
- not a liquidat on: The IBC does not allow liquidat on of a Corporate Debtor directly and permits liquidat on only on failure of the resolut on process. The ‘Insolvency & Bankruptcy Code’, therefore, does not allow liquidat on of a ‘Corporate Debtor’ directly. It allows liquidat on only on failure of ‘Corporate Insolvency Resolut on Process’.

Insolvency & Bankruptcy Code rather facilitates and encourages resolut on in several ways. Insolvency & Bankruptcy Code aims to balance the interests of all stakeholders.

Q40: What are the key principles laid down by the NCLAT in *Binani Industries Limited v. Bank of Baroda & Anr.* regarding the formulat on and approval of a resolut on plan under the Insolvency and Bankruptcy Code (IBC)?

Answer: In the landmark case *Binani Industries Limited v. Bank of Baroda & Anr.*, the Nat onal Company Law Appellate Tribunal (NCLAT) laid down foundat onal principles for resolut on plans under the Insolvency and Bankruptcy Code (IBC), 2016. The case involved the resolut on of Binani Cement Limited, where the revised resolut on plan submit ed by Ultratech Cement Limited was approved. The NCLAT emphasized the following key principles:

1. **Purpose of Resolut on Plan:** A resolut on plan must aim to resolve insolvency, maximise the value of the corporate debtor’s assets, promote entrepreneurship and availability of credit, and balance the interests of all stakeholders. It is not to be treated as a sale, auct on, recovery, or liquidat on.

2. **No Auct on Mechanism:** The resolut on process under IBC is not akin to an auct on or bidding contest. The focus is on the **feasibility and viability** of the plan, which requires the commercial wisdom of the f nancial creditors.
3. **Dist nct on from Recovery and Liquidat on:** The IBC prohibits the resolut on process from becoming a tool for individual recovery. Resolut on is a collect ve mechanism aimed at revival, not a confrontat on between debtor and creditor. Liquidat on is only a last resort.
4. **Equitable Treatment of Stakeholders:** The plan must balance the interests of all stakeholders, not just f nancial creditors. Operat onal creditors should receive treatment that is fair and equitable, not discriminatory.
5. **Non-Discriminat on Principle:** Any resolut on plan that discriminates among similarly placed creditors—f nancial or operat onal—can be struck down as violat ve of IBC provisions. The Supreme Court upheld the NCLAT's decision, af rming that these principles are essent al to ensure that the resolut on process under IBC is fair, equitable, and in line with the object ves of the Code.

Q41: Whether the Former Directors of the Company on which insolvency proceedings have been init ated are ent tled to receive the copy of the Resolut on Plan from the Resolut on Professional. Comment. (3 marks)

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Answer: As per sect on 24(3)(b) of Insolvency and Bankruptcy Code, 2016, the resolut on professional shall give not ce of each meet ng of the commit ee of creditors to members of the suspended Board of Directors or the partners of the corporate persons, as the case may be. As per provision of sect on 24(4) the directors, as referred to in subsect on (3)(b), may at end the meet ngs of commit ee of creditors, but shall not have any right to vote in such meet ngs. In the mat er of *Vijay Kumar Jain vs. Standard Chartered Bank and others*, an appeal was f led with Supreme Court against orders reject ng the prayer of an erstwhile director for get ng copy of the resolut on plans from the Resolut on Professional. Both the NCLT and NCLAT ruled that appellant had no right to receive the resolut on plans and the Resolut on Professional has contended that only the members of CoC are ent tled to have resolut on plans, as per Sect on 30(3) IBC read with Regulat on 39(2) of CIRP Regulat ons.

The Supreme Court expressly rejected the argument based on relying on notes on clauses of sect on 24 of the code and held that every part cipant is ent tled to a not ce of every meet ng of the commit ee of creditors. Such not ce of meet ng must contain an agenda of the meet ng, together with the copies of all documents relevant for mat ers to be discussed and the issues to be voted upon at the meet ng vide Regulat on 21(3)(iii). Obviously, resolut on plans are “mat ers to be discussed” at such meet ngs, and the erstwhile Board of Directors are “part cipants” who will discuss these issues.”

It was held that members of the erstwhile Board of Directors, being vitally interested in resolut on plans that may be discussed at meet ngs of the commit ee of creditors, must be given a copy of such plans as part of “documents” that have to be furnished along with the not ce of such commit ee of creditor (CoC) meet ngs.

The Judgement also clarified that the resolution professional can take an undertaking from the erstwhile director to maintain confidentiality of the information.

Q42: Whether NCLAT can direct successful resolution applicant to modify its resolution plan?

Answer: No, the NCLAT cannot direct a successful resolution applicant to modify its resolution plan merely because its value is lower than the liquidation value.

In *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh & Ors.* [Civil Appeal No. 4242 of 2019], the Supreme Court held that:

- There is no requirement under the IBC for a resolution plan to match or exceed the liquidation value.
- The liquidation value is only a reference point to help the Committee of Creditors (CoC) make an informed decision.
- The commercial wisdom of the CoC must be respected, and courts or tribunals should not interfere with their decision on the resolution plan.

This ruling reinforces that the valuation process is advisory, and judicial intervention in CoC decisions should be minimal.

Q43: What were the key principles set led by the Supreme Court in *Essar Steel* regarding subrogation and claim finality in the resolution process?

Answer: In *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Others* [Civil Appeal No. 8766-67/2019], the Supreme Court clarified crucial aspects of the CIRP:

1. Subrogation:

- Once a resolution plan is approved under Section 31(1) of the IBC, it is binding on all stakeholders, including guarantors.
- Any clause in the resolution plan that extinguishes guarantors' subrogation rights (such as those of erstwhile directors) is valid and enforceable.
- This ensures that the successful resolution applicant starts afresh, without legacy liabilities.

2. Finality of Claims:

- All claims must be submitted to and dealt with by the Resolution Professional (RP) during the CIRP.
- No undecided or belated claims should arise after approval of the resolution plan.
- This protects the resolution applicant from uncertainty and potential liabilities post-approval, maintaining predictability and stability in the process.

Conclusion:

This landmark ruling reinforced the finality and binding nature of resolution plans and emphasized the commercial wisdom of the CoC, while promoting certainty for resolution applicants taking over distressed assets.

Q44: Can the Committee of Creditors (CoC) accept a settlement proposal under Section 12A of the IBC after it has already approved a resolution plan?

Answer: No, once the CoC has approved a resolution plan, it cannot reconsider or accept a Section 12A settlement proposal.

In **Hem Singh Bharana v. Pawan Doot Estate Pvt. Ltd. & Ors.** [CA (AT) (Ins.) No. 1481 of 2022], the NCLAT dismissed the appeal seeking to keep the resolution process in abeyance to consider a settlement proposal under Section 12A.

The NCLAT relied on the Supreme Court's judgment in **Ebix Singapore Pvt. Ltd. v. CoC of Educomp Solutions Ltd.**, which held that:

- Once the CoC approves a resolution plan, it is bound by its decision.
- The process cannot be reversed or re-opened after plan approval, as it would defeat the discipline, sanctity, and finality of the resolution process under the IBC.

Conclusion:

After CoC approval of a resolution plan, no settlement under Section 12A can be entertained, and the CoC cannot go back on its decision.

Q45: What was the NCLAT's ruling in *Hindalco Industries Ltd. v. Hiralud Industrial Works Ltd.* regarding fraudulent initiation of CIRP and constitution of CoC?

Answer: In **Hindalco Industries Ltd. v. Hiralud Industrial Works Ltd.** [CA (AT) (Ins.) No. 42, 43, 52, and 53 of 2022], the NCLAT quashed the approved resolution plan on the following key grounds:

1. Fraudulent Initiation of CIRP:

The CIRP was initiated fraudulently as collusion existed between the Corporate Debtor (CD) and the Financial Creditor (FC).

Both entities were found to be part of the same corporate group.

2. Illegal Constitution of CoC:

The Committee of Creditors (CoC) was constituted without proper admission and verification of claims, in violation of CIRP Regulations.

This undermined the integrity and legality of the resolution process.

3. Common Control & Collusion:

There were inter-connections between the CD, FC, CoC members, and the Successful Resolution Applicant (SRA):

Common directors on boards,

Shared registered offices and email IDs.

4. Orders Passed:

The resolution plan was quashed.

The FC and CD were penalised.

A detailed investigation was ordered by the Insolvency and Bankruptcy Board of India (IBBI).

Conclusion:

The NCLAT emphasized that fraud and collusion vitiate the insolvency process, and any resolution plan flowing from such irregularities is unsustainable.

Q46: Can a revised resolution on plan submitted after the deadline be considered by the CoC under the Swiss Challenge method?

Answer: No, a revised resolution on plan submitted after the final deadline for submission cannot be considered once the Swiss Challenge method has concluded.

In *Jindal Stainless Ltd. v. Shailendra Ajmera* [CA (AT) (Ins.) No. 1058 of 2022], the NCLAT set aside the Adjudicating Authority's (AA) order which had directed the CoC to consider a revised resolution on plan filed after closure of the challenge process.

Key Findings of the NCLAT:**1. Late Submission Is Invalid:**

- The revised plan submitted by Shyam Sel and Power Ltd. was beyond the permitted timeline.
- The Swiss Challenge method, once closed, cannot be reopened to accommodate late submissions.

2. Reliance on SC Judgment:

- The NCLAT relied on the **Supreme Court's ruling** in *Ngaitlang Dhar v. Panna Pragat Infrastructure Pvt. Ltd. & Ors.*
- Held that the process timeline must be strictly followed to maintain the sanctity of CIRP.

3. Direct Orders Issued:

- The AA's order was set aside.
- The Resolution Professional (RP) was directed to initiate fresh voting on resolution plans received within the stipulated time.

Conclusion:

After the closure of the Swiss Challenge process, no new or revised resolution on plan can be accepted, and doing so would compromise the discipline and fairness of the IBC process.

CHAPTER 20 AS PER ICSI MODULE

PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS

Q1: Mr. X, who is a Practising Company Secretary is approached by an Association of Small Enterprises. The members of Association want to understand Pre-Packaged Insolvency Resolution Process. As an Assistant to Mr. X, you are required to prepare a brief on Pre-Packaged Insolvency Resolution Process, indicating features of Pre-pack insolvency resolution process under IBC and its benefits to make the members of Association understand the features. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Sections 54A to 54P of the Insolvency & Bankruptcy Code contain provisions relating to Pre-packaged Insolvency Resolution Process.

- An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under subsection (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006. The minimum amount of default for initiating pre-packaged insolvency resolution process is Rs. 10 lakhs.
- Pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.
- The resolution professional shall submit the resolution plan, as approved by the committee of creditors to the Adjudicating Authority within a period of ninety days from the pre-packaged insolvency commencement date.
- An application for pre-packaged insolvency resolution process may be filed by a corporate applicant. The Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 contains the procedure for pre-packaged insolvency resolution process.
- The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolution professional a list of claims and a preliminary information memorandum. During the pre-packaged insolvency resolution process period, the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor.
- The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed. As per Section 54(2), the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- The committee of creditors (CoC), at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent. of the voting shares, resolve to vest the management of the corporate debtor with the resolution professional.

- The corporate debtor shall submit the base resolution plan to the resolution professional within two days of the pre-packaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.
- The CoC may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval or invitation of prospective resolution applicants, as the case may be.
- The committee of creditors may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors and conforms to the requirements of section 30(1) & (2) of the Code.
- Where – (a) the committee of creditors does not approve the base resolution plan under sub-section (4); or (b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors, the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan, in such manner as may be specified.
- The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select either BRP or a resolution plan which is significantly better than BRP. The resolution plan approved by the committee of creditors is submitted to the Adjudicating Authority by the Resolution Professional.
- The Adjudicating Authority shall, before passing an order for approval of a resolution plan under this sub-section, satisfy itself that the resolution plan has provisions for its effective implementation.

Benefits of pre-pack insolvency resolution process:

- It consolidates the benefit of both formal and informal proceedings of resolution, thus broadening the options for stakeholders.
- It enables faster resolution as the corporate debtor can prepare a settlement plan or resolution plan with the creditors before going to NCLT.
- Reduced burden on NCLT due to out of court settlements.
- With the suspension of CIRP until March 2021, pre-pack has come as a relief to promoters and corporate debtors.
- It allows the corporate debtor retain control till a settlement is reached with the creditors.

Q2: What are the provisions governing corporate debtor's eligibility to Pre-packaged Insolvency Resolution Process. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Corporate Debtors eligible for Prepackaged Insolvency Resolution Professional (PPIRP) provided under Section 54-A of Insolvency & Bankruptcy Code, 2016. It states that:

(1) Application for initiation of PPIRP may be made by corporate debtors classified as micro, small and medium enterprises under sub-section (1) of Section 7 of the MSME Development Act 2006.

(2) Without prejudice to sub-section (1) above, an application for initiation of PPIRP may be made by Corporate Debtors who commits a default subject to the following conditions -

- (a) It has not undergone PIRP resolution or completed insolvency resolution process during period of three years preceding the initiation date
- (b) It is not undergoing a corporate insolvency resolution process
- (c) No order requirements related to liquidation is passed under section 33
- (d) Eligible to submit resolution plan under section 29A
- (e) The financial creditors of the Corporate Debtors not being its related parties
- (f) Majority of the directors/partners of the Corporate Debtor shall file declaration that
 - they will file application for PIRP within 90 days
 - that the process is not being initiated to defraud any person
 - the name of Insolvency Professional to be appointed as a resolution professional.
- (h) The members of corporate debtors have passed a special resolution approving the filing of an application for initiation of PIRP.
- (3) Approval from creditors not less than 66% of value of financial debt.
- (4) Prior to seeking approval from financial creditors, declaration by the majority of the directors or partners of the corporate debtor.
- (5) Base resolution plan under Section 54K.
- (6) Such other information and documents as may be specified.

Q3: Who is Eligible for Pre-Packaged Insolvency Resolution Process (PIRP)?

Answer: Under Section 54A, a Corporate Debtor (CD) must satisfy two main conditions:

1. MSME Classification

The CD must be a **Micro, Small, or Medium Enterprise** under the MSME Development Act, 2006:

Enterprise Class	Investment in Plant & Machinery/Equipment	Turnover	Eligible for Pre-Pack?
Micro	≤ ₹1 crore	≤ ₹5 crore	Yes
Small	≤ ₹10 crore	≤ ₹50 crore	Yes
Medium	≤ ₹50 crore	≤ ₹250 crore	Yes

2. Additional Conditions (Section 54A(2))

A corporate debtor must also fulfil the following cumulative criteria:

(a) Not undergone CIRP or PIRP in the last 3 years

No pre-pack or regular CIRP should have been completed in the preceding 3 years from the proposed initiation date.

(b) Not undergoing CIRP presently

The CD must not be undergoing a CIRP currently.

(c) No liquidation order

No order under Section 33 should have been passed to liquidate the CD.

(d) Eligibility under Section 29A

The CD must be eligible to submit a resolution plan—i.e., it must not be disqualified under Section 29A.

(e) Approval of RP by unrelated financial creditors (66%)

The financial creditors (FCs) who are not related parties must:

- Propose the name of the Resolution Professional (RP), and
- Approve the proposal by at least 66% in value of the debt.

If there are no unrelated financial creditors, approval must be given by persons as specified in the rules.

(f) Declaration by majority directors/partners

A declaration must be made stating:

1. The application will be filed within 90 days.
2. The process is not intended to defraud anyone.
3. The proposed RP's name.

(g) Shareholders'/Partners' Resolution

- A special resolution (in case of company), or
- 3/4th majority approval (in case of partnership/LLP) must be passed to approve filing of PIRP application.

3. Separate Approval for Filing PIRP Application (Section 54A(3))

The CD must obtain 66% approval from unrelated FCs before filing the application with the AA.

4. Disclosures to Financial Creditors Before Approval Request (Section 54A(4))

Before seeking the approval under sub-section (3), the CD must provide:

- a) Declaration (as per 54A(2)(f)),
- (b) the special resolution or resolution (as per 54A(2)(g)),
- (c) Base Resolution Plan which conforms to the requirements (under Section 54K),
- (d) Any other information and documents as may be specified by regulations

Q4: What are the duties of resolution professional before initiation of pre-packaged insolvency resolution process? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: As per Section 54B (1), the insolvency professional, proposed to be appointed as the resolution professional, shall have the following duties commencing from the date of the approval under clause (e) of sub-section (2) of section 54A, namely:

- (a) prepare a report in such form as may be specified, confirming whether the corporate debtor meets the requirements of section 54A, and the base resolution plan conforms to the requirements referred to in clause (c) of sub-section (4) of section 54A;
- (b) file such reports and other documents, with the Board, as may be specified; and
- (c) perform such other duties as may be specified.

Section 54B (3) provides that the fees payable to the insolvency professional in relation to the duties performed under sub-section (1) shall be determined and borne in such manner as may be specified and such fees shall form part of the pre-packaged insolvency resolution process

costs, if the application for initiation of pre-packaged insolvency resolution process is admitted.

Q5: When will the duties of insolvency professional under Sect on 54B (1) of the Code cease?

Answer: Sect on 54B(2) provides the following circumstances:

- (a) If the corporate debtor fails to file an application for initiating prepackaged insolvency resolution process within the time period as stated under the declaration referred to in clause (f) of subsection (2) of sect on 54A; or
- (b) the application for initiating prepackaged insolvency resolution process is admitted or rejected by the Adjudicating Authority, as the case may be.

Q6: What are the key requirements and procedural steps for a corporate debtor to initiate a Pre-Packaged Insolvency Resolution Process (PPIRP) under Sect on 54C of the Insolvency and Bankruptcy Code, 2016?

Answer:

1. **Who can apply?** If a corporate debtor meets all the conditions mentioned in Sect on 54A (mainly being an eligible MSME), then the company (through its authorized applicant) can file an application to start the Pre-Packaged Insolvency Resolution Process (PPIRP).
2. **How to apply?** The application must be made:
 - In the prescribed form,
 - With all the required details,
 - In the manner specified, and
 - Along with the required fee.
3. **Documents to be submitted along with the application:** The company must also submit:
 - (a) A declaration, special resolution (or partners' resolution), and approval of financial creditors as required under Sect on 54A;
 - (b) The name and consent of the proposed Insolvency Professional (who will be the Resolution Professional), and the report prepared by him;
 - (c) A declaration disclosing any suspicious transactions (like fraud or transactions meant to cheat creditors);
 - (d) Books of accounts and other relevant documents for a specified period.
4. **What will the Adjudicating Authority (NCLT) do?** Within 14 days of receiving the application:
 - (a) It will admit the application if everything is in order.
 - (b) It will reject the application if it's incomplete. However, before rejecting, the NCLT must give the applicant a 7-day notice to fix any mistakes or missing documents.

Q7: What is the time limit for completing the Pre-Packaged Insolvency Resolution Process (PPIRP) under Sect on 54D of the Insolvency and Bankruptcy Code, 2016, and what actions must the resolution professional take if no resolution plan is approved within the prescribed period?

Answer:

1. **Overall Time Limit:** The entire pre-packaged insolvency process must be finished within 120 days from the date it starts.

2. **Submission of Resolution Plan:** The Resolution Professional (RP) must submit the resolution plan (which is approved by the Committee of Creditors) to the Adjudicating Authority (AA) within 90 days from the start date.

3. **If No Plan is Approved:** If the Committee of Creditors doesn't approve any plan within 90 days, the RP must apply to end the process immediately after 90 days are over.

If the Committee of Creditors (CoC) does not approve any resolution plan within the given time (90 days), then the Resolution Professional (RP) must, on the very next day, apply to the Adjudicating Authority (NCLT) to end the pre-packaged insolvency process, by filing an application in the prescribed format and manner.

Submission of Resolution plan by Resolution Professional:	90 days from the prepackaged insolvency commencement date
Non approval of Resolution plan within time line	RP to file an application for termination of Non approval pre-packaged insolvency resolution process expiry of the said period
Completion of Pre-Pack cases	120 days from pre-packaged insolvency Commencement date

Q8: A practicing lawyer has sought your advice whether it is possible to terminate pre-packaged insolvency resolution process under Insolvency and Bankruptcy Code, 2016. Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: (1) Where the resolution professional files an application with the Adjudicating Authority. -

(a) under the proviso to sub-section (12) of section 54K; or

(b) under sub-section (3) of section 54D, the Adjudicating Authority shall, within thirty days of the date of such application, by an order, -

I. terminate the pre-packaged insolvency resolution process; and

II. provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.

(2) Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section

(4) or sub-section (12), as the case may be, of section 54K. intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).

(3) Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.

Considering the above provisions, it is possible to terminate the pre-packaged insolvency resolution process under Insolvency and Bankruptcy Code, 2016 in the manner stated above.

Q9: What happens when the Adjudicating Authority admits a pre-packaged insolvency application under Section 54C?

Answer: (1) The Adjudicating Authority shall, on the pre-packaged insolvency commencement date, along with the order of admission under section 54C -

- (a) declare a moratorium for the purposes referred to in sub-section (1) read with sub-section (3) of section 14, which shall, mutatis mutandis apply, to the proceedings under this Chapter;
 - (b) appoint a resolution professional -
 - (i) as named in the application, if no disciplinary proceeding is pending against him; or
 - (ii) based on the recommendation made by the Board, if any disciplinary proceeding is pending against the insolvency professional named in the application.
 - (c) cause a public announcement of the initiation of the prepackaged insolvency resolution process to be made by the resolution professional, in such form and manner as may be specified, immediately after his appointment.
- (2) The order of moratorium shall have effect from the date of such order till the date on which the prepackaged insolvency resolution process period comes to an end.

Q10: What are the duties of Resolution Professional during the Pre-Packaged Insolvency Resolution Process? (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: According to the Section 54F of the Insolvency and Bankruptcy Code, the resolution professional shall perform the following duties, namely:

- (a) confirm the list of claims submitted by the corporate debtor under section 54G, in such manner as may be specified;
- (b) inform creditors regarding their claims as confirmed under clause (a), in such manner as may be specified;
- (c) maintain an updated list of claims, in such manner as may be specified;
- (d) monitor management of the affairs of the corporate debtor;
- (e) inform the committee of creditors in the event of breach of any of the obligations of the Board of Directors or partners, as the case may be, of the corporate debtor, under the provisions of this Chapter and the rules and regulations made thereunder;
- (f) constitute the committee of creditors and convene and attend all its meetings;
- (g) prepare the information memorandum on the basis of the preliminary information memorandum submitted under section 54G and any other relevant information, in such form and manner as may be specified;
- (h) file applications for avoidance of transactions under Chapter III or fraudulent or wrongful trading under Chapter VI, if any; and
- (i) such other duties as may be specified.

Q11: What are the powers of Resolut on Professional during the Pre-Packaged Insolvency Resolut on Process?

Answer: According to the Sect on 54F(3) of the Insolvency and Bankruptcy Code, the resolut on professional shall perform the following powers, namely:

- (a) access all books of accounts, records and informat on available with the corporate debtor;
- (b) access the electronic records of the corporate debtor from an informat on ut lity having f nancial informat on of the corporate debtor;
- (c) access the books of accounts, records and other relevant documents of the corporate debtor available with government authorit es, statutory auditors, accountants and such other persons as may be specif ed;
- (d) at end meet ngs of members, Board of Directors and commit ee of directors, or partners, as the case may be, of the corporate debtor;
- (e) appoint accountants, legal or other professionals in such manner as may be specif ed;
- (f) collect all informat on relat ng to the assets, f nances and operat ons of the corporate debtor for determining the f nancial posit on of the corporate debtor and the existence of any transact ons that may be within the scope of provisions relat ng to avoidance of transact ons under Chapter III or fraudulent or wrongful trading under Chapter VI, including informat on relat ng to:
 - (i) business operat ons for the previous two years from the date of prepackaged insolvency commencement date;
 - (ii) f nancial and operat onal payments for the previous two years from the date of pre-packaged insolvency commencement date;
 - (iii) list of assets and liabilit es as on the init at on date; and
 - (iv) such other mat ers as may be specif ed;
- (g) take such other act ons in such manner as may be specif ed.

Q12: What is required under Sect on 54G regarding the list of claims and preliminary informat on memorandum in a pre-packaged insolvency resolut on process?

Answer:

- (1) The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolut on professional the following informat on, updated as on that date, in such form and manner as may be specif ed, namely:-
 - (a) a list of claims, along with details of the respect ve creditors, their security interests and guarantees, if any; and
 - (b) a preliminary informat on memorandum containing informat on relevant for formulat ng a resolut on plan.
- (2) Where any person has sustained any loss or damage as a consequence of the omission of any material informat on or inclusion of any misleading informat on in the list of claims or the preliminary informat on memorandum submit ed by the corporate debtor, every person who

(a) is a promoter or director or partner of the corporate debtor, as the case may be, at the time of submission of the list of claims or the preliminary information memorandum by the corporate debtor; or

(b) has authorised the submission of the list of claims or the preliminary information memorandum by the corporate debtor, shall, without prejudice to section 77A, be liable to pay compensation to every person who has sustained such loss or damage.

(3) No person shall be liable under sub-section (2), if the list of claims or the preliminary information memorandum was submitted by the corporate debtor without his knowledge or consent.

(4) Subject to section 54E, any person, who sustained any loss or damage as a consequence of omission of material information or inclusion of any misleading information in the list of claims or the preliminary information memorandum shall be entitled to move a court having jurisdiction for seeking compensation for such loss or damage.

Q13: Discuss on the provisions of Management of affairs of corporate debtor during the pre-packaged insolvency resolution, also brief the powers of Committee of Creditors in vesting the Management of Corporate Debtor in pre-packaged insolvency resolution process. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: Section 54H of the Insolvency & Bankruptcy Code, 2016 provides following provisions with respect to the management of affairs of corporate debtor during the pre-packaged insolvency resolution process period-

(a) The management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor, subject to such conditions as may be specified;

b) The Board of Directors or the partners, as the case may be, of the corporate debtor, shall make every endeavour to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern; and

(c) The promoters, members, personnel and partners, as the case may be, of the corporate debtor, shall exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of this chapter and such other conditions and restrictions as may be prescribed.

Section 54J of the Insolvency & Bankruptcy Code, 2016 prescribes the following provisions in respect to power of CoC in vesting management of corporate debtor with resolution professional:

(1) Where the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional, the resolution professional shall make an application for this purpose to the Adjudicating Authority, in such form and manner as may be specified.

(2) On an application made under sub-section (1), if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process—

- (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or
- (b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the resolution professional.

Q14: What does Section 54I of the IBC, 2016 provide regarding the constitution and functioning of the Committee of Creditors (CoC) during the pre-packaged insolvency resolution process?

Answer:

(1) The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed under clause (a) of sub-section (2) of section 54F(2)(a):

Provided that the composition of the committee of creditors shall be altered on the basis of the updated list of claims, in such manner as may be specified, and any such alteration shall not affect the validity of any past decision of the committee of creditors.

(2) The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

(3) Provisions of section 21, except sub-section (1) thereof, shall, mutatis mutandis apply, in relation to the committee of creditors under this Chapter: Provided that for the purposes of this sub-section, references to the “resolution professional” section 21(9) & (10), shall be construed as references to “corporate debtor or the resolution professional”.

Q15: Under what conditions can the Committee of Creditors transfer the management of the corporate debtor to the Resolution Professional during the Pre-Packaged Insolvency Resolution Process? What legal provisions apply after such transfer?

Answer: Section 54J(1) provides that where the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional, the resolution professional shall make an application for this purpose to the Adjudicating Authority, in such form and manner as may be specified.

Section 54J(2) of the Code provides that on an application made under sub-section (1), if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process —

- (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or
- (b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the resolution professional.

Section 54J(3) provides that notwithstanding anything to the contrary contained in this chapter, the provisions of:

- (a) Section 14(2) and (2A) (moratorium)
- (b) Section 17 (Management of affairs of corporate debtor by IRP)

(c) Section 18 (e) to (g) (Duties of IRP)

(d) Sections 19 and 20 (Personnel to extend co-operation to IRP and management of operations of corporate debtor as going concern)

(e) Section 25(1) (Duty of RP to preserve and protect the assets of corporate debtor)

(f) Section 25(2) (a) to (c) and (k) (duties of RP) and

(g) section 28 (Approval of COC for certain actions) shall, mutatis mutandis apply, to the proceedings under this chapter, from the date of the order under sub-section (2), until the pre-packaged insolvency resolution process period comes to an end.

Q16: What is the process for submitting and approving the base resolution plan under Section 54K of the Pre-Packaged Insolvency Resolution Process?

Answer: (1) The corporate debtor shall submit the base resolution plan, referred to in section 54A(4)(c), to the resolution professional within two days of the prepackaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.

(2) The committee of creditors may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval under sub-section (4) or invitation of prospective resolution applicants under sub-section (5) as the case may be.

(3) The resolution plans and the base resolution plan, submitted under this section shall conform to the requirements referred to in Section 30(1) and (2), and the provisions of section 30(1), (2) and (5) shall, mutatis mutandis apply, to the proceedings under this Chapter.

(4) The committee of creditors may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors.

(5) Where -

(a) the committee of creditors does not approve the base resolution plan under sub-section (4); or

(b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors, the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan, in such manner as may be specified.

(6) The resolution applicants submitting resolution plans pursuant to invitation under sub-section (5), shall fulfil such criteria as may be laid down by the resolution professional with the approval of the 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.

(7) The resolution professional shall provide to the resolution applicants -

(a) the basis for evaluation of resolution plans for the purposes of sub-section (9), as approved by the committee of creditors subject to such conditions as may be specified; and

(b) the relevant information referred to in section 29, which shall, mutatis mutandis apply, to the proceedings under this chapter, in such manner as may be specified.

(8) The resolution professional shall present to the committee of creditors, for its evaluation, resolution plans which conform to the requirements referred to in sub-section (2) of section 30.

(9) The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select a resolution plan from amongst them.

(10) Where, on the basis of such criteria as may be laid down by it, the committee of creditors decides that the resolution plan selected under sub-section (9) is significantly better than the base resolution plan, such resolution plan may be selected for approval under sub-section (12):

Provided that the criteria laid down by the committee of creditors under this sub-section shall be subject to such conditions as may be specified.

(11) Where the resolution plan selected under sub-section (9) is not considered for approval or does not fulfil the requirements of sub-section (10), it shall compete with the base resolution plan, in such manner and subject to such conditions as may be specified, and one of them shall be selected for approval under sub-section (12).

(12) The resolution plan selected for approval under sub-section (10) or sub-section (11), as the case may be, may be approved by the committee of creditors for submission to the Adjudicating Authority:

Provided that where the resolution plan selected for approval under sub-section (11) is not approved by the committee of creditors, the resolution professional shall file an application for termination of the pre-packaged insolvency resolution process in such form and manner as may be specified.

(13) The approval of the resolution plan under sub-section (4) or sub-section (12), as the case may be, by the committee of creditors, shall be by a vote of not less than sixty-six per cent. of the voting shares, after considering its feasibility and viability, the manner of distribution proposed, taking into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified.

(14) While considering the feasibility and viability of a resolution plan, where the resolution plan submitted by the corporate debtor provides for impairment of any claims owed by the corporate debtor, the committee of creditors may require the promoters of the corporate debtor to dilute their shareholding or voting or control rights in the corporate debtor:

Provided that where the resolution plan does not provide for such dilution, the committee of creditors shall, prior to the approval of such resolution plan under sub-section (4) or sub-section (12), as the case may be, record reasons for its approval.

Q17: What are the key requirements that a resolution plan must fulfil under the IBC during the pre-packaged insolvency resolution process?

Answer: A resolution applicant may submit a resolution plan along with an affidavit stating that he is eligible under section 29A to the resolution professional prepared on the basis of the information memorandum.

The resolutor professional shall examine each resolutor plan received by him to confirm that each resolutor plan –

- (a) provides for the payment of insolvency resolutor process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
- (b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than-
 - (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
 - (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolutor plan had been distributed in accordance with the order of priority in section 53(1), whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolutor plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with section 53(1) in the event of a liquidation of the corporate debtor.
- (c) provides for the management of the affairs of the corporate debtor after approval of the resolutor plan;
- (d) The implementation and supervision of the resolutor plan;
- (e) does not contravene any of the provisions of the law for the time being in force;
- (f) conforms to such other requirements as may be specified by the Board.

Q18: Who submits the resolutor plan approved by the Committee of Creditors to the Adjudicating Authority, and under which provisions is it submitted?

Answer: Step-by-Step Process for Submission and Approval of Resolutor Plan in PPIRP:

1. **Base Resolutor Plan Submission:** The Corporate Debtor (CD) must submit the base resolutor plan to the Resolutor Professional (RP) within 2 days from the commencement of the PPIRP.
2. **Presentator to Committee of Creditors (CoC):** The RP presents this base resolutor plan to the Committee of Creditors for their consideration.
3. **Opportunity to Revise:** The CoC may give the CD a chance to revise the base resolutor plan before they either approve it or decide to invite other resolutor applicants (PRAs).
4. **Compliance Check :** The RP ensures that the base resolutor plan and any other plans comply with the IBC provisions.
5. **Approval of Base Plan (Optional):** If the CoC is satisfied that the base plan does not impair the claims of operational creditors, they may approve it with a 66% majority vote, and the RP submits it to the NCLT.
6. **Non-approval of Base Plan :** If the base resolutor plan is not approved, the RP invites Prospective Resolutor Applicants (PRAs) to submit competing resolutor plans.
7. **Information Sharing:** The RP shares relevant information (as per Section 29) with PRAs to help them prepare their plans.
8. **Placement Before CoC:** The RP places all received resolutor plans (that comply with the Code) before the CoC for consideration.

9. **Evaluate on by CoC:** The CoC evaluates all the plans and selects the best resolution plan, which could include the revised base plan or a plan from a PRA.
10. **Final Approval by CoC:** The CoC approves the best plan with a 66% voting share.
11. **Submission to NCLT:** The approved resolution plan is then submitted by the RP to the NCLT for final approval.
12. **If No Plan is Approved:** If no resolution plan is approved, the RP files an application with the NCLT for termination of the pre-packaged insolvency resolution process.

Q19: What happens after the Committee of Creditors (CoC) approves a resolution plan under Section 54K in a Pre-Packaged Insolvency Resolution Process?

Answer: Approval of resolution plan (Section 54L)

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) or sub-section (12) of section 54K, as the case may be, subject to the conditions provided therein, meets the requirements as referred to in sub-section (2) of section 30, it shall, within thirty days of the receipt of such resolution plan, by order approve the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of a resolution plan under this sub-section, satisfy itself that the resolution plan has provisions for its effective implementation.

(2) The order of approval under sub-section (1) shall have such effect as provided under section 31(1), (3) and (4), which shall, mutatis mutandis apply, to the proceedings under this Chapter.

(3) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, within thirty days of the receipt of such resolution plan, by an order, reject the resolution plan and pass an order under section 54N.

(4) Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J and the resolution plan approved by the committee of creditors under sub-section (4) or sub-section (12), as the case may be, of section 54K, does not result in the change in the management or control of the corporate debtor to a person who was not a promoter or in the management or control of the corporate debtor, the Adjudicating Authority shall pass an order -

- (a) rejecting such resolution plan;
- (b) terminating the pre-packaged insolvency resolution process and passing a liquidation order in respect of the corporate debtor as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of section 33; and
- (c) declaring that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Q20: Explain the provisions pertaining to termination of pre-packaged insolvency resolution process. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Section 54N of the Insolvency & Bankruptcy Code dealing with termination of pre-packaged insolvency resolution process. It provides that:

1. Where the resolution professional files an application with the Adjudicating Authority, -
 - a) under the proviso to sub-section (12) of section 54K; or
 - b) under sub-section (3) of section 54D,
 the Adjudicating Authority shall, within thirty days of the date of such application, by an order -
 - i) terminate the pre-packaged insolvency resolution process; and
 - ii) provide for the manner of continuation of proceedings initiated for avoidance of transactions under Chapter III or proceedings initiated under section 66 and section 67A, if any.
2. Where the resolution professional, at any time after the pre-packaged insolvency commencement date, but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, intimates the Adjudicating Authority of the decision of the committee of creditors, approved by a vote of not less than sixty-six per cent of the voting shares, to terminate the pre-packaged insolvency resolution process, the Adjudicating Authority shall pass an order under sub-section (1).
3. Where the Adjudicating Authority passes an order under sub-section (1), the corporate debtor shall bear the pre-packaged insolvency resolution process costs, if any.
4. Notwithstanding anything to the contrary contained in this section, where the Adjudicating Authority has passed an order under sub-section (2) of section 54J and the pre-packaged insolvency resolution process is required to be terminated under sub-section (1), the Adjudicating Authority shall pass an order -
 - (a) of liquidation in respect of the corporate debtor as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1) of section 33; and
 - (b) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Q21: What happens when the Adjudicating Authority has passed an order for termination of pre-packaged insolvency resolution process pursuant to the decision of COC?

Answer: As per Section 54N(4) of the Code, the Adjudicating Authority shall further pass an order —

- (a) of liquidation of corporate debtor;
- (b) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of the liquidation costs for the purposes of liquidation of the corporate debtor.

Q22: Under what circumstances can a corporate insolvency resolution process (CIRP) be initiated during the pre-packaged insolvency resolution process (PPIRP) as per Section 54-O?

Answer: (1) The committee of creditors, at any time after the pre-packaged insolvency commencement date but before the approval of resolution plan under sub-section (4) or sub-section (12), as the case may be, of section 54K, by a vote of sixty-six per cent. of the voting shares, may resolve to initiate a corporate insolvency resolution process in respect of the corporate debtor, if such corporate debtor is eligible for corporate insolvency resolution process under Chapter II.

(2) Notwithstanding anything to the contrary contained in Chapter II, where the resolution professional intimates the Adjudicating Authority of the decision of the committee of creditors under sub-section (1), the Adjudicating Authority shall, within thirty days of the date of such intimation, pass an order to -

(a) terminate the pre-packaged insolvency resolution process and initiate corporate insolvency resolution process under Chapter II in respect of the corporate debtor;

(b) appoint the resolution professional referred to in clause (b) of sub-section (1) of section 54E as the interim resolution professional, subject to submission of written consent by such resolution professional to the Adjudicating Authority in such form as may be specified; and

(c) declare that the pre-packaged insolvency resolution process costs, if any, shall be included as part of insolvency resolution process costs for the purposes of the corporate insolvency resolution process of the corporate debtor.

(3) Where the resolution professional fails to submit written consent under clause (b) of sub-section (2), the Adjudicating Authority shall appoint an interim resolution professional by making a reference to the Board for recommendation, in the manner as provided under section 16.

Q23: What happens when the Adjudicating Authority passes an order under sub-section (2) of Section 54-O of the Code?

Answer: Section 54-O(4) of the Code provides that where the Adjudicating Authority passes an order under sub-section (2):

(a) such order shall be deemed to be an order of admission of an application under section 7 and shall have the same effect;

(b) the corporate insolvency resolution process shall commence from the date of such order;

(c) the proceedings initiated for avoidance of transaction under Chapter III or proceedings initiated under section 66 and section 67 A, if any, shall continue during the corporate insolvency resolution process;

(d) for the purposes of sections 43, 46 and 50, references to "insolvency commencement date" shall mean "pre-packaged insolvency commencement date"; and

(e) in computing the relevant time or the period for avoidable transactions, the time period for the duration of the prepackaged insolvency resolution process shall also be included, notwithstanding anything to the contrary contained in sections 43, 46 and 50.

CHAPTER 21 AS PER ICSI MODULE

CROSS BORDER INSOLVENCY

Q1: “UNCITRAL Model Law is not a law in its own right and has no force.” Comment. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: The UNCITRAL Model Law on Cross-Border Insolvency adopted in 1997 is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross border insolvency. Although the number of cross border insolvency cases has increased significantly, the adoption of national or international legal regimes equipped to address the issues raised by those cases have not kept pace.

The following circumstances necessitated the harmonization of legislations across nations with reference to cross border insolvency:

1. Continuing global expansion of trade and investment
2. Increasing evidence of cross border insolvency due to integration of trade across countries
3. National Insolvency Laws of different countries have by and large not kept pace with the trend.

Inadequate and inharmonious legal approach due to difference in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of assets of the insolvent debtors against dissipation. The UNCITRAL Model law has been adopted in as many as 44 countries and therefore forms part of international best practices of cross border insolvency.

Q2: UNCITRAL Model Law is binding on member countries but at the best obiter dicta for Courts of the member countries dealing in disputes relating to cross border insolvency and international trade. Elucidate. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: *Obiter dicta* refer to opinion expressed in a Court by the Judge but not essentially to the decision and hence not binding. Thus the statement emphasises to adopt the law as legislation in member countries but not binding on Courts unless incorporated in a legislation. Framing of UNCITRAL Model Law was necessitated due to certain reasons:

- (a) global expansion of trade and investment;
- (b) inadequate and inharmonious legal approaches due to differences in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of the assets of the insolvent debtor against dissipation;
- (c) increasing incidences of cross border insolvency due to integration of trade across countries;
- (d) National insolvency laws of different countries have by and large not kept pace with the trend.

Main thrust of Model Law is to achieve fair and efficient administration of cross border insolvencies protecting the interest of every stakeholder.

Q2: Examine whether the recommendations of the Insolvency Law Committee (ILC) on Cross-border insolvency are in line with the provisions set out in the UNCITRAL Model Law on Cross-border insolvency? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The Insolvency Law Committee (ILC) on Cross Border insolvency constituted by the Ministry of Corporate Affairs recommended certain modifications in the existing Insolvency and Bankruptcy Code, 2016 to match with the models of United Nations Commission on International Trade Law (UNCITRAL). The necessity of having Cross Border insolvency framework arises from the fact that many Indian companies have global presence and many foreign companies are operating in India. Inclusion of comprehensive legal laws dealing with cross border insolvency will boost greater confidence among foreign investors, adequate flexibility for seamless integration with the domestic insolvency law and a robust mechanism for international cooperation.

The key recommendations of the ILC are as under:

- i. The recommendation will enable Indian companies having foreign assets to proceed and take advantage of the framework of UNCITRAL.
- ii. The Committee recommended that the Model Law may be adopted initially on a reciprocity basis. Reciprocity indicates that a domestic court will recognize and enforce a foreign court's judgement only if the foreign country has adopted similar legislation to the domestic country.
- iii. Access to foreign representatives- The Model Law allows foreign insolvency professionals and foreign creditors access to domestic courts to seek remedy directly.
- iv. The model law will allow recognition of foreign proceedings and provides relief based on this recognition.
- v. The model law lays down the basic framework for cooperation between domestic and foreign courts and domestic and foreign insolvency professionals.
- vi. The model provides for commencement of domestic insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordination of two or more concurrent insolvency proceedings in different countries by encouraging cooperation between courts.
- vii. Part Z of the recommendation provides for the adjudicating authority may refuse to take action under the Code if it is contrary to public policy.

Thus, the recommendation of the Insolvency Law Committee (ILC) is completely on the lines of UNCITRAL.

Q3: What are the key objectives of an effective and efficient insolvency law

Answer: Although approaches in different countries may vary but there is a broad agreement that an effective and efficient insolvency regime should aim to achieve the following key objectives in a balanced manner:

1. Maximization of value of assets
2. ensuring equitable treatment of similarly situated creditors
3. Provision for timely, efficient and impartial resolution of insolvency
4. Preservation of the insolvency estate to allow equitable distribution to creditors
5. Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information
6. Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims
7. Establishment of a framework for cross-border insolvency

Q4: United Nations Commission on International Trade (UNCITRAL) demonstrated as Guiding Role in respect of Insolvency Laws in Member Nations—Comment. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: 'The United Nations Commission on International Trade' (UNCITRAL) is a subsidiary body of the United Nations General Assembly, established in 1966.

The Body is responsible for preparing international legislative texts for use by different Nations to have uniform and harmonious legislations to promote International Trade.

(ii) UNCITRAL has prepared the Legislative Guide on Insolvency Law with the objective to amicably settle the business deals. The Guide is divided into four parts.

(iii) Part One discusses the key objectives of an insolvency law, structural issues such as relationship between insolvency law and other law, the type of mechanisms available for resolving a debtor's financial difficulties, etc.

(iv) Parts Two to four deal with core features of an effective insolvency law, treatment of enterprise groups in insolvency and focus on the obligation that might be imposed upon those responsible for making decisions with respect to the management of an enterprise when such unit is facing insolvency or insolvency is inevitable.

(v) All Cross – border insolvency issues are thus tackled by the UNCITRAL as a guiding role.

Q5: “Vasudev Kutumbakam or one world one family is the motto of any business entity in addition to political and cultural togetherness. This has prompted to the formation of United Nations Organisation (UNO) to ensure smooth universal trade”. Comment on the statement with special emphasis on efforts being made with respect to Cross Border Insolvency. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: United Nations Commission on International Trade Law (UNCITRAL) was formed in 1966 as an organ of UNO with a mandate to further the harmonization and unification of the law relating to International Trade. Commission has developed a Model Law on Cross-Border Insolvency (the Model Law) in order to create and maintain harmony in regulatory aspects of insolvency mechanism across countries. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It

of ers solut ons that help in several signif cant ways to have harmony among regulatory frameworks. Its Mot o is harmonizat on of legislat ons across countries.

Model Law aims co-operat on between the courts and competent authorit es, greater legal certainty for trade and investment, fair and ef cient administrat on to protect the interests of creditors, stakeholders including the debtor, protect on, maximisat on of the value of the debtor's assets and facilitat on of the rescue of f nancially troubled businesses thus protect ng investment and preserving employment. Key provision of Model Law aims at access, recognit on, relief assistance and co-operat on.

Q6: What is the purpose and scope of the UNCITRAL Legislat ve Guide on Insolvency Law, and how does it support nat onal authorit es in designing ef ect ve insolvency regimes?

Answer: The Legislat ve Guide on insolvency law was prepared by the United Nat ons Commission on Internat onal Trade Law (UNCITRAL). the project arose from a proposal made to the Commission in 1999 that UNCITRAL should undertake further work on insolvency law, specif cally corporate insolvency, to foster and encourage the adopt on of ef ect ve nat onal corporate insolvency regimes.

Organizat on and Scope of the Legislat ve Guide

The legislat ve Guide on insolvency law is intended be used as a reference by nat onal authorit es and legislat ve bodies when preparing new laws benef ts and regulat ons or reviewing the adequacy of exist ng laws and regulat ons.

The Guide discusses issues central to the design of an ef ect ve and ef cient insolvency law, which, despite numerous dif erences in policy and legislat ve treatment, are recognized in many legal systems.

The legislat ve Guide also discusses the increasing use and importance of other tools for addressing preparatory insolvency, specif cally restructuring negot at ons entered into voluntarily between a debtor and its key creditors, which are not regulated by the insolvency law.

Q7: Describe the development process of the UNCITRAL Legislat ve Guide on Insolvency Law, highlight ng the role of Working Group V, the involvement of member States and internat onal organizat ons, and the coordinat on with other UNCITRAL init at ves.

Answer: The development of the UNCITRAL Legislat ve Guide on Insolvency Law began with an exploratory meet ng held in December 1999 to assess the feasibility of the project. Based on the recommendat on from that meet ng, the United Nat ons Commission on Internat onal Trade Law (UNCITRAL) mandated Working Group V (Insolvency Law) to prepare a comprehensive statement of key object ves and core features for a strong insolvency and debtor-creditor regime. This included both court-based and out-of-court restructuring approaches.

Working Group V was tasked with developing a legislat ve guide that would of er f exible approaches for implement ng these object ves, along with discussions on alternat ve methods and their perceived advantages and disadvantages. The f rst draf of the guide was reviewed

in July 2001, and the development continued over seven one-week sessions, with the final session held in March 2004.

Throughout the process, representatives from the 36 member States of UNCITRAL, other States, and various intergovernmental and non-governmental international organizations actively participated. The work was closely coordinated with Working Group VI (Security Interests) to ensure consistency between the treatment of security in insolvency and the legislative guide on secured transactions.

Final negotiations on the guide took place during the thirty-seventh session of UNCITRAL in New York from 14 to 21 June 2004, and the guide was adopted by consensus on 25 June 2004. The United Nations General Assembly later adopted resolution 59/40 on 2 December 2004, expressing appreciation to UNCITRAL for its completion and adoption of the Legislative Guide.

Q8: What is the primary purpose of the UNCITRAL Legislative Guide on Insolvency Law, and how does it support national authorities in reforming insolvency frameworks?

Answer: The primary purpose of the UNCITRAL Legislative Guide on Insolvency Law is to support the creation of an efficient and effective legal framework for addressing the financial difficulties of debtors. It provides a comprehensive statement of key objectives and principles that should be reflected in a State's insolvency laws.

The Guide is intended as a reference tool to assist national authorities and legislative bodies in drafting new insolvency laws and regulations or reviewing and improving existing ones. It helps to balance three critical considerations:

1. The need to resolve a debtor's financial distress quickly and efficiently.
2. The protection of the interests of stakeholders, particularly creditors and others involved in the debtor's business.
3. Broader public policy concerns, including employment and taxation.

By outlining different legal approaches and offering comparative insights, the Guide enables lawmakers to evaluate and adopt solutions that are most appropriate for their country's legal and economic context.

Q9: Explain the relevance of strong and effective insolvency regimes to international trade, and discuss the challenges posed by insolvency in enterprise groups operating across multiple jurisdictions.

Answer: Strong and effective insolvency regimes are essential for all States to prevent or mitigate financial crises and enable rapid, orderly resolution of excessive debt. These regimes support the reallocation of resources from unviable to efficient businesses, encourage entrepreneurial investment, and prompt early intervention by managers of failing firms, thereby preserving jobs. They also reduce business costs and increase credit availability. Comparative analysis of insolvency systems is now common and crucial for lending, affecting countries at all stages of development.

However, while most insolvency laws focus on single corporate entities, modern business is often conducted through enterprise groups—interconnected corporations operating

nat onally and internat onally. These groups are key players in global trade and f nance, part cularly in emerging and developed markets. When such groups face insolvency, there is a signif cant challenge, as very few domest c laws and no internat onal or regional legal frameworks exist to ef ect vely coordinate mult -jurisdict onal insolvency proceedings.

Q10: “The UNCITRAL Model Law focuses on four elements ident f ed as key to the conduct of cross-border insolvency cases”. Explain. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: The Model Law focuses on four elements ident f ed as key to the conduct of cross-border insolvency cases: access, recognit on, relief (assistance) and cooperat on.

a) Access

These provisions give representat ves of foreign insolvency proceedings and creditors a right of access to the courts of an enact ng State to seek assistance and authorize representat ves of local proceedings being conducted in the enact ng State to seek assistance elsewhere.

b) Recognit on

One of the key object ves of the Model Law is to establish simplified procedures for recognit on of qualifying foreign proceedings in order to avoid t me-consuming legalizat on or other processes that of en apply and to provide certainty with respect to the decision to recognize.

These core provisions accord recognit on to orders issued by foreign courts commencing qualifying foreign proceedings and appoint ng the foreign representative of those proceedings.

Provided it sat sf es specif ed requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its center of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognit on of foreign proceedings under the Model Law has several ef ects — principal amongst them is the relief accorded to assist the foreign proceeding.

c) Relief

A basic principle of the Model law is that the relief considered necessary for the orderly and fair conduct of cross border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model law neither imports the consequences of foreign law into the insolvency system of the enact ng State nor applies to the foreign proceedings the relief that would be available under the law of the enact ng State. Key elements of the relief available include interim relief at the discret on of the court between the making of an applicat on for recognit on and the decision on that applicat on, an automat c stay upon recognit on of main proceedings and relief at the discret on of the court for both main and non-main proceedings following recognit on.

d) Cooperat on and coordinat on

These provisions address cooperat on among the courts of States where the debtor’s assets are located and coordinat on of concurrent proceedings concerning that debtor. The Model

law expressly empowers courts to cooperate in the areas governed by the Model law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

Q11: Briefly describe the structure of the UNCITRAL Legislative Guide on Insolvency Law and the focus of each of its four parts.

Answer: The UNCITRAL Legislative Guide on Insolvency Law is divided into four parts:

Part One outlines the **key objectives** of insolvency law and addresses **structural issues**, such as the relationship between insolvency and other areas of law, mechanisms to resolve financial distress, and the **institutional framework** needed to support an effective insolvency regime.

Part Two covers the **core features of effective insolvency law**, following the stages of insolvency proceedings from initiation to closure. Key elements include standardized commencement criteria, asset protection through a stay (including against secured creditors), post-commencement finance, creditor participation, expedited reorganization, simplified claim procedures, conversion to liquidation, and clear discharge and closure rules.

Part Three focuses on the **insolvency of enterprise groups**, both domestically and internationally. It supplements parts one and two by addressing group-specific issues such as coordination of multiple proceedings, group financing, avoidance provisions, substantive consolidation, common insolvency representatives, and coordinated reorganization plans. Internationally, it builds on the Model Law on Cross-Border Insolvency to enhance cooperation and coordination in group insolvencies.

Part Four deals with the **obligations of decision-makers** in an enterprise approaching insolvency. These obligations, enforceable once proceedings begin, aim to protect creditor and stakeholder interests and encourage timely action to mitigate financial distress.

Q12: Differentiate between the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency in terms of their purpose, use, and legal nature.

Answer: The UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency serve different purposes and are used in distinct ways:

- The Model Law is a legislative text recommended for direct adoption into national legal systems, either wholly or with modifications. It presents a comprehensive legal framework with specific provisions designed for direct incorporation into domestic legislation, particularly aimed at addressing cross-border insolvency issues.
- In contrast, the Legislative Guide functions as a reference and advisory tool for lawmakers. It offers guidance and analysis, including extensive commentary on relevant issues, to assist in drafting or reforming insolvency laws. Unlike a model law, it is not intended to be enacted.

as legislative. Instead, it outlines core issues and suggests flexible recommendations on how certain provisions may be structured, tailored to the specific needs and contexts of individual jurisdictions.

In summary, the Model Law is prescriptive and adoptable, while the Legislative Guide is descriptive and consultative.

Q13: A model Law is a legislative text that needs legislative guide to outline the core issues to be incorporated in the substantive law — Discuss the relevance in having Legislative Guide by United Nations Commission for International Trade Law (UNCITRAL) to supplement UNCITRAL Model Law on cross border insolvency. (5 Marks)

PAST YEAR QUESTION JUNE 2019

Answer: A model law is generally used differently than a legislative guide. Specifically, a model law is a legislative text recommended to States to enact as part of National Law, with or without modification. As such, model laws generally propose a comprehensive set of legislative solutions to address a particular topic and the language employed supports direct incorporation of the provisions of the model law into a national law.

On the other hand, legislative guide focuses upon providing guidance to legislators and other users and for that reason guides generally include a substantial commentary discussing and analysing relevant issues. It is not intended that the recommendations of a legislative guide be enacted as part of law as such. Rather, they outline the core issues that it would be desirable to address in that law, with some recommendations providing specific guidance on how certain legislative provisions might be drafted.

The purpose of the Legislative Guide on Insolvency Law is to assist the establishment of an efficient and effective legal framework to address the financial difficulty of debtors.

The Legislative Guide provides a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws.

Q14: What is the purpose of the UNCITRAL Model Law on Cross-Border Insolvency, and how does it address the challenges of cross-border insolvency cases?

Answer: The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, aims to help States modernize their insolvency laws by providing a harmonized and fair legal framework for handling cross-border insolvency cases. These are situations where an insolvent debtor has assets in multiple countries or where some creditors are located outside the jurisdiction where insolvency proceedings are initiated.

The Model Law does not seek to unify substantive insolvency laws across jurisdictions. Instead, it focuses on enabling cooperation and coordination between national courts and insolvency professionals involved in such cases. It respects the diversity of national legal systems while promoting efficient and fair handling of multinational insolvency matters. Its core objective is to facilitate communication and mutual assistance across borders, helping manage complex insolvencies involving multiple countries in a coordinated and effective manner.

Q15: Explain the relevance of the UNCITRAL Model Law on Cross-Border Insolvency to international trade and outline its key principles.

Answer: The UNCITRAL Model Law on Cross-Border Insolvency is highly relevant to international trade due to the growing number of cross-border insolvency cases arising from global business operations. However, the development of national or international legal frameworks to address these complex cases has not kept pace, resulting in uncoordinated, unpredictable, and non-transparent proceedings. These inefficiencies hinder the protection of asset value and the rescue of financially distressed businesses, ultimately disrupting international trade and investment.

To address these challenges, the Model Law—now adopted by 44 countries—is considered part of international best practices. It introduces a modern, harmonized legal framework that enables cooperation and effective resolution of cross-border insolvency matters.

The Model Law is based on four major principles:

1. Direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor;
2. Recognition of foreign proceedings & provision of remedies;
3. Cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and
4. Coordination between two or more concurrent insolvency proceedings in different countries. The main proceeding is determined by the concept of centre of main interest (COMI).

Q16: The purpose of the Model Law is to provide effective mechanism for dealing with cases of cross-border insolvency. Comment upon the statement.

PAST YEAR QUESTION JUNE 2018

Answer: The purpose of the Model Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
- (b) Greater legal certainty for trade and investment
- (c) Fair and efficient administration of cross border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- (d) Protection and maximization of the value of the debtor's assets; and
- (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment

Q17: What is the scope of application of the UNCITRAL Model Law on Cross-Border Insolvency?

Answer: The UNCITRAL Model Law on Cross-Border Insolvency applies in situations where:

- (a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

- (b) assistance is sought in a foreign State in connection with a proceeding under identical laws of the enacting State relating to insolvency; or
- (c) foreign proceeding and a proceeding under identical laws of the enacting State relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under identical laws of the enacting State relating to insolvency

Q18: According to Article 1 of the UNCITRAL Model Law on Cross-Border Insolvency, in what situations does the Model Law apply?

Answer: According to Article 1 of the UNCITRAL Model Law on Cross-Border Insolvency, the Model Law applies in the following situations:

- (a) Assistance is sought in the enacting State by a foreign court or a foreign representative in connection with a foreign proceeding; or
- (b) Assistance is sought in a foreign State in connection with a proceeding under the laws of the enacting State relating to insolvency; or
- (c) A foreign proceeding and a proceeding under the laws of the enacting State relating to insolvency in respect of the same debtor are taking place concurrently; or
- (d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceeding under the laws of the enacting State relating to insolvency.

It further says that the Model law does not apply to a proceeding concerning any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in a State and that State wishes to exclude from the law (the type of entity to be excluded may be designated).

Q19: What types of foreign proceedings are covered under the UNCITRAL Model Law on Cross-Border Insolvency?

OR

Write a short note on *Types of foreign proceedings covered*. (4 Marks)

PAST YEAR QUESTION JUNE 2015

Answer: To fall within the scope of the UNCITRAL Model Law on Cross-Border Insolvency, a foreign proceeding must possess the following key attributes: These include:

- Basis in insolvency-related law of the originating State;
- Involvement of creditors collectively;
- Control or supervision of the assets and affairs of the debtor by a court or another official body; and
- Reorganization or liquidation of the debtor as the purpose of the proceeding.

The Model Law covers a wide variety of proceedings, including:

- Compulsory or voluntary proceedings;
- Corporate or individual insolvency cases;

- Winding-up or reorganization processes;
- Proceedings where the debtor retains control over its assets under court supervision (e.g., "debtor in possession" or suspension of payments).

Q20: What rights and provisions does the UNCITRAL Model Law on Cross-Border Insolvency provide to a foreign representative under Article 11 and related provisions?

Answer: Under **Article 11** of the UNCITRAL Model Law on Cross-Border Insolvency, a foreign representative is entitled to apply to commence an insolvency proceeding under the laws of the enacting State, without the need for prior recognition of the foreign proceeding—provided the local conditions for commencement are otherwise met. This allows urgent action to preserve the debtor's assets and avoids reliance on slow diplomatic procedures like letters rogatory.

In addition to establishing the principle of direct court access for the foreign representative, the Model law:

- (a) **(Article 15):** Establishes simplified proof requirements for seeking recognition and relief for foreign proceedings, which avoid time-consuming "legalization" requirements involving notarial or consular procedures
- (b) **(Articles 11 and 12):** Provides that the foreign representative has procedural standing for commencing an insolvency proceeding in the enacting State (under the conditions applicable in the enacting State) and that the foreign representative may participate in an insolvency proceeding in the enacting State
- (c) **(Article 13):** Confirms, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of commencing in the enacting State an insolvency proceeding or participating in such a proceeding;
- (d) **(Article 24):** Gives the foreign representative the right to intervene in proceedings concerning individual actions in the enacting State affecting the debtor or its assets
- (e) **(Article 10):** Provides that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over all the assets and affairs of the debtor.

Q21: Protection of creditors and other interested persons under the UNCITRAL model law. (4 Marks)

PAST YEAR QUESTION JUNE 2015

Answer: Protection of creditors and other interested persons Foreign creditors have the same rights regarding the commencement of and participation in a proceeding under the laws of the enacting state relating to insolvency as creditors in the state.

The UNCITRAL Model Law on Cross-Border Insolvency ensures the protection of creditors and other interested persons, including the debtor, through the following provisions:

- a) Availability of temporary relief upon application for recognition of a foreign proceeding or upon recognition is subject to the discretion of the court; it is expressly stated that in granting

such relief the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected (**Article 22, paragraph 1**);

b) The court may subject the relief it grants to conditions it considers appropriate; and

c) The court may modify or terminate the relief granted, if so requested by a person affected thereby (**Article 22, paragraphs 2 and 3**).

d) The court may refuse to take any act on under the Model Law if it would be manifestly contrary to the public policy of the enacting State (**Article 6**).

Q22: Elucidate briefly the process of Notification to Foreign Creditors as per United Nations Commission on International Trade (UNCITRAL) Model Law. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

OR

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

PAST YEAR QUESTION DECEMBER 2017

Answer:(i) Article 14 of the UNCITRAL Model suggests the procedure for States (Member Nations) enacting Insolvency Law the manner of notification to be given to creditors.

(ii) Such notification shall also be given to the known creditors that do not have addresses in the state.

(iii) Notifications shall be made to the foreign creditors individually, unless the Authority/Court that under the circumstances, some other form of notification would be more appropriate.

(iv) Notice shall indicate a reasonable time for filing claims, whether secured creditors need to file their secured claims and other information as required either by law or authority.

(v) The main purpose of notifying foreign creditors is to inform them of the commencement of insolvency proceedings and of the time limit to file their claims.

(vi) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

Q23: What are the procedural requirements for recognition of a foreign proceeding under Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency?

Answer: Under **Article 15** of the UNCITRAL Model Law on Cross-Border Insolvency, a foreign representative may apply to a court in the enacting State for recognition of a foreign proceeding in which they have been appointed. The following are the key procedural requirements for such an application:

1. Mandatory Documents to Accompany the Application

The application must be accompanied by one of the following:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or

(c) In the absence of (a) or (b), any other evidence acceptable to the court of the existence of the foreign proceeding and the appointment of the foreign representative.

2. Statement of Other Proceedings

A statement identifying all foreign proceedings involving the same debtor known to the foreign representative must be included. This helps the court coordinate relief and avoid inconsistencies with concurrent proceedings.

3. Language Requirements

The court may require translations of the submitted documents into an official language of the enacting State.

4. No Requirement for Legalization

As per Article 16, the documents need not be legalized or authenticated via diplomatic channels. The court is entitled to presume their authenticity unless proven otherwise.

5. Treaty Overrides

If any of the provisions of the Model Law (such as relaxed authentication) conflict with international treaties to which the enacting State is a party, then the treaty provisions will prevail (Article 3).

Q24: What are the conditions for recognizing a foreign proceeding under Article 17 of the UNCITRAL Model Law on Cross-Border Insolvency?

Answer: Subject to Article 6, a foreign proceeding shall be recognized if:

- (a) The foreign proceeding is a proceeding within the meaning as defined under Article 2;
- (b) The foreign representative applying for recognition is a person or body within the meaning as defined under Article 2;
- (c) The application meets the requirements of Article 15; and
- (d) The application has been submitted to the court referred to in Article 4.

The foreign proceeding shall be recognized as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of Article 2 in the foreign State.

The purpose of Article 17 is to indicate that, if recognition is not contrary to the public policy of the enacting State and if the application meets the above said requirements, recognition will be granted as a matter of course. A decision to recognize a foreign proceeding would normally be subject to review or rescission, as any other court decision.

Q25: What types of relief may be granted under Article 19 of the UNCITRAL Model Law on Cross-Border Insolvency upon an application for recognition of a foreign proceeding?

Answer: Under Article 19 of the UNCITRAL Model Law on Cross-Border Insolvency, a court may grant provisional relief between the filing of an application for recognition of a foreign proceeding and the decision on that application, if urgent relief is needed to protect the debtor's assets or the interests of creditors.

- (a) Staying execution against the debtor's assets;

- (b) entrusting the administration or realization of all or part of the debtor's assets located in a State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- (c) any relief mentioned in Article 21.

Relief available under Article 19 is provisional in the sense that, the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in Article 21. The court may refuse to grant relief under this Article if such relief would interfere with the administration of a foreign main proceeding.

Q26: Explain the effects of recognition of foreign main proceedings under the UNCITRAL Model Law on Cross Border Insolvency. (5 marks).

PAST YEAR QUESTION JUNE 2023

OR

"The effects provided by Article 20 of the UNCITRAL model law in respect of recognition of a foreign main proceeding are discretionary in nature." Comment whether the statement is correct or not and state the effects of recognition of a foreign main proceeding as per Article 20. (5 marks)

PAST YEAR QUESTION JUNE 2015

OR

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

PAST YEAR QUESTION DECEMBER 2015

OR

Write a note on "Effect of recognition of a foreign main proceeding" under the UNCITRAL Model law. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Article 20 of the UNCITRAL Model Law provides that once foreign proceeding is recognized which is a foreign main proceeding, the following are the effects:

- (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
- (b) execution against the debtor's assets is stayed; and
- (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

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

Q27: Describe the whole gamut of reliefs that may be granted upon recognition of a foreign proceedings whether main or non-main. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Upon recognition of a foreign proceeding, whether main or non-main, where it is necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

- a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of Article 20;
- b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) Article 20;
- c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of Article 20;
- d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;
- f) Extending relief granted under paragraph 1 of Article 19; and
- g) Granting any additional relief that may be available to a person or body administering a reorganization or liquidation under the law of the enacting State under the laws of that State.

Q28: What protection does Article 22 of the UNCITRAL Model Law on Cross-Border Insolvency provide to creditors and other interested persons?

Answer: The court may under Article 22, at the request of the foreign representative or a person affected by relief granted, or at its own motion, modify or terminate such relief. In granting or denying relief under Article 19 or 21, or in modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

The idea underlying Article 22 is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief.

Q29: What does Article 23 of the UNCITRAL Model Law on Cross-Border Insolvency provide regarding actions to avoid acts detrimental to creditors?

Answer: Article 23 of the UNCITRAL Model Law on Cross-Border Insolvency grants procedural standing to a foreign representative to bring actions that aim to avoid or render ineffective legal acts detrimental to creditors, similar to the actions available to a local insolvency administrator under the insolvency law of the enacting State.

1. Procedural Standing Only:

- The article does not create any new substantive rights.
- It only permits the foreign representative to exercise existing rights under the laws of the enacting State, similar to a local insolvency administrator.
- It does not address or resolve conflict of law issues.

2. Scope Limited to Insolvency Proceedings:

- Art cle 23 applies only to act ons that may be taken within the context of an insolvency proceeding.

- It does not equate the foreign representat ve with individual creditors who may have similar rights under general civil law (outside insolvency law).

3. Exclusion of Individual-Creditor Act ons:

- Act ons available to individual creditors under general legal provisions, such as civil codes (e.g., fraudulent transfer or act o pauliana), are outside the scope of Art cle 23.

- Such rights are independent of insolvency proceedings and are not extended to foreign representat ves under this Art cle.

4. Key Ef ect:

- A foreign representat ve is not barred from init at ng avoidance act ons solely because they were not appointed under the local insolvency regime.

- This helps in promot ng cross-border cooperat on and asset protect on, ensuring that fraudulent or preferent al transfers can be challenged internat onally.

Purpose:

The object ve of Art cle 23 is to enable ef ect ve cross-border insolvency administrat on by allowing the foreign representat ve to init ate avoidance proceedings, thus protect ng creditor interests and ensuring fair distribut on of assets.

In essence, Art cle 23 ensures that foreign representat ves are empowered to challenge acts detrimental to creditors under the local insolvency framework, thereby strengthening judicial cooperat on and creditor protect on across borders.

Q30: What is the signif cance of Chapter IV (Art cles 25–27) of the UNCITRAL Model Law on Cross-Border Insolvency regarding cooperat on with foreign courts and representat ves?

Answer: Chapter IV of the UNCITRAL Model Law on Cross-Border Insolvency (Art cles 25–27) focuses on cross-border cooperat on and is considered a core element of the Model Law. Its primary object ve is to facilitate ef cient cooperat on between courts and insolvency representat ves across dif erent jurisdict ons to achieve opt mal outcomes in cross-border insolvency cases.

Key Features and Signif cance:

1. Mandatory Cooperat on (Art cles 25 and 26):

The Model Law goes beyond merely authorizing cooperat on; it mandates that courts and insolvency administrators shall cooperate to the maximum extent possible.

This cooperat on is essent al to prevent the dissipat on of assets, ensure coordinat on, and maximize asset value in transnat onal insolvency cases.

2. Legal Basis for Cooperat on:

Many nat onal laws lack clear provisions for their courts to cooperate with foreign courts in insolvency mat ers.

Art cles 25–27 f ll this legal gap by providing a statutory framework that authorizes and guides such cooperat on.

This is particularly important in legal systems where judicial discretion is limited to operate outside explicit statutory authority.

3. Enhancing Comity:

These provisions help concretize the principle of international comity, making it more actionable and tailored to the specific needs of insolvency law.

4. Flexible Implementation:

Although cooperation is mandated, how and when to cooperate is left to the discretion of the courts and, under court supervision, the insolvency administrators.

The Model Law does not require formal recognition of a foreign proceeding before cooperation can occur.

5. No Prior Recognition Required:

Courts may begin cooperation even before officially recognizing the foreign proceeding under the Model Law, allowing for rapid response in urgent cases.

Purpose:

The provisions of Chapter IV aim to enable seamless coordination in cross-border insolvency cases, reduce delays, and enhance trust between jurisdictions. By creating a structured yet adaptable legal basis for international cooperation, Articles 25–27 strengthen the global effectiveness of insolvency systems.

Q31: What is the purpose of Article 24 of the UNCITRAL Model Law on Cross-Border Insolvency regarding intervention by a foreign representative?

Answer: Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of the State are met, intervene in any proceedings in which the debtor is a party. The purpose of Article 24 is to avoid the denial of standing to the foreign representative to intervene in proceedings merely because the procedural legislation may not have contemplated the foreign representative among those having such standing. The article applies to foreign representatives of both main and non-main proceedings.

Q32: What is the objective of Article 26 of the UNCITRAL Model Law on Cross-Border Insolvency, and how does it facilitate cooperation between insolvency administrators and foreign authorities?

Answer: Article 26 on international cooperation between persons who are appointed to administer assets of insolvent debtors reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority. The provision makes it clear that an insolvency administrator acts under the overall supervision of the competent court. The Model law does not modify the rules already existing in the insolvency law of the enacting State on the supervisory functions of the court over the activities of the insolvency administrator.

Q33: According to Art cle 27 of the UNCITRAL Model Law on Cross-Border Insolvency, what are the possible means by which cooperat on may be implemented between courts and insolvency administrators?

Answer: According to **Art cle 27**, Cooperat on may be implemented by any appropriate means, including

- (a) appointment of a person or body to act at the direct on of the court;
- (b) Communicat on of informat on by any means considered appropriate by the court;
- (c) Coordinat on of the administrat on and supervision of the debtor's assets and af airs;
- (d) approval or implementat on by courts of agreements concerning the coordinat on of proceedings;
- (e) Coordinat on of concurrent proceedings regarding the same debtor;
- (f) the enact ng State may wish to list addit onal forms or examples of cooperat on.

Q34: What does Art cle 28 of the UNCITRAL Model Law on Cross-Border Insolvency provide regarding the commencement of a local insolvency proceeding af er recognit on of a foreign main proceeding?

Answer: Af er recognit on of a foreign main proceeding, a proceeding under the laws of the enact ng State relat ng to insolvency may be commenced only if the debtor has assets in the State enact ng the Model Law. The ef ects of that proceeding shall be restricted to the assets of the debtor that are located in such State and to the extent necessary to implement cooperat on and coordinat on under Art cles 25, 26 and 27 to other assets of the debtor that, under the law of such State, should be administered in that proceeding.

Art cle 28, in conjunct on with Art cle 29, provides that recognit on of a foreign main proceeding will not prevent the commencement of a local insolvency proceeding concerning the same debtor as long as the debtor has assets in the State.

Q35: What is the purpose of Art cle 29 of the UNCITRAL Model Law on Cross-Border Insolvency, and how does it address coordinat on of concurrent proceedings?

Answer: Art cle 29 addresses situat ons where a debtor is undergoing both a foreign insolvency proceeding and a local proceeding under the laws of the enact ng State at the same t me. The core purpose is to promote cooperat on, coordinat on, and consistency between the two proceedings, as guided by Art cles 25, 26, and 27.

The court must ensure the following:

(a) When the proceeding in the State (which has enacted Model law) is taking place at the t me the applicat on for recognit on of the foreign proceeding is f led,	(b) When the proceeding in such State commences af er recognit on, or af er the f ling of the applicat on for recognit on, of the foreign proceeding,	(c) in grant ng, extending or modifying relief granted to a representat ve of a foreign nonmain proceeding, the court must be sat sfed that the relief relates to assets which, according to the law

(i) any relief granted under Article 19 or 21 must be consistent with the proceeding in such State; and (ii) if the foreign proceeding is recognized in such State as a foreign main proceeding, article 20 does not apply;	(i) Any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and (ii) if the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in Article 20 shall be modified or terminated, if inconsistent with the proceeding in such State;	of the enacting State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Q36: Discuss the provisions of UNCITRAL Model Law regarding co-ordination of more than one foreign proceeding. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

- (a) Any relief granted under Article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;
- (b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under Article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;
- (c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

The objective of Article 30 is similar to that of Article 29 in that the key issue in the case of concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Unlike Article 29, which, as a matter of principle, gives

primacy to the local proceeding, Art cle 30 gives preference to the foreign main proceeding if there is one.

Q37: What is the purpose of the “Rule of Payment in Concurrent Proceedings” under Art cle 32 of the UNCITRAL Model Law on Cross-Border Insolvency?

Answer: Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in a proceeding, pursuant to a law relat ng to insolvency, in a foreign State, may not receive a payment for the same claim in a proceeding under the laws of the enact ng State relat ng to insolvency regarding the same debtor, so long as the payment to the other creditors of the same class is proport onately less than the payment the creditor has already received.

The rule set forth in Art cle 32, also referred to as the hotchpotch rule, is a useful safeguard in a legal regime for coordinat on and cooperat on in the administrat on of cross-border insolvency proceedings. It is intended to avoid situat ons in which a creditor might obtain more favourable treatment than the other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in dif erent jurisdict ons.

Q38: What do the Principles for Ef ect ve Insolvency and Creditor/Debtor Regimes cover, and how are they intended to be applied?

Answer: The Principles for Ef ect ve Insolvency and Creditor/Debtor Regimes cover a broad range of legal and inst tut onal frameworks essent al for sound credit markets and ef ect ve insolvency systems. They are organized into four parts:

Part A: Laws and inst tut ons that recognize and enforce credit agreements.

Part B: Legal frameworks for risk management and informal corporate workouts.

Part C: Frameworks for formal commercial insolvency processes.

Part D: Inst tut onal and regulatory frameworks for implement ng these systems ef ect vely.

These Principles are:

- Flexible and non-prescript ve, allowing countries to adapt them to their specif c legal and economic contexts.
- Based on widely accepted internat onal good pract ces.
- Designed with the understanding that legal systems and commercial pract ces evolve, and thus, the Principles are subject to ongoing review and adaptat on to refect new developments.

They are relevant not only to corporate insolvency and creditor rights but also to broader f nancial sector stability and economic growth.

Q39: What are the key components of a sound credit environment under the World Bank Principles for Ef ect ve Insolvency and Creditor Rights Systems?

Answer: The World Bank Principles outline several key components for establishing an ef ect ve **credit environment**, which include:

A) Credit Environment

- B) Insolvency Law Systems
- C) Implementation: Institutional and Regulatory Frameworks
- D) Overarching Considerations of sound Investment Climates

Q40: What are the key components of a sound credit environment under the World Bank Principles, and how do they support access to credit and financial stability?

Answer: The World Bank Principles outline several key components for establishing an effective **credit environment**, which include:

1. Compatible Credit and Enforcement Systems

- Efficient, transparent, and reliable mechanisms are essential for recovering debt, including seizure and sale of movable, immovable, and intangible assets.
- Unsecured credit especially depends on the ability of creditors to take swift action without the need for insolvency proceedings, which can be delayed and costly.
- These mechanisms instill discipline and credibility in the credit system and improve enforcement outcomes.

2. Collateral Systems

- Secure property rights and the ability to grant security interests are pillars of a modern credit system.
- A robust legal framework must support:
 - Creation, recognition, and enforcement of security interests.
 - Application to all asset types (movable/immovable, tangible/intangible).
 - Present and future obligations.
- Effective registration and public notice systems are critical to reduce uncertainty and ensure priority clarity among competing claims.

3. Enforcement Systems

- Enforcement of both secured and unsecured claims must be affordable, predictable, and effective outside of insolvency.
- These systems enable creditors to rely on contractual rights, thereby encouraging lending and investment.
- Legal uncertainty regarding enforcement raises the cost of credit and restricts availability.

4. Credit Information Systems

- Access to accurate, comprehensive credit histories enhances credit risk evaluation and promotes responsible lending.
- Legal safeguards are essential to:
 - Define permissible use of data.
 - Protect individual privacy and ensure fairness.
 - Allow individuals to dispute and correct inaccuracies.
- Dispute resolution and enforcement mechanisms should be efficient, transparent, and cost-effective.

5. Informal Corporate Workouts

- An enabling environment should support out-of-court restructuring of distressed firms.

- It requires:
 - Timely and accurate financial disclosure.
 - Incentives for new funding, recapitalization, and restructuring (e.g., tax neutrality).
 - A strong banking and financial sector that promotes such workouts, especially when systemic insolvency is present.
 - Informal workouts are often more efficient and yield higher recovery than formal insolvency proceedings.
- These components are interdependent and, when well-integrated, they collectively ensure affordable credit.

Q41: What are the key objectives and features of an effective commercial insolvency law system according to the World Bank Principles?

OR

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

PAST YEAR QUESTION DECEMBER 2016

Answer: An effective commercial insolvency law system should be designed to support economic stability and credit flow while balancing the interests of debtors and creditors. According to the World Bank Principles, such a system should aim to:

- (i) integrate with a country's broader legal and commercial systems;
- (ii) maximize the value of a firm's assets and recoveries by creditors;
- (iii) provide for both efficient liquidation of nonviable businesses and those where liquidation is likely to produce a greater return to creditors and reorganization of viable businesses;
- (iv) strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one proceeding to another;
- (v) provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- (vi) provide for timely, efficient and impartial resolution of insolvencies;
- (vi) provide for timely, efficient and impartial resolution of insolvencies;
- (viii) prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;
- (ix) provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;
- (x) recognize existing creditor rights and respect the priority of claims with a predictable and established process; and
- (xi) establish a framework for cross border insolvencies, with recognition of foreign proceedings.

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

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

Q42: What overarching factors contribute to a sound investment climate according to the World Bank Principles, and how do they influence creditor rights and insolvency systems?

Answer: The World Bank Principles identify several overarching considerations that are essential for creating a sound investment climate. These factors significantly influence the effectiveness of creditor rights and insolvency systems:

1. Transparency, Accountability, and Corporate Governance

- Minimum standards for transparency and governance foster cooperation and informed decision-making.
- Disclosure of financial information (e.g., statements, cash flows, operating data) is critical for credit risk assessment.
- Internationally compatible accounting and auditing standards allow creditors to monitor debtor viability.
- Predictable legal frameworks and impartial judicial processes support enforcement and fairness.
- Corporate governance requires:
 - Responsible, accountable, and independent boards of directors.
 - Consistent and impartial application of corporate law and regulations.

2. Role in Creditor Rights and Insolvency Systems

- These elements enhance the reliability of out-of-court restructuring by providing confidence in disclosed information.
- Good governance reduces risks, thereby improving access to and cost of credit.
- These practices are most effective when they interact harmoniously with broader commercial and legal systems.

3. Predictability

- A lack of predictable risk allocation rules deters investment, particularly in emerging markets.
- Investors demand higher risk premiums to compensate for legal and systemic uncertainty.
- During crises, uncertainty can cripple markets, as lenders focus on avoiding losses rather than pursuing opportunities.
- Predictable frameworks help ensure markets remain functional, especially in distress scenarios.

4. Impact on Lending Decisions

- Transparency and corporate governance:
 - Encourage informal workouts, which often yield better returns than formal insolvency.
 - Reduce the need for litigation, saving time and costs.

- These considerations apply at all stages of lending—from origination to default and exit.

Q43: Explain salient features of Chapter 11—Reorganization under US Bankruptcy Code. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

Explain the salient features of Chapter 11 dealing with the US Bankruptcy Code. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: American bankruptcy procedures enable sick companies to restructure its debt obligations even while remaining operational. In this context, one must recognise that in the US the well-known Chapter 11 bankruptcy proceedings are considered as reorganization/resurrection process for corporates.

Many companies are known to have revived under Chapter 11. Further, Chapter 11 ensures the emergence of companies with sustainable debt levels and profitable working.

Chapter 11 bankruptcy proceedings are available to every business, whether organized as a corporation, partnership or sole proprietorship, and to individuals, although it is most prominently used by corporate entities.

Salient features of Chapter 11 are as under:

- Chapter 11 is not a declaration of insolvency.
- Companies don't file under Chapter 11 to liquidate; they do so in order to continue operating and to take the necessary steps to emerge as a financially stronger business, reorganizing their operations or balance sheet or in some cases by selling substantially all its assets.
- Management remains in control of the business during the chapter 11 rehabilitative process. Trustees, administrators and monitors typically are not appointed.
- Chapter 11 normally does not cause interruption to business operations.
- The company is given breathing room during the process - an "automatic stay" generally prevents parties from taking legal action against the company or taking the company's assets.
- Most publicly-held companies prefer to file under Chapter 11 rather than Chapter 7 because they can still run their business and control the bankruptcy process. Chapter 11 provides a process for rehabilitating the business of the company.

Q44: Discuss the provisions dealing with cases involving cross-border insolvency under the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2019

OR

Of late, Insolvency and Bankruptcy Code, 2016 has provisions to tackle the issue of Cross Border Insolvency. Justify the statement with any recent case law. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: 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)].

Alternate Answer,

Insolvency & Bankruptcy Code, 2016 (IBC) has enabling provisions to consider the cases of Cross Border insolvency matters involving corporate persons in India and their counterparts in any foreign nation.

Sections 234 and 235 of IBC make provisions to deal with cross border insolvencies. Section 234 of IBC empowers the Central Government to enter into agreements with other countries to deal with or resolve situations pertaining to cross border insolvency. The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries which is a long-drawn process requiring time consuming negotiations.

Section 235 requires Adjudicating Authority to file Letter of request to court or authority of a country of competent for cross border insolvency as follows:

(1) 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.

(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) 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.

Jet Airways (India) Ltd Vs State Bank of India & anr is the first case touching the realm of cross border insolvency. In the instant case, Jet Airways (India) Ltd was subjected to parallel insolvency proceedings in India as well as in Netherlands.

Q45: Critically dwell upon/describe relevant enabling provisions for cross border transactions under Insolvency and Bankruptcy Code, 2016? (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 make provisions to deal with cases involving cross border insolvency.

Agreements with foreign countries : Section 234 empowers the Central Government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency.

Section 234 of the Code provides that:

- The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. [Section 234(1)]
- The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified. [Section 234(2)]

Letter of request to a country outside India in certain cases –

Section 235 of the Code lays down that notwithstanding anything contained in this Insolvency and Bankruptcy 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 under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) 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)]

The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries. Finalisation of bilateral agreements is a long-drawn process as it involves long term negotiations and thus takes a lot of time. Moreover, every trade is distinct and thus it would be difficult for the adjudicating authorities to enforce the agreements/treaties entered into with other countries.

Q46: RDX International Ltd is undergoing Corporate Insolvency Resolution Process. The Resolution Professional has not sold large chunk of plant and machinery of the company which are situated in a foreign country with which Government of India has bilateral relation. Resolution Professional seeks your guidance for the recovery of assets situated in the foreign country. Give your views. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Attention of the Resolution Professional can be drawn to the provisions of Section 234 and 235 of the Insolvency and Bankruptcy Code, 2016 (IBC). Section 234 envisages the Central Government to notify to recover properties of the Corporate Debtor or any such Guarantor situated in a country, with which there is a reciprocal arrangement subject to specified conditions. Section 235 of the IBC enables the Resolution Professional to apply to Adjudicating Authority in such situations. On filing such application, the authority after being satisfied as to the evidences produced, may issue a letter of request to the Court or other authority of the other country for a suitable action.

The current cross border insolvency framework in India is dependent on entering into Bilateral agreements with other countries. In the instant case, exists bilateral relation with the foreign nation and Resolution Professional may avail the provisions of Section 235.

DEFINITION UNDER THIS CHAPTER

- a) **“Foreign proceeding”** means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;
- b) **“Foreign main proceeding”** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
- c) **“Foreign non-main proceeding”** means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;
- d) **“Foreign representative”** means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;
- e) **“Foreign court”** means a judicial or other authority competent to control or supervise a foreign proceeding;
- f) **“establishment”** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;

Q47: Write notes on the State' with reference to the UNCITRAL model law.(4 marks)

PAST YEAR QUESTION JUNE 2015

Answer: the word **“State”**, as used in the preamble and throughout the Model law, refers to the country that enacts the law (the “enacting State”). the term should not be understood as referring, for example, to state in a country with a federal system.

Q48: What are the key recommendations of the Insolvency Law Committee (ILC) on cross-border insolvency, and why is a cross-border insolvency framework important for India?

Answer: The Insolvency Law Committee (ILC), constituted by the Ministry of Corporate Affairs, submitted its 2nd Report on 16 October 2018 recommending the introduction of a cross-border insolvency framework under the Insolvency and Bankruptcy Code (IBC), 2016.

Key Recommendations:

1. Adopt on of UNCITRAL Model Law (1997):

- The ILC recommended adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which is recognized globally.
- This model law provides a flexible, comprehensive, and internationally accepted mechanism to address cross-border insolvency issues.

2. Introduction of Draft 'Part Z' in the IBC:

- The ILC proposed inserting a new Part Z in the IBC, based on the UNCITRAL Model Law.
- This draft was adapted to Indian needs, with specific carve-outs to ensure compatibility with the existing domestic insolvency framework.

3. Core Principles of the Model Law Recommended:

- Direct Access for foreign insolvency professionals and creditors to Indian insolvency proceedings.
- Recognition of Foreign Proceedings and provision of suitable reliefs/remedies.
- Cooperation between Indian and foreign courts and insolvency professionals.
- Coordination of concurrent proceedings in multiple jurisdictions.

4. COMI – Centre of Main Interest:

- The main proceedings will be based on the COMI concept, i.e., the jurisdiction where the debtor's main economic interests are centered.

Need for a Cross-Border Insolvency Framework in India:

Global Operations: Many Indian companies operate internationally, and numerous foreign companies have assets or operations in India.

Legal Certainty: A defined framework enhances predictability in resolving insolvency matters involving foreign assets or creditors.

Harmonization with Global Standards: Adoption of the UNCITRAL Model Law will align India with international best practices, placing it on par with mature insolvency jurisdictions such as the UK, USA, and Singapore.

Current Limitations: The IBC currently lacks comprehensive provisions to deal with cross-border insolvency, which affects creditor rights and asset recovery in multinational cases.

Enterprise Group Insolvency Pending: While the proposed framework addresses individual cross-border cases, group insolvency (corporate groups spread across multiple countries) remains a work in progress globally.

Conclusion:

The ILC's recommendations for a cross-border insolvency framework mark a significant step towards modernizing India's insolvency regime, improving investor confidence, and enhancing legal efficiency in dealing with international insolvency matters.

Key recommendat ons of the commit ee

Applicability: the Commit ee recommended that at present, draf Part Z should be extended to corporate debtors only.

Duplicity of regimes: the Commit ee noted that currently the Companies act, 2013 contains provisions to deal with insolvency of foreign companies. It observed that once Part Z is enacted, it will result in a dual regime to handle insolvency of foreign companies. It recommended that the Ministry of Corporate Af airs undertake a study of such provisions in the Companies act, 2013 to assess whether to retain them.

Reciprocity: the Commit ee recommended that the Model law may be adopted init ally on a reciprocity basis. This may be diluted subsequently upon re-examinat on. Reciprocity indicates that a domest c court will recognise and enforce a foreign court's judgment only if the foreign country has adopted similar legislat on to the domest c country.

Access to Foreign representat ves: the Model law allows foreign insolvency professionals and foreign creditors access to domest c courts to seek remedies directly. Direct access with regards to foreign creditors is envisaged under the Code even presently. With respect to access by foreign insolvency professionals to Indian courts, the Commit ee recommended that the Central Government be empowered to devise a mechanism that is pract cable in the current Indian legal framework.

Centre of Main interests (COMI): the Model law allows recognit on of foreign proceedings and provides relief based on this recognit on. Relief may be provided if the foreign proceeding is a main proceeding or non-main proceeding. If the domest c courts determine that the debtor has its COMI in a foreign country, such foreign proceedings will be recognised as the main proceedings. This recognit on will result in certain automat c relief, such as allowing foreign representat ves greater powers in handling the debtor's estate.

For non-main proceedings, such relief is at the discret on of the domest c court. the Commit ee recommended that a list of indicat ve factors comprising COMI may be inserted through rule-making powers. Such factors may include locat on of the debtor's books and records, and locat on of f nancing.

Cooperat on: the Model law lays down the basic framework for cooperat on between domest c and foreign courts, and domest c and foreign insolvency professionals. Given that the infrastructure of adjudicat ng authorit es under the Code is st ll evolving, the cooperat on between adjudicat ng authorit es and foreign courts is proposed to be subject to guidelines to be not f ed by the Central Government.

Concurrent Proceedings: the Model law provides a framework for commencement of domest c insolvency proceedings, when a foreign insolvency proceeding has already commenced or vice versa. It also provides for coordinat on of two or more concurrent insolvency proceedings in dif countries by encouraging cooperat on between courts. The Commit ee recommended adopt ng provisions in relat on to these in draf Part Z.

Public policy considerat ons: Part Z provides that the adjudicat ng authority may refuse to take act on under the Code if it is contrary to public policy. The Commit ee recommended that

in proceedings where the authority is of the opinion that a violation of public policy may be involved, a notice must be issued to the Central Government. If the authority does not issue notice, the Central Government may be empowered to apply to it directly.

Q49: Discuss the significance of the case *Jet Airways (India) Ltd. v. State Bank of India & Anr.* in the context of cross-border insolvency under the Insolvency and Bankruptcy Code, 2016.

Answer:

The case of **Jet Airways (India) Ltd. v. State Bank of India & Anr.** [(Company Appeal (AT) (Insolvency) No. 707 of 2019)] is India's first significant judicial development in the area of cross-border insolvency under the Insolvency and Bankruptcy Code (IBC), 2016. It highlighted the urgent need for a comprehensive statutory framework to deal with cross-border insolvency matters.

Background:

- Jet Airways was undergoing parallel insolvency proceedings:
 - In India, under the IBC, where the Resolution Professional (RP) was appointed and the Committee of Creditors (CoC) was formed.
 - In the Netherlands, where the company was declared bankrupt, and a Dutch trustee was appointed.
- The Dutch trustee challenged the Indian NCLT's order that dismissed the jurisdiction of the Dutch court.

Key Issues:

1. **Jurisdictional Conflict:** Whether the Dutch proceedings could be recognized in India.
2. **Coordination:** Whether Indian insolvency professionals and CoC could cooperate with foreign insolvency representatives in the absence of a statutory cross-border framework.

NCLAT Orders and Significance:

- NCLAT set aside the NCLT Mumbai's observation that the Dutch court had no jurisdiction.
- Directed the RP and CoC to consider a joint insolvency resolution process in consultation with the Dutch trustee.
- Allowed and encouraged cooperation between the Indian and Dutch insolvency officials in the best interest of all stakeholders.
- Admission of the insolvency petition under Section 7 of the IBC by SBI was not disturbed.

Significance:

1. **First Judicial Recognition of Cross-Border Proceedings:**

Though India has no formal cross-border insolvency framework yet, this case set a judicial precedent for cooperation with foreign courts and representatives.

2. **Judicial Innovation:**

The NCLAT's approach was a pragmatic and flexible judicial innovation, advocating coordination and cooperation, reflecting the spirit of the UNCITRAL Model Law.

3. **Pushed for Legal Reform:**

The case strengthened the case for implementing the Insolvency Law Committee's 2018 recommendations for adopting the UNCITRAL Model Law through a new Part Z in the IBC.

4. Promoted International Credibility:

The decision was viewed positively internationally and showcased India's willingness to harmonize with global insolvency norms.

Conclusion:

The Jet Airways case represents a turning point in the development of cross-border insolvency jurisprudence in India. In the absence of a statutory framework, the judiciary took a constructive and cooperative approach, reinforcing the importance of global coordination in insolvency matters involving multinational corporations.

Q50: What was the role and significance of the *Cross Border Insolvency Protocol* in the case of *Jet Airways (India) Ltd. v. State Bank of India & Anr.*, and how did it reflect the principles of cooperation under international insolvency frameworks?

Answer: In the landmark case of *Jet Airways (India) Ltd. v. State Bank of India & Anr.*, the formulation and adoption of a Cross Border Insolvency Protocol between the Resolution Professional (RP) in India and the Dutch trustee marked a pioneering effort in the practical coordination of parallel insolvency proceedings in two jurisdictions — India and the Netherlands.

Purpose of the Protocol:

The Protocol served as a voluntary framework to:

- Facilitate cooperation, coordination, and information-sharing between the two insolvency professionals.
- Avoid duplication of efforts and conflict of jurisdictions.
- Preserve and maximize the value of Jet Airways' global assets for all creditors.

Key Features of the Protocol:

1. Statement of Intent:

Not legally binding but represents a guiding framework.

Aims to minimize costs, maximize recoveries, and share information in good faith.

2. Respect for Sovereignty and Legal Obligations:

- The Protocol respects the autonomy of both the Indian and Dutch legal systems.
- It does not impose any obligation that conflicts with local laws or fiduciary duties of either the RP or the Dutch trustee.

3. Recognition of Main and Non-Main Proceedings:

- India was recognized as the Centre of Main Interest (COMI) — the main proceedings.
- The Dutch proceedings were treated as non-main, ensuring harmonization with the UNCITRAL Model Law concept.

4. Areas of Cooperation:

- Coordination of proceedings to reduce costs and avoid conflict.
- Direct communication between courts and insolvency professionals.
- Data and information sharing to promote transparency and efficiency.
- Asset preservation and recovery through joint efforts.
- Claims reconciliation to ensure fair treatment of creditors.

5. Obligations of the Dutch Trustee:

- Shall not act adversely against the interests of Jet Airways or its creditors.
- Shall facilitate the submission of a reorganization plan consistent with the Indian resolution plan in Dutch courts.
- Must consult and notify the RP prior to any material decisions affecting the company, including:
 - Approval of any Dutch restructuring plan,
 - Major contractual changes,
 - Matters covered under the Indian moratorium (Section 14 of IBC).

6. Role of the CoC (Committee of Creditors):

The NCLAT clarified that the agreement was judicially mandated, not subject to CoC approval. Interference by the CoC was discouraged to avoid disruptions in international cooperation.

7. Binding Nature of the Protocol:

The NCLAT directed that the finalized draft of the Protocol would be mandatory, to be complied with as an order of the Appellate Tribunal, while respecting the procedures under the IBC.

Legal and Practical Significance:

- The Protocol is a practical manifestation of the principles of the UNCITRAL Model Law on Cross-Border Insolvency, even though India has not yet adopted the Model Law.
- It reflects a landmark judicial innovation in Indian insolvency law by facilitating:
 - International judicial and administrative cooperation,
 - Respect for comity of nations, and
 - Preservation of creditor rights across borders.
- It also underscores the need for a formal cross-border insolvency framework in India — as recommended by the Insolvency Law Committee (ILC) in 2018 through the proposed Part Z in the IBC.

Conclusion:

The Jet Airways Cross Border Insolvency Protocol established a new benchmark for transnational insolvency cooperation. It demonstrated how, in the absence of formal statutory mechanisms, judicial directives and professional cooperation can bridge the legal and jurisdictional gaps in multinational insolvency cases, reinforcing India's resolve to move toward a mature, globally-aligned insolvency regime.

Q51: Constitution of National Company Law Tribunal (NCLT) will usher a new era as far as insolvency issues are concerned and will also open up new professional opportunities for Company Secretaries. Comment. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: The Companies Act of 2013 envisages a paradigm shift in the process of reconstruction/reorganization. NCLT and NCLAT are constituted under Companies Act 2013. The Establishment of a single forum, which is dedicated to corporate matters, removes the problem of multiple regulators. Besides, Companies Act confers new powers on NCLT. NCLT is

an adjudicating authority under Insolvency Code 2016 for insolvency resolution process of corporate and LLPs. NCLT and NCLAT is constituted with effect from Jun 01, 2016.

Professional Opportunities for Company Secretaries:

The establishment of NCLT/NCLAT shall offer various opportunities to Practising Company Secretaries as they have been authorized to appear before the Tribunal/ Appellate Tribunal.

(1) Practising Company Secretaries would be eligible to appear for matters which were hitherto dealt with by the High Court viz. mergers, amalgamations and winding up proceedings under the Companies Act.

(2) A Practising Company Secretary can be appointed as a Technical Member of NCLT, provided he has 15 years working experience as secretary in whole-time practice.

(3) The National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore Practising Company Secretaries may represent the winding up case before the Tribunal. With the establishment of NCLT, a whole new area of practice will open up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger, reverse merger, compromise and other arrangements right from the conceptual to implementation level. Company Secretaries in Practice will be able to render services in preparing schemes, appearing before NCLT/ NCLAT for approval of schemes and post-merger formalities.

(4) Since all powers of BIFR have been entrusted to NCLT, detecting the Sick companies and providing resolution of the queries and for making reference to the Tribunal for revival and rehabilitation of the Company. The provisions also mandated preparation of scheme and seeking approval from the Tribunal as may be required. Thus the practicing professionals could play a pivot role in the same area.

Q52: What is meant by Principle of Supremacy of International Obligations as enunciated in Article 3 of Model Law. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

Answer: Principle of Supremacy of International Obligations (Article 3)

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

CHAPTER 22 AS PER ICSI MODULE

LIQUIDATION ON OR AFTER FAILING OF RESOLUTION PLAN

Q1: What are the triggers for initiation of the liquidation process under Section 33 of the Insolvency and Bankruptcy Code, 2016, and how does this section govern the commencement of liquidation for corporate persons?

Answer: Section 33 of the Insolvency and Bankruptcy Code, 2016 outlines the circumstances (or "triggers") under which liquidation of a corporate debtor may be initiated by the Adjudicating Authority. These triggers and the consequences are as follows:

Triggers for Liquidation:

1. **Failure to Submit a Resolution Plan (Section 33(1)(a)):** If no resolution plan is received by the Adjudicating Authority within the prescribed CIRP period under Section 12 or in case of a fast-track process under Section 56, the Adjudicating Authority shall initiate liquidation.
2. **Rejection of the Resolution Plan (Section 33(1)(b)):** If the Adjudicating Authority rejects a resolution plan under Section 31 for non-compliance with the specified requirements, it must order liquidation.
3. **Decision of the Committee of Creditors (Section 33(2)):** If, at any time during the CIRP but before the approval of the resolution plan, the resolution professional informs the Adjudicating Authority of a decision by the Committee of Creditors (CoC) — passed by not less than 66% voting share — to liquidate the corporate debtor, the Authority shall pass a liquidation order.
4. **Contravention of the Approved Resolution Plan (Section 33(3) & (4)):** If a person whose interests are adversely affected by the corporate debtor's non-compliance with an approved resolution plan files an application, and the Adjudicating Authority confirms the contravention, it shall order liquidation.

Consequences of a Liquidation Order:

Section 33(1)(i)-(iii): The Adjudicating Authority shall:

- Order the corporate debtor to be liquidated.
- Issue a public announcement of liquidation.
- Send the liquidation order to the corporate debtor's registrar authority.

Section 33(5): Once a liquidation order is passed (subject to Section 52), no legal proceedings can be initiated by or against the corporate debtor, except with the liquidator's approval and permission from the Adjudicating Authority.

Section 33(6): This bar on legal proceedings does not apply to cases notified by the Central Government in consultation with financial sector regulators.

Section 33(7): The liquidation order serves as a notice of discharge to all officers, employees, and workmen of the corporate debtor — unless the liquidator decides to continue the business during the liquidation process.

Q2: A resolution plan has been submitted in respect of the company PQR Ltd. And the resolution plan is yet to be confirmed. The committee of creditors resolved to liquidate PQR Ltd. approved by not less than sixty-five percent of the voting share. Can liquidation be ordered? (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Section 33(2) of the Insolvency and Bankruptcy Code, 2016 provides that where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

In the instant question the approval of the resolution to liquidate PQR Ltd. by the creditors having sixty-five percent of the voting share is not sufficient. The decision of the committee of creditors should be approved by not less than sixty-six percent of the voting share. Hence, the liquidation of PQR Ltd. cannot be ordered.

Q3: State the situations under which the Adjudicating Authority can order liquidation of a corporate person in terms of Insolvency & Bankruptcy Code, 2016 (IBC). (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The Adjudicating Authority, in exercise of powers may order for liquidation of the Corporate Debtor. However, keeping in view liquidation is the last resort because revival is the priority for the economy.

Section 33 of the Insolvency and Bankruptcy Code, 2016 provides that the Adjudicating Authority shall pass an order requiring the corporate debtor to be liquidated if:

- 1) No resolution plan is received under section 30(6) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast-track corporate insolvency resolution process under section 56;
- 2) the resolution plan under section 31 is rejected by the Adjudicating Authority for non-compliance of the requirements specified therein;
- 3) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than sixty-six per cent. of the voting share to liquidate the corporate debtor;
- 4) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, makes an application to the Adjudicating Authority for a liquidation order and such a contravention is determined by the Adjudicating Authority.

Q4: Unlike Companies Act, 2013 winding up can be resorted to only when resolution plan either could not be finalised or failed within 30 days of approval by adjudicating authority as per Insolvency and Bankruptcy Code, 2016. Are there any exceptions to such perception? Who all are entitled to move petitions for winding up? (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: Section 33 provides for the liquidation of the corporate debtor in following four scenarios:

1. Where the Adjudicating Authority does not receive a resolution plan before the expiry of Corporate Insolvency Resolution Process or Fast Track Insolvency Process under the Code.
2. Where the Adjudicating Authority rejects the resolution plan for non-compliance of requirements under Section 31 of the Code.
3. Where, at any time before confirmation of resolution plan, including at any time before the preparation of the information memorandum, the committee of creditors resolve to liquidate the corporate debtor.
4. Where the corporate debtor contravenes the terms of the resolution plan.

As per Section 272, the following persons may file a petition to the Tribunal for winding up of a company:

- (a) The company itself;
- (b) Any contributory or contributories (i.e., shareholders);
- (c) All or any of the persons mentioned in clauses (a) and (b);
- (d) The Registrar of Companies;
- (e) Any person authorised by the Central Government in this behalf;
- (f) In case of clause (b) of Section 271 (i.e., acting against sovereignty, security, or public order), the Central Government or a State Government may file the petition.

Q5: Enumerate the circumstances under which the Adjudicating Authority is required to pass a liquidation order under Section 33 of the Insolvency and Bankruptcy Code, 2016. What are the legal consequences that follow such an order?

Answer: Under Section 33 of the IBC, 2016, the Adjudicating Authority (National Company Law Tribunal – NCLT) is mandated to pass a liquidation order against a corporate debtor under the following circumstances:

1. Non-receipt of a Resolution Plan

[Section 33(1)(a)]: If the Adjudicating Authority does not receive any resolution plan:

- Within the prescribed CIRP period under Section 12, or
- Under the fast-track CIRP as per Section 56, then it shall order liquidation.

2. Rejection of the Resolution Plan

[Section 33(1)(b)]: If the resolution plan is received but the Adjudicating Authority rejects it under Section 31 due to non-compliance with the Code's provisions, it must order liquidation.

In both the above scenarios, the Adjudicating Authority shall:

- (i) Pass a liquidation order in accordance with Chapter III of Part II of the Code,

(ii) Issue a public announcement stating the corporate debtor is in liquidation, and

(iii) Send a copy of the order to the registrar on authority of the corporate debtor.

3. Decision by the Committee of Creditors (CoC)

[Sect on 33(2)]: At any time during the CIRP and before the confirmation of the resolution plan, if:

- The resolution professional informs the Adjudicating Authority that the CoC has resolved to liquidate the corporate debtor,
- And such decision is approved by at least 66% of the voting share, then the Adjudicating Authority shall pass a liquidation order.

Note: The CoC may take this decision even before the information memorandum is prepared.

[Explanation to Sect on 33(2)]

4. Contravention of an Approved Resolution Plan

[Sect on 33(3) and (4)]: If the corporate debtor violates the terms of the resolution plan approved under:

- Sect on 31 (CIRP), or
- Sect on 54L(1) (Pre-packaged Insolvency),

then any person (other than the corporate debtor) whose interests are adversely affected can apply for liquidation.

Upon confirming the contravention, the Adjudicating Authority shall pass a liquidation order as per Sect on 33(4).

Legal Consequences of Liquidation Order:

a. Bar on Legal Proceedings

[Sect on 33(5)]: Once a liquidation order is passed:

No suit or legal proceeding shall be instituted by or against the corporate debtor.

Exception: The liquidator may file or defend proceedings with prior approval of the Adjudicating Authority.

b. Exception to the Bar

[Sect on 33(6)]: The Central Government may notify certain proceedings, in consultation with financial sector regulators, that will not be subject to the above bar.

c. Discharge of Employees

[Sect on 33(7)]: The liquidation order shall be deemed to be a notice of discharge to all officers, employees, and workmen of the corporate debtor, except where the business is continued by the liquidator during the liquidation process.

Q6: Abid Industries Ltd filed petition for insolvency in NCLT, Delhi which admitted petition and subsequently resolution plan was submitted by RP to committee of creditors which was approved by 87% majority. Resolution plan provided for extinguishment of all claims (except criminal proceedings) against the Corporate Debtor, exemption of all taxes/dues by the Government/local authorities, and closure of all proceedings pending against the Corporate Debtor relating to such dues. The Resolution Plan, so approved, has been submitted to NCLT

for approval. Referring to relevant sect on and case law, discuss the tenability of Resolut on Plan duly approved by 87% majority? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: In the mat er of Small Industries Development Bank of India vs. Tirupat Jute Industries Limited [CP (IB) 508/KB/18 and connected mat ers], the Adjudicat ng Authority(AA) noted that the resolut on plan, which has been submit ed for its approval, was subject to ext nguishment of all claims (except criminal proceedings) against the Corporate Debtor, exempt on of all taxes/dues by the Government/ local authorit es, and closure of all proceedings pending against the Corporate Debtor relat ng to such dues.

The Adjudicat ng Authority rejected the plan and ordered for liquidat on. It observed that such a plan should not have been approved by the CoC, as it was not consistent with the provisions of sect on 30(2)(e) of the Insolvency & Bankruptcy Code. The resolut on professional shall examine each resolut on plan received by him to conf rm that each resolut on plan does not contravene any of the provisions of the law for the t me being in force.

AA also observed that the Resolut on Professional did not give correct advice when he submit ed the plan for approval of CoC and therefore, it would not be proper to appoint him as the Liquidator.

Thus, resolut on plan approved by COC and submit ed to AA is not fair/just hence its tenability / just f ability is quest onable and liable to be rejected.

Q7: Def ne “Financial Sector Regulator”.

Answer: “Financial Sector Regulator” means an authority or body const tuted under any law for the t me being in force to regulate services or transact ons of f nancial sector and includes the Reserve Bank of India, the Securit es and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorit es as may be not f ed by the Central Government. [Sect on 3(18)]

Q8: What are the provisions regarding the appointment of the liquidator, his powers, and the dut es of the personnel of the corporate debtor under Sect on 34 of the Insolvency and Bankruptcy Code, 2016?

Answer: Sect on 34 of the IBC, 2016 deals with the appointment of the liquidator, the vest ng of powers, and the dut es of corporate debtor’s personnel during the liquidat on process. Key provisions include:

1. Appointment of Liquidator [Sect on 34(1)]

When the Adjudicat ng Authority (NCLT) passes a liquidat on order under Sect on 33, the resolut on professional (RP) appointed during:

The Corporate Insolvency Resolut on Process (CIRP) under Chapter II, or

The Pre-packaged Insolvency Resolut on Process (PPIRP) under Chapter III-A shall act as the liquidator, subject to writ en consent submit ed to the NCLT in the prescribed form.

The RP will continue as the liquidator unless replaced by the Adjudicating Authority under Section 34(4).

Definition: As per Section 5(18) of the Code, a “**liquidator**” means an insolvency professional appointed as liquidator in accordance with the provisions of Chapter III or Chapter V of Part II.

2. Vesting of Powers in Liquidator [Section 34(2)]

Upon appointment:

All powers of the Board of Directors, Key Managerial Personnel (KMP), and partners (if applicable) of the corporate debtor shall cease to exist, and such powers shall vest in the liquidator.

3. Personnel of corporate debtor to extend all assistance and cooperation to the liquidator [Section 34(3)]

The personnel of the corporate debtor are mandated to extend full assistance and cooperation to the liquidator in managing the affairs of the corporate debtor.

The provisions of **Section 19** (which deals with cooperation to IRP) shall apply mutatis mutandis to the liquidation process, with the term ‘interim resolution professional’ substituted with ‘liquidator’.

Q9: Under what circumstances can the resolution professional be replaced by the Adjudicating Authority during the liquidation process as per Section 34(4) of the IBC, 2016?

Answer: According to Section 34(4) of the Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority (NCLT) shall replace the resolution professional by passing an order under any of the following circumstances:

a) Rejection of Resolution Plan

If the resolution plan submitted by the resolution professional under Section 30 is rejected due to failure to meet the requirements of Section 30(2).

b) Recommendation by the Board

If the Insolvency and Bankruptcy Board of India (IBBI) recommends replacement of the resolution professional to the Adjudicating Authority, with reasons recorded in writing.

c) Non-submission of Consent

If the resolution professional fails to submit the written consent to act as a liquidator under Section 34(1) in the specified form.

Q10: What is the procedure for appointment of another insolvency professional as liquidator under Section 34(5) of the IBC, and how has the judiciary addressed challenges faced by liquidators in taking charge of the corporate debtor’s assets?

Answer: 1. Appointment of Another Insolvency Professional as Liquidator

As per **Section 34(5)** of the Insolvency and Bankruptcy Code, 2016:

For the purposes of clause (a) (rejection of resolution plan) and clause (c) (failure to submit written consent) of sub-section (4) of Section 34,

The Adjudicating Authority (NCLT) may direct the Insolvency and Bankruptcy Board of India (IBBI) to propose the name of another insolvency professional to be appointed as liquidator.

2. Judicial Support to Liquidator in Taking Charge – S. Muthuraju v. Commissioner of Police

In this case:

The liquidator faced physical obstruction and threats from a mob that prevented him from entering the premises of the corporate debtor (CD).

The Hon'ble NCLT intervened and directed the Superintendent of Police to provide adequate police protection.

This was to ensure the liquidator could perform his statutory duties effectively under the Code.

Conclusion:

Section 34(5) empowers the NCLT to ensure continuity in liquidation by appointing a new liquidator via IBBI when needed. Moreover, the judiciary plays a vital role in protecting the authority and functioning of the liquidator, as seen in the S. Muthuraju case, where state machinery was directed to assist in enforcing the law.

Q11: What is the process for appointment of a new liquidator under Section 34(6) and 34(7) of the IBC, and what does the law provide regarding liquidator's fees? Also, how did the NCLAT interpret the NCLT's power to replace a Resolution Professional in Devendra Padamchand Jain v. SBI?

Answer:

1. Proposal and Appointment of New Liquidator

Section 34(6): The Insolvency and Bankruptcy Board of India (IBBI) shall propose the name of another insolvency professional, along with their written consent in the specified form, within ten days from the date of direction by the Adjudicating Authority.

Section 34(7): Upon receipt of the IBBI's proposal, the Adjudicating Authority (NCLT) shall appoint the proposed insolvency professional as the liquidator by an order.

2. Judicial Interpretation – Devendra Padamchand Jain v. SBI

The NCLAT held that:

- Apart from the Committee of Creditors (CoC), the NCLT also has the power to remove the Resolution Professional (RP).
- However, such removal must be based on valid reasons and done in the manner prescribed under the Code.
- In this case, the RP was removed because he failed to properly evaluate the resolution plan and did not confirm that it met the requirements of Section 30(2) of the Code.
- The NCLT's removal was upheld by the NCLAT as the RP's actions amounted to non-compliance with the statutory requirements.

3. Liquidator's Fees – Sections 34(8) and 34(9)

Section 34(8): The insolvency professional appointed as liquidator shall charge a fee for conducting the liquidation proceedings, based on a proportion of the value of the liquidation estate assets, as specified by the IBBI.

Sect on 34(9): The fees of the liquidator shall be paid from the proceeds of the liquidation estate, as per Sect on 53 of the Code.

Conclusion:

The IBC provides a clear mechanism for the replacement and appointment of a liquidator, including timelines, the role of IBBI, and the Adjudicating Authority's powers. The NCLAT judgment reinforces that RPs must strictly adhere to the Code, and non-compliance can justify their removal. Liquidator's fees are regulated and recoverable from the liquidation estate to ensure transparency and fairness.

Q12: Can CoC challenge the appointment of liquidator after the liquidation order is passed by the Adjudicating Authority?

Answer: In the case of '**Punjab National Bank Vs. Mr. Kiran Shah, Liquidator of ORG Informat cs Ltd.**', NCLAT held that after the liquidation order, the CoC has no role to play and that they are simply claimants, whose matters are to be determined by the liquidator and hence cannot move an application for his removal.

Q13: What are the powers and duties of the liquidator to ensure orderly completion of the liquidation proceedings.

Answer: Sect on 35(1) provides that subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties:

- (a) to verify claims of all the creditors
- (b) to take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor;
- (c) to evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report;
- (d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;
- (e) to carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.
- (f) subject to sect on 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.

- (g) subject to sect on 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified:

(h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself;

(i) to obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities;

(j) to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code;

(k) to institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or on behalf of the corporate debtor;

(l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions;

(m) to take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator;

(n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board; and

(o) to perform such other functions as may be specified by the Board

Section 35(2) further provides that the liquidator shall have the power to consultancy of the stakeholders entitled to a distribution of proceeds under section 53.

First proviso to section 35(2) provides that any such consultation shall not be binding on the liquidator. The second provision further provides that the records of any such consultation shall be made available to all other stakeholders not so consulted, in a manner specified by the Board.

CASE STUDY:

In the case of **B.R. Traders Vs. Venkataramanarao Nagarajan & Ors. [CA (AT) (Ins.) No. 189 of 2019 and other appeals]** Order dated 13.11.2019, NCLAT observed that the liquidator is duty bound to make every endeavour to protect and preserve the value of the property of the CD and manage the operations as a going concern.

In the case of **IFCI Ltd. & Ors. Vs. BS Ltd. (in liquidation) IA No. 1148/2020 in CP(IB) No. 278/7/HDB/2018]** order dated 07.01.2021, NCLT inter alia observed that the liquidator has been endowed with very wide powers as a quasi-judicial functionary under the Code. Section 35(2) empowers the liquidator to consult any of the stakeholders entitled to a distribution of proceeds under section 53, but the proviso makes it amply clear that such consultation is not binding on the liquidator.

Q14: What is the liquidator's estate under Sect 36 of the IBC, 2016, and which assets are included in it?

Answer: Sect 36 of the Insolvency and Bankruptcy Code (IBC), 2016 provides for the formation of a liquidator's estate by the liquidator for the purpose of liquidating the corporate debtor's assets. It outlines both the assets to be included and those to be excluded from the liquidator's estate.

Key Provisions of Sect 36:

1. Formation and Purpose of Liquidator's Estate:

Sect 36(1): The liquidator shall form an estate of assets referred to in Sect 36(3), known as the liquidator's estate of the corporate debtor.

Sect 36(2): The liquidator shall hold the liquidator's estate as a fiduciary for the benefit of all creditors.

2. Assets to be Included in the Liquidator's Estate [Sect 36(3)]:

The liquidator's estate shall include the following:

- (a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;
- (b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;
- (c) tangible assets, whether movable or immovable;
- (d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;
- (e) assets subject to the determination of ownership by the court or authority;
- (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
- (g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;
- (h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and
- (i) all proceeds of liquidation as and when they are realised.

Q15: "All the assets that are in possession of the Corporate Debtor undergoing liquidation are to be taken into custody by the Liquidator". Would you analyse the statement? (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned, which will be called the liquidator's estate in relation to the corporate debtor.

The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. All the assets of the Corporate Debtor in liquidation are to be taken into custody by the Liquidator on receipt of the order of appointment by National Company Law Tribunal.

Section 36 of the Insolvency and Bankruptcy Code, 2016 (IBC) elaborates the term Liquidation Estate. Accordingly, all such assets that are either in the possession of the Corporate Debtor at its own premises or any other place including encumbered assets intangible assets such as intellectual property rights, securities, insurance policies, any assets that have been recovered through proceedings for avoidable transactions and assets that have been relinquished by the secured creditors.

Liquidation Estate does not include assets held in trust for third parties, bailment contracts, and amounts due to workmen towards provident fund, pension or gratuity, leased assets, such other assets as prescribed. Liquidator needs to distinguish between assets that could be included and excluded for taking into custody.

Q16: The liquidator is equipped with the powers to take possession of assets of the Corporate Debtor under liquidation forming part of liquidation estate yet some Assets need to be excluded". Elucidate. (3 marks)

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OR

What shall not be included in the liquidation estate assets under the Insolvency and Bankruptcy Code, 2016? (3 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Section 36 (3) of the Insolvency and Bankruptcy Code, 2016 (IBC) specifies the assets of the Corporate Debtor that should be taken into custody as Liquidation Estate.

a) In a similar way, Section 36 (4) of IBC illustrates the following assets which shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation assets owned by a third party which are in possession of the corporate debtor, including-

i) assets held in trust for any third party;

ii) bailment contracts;

iii) all sums due to any workmen or employee from the provident fund, the pension fund and the gratuity fund;

iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

Alternate Answer,

The following shall not be included in the liquidation estate assets under the Insolvency and Bankruptcy Code: -

(a) assets owned by a third party which are in possession of the corporate debtor, including –

- (i) assets held in trust for any third party;
- (ii) bailment contracts;
- (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;
- (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and
- (v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;
- (b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;
- (c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;
- (d) assets of any Indian or foreign subsidiary of the corporate debtor; or
- (e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.

Q17: Are the dues in respect to Provident Fund/Pension Fund/Gratuity Fund part of the liquidation estate?

Answer: In the case of '**Precision Fasteners Ltd. vs. Employees Provident Fund Organisation**', the liquidators sought a declaration regarding attachment of movable and immovable properties of the CD (under liquidation) under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 as null and void to enable him to dispose of these properties alongside other assets of the CD. The court noted that in terms of the Code, the dues in respect to Provident Fund/Pension Fund/Gratuity Fund are not part of the liquidation estate. The court vacated the attachment with a direction to the liquidator to sell the assets and pay off the provident fund dues in priority to all claims payable by the CD in liquidation.

Q18: As a liquidator of a Corporate Debtor, how will you gather information for the purpose of admission & proof of claims and identification of the liquidation estate assets. (5 marks)
PAST YEAR QUESTION DECEMBER 2021

Answer: Section 37(1) of the Insolvency and Bankruptcy Code, 2016 provides that notwithstanding anything contained in any other law for the time being in force, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from the following sources:

- a) an information utility;
- b) credit information systems regulated under any law for the time being in force;
- c) any agency of the Central, State or Local Government including any registration authorities;
- d) information systems for financial and non-financial liabilities regulated under any law for the time being in force;

- e) information systems for securities and assets posted as security interest regulated under any law for the time being in force;
- f) any database maintained by the Board; and
- g) any other source as may be specified by the Board.

Right to Seek Information [Sect on 37(2)]:

The creditors may require the liquidator to provide the many financial information relating to the corporate debtor in such manner as may be specified.

Obligation of the Liquidator [Sect on 37(3)]:

The liquidator shall provide information referred to in sub-section (2) to such creditors who have requested for such information within a period of seven days from the date of such request or provide reasons for not providing such information.

Q19: What are the provisions under Sect on 38 of the IBC, 2016 relating to the receipt, submission, and withdrawal of claims by creditors during the liquidation process?

Answer: Sect on 38 of the IBC, 2016 outlines the procedures and timelines for the consolidation of claims by the liquidator during the liquidation process. The key provisions are:

1. Receipt or Collection of Claims [Sect on 38(1)]:

- The liquidator must receive or collect claims of creditors within 30 days from the commencement of the liquidation process.

2. Submission of Claims:

(a) By Financial Creditors [Sect on 38(2)]:

- A financial creditor may submit their claim by providing a record with an information utility.
- If no such record exists, the claim must be submitted as per the procedure applicable to operational creditors under Sect on 38(3).

(b) By Operational Creditors [Sect on 38(3)]:

- An operational creditor must submit the claim in the prescribed form, manner, and with supporting documents as specified by the IBBI.

(c) By Hybrid Creditors [Sect on 38(4)]:

- A creditor who is partly a financial creditor and partly an operational creditor must:
 - Submit the financial debt portion as per Sect on 38(2), and
 - Submit the operational debt portion as per Sect on 38(3).

3. Withdrawal or Variation of Claims [Sect on 38(5)]:

- A creditor may withdraw or vary a submitted claim within 14 days of its submission.

Q20: What is the procedure for verification of claims by the liquidator under Sect on 39 of the IBC, 2016?

Answer: Sect on 39 of the Insolvency and Bankruptcy Code, 2016 outlines the process for verification of claims by the liquidator after the claims have been received under Sect on 38. The key provisions are:

1. Timeframe for Verification [Sect on 39(1)]:

The liquidator must verify the claims submitted by creditors within the time specified by the Board. As per Regulation 30 of the IBBI (Liquidation Process) Regulations, 2016, this verification must be completed within 30 days from the last date of receipt of claims.

2. Right to Seek Additional Documents [Sect on 39(2)]:

The liquidator may require: Any creditor, The corporate debtor, or Any other person, to produce documents or evidence as may be necessary for verifying the whole or part of the claim

Q21: Whether a liquidator can decide a claim of an appellant where a resolution plan is not approved and order of liquidation is passed?

Answer: In the case of '**Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd. & Ors.**', it was held that ".....In case the resolution plan is not approved and the order of liquidation is passed, in such case, it will be open to the appellant to file claim before the liquidator in accordance with the provisions as referred to above and the liquidator will decide the claim under section 40 of the Code."

Q22: What is the procedure for admission or rejection of claims by the liquidator under Section 40 of the IBC, 2016?

Answer: Section 40 lays down the procedure for the admission and rejection of claims.

[Section 40(1)] Admission or rejection of claims- The liquidator may, after verification of claims under section 39, either admit or reject the claim, in whole or in part, as the case may be. But if the liquidator rejects a claim, he shall record in writing the reasons for such rejection.

[Section 40(2)] Communication of decision- The liquidator shall communicate his decision of admission or rejection of claims to the creditor and corporate debtor within seven days of such admission or rejection of claims.

Q23: What is the process for determination of the value of claims by the liquidator under Section 41 of the IBC, 2016?

Answer: Section 41 provides that the liquidator shall determine the value of claims admitted under section 40 in such manner as may be specified by the Insolvency and Bankruptcy Board of India.

Q24: What remedy is available to a creditor if they are aggrieved by the liquidator's decision on their claim under the IBC, 2016?

Answer: Under Section 42 of the Insolvency and Bankruptcy Code, 2016, a creditor who is aggrieved by the decision of the liquidator, whether it is an acceptance or rejection of their claim (in whole or in part), has the right to appeal to the Adjudicating Authority (NCLT).

Key Provisions of Section 42:

- A creditor may file an appeal before the Adjudicating Authority against the liquidator's decision on admission or rejection of their claim.

- The appeal must be filed within 14 days from the receipt of such decision.
- This provision was clarified and reinforced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which made it explicit that the right to appeal exists regardless of whether the claim was accepted or rejected.

Q25: Why does Sect on 43 of the IBC invalidate certain transfers made by a corporate debtor during the relevant time.

Answer: Sect on 43 of the Insolvency and Bankruptcy Code, 2016, seeks to invalidate preferential transactions made by a corporate debtor during the relevant time prior to insolvency commencement.

Such transactions typically involve the transfer of property or an interest therein to a: Creditor, Surety, or Guarantor, on account of an antecedent debt or liability, and have the effect of placing them in a better position than they would have been if the transfer had not occurred and the assets were distributed equitably under Sect on 53 during liquidation.

Q26: What constitutes preferential transaction?

Answer: As per Sect on 43(2) of the Code, a corporate debtor shall be deemed to have given a preference, if-

- (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or guarantee or for or on account of an antecedent financial debtor operational debtor other liabilities owed by the corporate debtor; and
- (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with sect on 53.

Q27: When can the liquidator or resolution professional apply to the Adjudicating Authority for avoidance of preferential transactions under Sect on 43 of the IBC, and what types of transactions are excluded from being treated as preferential?

Answer: Under Sect on 43(1) of the Insolvency and Bankruptcy Code (IBC), the liquidator or resolution professional may apply to the Adjudicating Authority for avoidance of preferential transactions, if they form the opinion that:

The corporate debtor, during the relevant time, has given a preference as described in Sect on 43(2) to any person specified in Sect on 43(4), which puts such person in a better position than others in the event of liquidation.

Exclusions: What is not treated as a preferential transaction [Sect on 43(3)]:

The following transfers are excluded and not deemed as preferential:

1. **Ordinary Course of Business:**
 - Transfer made in the ordinary course of business or financial affairs of the corporate debtor or the transferee.
2. **Security Interest for New Value:** A transfer creating security interest in property acquired by the corporate debtor is not treated as preferential if:

- (i) It secures new value given to the corporate debtor at the time of, or after, the signing of a security agreement describing such property as the security; and
- (ii) The transfer is registered with an information utility within 30 days of the corporate debtor receiving possession of the property.

3. **Judicial Orders:** Transfers made in pursuance of a court order are not excluded — they can still be treated as preferential.

Definition – “New Value”:

As per the explanation to **Sect on 43(3)**, "new value" means:

Money, goods, services, new credit, or release of previously transferred property (not involving substitution of old financial/operational debt with new).

It **excludes** substitution of an existing financial or operational debt with a new one.

Q28: What is the “relevant time” under Sect on 43(4) of the Insolvency and Bankruptcy Code for determining whether a transaction is a preferential transaction?

Answer: As per Sect on 43(4), the preferential transaction is at a relevant time if:

- It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or
- a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

Q29: During the course of liquidation the liquidator noticed that some preferential transactions were made with some persons. What do you understand by preferential transactions? State the orders that may be passed by the Adjudicating Authority in relation to the avoidance of preferential transactions. (5 marks)

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Answer: Preferential transaction in reference to corporate insolvency resolution process or the liquidation process means preferential transaction made with any person within the period of one year preceding the insolvency commencement date or transaction made with a related party within a period of two years preceding the insolvency commencement date.

An application may be made to the Adjudicating Authority by the Liquidator or Resolution Professional for avoidance of such preferential transaction.

Sect on 44 of Insolvency & Bankruptcy Code, 2016 specifies the orders that may be passed by the Adjudicating Authority in relation to the avoidance of a preferential transaction. These orders are passed to reverse the effects of the preferential transaction and require the person to whom the preference is granted to pay back any gains he may have made as a result of such preference.

Sect on 44 lays down that the Adjudicating Authority, may on an application made by the resolution professional or liquidator under sub-sect on (1) of sect on 43, by an order:

- (a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

- (b) require any property to be so vested if it represents the application on either of the proceeds of sale of property so transferred or of money so transferred;
- (c) release or discharge (in whole or in part) of any security interest created by the corporate director;
- (d) require any person to pay such sum in respect of benefits received by him from the corporate debtor, such sum to the liquidator or the resolution professional, as the Adjudicating Authority may direct;
- (e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;
- (f) direct for providing security or charge of any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and
- (g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

Q30: Under what circumstances does Sect on 44 of the Insolvency and Bankruptcy Code, 2016 protect transactions done in good faith and for value, and what are the presumptions involved?

Answer: Sect on 44 of the Insolvency and Bankruptcy Code, 2016 deals with the orders that the Adjudicating Authority (AA) may pass in case of preferential transactions. However, the Code provides protection for certain bona fide transactions, even if they are preferential in nature.

Protection for Transactions in Good Faith and for Value:

The Adjudicating Authority shall not pass an order that:

1. Affects any interest in property which was: Acquired from a person other than the corporate debtor, or Derived from such interest, Provided it was acquired in good faith and for value.
2. Requires a person, who received a benefit from the preferential transaction,
 - To pay any sum to the liquidator or resolution professional,
 - If that person received the benefit in good faith and for value.

Presumptions under Sect on 44 (Explanation I):

The law presumes a lack of good faith in the following cases, unless proven otherwise:

- If the acquirer of the interest or beneficiary of the transaction:
 - Had sufficient information of the initiation or commencement of insolvency proceedings, or
 - Is a related party to the corporate debtor.

Effect of Public Announcement (Explanation II):

A person shall be deemed to have had sufficient information or opportunity if a public announcement of the Corporate Insolvency Resolution Process (CIRP) has been made under Section 13 of the Code.

Q31: What constitutes an undervalued transaction under the IBC, and how and when can such transactions be avoided by the Adjudicating Authority?

Answer: Under Section 45 of the Insolvency and Bankruptcy Code, 2016, undervalued transactions can be avoided (i.e., declared void) if they are found to have been made during the relevant period and are not in the ordinary course of business.

Application to Adjudicating Authority [Section 45(1)]

If, upon examination, the resolution professional (RP) or liquidator finds any transaction that appears to be undervalued as per Section 45(2), they must:

- File an application to the Adjudicating Authority (NCLT) to:
 - Declare the transaction void, and
 - Reverse the effects of such a transaction.

What is an Undervalued Transaction? [Section 45(2)]

Section 45(2) provides that a transaction shall be considered undervalued where the corporate debtor—

1. Makes a gift to any person; OR
2. enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Relevant Time Period [Section 46(1)]

An undervalued transaction is avoidable if:

- transaction was made with any person within the period of one year preceding the insolvency commencement date; or
- transaction was made with a related party within the period of two years preceding the insolvency commencement date.

Such provisions are intended to prevent the siphoning of assets or fraudulent dilution of value by the corporate debtor to the detriment of creditors when insolvency is foreseeable.

In the case of **Anuj Jain Vs. Axis Bank Ltd. & Ors. [Civil Appeal Nos. 8512-8527 of 2019 with other appeals]** judgement dated 26.02.2020, Hon'ble Supreme Court inter alia observed that:

(a) Preferential Transactions: A CD shall be deemed to have given a preference at a relevant time if:

- (i) there is a transfer of property or the interest thereof of the CD for the benefit of a creditor or surety or guarantor for or on account of an antecedent financial debt or operational debt or other liability;

(ii) such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets in accordance with section 53 of the Code; and

(iii) preference is given, either during the period of two years/one year preceding the ICD when the beneficiary is a related/an unrelated party. However, such deemed preference may not be an offending preference, if it falls into any or both exclusions provided by section 43(3). Section 43(3)(a) exempts transfers made in ordinary course of business of the CD or the transferee. This calls for purposive interpretation. The expression 'or', appearing as disjunctive between the expressions 'corporate debtor' and 'transferee', ought to be read as 'and'. Therefore, a preference shall not include the transfer made in the ordinary course of the business of the CD and the transferee.

(b) Duties and responsibilities of RP: The RP shall –

(i) shift through all transactions relating to the property/ interest of the CD backwards from the ICD and up to the preceding two years;

(ii) identify persons involved in the transactions and put them in two categories:

(1) related party under section 5(24) and

(2) remaining persons;

(iii) identify which of the said transactions of preceding two years, the beneficiary is a related party of the CD and in which the beneficiary is not a related party. The sub-set relating to unrelated parties shall be trimmed to include only the transactions preceding one year from the ICD;

(iv) examine every transaction in each of these sub-sets to find out whether

(1) the transaction is of transfer of property of the CD or its interest in it; and

(2) beneficiary involved in the transaction stands in the capacity of creditor/surety/guarantor;

(v) scrutinise the shortlisted transactions to find, if the transfer is for or on account of antecedent financial debt/operational debt/other liability of the CD;

(vi) examine the scanned and scrutinised transactions to find, if the transfer has the effect of putting such creditor/surety/guarantor in beneficial position, then it would have been in the event of distribution of assets under section 53. If answer is in the affirmative, the transaction shall be deemed to be of preferential, provided it does not fall within the exclusion under section 43(3); and then

(vii) apply to the AA for necessary orders, after carrying out the aforesaid volumetric and gravimetric analysis of the transactions.

c) Undervalued and fraudulent transactions: As the transactions are held as preferential, it is not necessary to examine whether these are undervalued and/or fraudulent. In preferential transaction, the question of intent is not involved and by virtue of legal fiction, upon existence of the given ingredients, a transaction is deemed to be of giving preference at a relevant time, while undervalued transaction requires different enquiry under sections 45 and 46 where the AA is required to examine the intent, if such transactions were to defraud the creditors. The AA needs to examine the aspect of preferential, undervalued and fraudulent separately and distinctly.

Q32: Can a creditor or partner of a corporate debtor apply to the Adjudicating Authority for avoidance of an undervalued transaction if the resolution professional or liquidator has not taken any action?

Answer: Yes, under Section 47(1) of the Insolvency and Bankruptcy Code (IBC), 2016, a creditor, member, or partner of the corporate debtor has the right to directly approach the Adjudicating Authority (NCLT) if:

- An undervalued transaction has occurred during the relevant period, and
- The resolution professional (RP) or liquidator has not reported such a transaction for avoidance under Section 45.

Purpose of Section 47:

This provision acts as a safeguard to ensure that undervalued transactions are not overlooked, even if the resolution professional or liquidator fails to act. It empowers stakeholders of the corporate debtor to initiate action for protecting the value of the liquidation estate or resolution estate.

Relief Sought:

The applicant may request the Adjudicating Authority to:

- Declare the transaction void, and
- Reverse the effects of such transaction, just as would be done under Section 45.

Q33: What order can the Adjudicating Authority pass under Section 47(2) if it finds that the resolution professional or liquidator failed to report an undervalued transaction?

Answer: Under Section 47(2) of the IBC, 2016, if the Adjudicating Authority (NCLT), upon examining an application made by a creditor, member, or partner under Section 47(1), is satisfied that:

- An undervalued transaction has actually occurred, and
 - The liquidator or resolution professional, despite having sufficient information or opportunity to access such information, failed to report the transaction,
- then the Adjudicating Authority shall pass an order:

it shall pass an order-

- (a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;
- (b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Q34: 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? (5 marks)

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Answer: 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 sect on 48, the order of the Adjudicat ng Authority under sub-sect on (1) of sect on 45 of the Code may provide for the following:

- (a) require any property transferred as part of the transact on, 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 benef ts received by such person, to the liquidator or the resolut on professional as the case may be, as the Adjudicat ng Authority may direct; or
- (d) require the payment of such considerat on for the transact on as may be determined by an independent expert.

Q35: What are transact ons defrauding creditors under Sect on 49 of the IBC, 2016, and what orders can the Adjudicat ng Authority pass in such cases?

Answer: As per Sect on 49 of the Code, a transact on shall be considered as defrauding creditors where transact on was deliberately entered into by such corporate debtor -

- (a) for keeping assets of the corporate debtor beyond the reach of any person who is ent tled to make a claim against the corporate debtor; or
- (b) in order to adversely af ect the interests of such a person in relat on to the claim.

Orders by the Adjudicat ng Authority:

If sat sf ed that such a fraudulent transact on has occurred, the Adjudicat ng Authority (NCLT) shall make an order:

1. Restoring the posit on as it existed before the transact on was made, as if the transact on had not taken place; and
2. Protect ng the interests of the persons who were vict ms of such fraudulent transact ons.

Proviso – Protect on for Bona Fide Third Part es:

- (a) shall not af ect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without not ce of the relevant circumstances, or af ect any interest deriving from such an interest, and
- (b) shall not require a person who received a benef t from the transact on in good faith, for value and without not ce of the relevant circumstances to pay any sum unless he was a party to the transact on.

Q36: Subodh Consumer Products Limited (SCPL) decided to demerge its food and beverages business into a separate ent ty, Subodh Foods Limited (SFL). The demerger allowed SCPL to concentrate on its core products line while its food and beverages business could be more ef ect vely managed by SFL. The demerger took place within the meaning of Sect on 2(19 AA) of the Income-tax Act, 1961. N who was holding 100 shares in SCPL was allot ed 100 shares in Subodh Foods Limited along with the shares in result ng company as per the swap rat o.

N seeks your advice to calculate the following as he intends to transfer some of his shares after demerger :

- (a) Cost of acquisition of shares in the resulting company.***
- (b) Cost of acquisition of shares in the demerged company.***
- (c) Period of holding of shares of the resulting company. (5 marks)***

PAST YEAR QUESTION JUNE 2025

Answer: In the case of demerger, the existing shareholders of the demerged company will hold after demerger:

- (a) shares in resulting company; and
- (b) shares in demerged company.

And in case the shareholder transfers any of the above shares subsequent to the demerger, the cost of such shares shall be calculated as under: –

Cost of acquisition of shares in the resulting company [Sect on 49(2C)]

The cost of acquisition of the shares in the resulting company shall be the amount which bears to the cost of acquisition of shares held by the assessee in the demerged company the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.

Cost of acquisition of shares in the demerged company [Sect on 49(2D)]

The cost of acquisition of the original shares held by the shareholder in the demerged company shall be deemed to have been reduced by the amount as so arrived at under sub-section (2C).

For the above purpose, net worth shall mean the aggregate of the paid-up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger.

Period of holding of shares of the resulting company [Sect on 2(42A)(g)]

In the case of a capital asset, being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a demerger, there shall be included the period for which the share or shares held in the demerged company were held by the assessee.

Q36: What are extortionate credit transactions under Sect on 50 of the IBC, 2016, and under what circumstances can they be avoided?

Answer: Under Sect on 50 of the Insolvency and Bankruptcy Code (IBC), 2016, an extortionate credit transaction is one where a corporate debtor has received a financial or operational debt under unfair or exorbitant terms, particularly within the two years preceding the insolvency commencement date.

1. Application for Avoidance – [Sect on 50(1)]:

- If a corporate debtor has entered into an extortionate credit transaction within two years prior to the insolvency commencement date,
- The liquidator or resolution professional (RP) may apply to the Adjudicating Authority (NCLT) for avoidance of such transaction.

- Such a transaction involves terms that require exorbitant payments to be made by the corporate debtor.

2. Power of IBBI – [Sect on 50(2)]:

The Insolvency and Bankruptcy Board of India (IBBI) may specify the circumstances in which a transaction will be considered extortionate.

3. Except on – [Explanation to Sect on 50]:

A debt provided by a financial service provider that is compliant with any prevailing law shall not be treated as extortionate. This protects legitimate lending institutions from unnecessary scrutiny.

Q37: What orders can the Adjudicating Authority pass under Sect on 51 of the IBC, 2016, in cases of extortionate credit transactions?

Answer: (a) restore the position as it existed prior to such transaction;
 (b) set aside the whole or part of the debt created on account of the extortionate credit transaction;
 (c) modify the terms of the transaction;
 (d) require any person who is, or was, a party to the transaction to repay any amount received by such person; or
 (e) require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

Q38: What are the rights and duties of a secured creditor during liquidation proceedings under Sect on 52 of the IBC, 2016?

Answer: Under Sect on 52 of the Insolvency and Bankruptcy Code (IBC), 2016, a secured creditor has two options during the liquidation of a corporate debtor:

Options Available to a Secured Creditor [Sect on 52(1)]:

1. A secured creditor **may either**:

- a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in sect on 53; or
- b) realise its security interest in the manner specified in this section.

Key Provisions and Duties Under Sect on 52:

Inform the Liquidator [Sect on 52(2)]: The secured creditor must **inform the liquidator** about the intention to realise the security interest and identify the secured asset.

Verification by Liquidator [Sect on 52(3)]: The liquidator must verify the security interest **before** its realisation. Verification is based on:

- Records with an Information Utility, or
- Other means specified by IBBI.

Enforcement of Security Interest [Sect on 52(4)]: The secured creditor may enforce or deal with the secured asset under applicable laws and apply the proceeds to recover its dues.

Realisation of secured asset [Sect on 52(5)]: If a secured creditor encounters resistance from the corporate debtor, or any person connected with the corporate debtor during the process of: taking possession of, selling, or otherwise disposing of the secured asset, then the secured creditor has the right to: Make an application to the Adjudicating Authority (NCLT) requesting assistance.

Assistance from Adjudicating Authority [Sect on 52(5)-(6)]: If the secured creditor faces resistance in taking possession or disposing of the secured asset, it may seek help from the Adjudicating Authority (NCLT), which can pass necessary orders.

What shall a secured creditor do when the enforcement of security interest yields an amount in excess of the debts due to him? [Sect on 52(7)]: As per Sect on 52(7) of the Code, the secured creditor shall-

- (a) account to the liquidator for such surplus; and
- (b) tender to the liquidator any surplus funds received from the enforcement of such secured assets.

Insolvency Resolution Process (IRP) Costs [Sect on 52(8)]: If a secured creditor realises its security interest, it must deduct IRP costs from the realised proceeds and pay them to the liquidator.

Deficit [Sect on 52(9)]: If the proceeds are insufficient, the remaining debt is treated as unsecured and will be paid in accordance with Sect on 53(1)(e).

Q39: "The Insolvency and Bankruptcy Code makes significant changes in the priority of claims for distribution of liquidation proceeds". Comment. (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Sect on 53 of the Insolvency and Bankruptcy Code 2016 deals with distribution of assets in liquidation. The Insolvency and Bankruptcy Code, 2016 makes significant changes in the priority of claims for distribution of liquidation proceeds.

In case of liquidation, the assets will be distributed in the following order:

- (i) fees of insolvency professional and costs related to the resolution process;
- (ii) workmen's dues for the preceding 24 months and secured creditors;
- (iii) employee wages;
- (iv) unsecured creditors;
- (v) government dues and remaining secured creditors (any remaining debt if they enforce their collateral);
- (vi) any remaining debts and dues
- (vii) preference shareholders, if any; and
- (viii) equity shareholders or partners, as the case may be.

Before the enactment of the Code, the government dues were immediately below the claims of secured creditors and workmen in order of priority. Now, the Central and State Government's dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors.

Q40: 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)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q41: What is the process for the dissolution of a corporate debtor under Section 54 of the IBC, 2016?

Answer: Section 54 provides that after the affairs of the corporate debtor have been wound up and its assets are completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the corporate debtor.

Application to the Adjudicating Authority – Subsection (1) of section 54 lays down that where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor.

Date of dissolution – According to sub-section (2), the Adjudicating Authority shall on application filed by the liquidator under sub-section (1) order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

Copy of Order – A copy of an order under sub-section (2) shall within seven days from the date of such order, be forwarded to the authority with which the corporate debtor is registered. [Section 54(3)]

As per Regulation 45(3) of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, the liquidator shall submit an application along with the final report prior to dissolution and the compliance certificate in Form H to the Adjudicating Authority for -

closure of the liquidation process of the corporate debtor where the corporate debtor is sold as a going concern; or for the dissolution of the corporate debtor, in cases not covered above.

CASE LAWS:

In the case of **Chennai Metro Rail Ltd. Vs. Lanco Infratech Ltd. (Represented by the Liquidator) & Ors. [Appellate No. 2826 of 2019]** judgement dated 15.10.2020, Madras High Court held that Section 279 of the Companies Act, 2013 applies only in cases of winding up under the Companies Act, 2013 and not the Code. Section 279 of the Act deals with both pending suits and institution of new suits, while section 33(5) of the Code deals with new proceedings and Section 33(5) of the Code overrides section 279 of Act, by virtue of section 238 and by the principle 'special law overrides general law'.

CHAPTER 23 AS PER ICSI MODULE

VOLUNTARY LIQUIDATION

Q1: "Though the procedure to be followed for voluntary liquidation proceedings under Chapter III is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Code yet there are marked differences". Point out some differences between two. (3 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Section 59(6) of the Insolvency and Bankruptcy Code, 2016 provides that the provisions of sections 35 to 53 of Chapter III and Chapter VII shall apply to voluntary liquidation proceedings for corporate persons with such modifications as may be necessary. Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of Part II of the Code yet there are marked differences:

1. Section 59 of the Code provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the Code whereas Liquidation is ordered under section 33 of the Code by the Adjudicating Authority in case of corporate debtors who have committed default and whose Corporate Insolvency Resolution Process fails.
2. Declaration of solvency and liquidation not intended to defraud any person shall be given by the majority of directors in case of voluntary liquidation whereas Liquidation is ordered in case of corporate debtor which has committed default of threshold limit.
3. Date of passing of special resolution of the members of the corporate debtor approving voluntary liquidation shall be deemed to be the date of commencement of voluntary liquidation whereas the date on which the Adjudicating Authority passes an order of liquidation under section 33 shall be deemed to be the date of commencement of Liquidation.
4. Liquidator is appointed by the Adjudicating Authority for liquidation under section 33 of the Code while Liquidator is appointed by the corporate debtor in case of voluntary liquidation under section 59 of the Code.
5. The Adjudicating Authority gives order under section 33 and then Liquidation commences while in case of Voluntary Liquidation, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate person after the affairs of the corporate person have been completely wound up, and its assets completely liquidated.

Q2: "Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Code yet there are marked differences." Elucidate. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: Though the procedure to be followed for voluntary liquidation proceedings under Chapter V is largely similar to the procedure to be followed for insolvent liquidation under Chapter III of the Insolvency & Bankruptcy Code yet there are marked differences:

1. To initiate voluntary liquidation proceedings, where the corporate debtor is 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's incipit 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.
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 sub-clause (c) within seven days of such resolution.
6. A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.

Q3: What are the key steps involved in the voluntary liquidation process of a corporate person under the Insolvency and Bankruptcy Code, 2016 and the IBBI (Voluntary Liquidation Process) Regulations, 2017?

Answer:

1. Submission of Declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person.
2. Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator, within four weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required;
3. Public Announcement inviting claims of all stakeholders, within five days of such approval, in newspaper as well as on website of the corporate person.
4. Intimation to the ROC and the Board about the approval, within seven days of such approval;
5. Preparation of Preliminary Report about the capital structure, estimates of assets and liabilities, proposed plan of action etc., and submission of the same to a corporate person within forty-five days of such approval;
6. Verification of claims, within thirty days from the last date for receipt of claims and preparation of list of stakeholders, within forty-five days from the last date for receipt of claims;

7. Opening of a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person;
8. Sale of assets, recovery of monies due to corporate person, realization of uncalled capital or unpaid capital contribution;
9. Distribution of the proceeds to the stakeholders within 30 days from receipt of the amount;
10. Submission of Final Report by the liquidator to the corporate person, ROC and the Board and application to the National Company Law Tribunal (NCLT) for the dissolution;
11. Submission of NCLT order regarding the dissolution, to the concerned ROC within fourteen days of the receipt of order.

Q4: 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? (5 marks)

PAST YEAR QUESTION DECEMBER 2019

Answer: 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.

Q5: What shareholder or contributory approvals are required under Sect on 59(3)(c) of the IBC for initiating voluntary liquidation of a company, and what is the timeline for such approvals?

Answer: Under Sect on 59(3)(c) of the Insolvency and Bankruptcy Code, 2016, the following approvals and timeline are mandated for initiating voluntary liquidation:

Within four weeks of a declaration by the Board of Directors, there shall be

- (i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
- (ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Q6: What are the requirements related to creditors' approval and declaration of solvency in the voluntary liquidation of a company or other corporate person under Section 59 and Regulation 3 of the Voluntary Liquidation Regulations, 2016?

Answer: Creditors' Resolution: It is also provided that if 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 by shareholders within seven days of such resolution.

Regulation 3 (1) to 3(3) of Voluntary Liquidation Regulations provide similar provisions for voluntary liquidation of corporate persons other than company as follows:

1) Declaration of solvency to be made by majority of

- (i) the designated partners, if a corporate person is a limited liability partnership,
- (ii) individuals constituting the governing body in case of other corporate persons, as the case may be.

2) Such declaration shall be verified by an affidavit stating that-

- (i) they have made a full inquiry into the affairs of the corporate person and they have formed an opinion that either the corporate person has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the liquidation; and
- (ii) the corporate person is not being liquidated to defraud any person.

3) Such declaration shall be accompanied with the documents, namely: —

- (i) audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later;
- (ii) a report of the valuation of the assets of the corporate person, if any prepared by a registered valuer.

4) within Four weeks of such declaration, there shall be-

- (i) a resolution passed by a special majority of the partners or contributories, as the case may be, of the corporate person requiring the corporate person to be liquidated and appointing an insolvency professional to act as the liquidator; or
- (ii) a resolution of the partners or contributories, as the case may be, requiring the corporate person to be liquidated as a result of expiry of the period of its duration, if any, fixed by its constitutional documents or on the occurrence of any event in respect of which the constitutional documents provide that the corporate person shall be dissolved, as the case may be, and appointing an insolvency professional to act as the liquidator.

If the corporate person owes any debt to any person, creditors representing two-thirds in value of the debt of the corporate person shall approve the resolution passed by partners or contributories, as stated above, within seven days of such resolution.

Q7: What are the provisions regarding the appointment and replacement of a liquidator under Regulation 5 of the IBBI (Voluntary Liquidation Process) Regulations, 2016?

Answer: Under Regulation 5 of the IBBI (Voluntary Liquidation Process) Regulations, 2016, the following provisions apply regarding the appointment and replacement of a liquidator:

- That the corporate person shall appoint an insolvency professional as liquidator, and, wherever required, may replace him by appointing another insolvency professional as liquidator.
- Appointment or replacement of liquidator shall be made by a resolution passed under clause (c) of sub-section (3) of section 59 or clause (c) of sub-regulation (1) of regulation 3, as the case may be.
- Only an insolvency professional who meets the eligibility criterion laid down in Regulation 6 can be appointed as Liquidator.
- It is provided that such resolution, passed by the members, partners, or contributories, shall contain the terms and conditions of appointment of the liquidator, including the remuneration payable to him.
- A duty has been casted on the insolvency professional that he shall, within seven days of his appointment as liquidator, intimate the Board about such appointment.

Q8: 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)

PAST YEAR QUESTION DECEMBER 2019

OR

An insolvency professional shall be eligible to be appointed as a liquidator for Voluntary Liquidation process 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. What are the circumstances under which an insolvency professional will be considered an independent person for the purpose of appointment as liquidator for the process of Voluntary Liquidation? (5 marks)

PAST YEAR QUESTION JUNE 2023

Answer: 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.

Q9: Mr. S, a company secretary in practice, was last appointed by M/s C Ltd. as secretarial auditor up to March 31, 2022. He now wants to be appointed as a liquidator. Advice and also comment on his eligibility to be appointed as liquidator. (3 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: Regulation 3 of the IBBI (Liquidation Process) Regulations, 2016 provides for eligibility for appointment as a liquidator. According to it, 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. Explanation:

- (1) 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, at any time in the last three years.
- (2) An insolvency professional shall not be eligible to be appointed as a liquidator if he, or the insolvency professional entity of which he is a partner or director is under a restraint order of the Board.
- (3) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.
- (4) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.

For being eligible to become a liquidator, Mr. S shall first be an insolvency professional. As question is silent whether he is an insolvency professional or not, even if it is assumed that he is an insolvency professional still Mr. S is not eligible to be appointed as a liquidator in the question as he was a secretarial auditor of M/s. C Ltd. till 31st March 2022 i.e. within last three financial years.

Q10: What are the requirements for intimation to regulatory authorities in case of voluntary liquidation under Section 59(4) of the IBC and Regulation 3(2) of the Voluntary Liquidation Regulations, 2016?

Answer: Section 59(4) of the Code provides that –

the company shall notify the Registrar of Companies and the Board about the resolution passed to liquidate the company the intimation shall be sent within seven days of such a resolution or the subsequent approval by the creditors, as the case may be.

Similar provisions are specified for corporate person other than a company in the Regulation 3(2) of Voluntary Liquidation Regulations that the corporate person shall notify the Registrar and the Board about the resolution passed by partners or contributories to liquidate the corporate person within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Q11: When is the voluntary liquidation commencement date in case of a company or other corporate person under the IBC and the Voluntary Liquidation Regulations?

Answer: According to section 59(5) of the Code, subject to approval of the creditors, the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution by the members, partners or contributories.

Regulation 3(3) provides that the liquidation proceedings in respect of a corporate person other than a company shall be deemed to have commenced from the date of passing of the resolution by partners or contributories under sub-clause (c) of sub-regulation (1) subject to approval of the creditors as stated in proviso to regulation 3 (1) (c).

Q12: What is the effect of liquidation on the business operations and legal existence of a corporate person under the Voluntary Liquidation Regulations?

Answer: As per regulation 4 of the Voluntary Liquidation Regulations, The corporate person shall cease to carry on its business from the liquidation commencement date, except as far as required for the beneficial winding up of its business.

However, the corporate person shall continue to exist until it is dissolved under section 59(8) of the IBC.

Q13: Are the provisions relating to liquidation under the IBC also applicable to voluntary liquidation proceedings?

Answer: Yes. As per Section 59(6) of the Insolvency and Bankruptcy Code (IBC), 2016, the provisions of Sections 35 to 53 of Chapter III and Chapter VII of the Code apply to voluntary liquidation proceedings of corporate persons, with such modifications as may be necessary.

- **Chapter III** includes provisions on:
 - **Powers and duties of the liquidator** (Section 35),
 - **Claim verification** (Section 38–40),
 - **Liquidation estate** (Section 36),
 - **Distribution of assets** (Section 53), etc.
- **Chapter VII** deals with **offences and penalties**.

Q14: When and how does the liquidator apply to the Adjudicating Authority (AA) for the dissolution of a corporate person under voluntary liquidation?

Answer: Section 59(7) of the Code mandates the liquidator to make an application to the Adjudicating Authority for dissolution of such corporate person, where the affairs of the corporate person have been completely wound up, and its assets completely liquidated. Regulation 38(3) of Voluntary Liquidation Regulations provides that the liquidator shall submit the Final Report and the compliance certificate in Form-H along with the application under sub-section (7) of section 59 to the Adjudicating Authority.

Q15: What is the role of the Adjudicating Authority after the liquidator files an application for dissolution under voluntary liquidation?

Answer: As per Section 59(8) of the Insolvency and Bankruptcy Code (IBC), 2016, once the liquidator files an application under Section 59(7) after completing the winding up of the affairs and full liquidation of the assets of the corporate person, the Adjudicating Authority (AA) shall:

- Pass an order that the corporate person shall be dissolved from the date of that order, and
- The corporate person shall stand dissolved accordingly.

Furthermore, in accordance with Section 59(9), a copy of the order of dissolution passed under sub-section (8) must be forwarded to the authority with which the corporate person is registered, such as the Registrar of Companies (RoC), within 14 days from the date of such order.

Q16: What are the reporting obligations of the liquidator during the voluntary liquidation process under Regulation 8, and how can stakeholders access these reports?

Answer: As per Regulation 8(1) of the IBBI (Voluntary Liquidation Process) Regulations, 2017, the liquidator is required to prepare and submit the following reports and minutes in the manner specified under the regulations:

1. Preliminary Report
2. Annual Status Report
3. Minutes of consultations with stakeholders
4. Final Report

According to **Regulation 8(2)**, stakeholders may request access to these reports or minutes in electronic or physical form, provided that they:

- (a) an application in writing;
- (b) cost of making such reports available to it; and
- (c) an undertaking from the stakeholder that it shall maintain confidentiality of such reports and shall not use these to cause an undue gain or undue loss to itself or any other person.

Q17: What are the obligations of the liquidator under Regulation 10 regarding the maintenance of registers and books of account during the voluntary liquidation process?

Answer: Complet on of registers and books of account [Regulat on 10(1)]:

Where the books of account of the corporate person are incomplete on the liquidat on commencement date, the liquidator shall have them completed and brought upto- date, with all convenient speed.

Registers and books of accounts to be maintained [Regulat on 10(2)]:

The liquidator shall maintain the following registers and books, as may be applicable, in relat on to the liquidat on of the corporate person:- (a) Cash Book; (b) Ledger; (c) Bank Ledger; (d) Register of Fixed Assets and Inventories; (e) Securit es and Investment Register; (f) Register of Book Debts and Outstanding Debts; (g) Tenants Ledger; (h) Suits Register; (i) Decree Register; (j) Register of Claims and Dividends; (k) Contributories Ledger; (l) Distribut ons Register; (m) Fee Register; (n) Suspense Register; (o) Documents Register; (p) Books Register; (q) Register of unclaimed dividends and undistributed proceeds; and] (r) such other books or registers as may be necessary to account for transact ons entered into by him in relat on to the corporate person.

Forms for maintaining the registers and books [Regulat on 10(3)]:

The registers and books under sub-regulat on (2) may be maintained in the forms indicated in Schedule II, with such modifcat ons as the liquidator may deem ft in the facts and circumstances of the liquidat on.

Duty of Liquidator to keep account of expenses Regulat on 10(4) also makes it mandatory for the liquidator to keep receipts for all payments made or expenses incurred by him.

Q18: What are the provisions under Regulat on 11 regarding the engagement of professionals by a liquidator in a voluntary liquidat on process?

Answer: Who may be appointed by a Liquidator: A liquidator may engage professionals to assist him in the discharge of his dutes, obligat ons and funct ons for a reasonable remunerat on and such remunerat on shall form part of the liquidat on cost. [Regulat on 11(1)]

Who cannot be engaged by the liquidator: Following professionals cannot be engaged by a liquidator his relat ve, a related party of the corporate person, or one who has served as an auditor to the corporate person at any t me during the f ve years preceding the liquidat on commencement date. [Regulat on 11(2)]

Disclosure by a professional: A professional engaged or proposed to be engaged under sub-regulat on(1) shall disclose the existence of any pecuniary or personal relat onship with any of the stakeholders, or the corporate person as soon as he becomes aware of it, to the liquidator. [Regulat on 11(3)]

Q19: A liquidator is ent tled to receive remunerat on at 2% on the assets realized, 3% on the amount distributed to Preferent al Creditors and 4% on the payment made to Unsecured Creditors. The assets were realized for 18,50,000 against which payments were made as follows
Amount in Rs.

Liquidat on Expenses	18,000
Secured Creditors	7,50,000
Preferent al Creditors	82,000
The amount due to Unsecured Creditors	12,00,000
You are asked to calculate the total remunerat on payable to the Liquidator.	
Calculat on of remunerat on payable to Liquidator. (5 marks)	
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Answer: Step I : Calculat on of amount available for unsecured creditors

Amount (Rs.)

Assets realised	18,50,000
Less : Liquidat on expenses	18,000
Payment to Secured Creditors	7,50,000
Payment to Preferent al Creditors	82,000
Amount available for unsecured creditors	10,00,000

Step II : Calculat on of Remunerat on to Liquidator

Amount (Rs.)

Remunerat on on realisat on of assets (2% of Rs. 18,50,000)	37,000
Remunerat on on amount distributed to Preferent al Creditors (3% of Rs. 82,000)	2,460
Remunerat on on payment made to Unsecured Creditors (10,00,000 * 4/104)	38,462
Remunerat on payable to Liquidator	77,922

Q20: What are the provisions regarding consultat on with stakeholders under Regulat on 12 of the Voluntary Liquidat on Regulat ons?

Answer: Duty of stakeholders to extend assistance: The stakeholders consulted under sect on 35(2) shall extend all assistance and cooperat on to the liquidator to complete the liquidat on of the corporate person. [Regulat on 12(1)]

Part culars of consultat on: The liquidator shall maintain the part culars of any consultat on with the stakeholders made under this Regulat on. [Regulat on 12(2)]

Q21: What const tutes an extort onate credit transact on under Regulat on 13 of the Voluntary Liquidat on Regulat ons?

Answer: A transact on shall be considered an extort onate credit transact on under sect on 50(2) where the terms-

- (a) require the corporate person to make exorbitant payments in respect of the credit provided; or
- (b) are unconscionable under the principles of law relat ng to contracts.

Q22: What are the requirements for public announcement by the liquidator under Regulation 14 of the Voluntary Liquidation Regulations?

Answer: Form of Public Announcement: The liquidator shall make a public announcement in Form A of Schedule I within five days from his appointment. [Regulation 14(1)]

Invitation of claim: The public announcement shall-

(a) call upon stakeholders to submit their claims as on the liquidation commencement date; and

(b) provide the last date for submission of claim, which shall be thirty days from the liquidation commencement date. [Regulation 14(2)]

Publication of Public Announcement: The announcement shall be published-

(a) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate person and any other location where in the opinion of the liquidator, the corporate person conducts material business operations;

(b) on the website, if any, of the corporate person; and

(c) on the website, if any, designated by the Board for this purpose [Regulation 14(3)].

Q23: What is the timeline for submission of the Preliminary Report under Regulation 9 of the Voluntary Liquidation Regulations, and what key details must it contain?

Answer: As per Regulation 9 of the IBBI (Voluntary Liquidation Process) Regulations, 2017, the liquidator shall submit the Preliminary Report to the corporate person within 45 days from the liquidation commencement date.

The Preliminary Report must include the following key details:

a) the capital structure of the corporate person;

b) the estimates of its assets and liabilities as on the liquidation commencement date based on the books of the corporate person: Provided that if the liquidator has reasons to believe, to be recorded in writing, that the books of the corporate person are not reliable, he shall also provide such estimates based on reliable records and data otherwise available to him;

(c) Whether he intends to make any further inquiry into any matter relating to the promotion, formation or failure of the corporate person or the conduct of the business thereof; and

d) the proposed plan of action for carrying out the liquidation, including the timeline within which he proposes to carry it out and the estimated liquidation costs.

Q24: How can an operational creditor prove their claim in a voluntary liquidation process under Regulation 15 and 16 of the Voluntary Liquidation Regulations?

Answer: Proof of claim (Regulation 15)

A person, who claims to be a stakeholder, shall prove his claim for debt or dues to him, including interest, if any, as on the liquidation commencement date.

Claims by operational creditors (Regulation 16)

Form to be filed: A person claiming to be an operational creditor of the corporate person, other than a workman or employee, shall submit proof of claim to the liquidator in person, by post or by electronic means in Form B of Schedule I. [Regulation 16(1)]

Proof of claim: The existence of debt due to an operational creditor under this Regulation may be proved on the basis of-

- (a) the records available with an information utility; or
- (b) other relevant documents which adequately establish the debt, including any of the following –
 - (i) a contract for the supply of goods or services with corporate person, supported by an invoice demanding payment for the goods and services supplied to the corporate person;
 - (ii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; and
 - (iii) financial accounts of the corporate person. [Regulation 16(2)]

Q25: How can a financial creditor prove their claim in a voluntary liquidation process under Regulation 17 of the Voluntary Liquidation Regulations?

Answer: Form to be filed: A person claiming to be a financial creditor of the corporate person shall submit proof of claim to the liquidator in electronic means in Form C of Schedule I. [Regulation 17(1)]

Proof of claim: The existence of debt due to the financial creditor may be proved on the basis of-

- (a) the records available in an information utility; or
- (b) other relevant documents which adequately establish the debt, including any or all of the following –
 - (i) a financial contract supported by financial statements as evidence of the debt;
 - (ii) a record evidencing that the amounts committed by the financial creditor to the corporate person under a facility has been drawn by the corporate person;
 - (iii) financial statements showing that the debt has not been repaid; and
 - (iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any. [Regulation 17(2)]

Q26: How can workmen and employees submit and prove their claims during the voluntary liquidation process under Regulation 18?

Answer: Form to be filed: A person claiming to be a workman or an employee of the corporate person shall submit proof of claim to the liquidator in person, by post or by electronic means in Form D of Schedule I. [Regulation 18(1)]

One proof of claim: Where there are dues to numerous workmen or employees of the corporate person, an authorized representative may submit one proof of claim for all such dues on their behalf in Form E of Schedule I. [Regulation 18(2)]

Proof of claim: The existence of dues to workmen or employees may be proved by them, individually or collectively, on the basis of-

- (a) records available in an information utility; or
 - (b) other relevant documents which adequately establish the dues, including any or all of the following –
 - (i) a proof of employment such as contract of employment for the period for which such workman or employee is claiming dues;
 - (ii) evidence of notice demanding payment of unpaid amount and any documentary or other proof that payment has not been made; and
 - (iii) an order of a court or tribunal that has adjudicated upon the non-payment of dues, if any.
- [Regulation 18(3)]

Duty of the liquidator to admit claim in absence of claim by workman or employee: The liquidator shall admit the claims of a workman or an employee on the basis of the books of account of the corporate person if such workman or employee has not made a claim. [Regulation 18(4)]

Q27: How can other stakeholders submit and prove their claims under Regulation 19 during the voluntary liquidation process?

Answer: Form to be filed: A person, claiming to be a stakeholder other than those under Regulations 16, 17 or 18 shall submit proof of claim to the liquidator in person, by post or by electronic means in Form F of Schedule I. [Regulation 19(1)]

Proof of claim: The existence of the claim of the stakeholder may be proved on the basis of-

- (a) the records available in an information utility; or
- (b) other relevant documents which adequately establish the claim, including any or all of the following-
 - (i) documentary evidence of notice demanding payment of unpaid amount or bank statements of the claimant showing that the claim has not been paid and an affidavit that the documentary evidence and bank statements are true, valid and genuine;
 - (ii) documentary or electronic evidence of his shareholding; and
 - (iii) an order of a court, tribunal or other authority that has adjudicated upon the non-payment of a claim, if any. [Regulation 19(2)]

Q28: What are the provisions under Regulation 20 regarding the proving of security interest during voluntary liquidation?

Answer: The existence of a security interest may be proved by a secured creditor on the basis of-

- (a) the records available in an information utility;
- (b) certificate of registration of charge issued by the Registrar of Companies;
- (c) proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India; or
- (d) other relevant documents which adequately establish the security interest.

Q29: What are the provisions relating to the production and substantiation of claims and the cost of proving a claim under the Voluntary Liquidation Process Regulations?

Answer:

Production of bills of exchange and promissory notes (Regulation 21)

Where a person seeks to prove a debt in respect of a bill of exchange, promissory note or other negotiable instrument or security of a like nature for which the corporate person is liable, such bill of exchange, note, instrument or security, as the case may be, shall be produced before the liquidator before the claim is admitted.

Substantiation of claims (Regulation 22)

The liquidator may call for such other evidence or clarification as he deems fit from a claimant for substantiating the whole or part of its claim.

Cost of proof (Regulation 23)

A claimant shall bear the cost of proving its claim. Costs incurred by the liquidator for verification and determination of a claim shall form part of liquidation cost. It is provided that if a claim or part of the claim is found to be false, the liquidator shall endeavor to recover the costs incurred for verification and determination of claim from such claimant, and shall provide the details of the claimant to the Board.

Q30: How does the liquidator determine the amount of claim, and how are claims in foreign currency and periodical payments treated under the Voluntary Liquidation Regulations?

Answer: Determination of amount of claim (Regulation 24)

Where the amount claimed by a claimant is not precise due to any contingency or any other reason, the liquidator shall make the best estimate of the amount of the claim, based on consultation with the claimant and the corporate person and the information available with him.

Debt in foreign currency (Regulation 25)

The claims denominated in foreign currency shall be valued in Indian currency at the official exchange rate as on the liquidation commencement date.

Explanation- "The official exchange rate" is the reference rate published by the Reserve Bank of India or derived from such reference rates.

Periodical payments (Regulation 26)

In the case of rent, interest and such other payments of a periodical nature, a person may claim only for any amounts due and unpaid up to the liquidation commencement date.

Q31: How is a debt payable at a future date treated in voluntary liquidation, and how is its present value calculated for distribution purposes?

Answer: Debt payable at future time (Regulation 27)

A person may prove for a claim whose payment was not yet due on the liquidation commencement date and is entitled to distribution in the same manner as any other stakeholder. Subject to any contract to the contrary, where a stakeholder has proved for a

claim under sub-regulation (1), and the debt has not fallen due before distribution, he is entitled to distribution of the admitted claim reduced as follows:

$$\frac{x}{(1+r)^n}$$

where—

(a) “x” is the value of the admitted claim;

(b) “r” is the closing yield rate (%) of government securities of the maturity of “n” on the date of distribution

as published by the Reserve Bank of India; and

(c) “n” is the period beginning with the date of distribution and ending with the date on which the payment of the debt would otherwise be due, expressed in years and months in a decimalized form.

Q32: How are mutual credits and debts between the corporate person and another party treated during voluntary liquidation under Regulation 28?

Answer: Mutual credits and set-off (Regulation 28)

Where there are mutual dealings between the corporate person and another party, the sums due from one party shall be set off against the sums due from the other to arrive at the net amount payable to the corporate person or to the other party.

Illustration: X owes Rs.100 to the corporate person. The corporate person owes Rs.70 to X. After set off, Rs.30 is payable by X to the corporate person.

Q33: What is the process and timeline for verification of claims under Regulation 29 of the Voluntary Liquidation Regulations? Can a creditor appeal against the liquidator's decision?

Answer: Time for verification of claim: The liquidator shall verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be, as per section 40 of the Code. [Regulation 29(1)]

Appeal to the Adjudicating Authority: A creditor may appeal to the Adjudicating Authority against the decision of the liquidator as per section 42 of the Code. [Regulation 29(2)]

Q34: What are the requirements for preparation and publication of the list of stakeholders under Regulation 30 of the Voluntary Liquidation Regulations?

Answer: [Regulation 30 (1)] Contents of list of stakeholders:

The liquidator shall prepare a list of stakeholders on the basis of proofs of claims submitted and accepted under these Regulations, with-

- (a) the amounts of claim admitted, if applicable,
- (b) the extent to which the debts or dues are secured or unsecured, if applicable,
- (c) the details of the stakeholders, and
- (d) the proofs admitted or rejected in part, and the proofs wholly rejected.

Timeline for preparing list of stakeholders [Regulation 30 (2)]:

When claim is filed by stakeholder: The liquidator shall prepare the list of stakeholders within forty five days from the last date for receipt of claims.

When no claim is filed by stakeholder: It is provided that where no claim from creditors has been received till the last date for receipt of claims, the liquidator shall prepare the list of stakeholders within fifteen days from the last date for receipt of claims.

List of stakeholders available for inspection or display: The list of stakeholders, as modified from time to time, shall be-

- (a) available for inspection by the persons who submitted proofs of claim;
- (b) available for inspection by members, partners, directors and guarantors of the corporate person;
- (c) displayed on the website, if any, of the corporate person;
- (d) displayed on the website, if any, designated by the Board for this purpose. [Regulation 30 (3)]

Q35: What is the manner of sale of assets and recovery of dues by the liquidator during voluntary liquidation as per Regulations 31 and 32?

Answer: Manner of Sale (Regulation 31)

As approved by corporate person: The liquidator may value and sell the assets of the corporate person in the manner and mode approved by the corporate person in compliance with provisions, if any, in the applicable statute.

Recovery of monies due (Regulation 32)

Maximisation of value of assets and dues: The liquidator shall endeavor to recover and realize all assets of and dues to the corporate person in a time-bound manner for maximisation of value for the stakeholders.

Q36: Who is contributory? Critically examine IBC provisions regarding Liquidator's authority to realise amount due from contributory and Contributory's right to receive any surplus left after paying all dues by Liquidator. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The IBBI (Liquidation Process) Regulations, 2016 defines "contributory" means a member of the company, a partner of the limited liability partnership, and any other person liable to contribute towards the assets of the corporate debtor in the event of its liquidation. Regulation 40 of the Liquidation Process Regulations provides for Liquidator to realize uncalled capital or unpaid capital contribution as follows:

- The liquidator shall realize any amount due from any contributory to the corporate person.
- Realisation of uncalled capital and calls in arrear: The liquidator shall be entitled to call and realize the uncalled capital of the corporate person and to collect the arrears if any due on calls made prior to the liquidation commencement date.
- The liquidator shall exercise this power notwithstanding any charge or encumbrance on the uncalled capital of the corporate person.

- A 15 days demand notice shall be served to the contributory to make the payments within fifteen days from the receipt of the notice.

Along with right to serve demand notice to collect dues or calls-in-arrear, the liquidator is vested with the right to hold all moneys so realized subject to the rights, if any, of the holder of any such charge or encumbrance.

Subject to the directions of the Adjudicating Authority, Liquidator under Section 35(1) (h) of Insolvency & Bankruptcy Code shall have power to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor.

No distribution shall be made to a contributory, unless he makes his contribution to the uncalled or unpaid capital as required in the constitutional documents of the corporate person.

According to Section 295(3) of the Companies Act, 2013 in the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

Q37: What are the powers and obligations of a Liquidator regarding 'uncalled capital' or 'unpaid capital contribution'? (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: Regulation 40 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 lays down the provisions relating Liquidator to realize uncalled capital or unpaid capital contribution.

According to Regulation 40:

- (1) The liquidator shall realize any amount due from any contributory to the corporate debtor.
- (2) Notwithstanding any charge or encumbrance on the uncalled capital of the corporate debtor, the liquidator shall be entitled to call and realize the uncalled capital of the corporate debtor and to collect the arrears, if any, due on calls made prior to the liquidation, by providing a notice to the contributory to make the payments within fifteen days from the receipt of the notice, but shall hold all moneys so realized subject to the rights, if any, of the holder of any such charge or encumbrance.
- (3) No distribution shall be made to a contributory, unless he makes his contribution to the uncalled or unpaid capital as required in the constitutional documents of the corporate debtor.

Q38: What are the provisions regarding handling of money by the liquidator during voluntary liquidation under Regulation 34?

Answer: Opening Bank Account in a scheduled bank: The liquidator shall open a bank account in the name of the corporate person followed by the words 'in voluntary liquidation',

in a scheduled bank, for the receipt of all moneys due to the corporate person. **[Regulation 34 (1)]**

Deposit of the realized amount by next working day: The liquidator shall pay to the credit of the bank account opened under sub-regulation (1) all moneys, including cheques and demand drafts received by him as the liquidator of the corporate person, and the realizations of each day shall be deposited into the bank account without any deduction not later than the next working day. **[Regulation 34 (2)]**

Use of deposits in bank: The money in the credit of the bank account shall not be used except in accordance with section 53(1) i.e. waterfall mechanism for distribution of realized amount in accordance with the priority and manner laid down in Section 53(1). **[Regulation 34 (3)]**

Cheque or online payment above specified limit: All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account. **[Regulation 34 (4)].**

Q39: What are the provisions relating to the distribution of proceeds during voluntary liquidation under Regulation 35?

Answer: Timeline for distribution of proceeds:

The liquidator shall distribute the proceeds from realization within thirty days from the receipt of the amount to the stakeholders. **[Regulation 35 (1)]**

Deduction of liquidation costs before such distribution:

The liquidation costs shall be deducted before such distribution is made. **[Regulation 35 (2)]**

Distribution of asset to stakeholder: The liquidator may, with the approval of the corporate person, distribute amongst the stakeholders, an asset that cannot be readily or advantageously sold due to its peculiar nature or other special circumstances. **[Regulation 35 (3)]**

Q40: What is the obligation of a stakeholder regarding return of money under Regulation 36 of the Voluntary Liquidation Regulations?

Answer: Refund of money to which stakeholder is not entitled to:

A stakeholder shall forthwith return any monies received by him in distribution, which he was not entitled to at the time of distribution, or subsequently became not entitled to.

Q41: What are the timelines and requirements for completion of the liquidation process under Regulation 37?

Answer: Timeline for completion of liquidation process: The timeline for completion of liquidation process has been changed to 270 days/90 days in place of 12 months. Regulation 37(1) provides for that the liquidator shall endeavour to complete the liquidation process of the corporate person and submit the Final Report under regulation 38 within: -

(a) two hundred and seventy days from the liquidation commencement date where the creditors have approved the resolution under clause (c) of sub-section (3) of section 59 or clause (c) of sub-regulation

(1) of regulation 3, and

(b) ninety days from the liquidation commencement date in all other cases.

Contributories' meeting in case of liquidation continued for more than 12 months: In the event of the liquidation process continuing for more than twelve months, the liquidator shall-

(a) hold a meeting of the contributories of the corporate person within fifteen days from the end of the twelve months from the liquidation commencement date, and at the end of every succeeding twelve months till dissolution of the corporate person; and

(b) shall present an Annual Status Report(s) indicating progress in liquidation, including-

(i) settlement of list of stakeholders;

(ii) details of any assets that remains to be sold and realized;

(iii) distribution made to the stakeholders;

(iv) distribution of unsold assets made to the stakeholders;

(v) developments in any material litigation, by or against the corporate person; and

(vi) filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code. [Regulation 37 (2)]

Enclosures with the Annual Status Report: The Annual Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date. [Regulation 37 (3)]

Q42: Explain the provisions related to presentation of Annual Status Report by Liquidator during completion of liquidation. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: As per regulation 37 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017-the Liquidator shall present an Annual Status Report(s) indicating progress in liquidation, including

i. settlement of list of stakeholders;

ii. details of any assets that remains to be sold and realized;

iii. distribution made to the stakeholders; and

iv. distribution of unsold assets made to the stakeholders;

v. developments in any material litigation, by or against the corporate person; and

vi. filing of, and developments in applications for avoidance of transactions in accordance with Chapter III of Part II of the Code.

The Annual Status Report shall enclose the audited accounts of the liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

Q43: What is the Final Report under Regulation 38, and when is it prepared by the liquidator in a voluntary liquidation process?

Answer: Contents of Final Report: Regulation 38 (1) provides for that the liquidator shall prepare the Final Report on completion of the liquidation process.

Final Report shall consist of-[Regulation 38 (1)]

(a) audited accounts of the liquidator, showing receipts and payments pertaining to liquidator since the liquidator commencement date; and a statement demonstrating that

- (i) the assets of the corporate person has been disposed of;
- (ii) the debt of the corporate person has been discharged to the satisfaction of the creditors;
- (iii) no litigation is pending against the corporate person or sufficient provision has been made to meet the obligations arising from any pending litigation.

4. a sale statement in respect of all assets containing the realized value;

- (i) cost of realization, if any;
- (ii) the manner and mode of sale;
- (iii) an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets under section 59(3)(b)(ii) or Regulation 3(1)(b)(ii), as the case may be;
- (iv) the person to whom the sale is made; and
- (vi) any other relevant details of the sale

Final Report to be submitted to Regulatory Authorities: The liquidator shall send the Final Report forthwith, to the Registrar and the Board. [Regulation 38 (2)]

Submission of Final Report and Compliance Certificate to AA: The liquidator shall submit the Final Report and the compliance certificate in Form-H along with the application under sub-section (7) of section 59 to the Adjudicating Authority. [Regulation 38 (3)]

Q44: What is the Corporate Voluntary Liquidator Account and how is it regulated under Regulation 39?

Answer: Open Corporate Voluntary Liquidator Account: [Regulation 39(1)]

The Board shall operate and maintain an Account to be called the Corporate Voluntary Liquidator Account in the Public Accounts of India.

It is provided that until the Corporate Voluntary Liquidator Account is operated as part of the Public Accounts of India, the Board shall open a separate bank account with a Scheduled bank for the purposes of this regulation.

Unclaimed dividend and undistributed proceeds to be deposited in the account:

A liquidator shall deposit the amount of unclaimed dividends, if any, and undistributed proceeds, if any, in a liquidation process along with any income earned thereon till the date of deposit, into the Corporate Voluntary Liquidator Account before he submits an application under sub-section (7) of section 59 for dissolution of the corporate person. [Regulation 39(2)]

15 days' time for deposit of unclaimed dividends or undistributed proceeds in hand:

A liquidator, who holds any amount of unclaimed dividends or undistributed proceeds in a liquidation process on the date of commencement of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) (Amendment) Regulations, 2020, shall deposit the same within fifteen days of the date of such commencement, along with any income earned thereon till the date of deposit. [Regulation 39(3)]

Interest for delay in deposit in the Account: A liquidator, who fails to deposit any amount into the Corporate Voluntary Liquidator Account under this regulation, shall deposit the same

along with interest thereon at the rate of twelve percent per annum from the due date of deposit till the date of deposit. [Regulation 39(4)]

Submission of evidence of deposit of the amount in the Account to Regulatory Authorities:

A liquidator shall submit to the authority with which the corporate person is registered and the Board, the evidence of deposit of the amount into the Corporate Voluntary Liquidation Account under this regulation, and a statement in Form-G setting forth the nature of the amount deposited into the Corporate Voluntary Liquidation Account, and the names and last known addresses of the stakeholders entitled to receive the unclaimed dividends or undistributed proceeds. [Regulation 39(5)]

Receipt of Deposit: The liquidator shall be entitled to a receipt from the Board for any amount deposited into the Corporate Voluntary Liquidation Account under this regulation. [Regulation 39(6)]

Form for filing claim for amount deposited in the account: A stakeholder, who claims to be entitled to any amount deposited into the Corporate Voluntary Liquidation Account, may apply to the Board in Form-I for an order for withdrawal of the amount.

Provided that if any other person other than the stakeholder claims to be entitled to any amount deposited to the Corporate Voluntary Liquidation Account, he shall submit evidence to satisfy the Board that he is so entitled. [Regulation 39(7)]

Release of amount of claim by Board: The Board may, if satisfied that the stakeholder or any other person referred to under sub-regulation (7) is entitled to withdrawal of any amount from the Corporate Voluntary Liquidation Account, make an order for the same in favour of that stakeholder or that other person. [Regulation 39(8)]

Maintenance of corporate person wise ledger account of deposit into and withdrawal from the account:

The Board shall maintain a corporate person-wise ledger of the amount deposited into and the amount withdrawn from the Corporate Voluntary Liquidation Account under this regulation. [Regulation 39(9)]

Nomination of officer:

The Board shall nominate an officer of the level of Executive Director of the Board as the custodian of the Corporate Voluntary Liquidation Account and no proceeds shall be withdrawn without his approval. [Regulation 39(10)]

Annual audit of accounts:

The Board shall maintain proper accounts of the Corporate Voluntary Liquidation Account and get the same audited annually. [Regulation 39(11)]

Audit Report to be placed before Governing Board and forwarded to CG:

The audit report along with the statement of accounts of the Corporate Voluntary Liquidation Account referred to in sub-regulation (11) shall be placed before the Governing Board and shall be forwarded to the Central Government. [Regulation 39(12)]

Transfer of unclaimed or undistributed amount to the Corporate Voluntary Liquidation Account:

Any amount deposited into the Corporate Voluntary Liquidation Account in pursuance of this regulation, which remains unclaimed or undistributed for a period of fifteen years from the date of order of dissolution of the corporate person and any amount of income or interest received or earned in the Corporate Voluntary Liquidation Account shall be transferred to the Consolidated Fund of India. [Regulation 39(13)]

Q45: Under what circumstances is the liquidator required to apply to the Adjudicating Authority for suspension of the voluntary liquidation process under Regulation 40?

Answer: Application to AA to suspend the process of liquidation: Regulation 40 lays down following situations in which the liquidator shall make an application to the Adjudicating Authority to suspend the process of liquidation and pass any such orders as it deems fit:

- (i) Where the liquidator is of the opinion that the liquidation is being done to defraud a person [Regulation 40(1)]
- (ii) Where the liquidator is of the opinion that the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the liquidation [Regulation 40(2)]

Q46: What are the requirements for preservation of records by the liquidator under Regulation 41 of the IBBI (Voluntary Liquidation Process) Regulations, 2017?

Answer: Preservation of copies of records: The liquidator shall preserve copies of all such records which are required to give a complete account of the voluntary liquidation process. [Regulation 41(1)]

Records to be preserved: Without prejudice to the generality of the obligations under sub-regulation (1), the liquidator shall preserve copies of records relating to or forming the basis of:- [Regulation 41(2)]

- (a) his appointment as liquidator, including the terms of appointment;
- (b) handing over / taking over of the assignment;
- (c) initiation of voluntary liquidation process;
- (d) public announcement;
- (e) claims, verification of claims, and list of stakeholders;
- (f) engagement of professionals, registered valuers, etc. including work done, reports etc., submitted by them;
- (g) all dealings with the Adjudicating Authority, Appellate Authority, High Courts, Supreme Court, whichever applicable and their orders;
- (h) statutory dealings with Board and insolvency professional agencies;
- (i) correspondence during the voluntary liquidation process;
- (j) cost of voluntary liquidation process;
- (k) all reports, registers, documents such as preliminary report, annual status report, final report prior to dissolution, various registers and books, etc. mentioned in Regulation 8 and 10 of principal regulations; and
- (l) any other records, which is required to give a complete account of the process.

Q47: “Init at on of voluntary liquidat on at the instance of Members or Creditors of the Corporate person intended to be liquidated but dissolut on only subject to the orders of Adjudicat ng Authority Nat onal Company Law Tribunal”. Examine the truth in the statement. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Sect on 59 of the Insolvency and Bankruptcy Code, 2016 provides details process from init at on to closing of voluntary liquidat on of Corporate Person whether solvent or insolvent.

Solvent bodies need to f le declarat on of solvency test consent of creditors having two-third in value by a suitable resolut on needs to be f led with Registrar of Companies.

The liquidator, being a registered Insolvency Professional, is appointed who shall issue public announcement within 5 days of appointment for invit ng claims. Thus, voluntary liquidat on is init ated at the instance of members or creditors. The liquidator on complet on of liquidat on process shall make an applicat on to the Nat onal Company Law Tribunal for seeking orders for dissolut on of the corporate person in voluntary liquidat on in terms of Sect on 59(7). The Tribunal having been sat sf ed passes orders for dissolut on as per Sect on 59(8). A copy of such order is forwarded within 14 days to Registrar of Companies by the Tribunal.

Q48: What are the key provisions under Regulat on 41 regarding the preservat on of records by the liquidator in a voluntary liquidat on process?

Answer: Minimum period of preservat on of records

The liquidator shall preserve:

(a) electronic copy of all records (physical and electronic) for a minimum period of eight years; and

(b) a physical copy of records for a minimum period of three years; from the date of dissolut on of the corporate person, before the Board, the Adjudicat ng Authority, Appellate Authority or any Court, whichever is later. [Regulat on 41(3)]

Duty to handover records to new liquidator: In case of replacement of liquidator during the process, the outgoing liquidator shall handover the records under sub-regulat on (1) and (2) to the new liquidator. [Regulat on 41(4)]

Duty of liquidator to preserve record at safe place and produce them: The liquidator shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the principal regulat ons. [Regulat on 41(5)]

Details of preservat on of records to be f led with the applicat on for dissolut on of corporate person: The liquidator shall, along with the applicat on f led under sub-sect on (7) of sect on 59 to the Adjudicat ng Authority, provide the details and manner of preservat on of records under sub-regulat on (1) and (2).

Explanat on - The records referred to in this regulat on includes records pertaining to the period of a liquidat on process during which the liquidator acted as such, irrespect ve of the fact that he did not take up the assignment from its commencement or cont nue the assignment t ll its conclusion. [Regulat on 41(6)]

Q49: What is the timeline for key tasks in the Voluntary Liquidation Process under the IBBI Regulations, 2017?

Answer:

Time line for Voluntary Liquidation Process

T=Liquidation Commencement Date

Sl. No.	Section / Regulation	Description of Task	Timeline (Normal in Days)
1	Sec 59(3)(a), Reg. 3(1)(a)	Declaration from majority of directors / partners regarding solvency of corporate person and it not being liquidated to defraud any person	T – 28
2	Sec 59(3)(c), (5); Reg. 3(1)(c), 3(3)	Passing of resolution / special resolution by members/ partners about commencement of voluntary liquidation process and appointment of insolvency professional as liquidator	T = 0
3	Proviso to Sec 59(3)(c), Reg. 3(1)(c)	Approval of creditors representing two-third in value of debt, if the corporate person owes any debt, of the resolution passed under section 59(3)(c) or regulation 3(1)(c)	T + 7
4	Reg. 5(2)	Intimation by Insolvency Professional regarding his appointment as Liquidator, to the Board	T + 7
5	Reg. 14(1)	Public Announcement in Form A by the Liquidator	T + 5
6	Sec 59(4); Reg. 3(2)	Notification to Registrar of Companies and Board about the resolution passed under section 59(3)(c) and regulation 3(1)(c) or subsequent approval of creditors thereto, as the case may be, by corporate person	T + 7 or T + 14
7	Sec 38(1); Reg. 14(2)	Submission of claims by stakeholders	T + 30
8	Sec 38(5)	Withdrawal/ modification of claim by stakeholders	T + 44
9	Reg. 9(1)	Submission of preliminary report to the corporate person by the Liquidator	T + 45
10	Reg. 29(1)	Verification of claims by the Liquidator	T + 60
11	Sec 40(2)	Intimation about decision of acceptance/ rejection of claim to the stakeholders by the Liquidator	T + 67
12	Reg. 30(2)	Preparation of list of stakeholders by the Liquidator	T + 45* / T + 75

Sl. No.	Sect on / Regulat on	Descript on of Task	Timeline (Norm in Days)
13	Sec 42	Appeal by creditor against the decision of the Liquidator	T + 81
14	Reg. 35(1)	Distribut on of the proceeds to stakeholders by the Liquidator	Within 30 days of realizat on
15	Reg. 39(2)	Deposit of amount of unclaimed dividends and undistributed proceeds in Corporate Voluntary Liquidat on Account by the Liquidator	Before submission under Sec 59(7)
16	Reg. 38(2)	Submission of Final Report to the Board and Registrar of Companies by the Liquidator	T + 90* / T + 270
17	Sec 59(7); Reg. 38(3)	Submission of Final Report, along with the applicat on for dissolut on, to AA	T + 90* / T + 270
18	Reg. 37(1)	Compleat on of Voluntary Liquidat on Process	T + 90* / T + 270
19	Reg. 37(2)	Meet ng of Contributories and presentat on of Annual Status Report.	T + 365

Q50: What are the prescribed forms under the IBBI (Voluntary Liquidat on Process) Regulat ons, 2017 and their respect ve purposes?

Answer:

SCHEDULE I		
FORMS	Events	The Insolvency and Bankruptcy Board of India (Voluntary Liquidat on Process) Regulat ons, 2017
Form	Purpose / Event	Relevant Regulat on
Form A	Public Announcement by the Liquidator	Regulat on 14
Form B	Proof of Claim by Operat onal Creditors (except workmen & employees)	Regulat on 16
Form C	Proof of Claim by Financial Creditors	Regulat on 17
Form D	Proof of Claim by a Workman or Employee	Regulat on 18
Form E	Proof of Claim by Authorised Representat ve of Workmen or Employees	Regulat on 18(2)

SCHEDULE I		
FORMS	Events	The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017
Form	Purpose / Event	Relevant Regulation
Form F	Proof of Claim by Any Other Stakeholder	Regulation 19
Form G	Statement for Deposit of Unclaimed Dividends and/or Undistributed Proceeds	Regulation 39(5)
Form H	Compliance Certificate submitted with Final Report to Adjudicating Authority	Regulation 38(3)
Form I	Application for Withdrawal from Corporate Voluntary Liquidation Account	Regulation 39(7)

CASE LAWS

Nippel Toyoma India Private Limited

The petition was filed by Nippel Toyoma India Private limited to initiate voluntary liquidation proceedings under section 59 of Insolvency and Bankruptcy Code, 2016 (IBC) before NCLT, Mumbai Bench.

Facts of the case

The Company was incorporated under the provisions of Companies Act, 1956 on 27.04.2007. It was engaged in the business of providing engineering services and trading of automotive components for automotive industries.

The Company does not have any operations as not carrying on any business activities. Considering the cost and time involved in ensuring compliances regarding the Company, the members of the Company in their Extra Ordinary General Meeting held on 28.09.2017 resolved to voluntarily liquidate the Company.

Judgement

The directors of the Company declared on affidavit dated 27.09.2017 that they have made full inquiry into the affairs of the Company, and are of the opinion that the Company has no debts/will be able to pay its debt in full from the proceeds of assets to be sold in the voluntary liquidation and that it is not being wound-up to defraud any person. The directors have appended to the aforesaid affidavit, audited financial statements and record of business operations of the company of previous two financial years viz. year ending on 31.03.2016 and 31.03.2017.

The statement of payment to stakeholders, annexed to the petition, detailed the payment made to various stakeholders and Dividend Distribution Tax. Post the aforementioned payment, the accumulated profit of Rs. 53,06,973/- as dividend and investment in share capital of Rs. 1,00,00,000/- were paid to the members of the Company, thereby, the assets of the company were fully liquidated.

The Independent Auditor certified that during the liquidation period 28.09.2017 to 23.07.2018, the proper books of accounts were kept and the said financial statements comply with the accounting standards under section 133 of Companies Act 2013. Further, it certified that there is no pending litigation involving the Company, there are no long term contracts with the Company for which there may be any foreseeable losses and there is no amount which is to be transferred to the Investor Education and Protection Fund by the Company.

The copy of the final report of the Liquidator dated 12.09.2018 was annexed to the petition, stating how the liquidation process has been conducted from 28.09.2017 to 12.09.2018, that all the assets of the Company have been discharged to the satisfaction of the creditors and that no litigation is pending against the company.

The said Final Report of the Liquidator was submitted with the Registrar of Companies vide Form GNL-2 dated 13.09.2018. The Liquidator had filed this petition before the Tribunal under section 59(7) of The Code seeking order of dissolution of the Company.

NCLT noted that on examining the submission made by the counsel appearing for the petitioner and the documents annexed to the petition, it appears that the affairs of the company have been completely wound-up, and its assets completely liquidated.

NCLT in view of the above facts and circumstances and Final Report of the Liquidator directed that the Company shall be dissolved from the date of its order. The Petitioner was further directed to serve a copy of the order upon the Registrar of Companies, with which the Company is registered, within fourteen days of receipt of the order.

Yogeshwar Enterprise Pvt Ltd, Order delivered on: 23/01/2023, National Company Law Tribunal Ahmedabad

Application under Section 59 of the Insolvency and Bankruptcy Code, 2016 read with the Regulation 38 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 was filed for voluntary liquidation of Yogeshwar Enterprise Private Limited ("Company")

Facts of the case:

The Company was incorporated as a Private Limited Company under the provisions of the Companies Act, 1956, on 18.10.2010.

The main objects of the Company were doing business and real estate activities and construction.

It is submitted that the Board of Directors of the Company were of the opinion to close down the business of the company by way of voluntarily liquidation, because of non-availability of business prospects and lack of long-term financial resources for the company. It was not financially viable to carry on the business activity of the company. Thus, the Directors (BOD) in their board meeting held on 28.10.2021 resolved to voluntarily liquidate the Company.

All the directors have declared on Affidavit dated 27.10.2021 that they have made full enquiry into the affairs of the Company and formed an opinion that the Company will be able to pay its debt in full within 12 months from the commencement of winding up, and further affirmed that by way of voluntary liquidation, the company is not being liquidated to defraud any person.

Audited financial statements and records of business operations of the Company of previous two financial years, viz. year ending 31.03.2020 and 31.03.2021 are also annexed.

The members of the Company in Extra-Ordinary General meeting held on 10.11.2021, as per provision of the Companies Act, 2013, had passed a Special Resolution to liquidate the Company voluntarily and appointed Insolvency Professional, to act as Liquidator.

The Liquidator had not filed the Registrar of Companies, Ahmedabad (ROC) about the passing of a Special Resolution under sub-section (4) of Section 59 of the IBC to liquidate the Corporate Person and appointment of Liquidator in Form MGT and Form GNL 2.

The liquidator submitted that they have received no claims as there are no other stakeholders than equity shareholders.

The Liquidator has also submitted the IBBI Circular No. IBBI/LIQ/45/2021 dated 15.11.2021 stating that the point 5 of that circular hereby clarified that "as per the provisions of the Code and the Regulations read with Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income-Tax Department as part of compliance in the said process."

However, the liquidator had served notice of appointment by email and speed post to the Income Tax Department informing them about the voluntary liquidation of the Company and that he has made compliance with the Regulation 14 of the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. However, no response was received nor any request for extension was made by the Income Tax Department.

Judgement:

Necessary compliances as per provisions of the Code have been made by the Corporate Person and the Liquidator. In exercise of the powers conferred under sub-section (8) of Section 59 of the Insolvency and Bankruptcy Code, 2016 Application is allowed with the following directions:

- i. Yogeshwar Enterprise Private Limited having CIN U45200GJ2010PTC062656, stands dissolved from the date of this Order.
- ii. The Liquidator is directed to file this order with the concerned Registrar of Companies, Income Tax Department and IBBI within 14 days from the date of receipt of an authentic copy of this order, for information and necessary action.
- iii. The Liquidator is also directed to file this order with all other Statutory Authorities connected with the affairs of the Company.
- iv. The Liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account referred to in Regulations 8 and 10 of IBBI Regulations for at least eight years after the dissolution of the Corporate Person, either with himself or with an information utility.
- v. Copy of the order be served to the respective parties.

CHAPTER 24 AS PER ICSI MODULE

DEBT RECOVERY & SARFAESI

Q1: Discuss the evolution of regulatory and legal frameworks in India for handling stressed assets. Highlight the key legislations introduced over the years, their objectives, limitations, and the role of the Insolvency and Bankruptcy Code, 2016 in transforming the resolution landscape.

Answer: The problem of stressed assets—especially Non-Performing Assets (NPAs)—has long posed a challenge to the soundness of India's banking system. High levels of NPAs erode the profitability and capital base of banks, particularly Public Sector Banks (PSBs), resulting in reduced credit flow and financial instability. Recognizing the critical need for effective management of NPAs, successive legal and institutional frameworks have been introduced over time.

1. Sick Industrial Companies (Special Provisions) Act, 1985 – SICA

Objective: Early detection of industrial sickness and timely resolution through an expert body, the Board for Industrial and Financial Reconstruction (BIFR).

Shortcomings:

- Plagued by procedural delays and legal bottlenecks.
- Stakeholder inaction and misuse of the process.

• **Outcome:** Failed to achieve its purpose; repealed in 2003. Functions were transferred to the National Company Law Tribunal (NCLT) under the Companies Act, 2013.

2. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – RDDBFI Act

Objective: Enable faster recovery of debts through specialized tribunals—Debt Recovery Tribunals (DRTs).

Key Features:

- Reduced dependence on overburdened civil courts.
- Provided a quasi-judicial mechanism for debt enforcement.

Limitations:

- Increasing case backlog.
- Procedural inefficiencies reduced its effectiveness.

3. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – SARFAESI Act

Objective: Allow secured creditors, mainly banks, to enforce security interests without court intervention.

Significance:

- Enabled direct action such as asset seizure and sale.
- Facilitated creation of Asset Reconstruction Companies (ARCs) to manage bad loans.

Limitations:

- Applicable only to secured loans.
- Ineffectiveness in large corporate defaults and unsecured exposures.

4. Insolvency and Bankruptcy Code, 2016 – IBC

Landmark Reform: Consolidated and replaced earlier fragmented laws into a unified framework.

• **Key Features:**

- Time-bound insolvency resolution (180–270 days).
- Covers companies, partnerships, and individuals.
- Establishment of:
 - **NCLT/NCLAT** as adjudicating authorities.
 - **Insolvency Professionals (IPs)** for process management.
 - **Information Utilities (IUs)** for record-keeping.
 - **Committee of Creditors (CoC)** to approve resolution plans.

• **Impact:**

- Shifted the control from debtor to creditors.
- Increased recoveries for financial creditors.
- Acted as a deterrent to willful defaulters.
- Improved India's rank in Ease of Doing Business (World Bank Index).

Conclusion

The evolution of India's stressed asset resolution mechanisms reflects a progressive shift from reactive and fragmented approaches (SICA, RDDBFI, SARFAESI) to a consolidated, proactive, and creditor-friendly regime under the IBC. While earlier frameworks laid the foundation, the IBC represents a structural reform, bringing accountability, predictability, and efficiency in the resolution of distressed assets, thereby strengthening the overall financial ecosystem.

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

PAST YEAR QUESTION DECEMBER 2017

Answer: Securitization is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. Basically securitization is a method of raising funds by way of selling receivables for money. In recent decades, securitization gained prominence in developments in international finance.

Primary parties in securitization are Banks or Financial Institutions that have lent loan against property, SPVs registered as Asset Reconstruction Company and investors who have acquired security from SPV. Besides above, the obligator being original borrower, a rating agency and appointed administrator are involved in securitization.

Steps involved in securitization are

- (a) Asset Reconstruction Company formed as SPV generally by banks or financial institutions acquires assets from the originator i.e. defaulting borrower;
- (b) the SPV, with the help of an investment banker, issues security receipts which are distributed to investors; and
- (c) the SPV pays the originator (original borrower of the loan) for the financial assets purchased with the proceeds from sale of securities.

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

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

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Answer: There was multiplicity of laws and enactments like Sick Industrial Companies (Special Provisions) Act, 1986, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (since renamed as 'Recovery of Debt and Bankruptcy Act as per section 249 of Insolvency and Bankruptcy Code, 2016), Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 and Companies Act, 2013 in cases of companies or corporate persons and for individuals and partnership firms there were Presidency Towns Insolvency Act, 1909 (applicable to presidency towns – Bombay, Calcutta and Madras) and Provincial Insolvency Act, 1920 (rest of India). Plethora of legislations and enactments imposed pressure on Courts, Tribunals and other adjudicating authorities such as BFIR, AAIFIR. There were no timelines to dispose of litigations resulting in mountainous pendency, if even time limit was fixed, they were twisted to further complicate legislations.

Moreover, there is a conspicuous departure from the earlier SICA, State Relief Undertaking enactments, liquidations under Company Law that were Debtor oriented whereas IBC Code provides Creditor oriented management during insolvency process.

Under the Code, Board of Directors is suspended from the date of admission of petition till Liquidation and Resolution Professional does day-to-day management subjected to Committee of Creditors.

Q2: "The Object ve of SARFAESI Act and the Insolvency and Bankruptcy Code, 2016 are altogether different and cannot be interchangeable." Examine the statement highlighting the prime objects of both Acts. (5 marks)

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Answer: The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them and the purpose of this Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court. One of the objects of SARFAESI Act is to provide a mechanism for banks and other financial institutions to recover secured assets.

On the other hand, the purpose of Insolvency & Bankruptcy Code, 2016 is to offer a market-directed, time-bound mechanism to resolve insolvency and run the corporate debtor as a going concern, wherever possible, or exit, where required. The IBC deals with the reorganization and insolvency resolution of corporate debtors (CDs), partnership firms, and even individuals. The IBC also provides an exit mechanism for a corporate person that has not defaulted, through a voluntary liquidation process.

The Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism.
2. To ensure maximisation of value of assets.
3. To promote entrepreneurship,
4. To increase availability of credit.
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues, and
6. To establish an Insolvency and Bankruptcy Board of India as a regulator's body,
7. To provide procedure for connected and incidental matters.

Therefore, the statement given in the question is correct in the light of the objectives of both the SARFAESI Act, 2002 and the IBC, 2016 which are altogether different and cannot be interchangeable.

Q3: Extreme Finance Limited wants to take possession of immovable property belonging to Amar pursuant to an order of Debt Recovery Tribunal (DRT). Discuss whether it can take assistance from the Chief Metropolitan Magistrate or the District Magistrate under SARFAESI Act, 2002 to take possession of secured assets and procedure therefor. (3 marks)
PAST YEAR QUESTION JUNE 2024

Answer: The main purpose of SARFAESI Act, 2002 is to enable and empower the secured creditors to take possession of their securities and to deal with them, without the intervention of Court.

- The secured creditors may also authorize any securitization or reconstruction company to acquire financial assets of any bank or financial institution.
- Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provides for assistance for taking possession of secured asset from the Chief Metropolitan Magistrate or the District Magistrate.
- The Chief Metropolitan Magistrate or the District Magistrate is empowered to facilitate taking possession of secured asset. The possession of secured asset may be for sale or transferring the asset for recovery of funds.
- For the purpose of taking possession or control of secured assets, the secured creditor may make a written application to the Magistrate (within jurisdiction).
- Such application shall be supported by an affidavit with details such as total financial assistance provided, amount due, nature of security interest existing, proof of default, status of NPA, copy of notice sent to the defaulting party etc.
- On receiving such application & affidavit, the Magistrate shall pass necessary orders (in 30 days) for taking possession of such asset and related documents. Due to any reasons duly written, such order cannot be passed within 30 days, the same may be sent within 60 days.
- The Magistrate may authorize any subordinate officer to take possession of the secured assets and forward the same to the secured creditor.

- The Magistrate is empowered to use force, in case of any wrongful resistance. Any act on or order of the Magistrate is not quashable in any court or before any authority.

Q4: A Scheduled Indian Bank advanced money to XYZ limited and the debt due to non-payment has been classified as 'Doubtful' by the Bank. The lender Bank intends to proceed against the debtor under SARFAESI Act, 2002. What are the majors available to the Bank for recovering its secured debt? (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the ordinance enabled banks and financial institutions to manage problems of liquidity, asset liability mismatches and improvement in recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them. The Banks can now issue notices to the defaulters to pay up the dues if they fail to do so within 60 days of the date of the notice, the banks can take over the possession of assets like factory, land and building, plant and machinery etc. charged to them including the right to transfer by way of lease, assignment or sale and realize the secured assets. In case the borrower refuses peaceful handing over of the secured assets, the bank can also file an application before the District Magistrate or Chief Metropolitan Magistrate for taking possession of assets. The Banks can also take over management of business of the borrower. The bank in addition can appoint any person to manage the secured assets the possession of which has been taken over by the bank. Banks can package and sell loans via "Securitisation" and the same can be traded in the market like bonds and shares.

The other majors are:

- **Securitisation of financial assets and issue of security receipt**

Acquire financial assets by agreements, issuance of debentures or bonds. Redeem the security receipts given to the QIBs after their realisation.

- **Reconstruction of financial assets**

Subject to Varying RBI standards, take actions for proper management, a sale, a debt restructures, a settlement, or to take control.

- **Enforcement of security interest**

Enforce the secured creditor's security interest without the need of court action.

- **Other Functions**

Act as a recovery agent for financial Institutions (FIs) or bank, as the manager of the secured assets appointed by the lender, or as the receiver assigned by the court.

Q5: Discuss the constitutional validity of the SARFAESI Act, 2002, with reference to the Supreme Court judgment in *Mardia Chemicals Ltd. v. Union of India*. What were the main challenges to the Act and how did the Court address the concerns regarding fairness and remedies available to borrowers?

Answer: The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was enacted to empower banks and financial institutions to recover non-performing assets (NPAs) efficiently, without the need for court intervention. However, the Act was challenged on constitutional grounds by borrowers, claiming that it was overly biased in favour of lenders and violated the principles of natural justice.

Case: *Mardia Chemicals Ltd. v. Union of India* [2004] 59 CLA 380 (SC)

In this landmark case, **Mardia Chemicals Ltd.** challenged the validity of certain provisions of the SARFAESI Act after being served a recovery notice by ICICI Bank. The petitioner argued that the Act violated the constitutional rights of borrowers and lacked necessary safeguards. The key objections raised were:

1. Existence of other recovery mechanisms

The petitioner claimed that a separate, harsh law like SARFAESI was unnecessary because the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) already provided a framework for debt recovery.

2. Lender's liability not considered

○ There was no provision in the Act to examine the conduct or accountability of lenders, which created an imbalance.

3. Lack of adjudicatory mechanism under Section 13

○ The Act allowed banks to seize property without prior judicial adjudication of disputes, which was viewed as a denial of fair hearing.

4. Oppressive appeal mechanism under Section 17

○ The requirement to deposit 75% of the claimed amount before approaching the Debt Recovery Tribunal (DRT) was termed arbitrary, harsh, and illusory, making it nearly impossible for borrowers to appeal.

Supreme Court's Judgment

The Hon'ble Supreme Court upheld the constitutional validity of the SARFAESI Act with some exceptions, making the following key observations:

Legislative Intent Justified: The Court acknowledged the objective of the Act—to ensure speedier recovery of dues, improve capital liquidity, and promote economic growth—was in public interest and did not render the Act unconstitutional merely because it appeared harsh.

Borrower's Right to Be Heard: The Court clarified that borrowers have the right to respond to the notice issued under Section 13(2), and that secured creditors must consider such

objectors before proceeding to take action under Section 13(4). This satisfies the doctrine of fairness and provides a minimal opportunity for the borrower to be heard.

Availability of Remedy under Section 17: Borrowers can approach the Debt Recovery Tribunal (DRT) under Section 17, once the secured creditor takes a measure under Section 13(4), such as taking possession or management of secured assets. This was considered an adequate post-deprivation remedy.

Striking Down the 75% Pre-deposit Requirement: The Supreme Court struck down the 75% deposit requirement under the proviso to Section 17(2), holding it to be oppressive, arbitrary, and violative of Article 14 of the Constitution. The Court observed that such a condition prevents fair access to justice. This provision has since been amended to require only a 5% deposit, which is more reasonable and serves the dual purpose of discouraging frivolous appeals while ensuring access to justice.

Conclusion:

The SARFAESI Act, 2002, though stringent in its approach, was held to be constitutionally valid by the Supreme Court in *Mardia Chemicals* case. The Court emphasized the importance of economic legislation in public interest, but ensured judicial checks by:

- Requiring consideration of borrower objections,
- Providing post-action remedy through DRT, and
- Removing arbitrary pre-conditions for filing appeals.

This judgment balanced the rights of borrowers with the need for efficient recovery mechanisms, setting an important precedent in financial and constitutional law.

Q6: Explain the meaning of non-performing assets and their classification. What is the role of Reserve Bank of India in connection with non-performing assets ? (5 marks)

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Answer: As per **Section 2(1)(o)**, **Non-performing asset** means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,

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

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

Non-performing assets can be further classified into :

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

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

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

Q7: What is an Asset Reconstruction Company (ARC) under the SARFAESI Act, 2002? Discuss its objectives of Non-Performing Assets (NPAs) in India.

Answer: Asset reconstruction company means a company registered with Reserve Bank under section 3 of SARFAESI Act for the purposes of carrying on the business of asset reconstruction or securitisation, or both.

Objectives of Asset Reconstruction Company ('ARC):

1. to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges,
2. to act as manager of the borrowers' asset taken over by banks, or financial institution,
3. to act as the receiver of properties of any bank or financial institution and
4. to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary.

If an ARC carries on any business other than the business of asset reconstruction or securitisation or the business mentioned above, it shall cease to carry on any such business within one year of doing such other business.

Q8: Discuss the legal framework under Section 3 of the SARFAESI Act, 2002, regarding the registration and regulatory requirements of Asset Reconstruction Companies (ARCs). What are the conditions to be fulfilled for registration and the role of the Reserve Bank of India (RBI) in this process?

Answer: The SARFAESI Act, 2002 (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act) provides a structured legal framework for the registration and regulation of Asset Reconstruction Companies (ARCs) in India under Section 3 of the Act.

Preconditions for Commencing Business

As per Section 3(1) of the Act, no ARC can commence or carry on the business of Securitisation, or Asset reconstruction unless it:

1. Obtains a Certificate of Registration (CoR) from the Reserve Bank of India (RBI); and
2. Has a minimum Net Owned Fund (NOF) of ₹2 crore, or such higher amount as may be specified by RBI through a notification.

RBI is also empowered to specify different NOF thresholds for different classes of ARCs.

Transitional Provision for Existing ARCs

ARCs existing at the commencement of the Act must:

- Apply for registration within six months of the Act's commencement.
- Continue operations until:
 - Certificate of Registration is granted, or

- The application is rejected (in which case the company must cease operations).

Application for Registration

ARCs must apply in the form and manner prescribed by the RBI.

The RBI may inspect books and records, or use other methods to verify the applicant's compliance.

Conditions to be Fulfilled for Registration (Section 3(3))

Before granting registration, RBI must be satisfied that:

- i. that the asset reconstruction company has not incurred losses in any of the three preceding financial years;
- ii. that such asset reconstruction company has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redemption respect due dates on the investments made in the company by the qualified buyers or other persons;
- iii. that the directors of asset reconstruction company have adequate professional experience in matters related to finance, securitisation and reconstruction;
- iv. that any of its directors has not been convicted of any offence involving moral turpitude;
- v. that a sponsor of an asset reconstruction company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;
- vi. that asset reconstruction company has complied with or is in a position to comply with prudential norms specified by the Reserve Bank;
- vii. that asset reconstruction company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.

Grant or Rejection of Registration

- If RBI is satisfied that the conditions specified in sub-section (3) are fulfilled, it may grant certificate of registration with appropriate conditions.
- If the ARC fails to meet the conditions, the RBI may reject the application after giving the applicant a reasonable opportunity to be heard.

Post-Registration Requirements

ARCs must seek RBI's prior approval for:

- Substantial changes in management, including: Appointment of any director, Managing Director (MD) or CEO, or Change in registered office, or Change in name of the company.
- The RBI's decision regarding what constitutes a substantial change in management is final.

Q9: Define the following terms:

- a) substantial change in management
- b) Asset reconstruction
- c) Asset reconstruction company
- d) Bank
- e) Securitisation

Answer:

- a) **“substantial change in management”** means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.
- b) **“Asset reconstruction”** means acquisition by any asset reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance; [Section 2(1)(b)]
- c) **“Asset reconstruction company”** means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both; [Section 2(1)(ba)]
- d) **“Bank”** means –
- i) a banking company; or
 - ii) a corresponding new bank; or
 - iii) the State Bank of India; or
 - iv) a subsidiary bank; or
 - iv a) a multi-State co-operative bank; or
 - v) such other bank which the Central Government may, by notification, specify for the purposes of this Act. [Section 2(1)(c)]
- e) **Securitisation** means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise; [Section 2(1)(z)]

Q10: Explain “Property” under Recovery of Debts (and Bankruptcy) Act 1993. (4 marks)
PAST YEAR QUESTION JUNE 2017

Answer: Section 2(jb) of the Recovery of Debts (and Bankruptcy) Act, 1993 defines ‘Property’ as :

- (a) Immovable property;
- (b) Movable property;
- (c) Any debt or any right to receive payment of money whether secured or unsecured;
- (d) Receivables, whether existing or future; and
- (e) Intangible assets, being know how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature, as may be prescribed by the central government in consultation with RBI.

CASE STUDY:

In 2013, the government amended the Act to include co-operative banks formally under the definition of banks eligible to use it. However, petitions were filed questioning the authority of the notification and the power of Parliament to amend the SARFAESI Act.

The Supreme Court vide order dated 05th May, 2020 in the matter of '**Pandurang Ganpat Chaugule vs. Vishwasrao Patil Murgud Sahakari Bank Limited**' held that co-operative are banks under the State legislation

and multi-State co-operative banks are 'banks' under section 2(1)(c) of SARFAESI Act, 2002. The order also stated that it is permissible for the Parliament to enact the law to provide recovery procedures for bank dues that have been done by providing speedy recovery of secured interest without intervention of the court/tribunal.

This move helps the co-operative banks to avoid inordinate delays in the recovery of their bad loans due to the involvement of civil courts and co-operative tribunals. The Indian banking system has 1,544 urban cooperative banks (UCBs) and 96,248 rural co-operative banks, with substantial deposits from retail investors.

Considering their size, for the smooth functioning of these co-operative banks, speedy recovery of defaulting loans is critical.

Q11: Under what circumstances the Certificate of Registration of an Asset Reconstruction Company issued under SARFAESI Act, 2002 can be cancelled? (3 marks)

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Answer: 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 subsection (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.

Q12: Discuss the provisions under the SARFAESI Act, 2002 regarding cancellation of registration of Asset Reconstruction Companies (ARCs). What are the safeguards provided

to ARCs against arbitrary cancellation, and what happens to the ARC's status post-cancellation?

Answer: Under the SARFAESI Act, 2002, the Reserve Bank of India (RBI) is the authority responsible for registering and regulating Asset Reconstruction Companies (ARCs). Sections 3 and 4 of the Act deal with the registration, regulation, and cancellation of ARCs.

Grounds for Cancellation of Registration

As per Section 4(1) of the Act, the RBI may **cancel the certificate of registration** granted to an ARC if it:

1. Fails to comply with the provisions of **clause (c)** – i.e., has failed to comply with any conditions subject to which the certificate of registration has been granted to it;
- clause (d)**- i.e., 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
- clause (e)(iv)** i.e.– obtain prior approval of the Reserve Bank required under section 3(6).

Safeguards Before Cancellation

To prevent arbitrary action, the Act provides due process safeguards:

- Before cancelling the registration on the above grounds, the RBI must give the ARC a reasonable opportunity to take corrective action — unless the RBI believes that such delay would be prejudicial to: Public interest, Interest of investors, or the ARC itself.
- The RBI may specify the terms for compliance or fulfilment of conditions before taking a final decision.

Right to Appeal

Under Section 4(2):

- If an ARC is aggrieved by the order of cancellation, it may file an appeal to the Central Government.
- The appeal must be filed within 30 days from the date the cancellation order is communicated.
- Before rejecting the appeal, the ARC must be given a reasonable opportunity of being heard.

Status of ARC Post-Cancellation or Rejection of Registration

According to Section 4(3):

- If an ARC's application is rejected or its registration is cancelled, but it holds investments of Qualified Buyers (QBs):
 - It will continue to be deemed an ARC only for the purpose of repaying such investments (including interest, if any).
 - This deemed status shall continue until full repayment, within the period specified by the RBI.

This provision is crucial for Investor protection, Orderly winding down, and Preventing disruption in securitisation markets.

Q13: Discuss the process and legal implications of the acquisition of financial assets by Asset Reconstruction Companies (ARCs) under Section 5 of the SARFAESI Act, 2002. What rights are transferred, and what are the effects on pending legal proceedings and related documentation?

Answer: Section 5 of the SARFAESI Act, 2002, deals with the acquisition of financial assets by Asset Reconstruction Companies (ARCs) and provides a legal framework for such transactions, ensuring a smooth and effective transfer of rights and obligations from the original lender to the ARC.

Modes of Acquisition of Financial Assets

Under Section 5(1), ARCs may acquire financial assets from banks or financial institutions in either of the following ways:

- (a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or
- (b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

Stamp Duty Exemption

As per Section 5(2):

- Documents executed for the purpose of asset reconstruction or securitisation under this section are exempt from stamp duty, under Section 8F of the Indian Stamp Act, 1899.
- However, this exemption does not apply if the assets are acquired for any purpose other than asset reconstruction or securitisation.

Legal Effects of Acquisition

Once the financial asset is acquired by an ARC:

1. Deemed Lender Status

- The ARC is deemed to be the lender in place of the bank or financial institution.
- All rights, titles, and interests related to the financial asset vest in the ARC.

2. Security Interests Also Transfer

- If the bank/financial institution held any security interest (tangible or intangible) to secure unpaid dues, that interest automatically transfers to the ARC.

3. Continuity of Legal Instruments

○ All agreements, deeds, PoAs, approvals, and contracts related to the financial asset that existed before the acquisition:

- Continue to be **valid and enforceable**,
- Shall be interpreted as if made in favour of or by the ARC.

Pending Legal Proceedings

Section 5(5) and 5(6) address litigation on continuity:

• No Abatement or Prejudice

- Any pending suit, appeal, or legal proceeding involving the financial asset (by or against the bank/FI) shall continue after acquisition.
- The ARC steps into the shoes of the original lender.

• Substitution of Name

- The ARC can apply to the DRT, Appellate Tribunal, Court, or other authority for substitution of its name in pending matters.
- Upon application, the tribunal/court must allow the substitution.

Q14: Explain "Financial Asset" under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. (2 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Financial asset [Section 2(1)(l)] means debt or receivables and includes—

- i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- iii) a mortgage, charge, hypothecation or pledge of movable property; or
- iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
- (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or
- vi) any financial assistance.

Q: Define Financial institution

Answer: Financial institution [Section 2(1)(n)] means—

- i) a public financial institution within the meaning of section 4A of the Companies Act, 1956;

- ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;
- iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958;
- iiia) a debenture trustee registered with the Board and appointed for secured debt securities;
- iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be;
- iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act.

Q15: Explain the provisions of Section 5A of the SARFAESI Act, 2002 regarding the transfer of pending applications to one Debts Recovery Tribunal (DRT). What is the process, and what are the legal implications of such a transfer?

Answer: Section 5A stipulates that if any financial asset, of a borrower acquired by an asset reconstruction company, comprise of secured debts of more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals the asset reconstruction company may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.

Any order passed by the Appellate Tribunal under sub-section (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall, accordingly, apply to such execution.

Explanation-

“Debt” shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and includes –

(a) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;

(b) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset; [Section 2(1)(ha)]

“Debts Recovery Tribunal” means the Tribunal established under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993; name changed Recovery of Debts and Bankruptcy Act, 1993 [Section 2(1)(i)]

Q16: Explain the provisions of Section 6 of the SARFAESI Act, 2002 relating to notice of obligors and discharge of their obligations after acquisition of financial assets by an Asset Reconstruction Company (ARC). What is the legal effect of such notice?

Answer: Section 6 of this Act states that the bank or financial institution may give a notice of acquisition of financial assets by any asset reconstruction company, to the concerned obligor and any other concerned person and to the concerned registering authority including Registrar of Companies in whose jurisdiction the mortgage, charge, hypothecation, assignment or other interest created on the financial assets had been registered.

Where a notice of acquisition of financial asset under sub-section (1) is given by a bank or financial institution, the obligor, on receipt of such notice, shall make payment to the concerned asset reconstruction company, as the case may be, and payment made to such company in discharge of any of the obligations in relation to the financial asset specified in the notice shall be a full discharge to the obligor making the payment from all liability in respect of such payment.

Where no notice of acquisition of financial asset under sub-section (1) is given by any bank or financial institution, any money or other properties subsequently received by the bank or financial institution, shall constitute monies or properties held in trust for the benefit of and on behalf of the asset reconstruction company, as the case may be, and such bank or financial institution shall hold such payment or property which shall forthwith be made over or delivered to asset reconstruction company, as the case may be, or its agent duly authorised in this behalf.

Q17: Explain how an Asset Reconstruction Company (ARC) can issue security receipts or raise funds after acquiring financial assets. How are such schemes managed, and what rights do investors have in case of non-recovery?

Answer: After an Asset Reconstruction Company (ARC) acquires financial assets (such as bad loans from banks), it is allowed to raise funds by issuing security receipts. These security receipts can be offered to Qualified Institutional Buyers (QIBs) or other investors, as allowed

by the Reserve Bank of India (RBI) in consultation with the Securities and Exchange Board of India (SEBI).

The ARC can launch separate schemes to raise money for acquiring these assets. Each scheme must have its own separate account, and the money recovered from the financial assets must be used to:

- Repay the investors who subscribed to the scheme,
- And pay the returns promised under the scheme.

These schemes are usually formed as trusts, managed by the ARC. The ARC holds the financial assets or the funds raised in trust for the benefit of the investors (those holding the security receipts). This trust is governed by the Indian Trusts Act, 1882, as long as it doesn't conflict with the SARFAESI Act.

In case the ARC is unable to recover money from the assets:

- The investors holding at least 75% of the total value of the security receipts can call a meeting of all investors.
- Any decision (resolution) passed in this meeting is binding on the ARC.
- The meeting should follow procedures similar to those followed in a Board of Directors meeting.

This system ensures that investors have rights and control if recoveries do not happen as planned.

Explanation-

Qualified buyer means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or asset reconstruction company which has been granted a certificate of registration under section 3(4) or any asset management company making investment on behalf of mutual fund or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992 or regulations made thereunder, any category of non-institutional investors as may be specified by the Reserve Bank under section 7(1) or any other body corporate as may be specified by the Board. [Section 2(1)(u)]

Q18: How will an asset reconstruction company raise fund from qualified buyers?

Answer: As per Section 7(2) of SARFAESI Act, an asset reconstruction company may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

Q19: What does Section 8 of the SARFAESI Act provide regarding exemption from registration of security receipts? Explain with reference to the nature of security receipts and the Registration Act, 1908.

Answer: Sect on 8 of the SARFAESI Act provides an exempt on from compulsory registrat on for security receipts under the Registrat on Act, 1908.

Under normal rules, certain documents involving rights in immovable property must be registered under Sect on 17(1) of the Registrat on Act, 1908. However, Sect on 8 of the SARFAESI Act overrides this requirement in two specif c cases:

Exempt ons Provided:

(a) If a security receipt is issued by an Asset Reconstruct on Company (ARC) under Sect on 7(1) of the SARFAESI Act, and does not create or af ect any specif c right or t tle in immovable property (other than giving the holder an undivided interest through a registered instrument), then it does not need registrat on.

(b) Any transfer of such security receipts also does not require compulsory registrat on.

Explanat on-

Security receipt means a receipt or other security, issued by a asset reconstruct on company to any qualif ed buyer pursuant to a scheme, evidencing the purchase or acquisit on by the holder thereof, of an undivided right, t tle or interest in the f nancial asset involved in securit sat on; [Sect on 2(1)(zg)]

Q20: “More and more banks are embarking on forming of Asset Reconstruct on Companies such that they can manage their risks bet er and can concentrate on lending”. Explain the salient features and funct ons of an Asset Reconstruct on Company in the context of the above statement. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer:

It may not be straight yes or no because many banks and f nancial inst tut ons do have Recovery Cells in addit on to Asset Recovery Companies (ARC) to tackle menace of non-performing assets (NPAs). 21st Century gave recognit on to outstanding loans with banks and f nancial inst tut ons upgrading assets to tradeable asset. Doubt ul and bad loans have to be termed as NPA as per RBI mandate that make Balance Sheets look dirty.

ARC is a company registered with Reserve Bank of India under sect on 3 of Securit sat on and Reconstruct on of Financial Assets and Enforcement of Security Interest Act, 2002 for the purposes of carrying on the business of asset reconstruct on or securit sat on, or both. ARC buys NPAs, obviously discounted, to make bank balance sheet cleaner and encourage them to use their t tme, energy and funds for development.

ARC can mix acquired good and bad assets to make them saleable. Pract cally, ARC acts as an agent for any bank or f nancial inst tut on for the purpose of recovering their dues, mange borrower's assets, act as Receiver and other ancillary business exclusively.

Q21: Measures to be taken by Assets Reconstruct on or Securit sat on Company for the purpose of Assets Reconstruct on. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Under the SARFAESI Act, an Asset Reconstruct on Company (ARC) is allowed to take various steps to recover and restructure non-performing assets (NPAs). These steps are called "measures for asset reconstruct on".

Even if other laws apply, the ARC can take one or more of the following measures:

- (a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;
- (b) the sale or lease of a part or whole of the business of the borrower;
- (c) rescheduling of payment of debts payable by the borrower;
- (d) enforcement of security interest in accordance with the provisions of this Act;
- (e) set lement of dues payable by the borrower;
- (f) taking possession of secured assets in accordance with the provisions of this Act;
- (g) conversion of any port on of debt into shares of a borrower company, This conversion is legally valid, even for past transact ons.

The Reserve Bank of India (RBI) determine the policy and issue necessary direct ons including the direct on for regulat on of management of the business of the borrower and fees to be charged.

The ARC must strictly follow the RBI's policies and direct ons when taking any of the above measures.

Explanat on:

As per **Sect on 2(1)(f)** of the SARFAESI Act, a **Borrower** means any person who has been granted f nancial assistance by any bank or f nancial inst tut on or who has given any guarantee or created any mortgage or pledge as security for the f nancial assistance granted by any bank or f nancial inst tut on and includes a person who becomes borrower of an asset reconstruct on company consequent upon acquisit on by it of any rights or interest of any bank or f nancial inst tut on in relat on to such f nancial assistance or who has raised funds through issue of debt securit es.

Q22: Ment on the other funct ons of securit sat on company or reconstruct on company as per the Securit sat on and Reconstruct on of Financial Assets and Enforcement of Security Interest Act, 2002. (5 marks)

PAST YEAR QUESTION JUNE 2016

OR

What are the various measures taken by assets reconstruct on or securit sat on company for the purpose of assets reconstruct on ? What are its other funct ons? (5 marks)

PAST YEAR QUESTION DECEMBER 2016

Answer: Under Sect on 10 of the SARFAESI Act, an Asset Reconstruct on Company (ARC) registered under Sect on 3 can perform certain addit onal funct ons besides asset reconstruct on and securit sat on.

1. act as an agent for any bank or f nancial inst tut on for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the part es;

2. act as receiver if appointed by any court or tribunal;

3. act as a manager referred to in clause (c) of sub-sect on (4) of sect on 13 on such fee as may be mutually agreed upon between the part es.

An ARC cannot start or cont nue any business other than securit sat on or asset reconstruct on, without prior approval of the Reserve Bank of India (RBI).

If an ARC was already doing any other business before the SARFAESI Act came into ef ect, it must stop that business within one year from the date of commencement of the Act.

Explanat on: "asset reconstruct on company" or "asset reconstruct on company" does not include its subsidiary.

Alternate Answer,

Asset Reconstruct on Company or Securit sat on Company can take the following measures for the purposes of asset reconstruct on:

- Proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower.
- Enforcement of security interest in accordance with the provisions of the Act.
- Set lement of dues payable by the borrower.
- Taking possession of secured assets in accordance with the provisions of the Act.
- To convert any port on of debt into share of a borrower company.

Securit sat on or Reconstruct on Company may do the following funct ons also in accordance with Sect on 10 of the Act:

(a) act as an agent for any bank or f nancial inst tut on for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the part es;

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

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

No securit sat on company or Reconstruct on Company shall act as a manager if act ng as such gives rise to any pecuniary liability. Securit sat on company or reconstruct on company which has been granted a cert f cate of registrat on cannot commence or carry on any business other than that of securit sat on or asset reconstruct on without prior approval of the Reserve Bank.

Q23: How are disputes relat ng to securit sat on or reconstruct on resolved?

Answer: According to Sect on 11 of SARFAESI Act, where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank, or financial institution, or asset reconstruction company or qualified buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996, as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

Q24: What powers does the Reserve Bank of India (RBI) have under Sect on 12 of the SARFAESI Act to regulate Asset Reconstruction Companies (ARCs), and what kind of directions can it issue?

Answer: Under Sect on 12 of the SARFAESI Act, the Reserve Bank of India (RBI) has the authority to regulate the functioning of Asset Reconstruction Companies (ARCs) in the public interest or to protect the financial system and investor interests.

RBI may issue directions if it believes: It is in the public interest, to regulate the financial system for the country's benefit, Or to prevent mismanagement of an ARC that may harm Investors, or the ARC itself.

RBI can issue directions related to: income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the asset reconstruction company.

RBI can also give more specific directions to: all ARCs, a group of ARCs, or a specific ARC.

These directions may include:

- (a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;
- (b) the aggregate value of financial assets which may be acquired by any asset reconstruction company;
- (c) the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company;
- (d) transfer of security receipts issued to qualified buyers.

Q25: What power does the Reserve Bank of India (RBI) have under the SARFAESI Act to obtain information from Asset Reconstruction Companies (ARCs), and for what purpose can this power be used?

Answer: The Reserve Bank may at any time direct an asset reconstruction company to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such asset reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act.

Q26: Omega Ltd. is a securitisation and reconstruction Company in terms of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

(SARFAESI). The certificate thus issued was cancelled by the competent authority. However, Omega Ltd. is holding certain investments of Qualified Institutional Buyers (QIB) at the time of cancellation. Offer your views regarding the authority that cancels the registration and the rights of Omega Ltd. against such cancellation. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) Reserve Bank of India (RBI) is the Authority to cancel the registration granted to an Asset Reconstruction Company in terms of Section 4 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI).

(ii) Omega Ltd can prefer an appeal to the Central Government within a period of 30 days of cancellation communicated to it. The Central Government shall give such company an opportunity of being heard before disposal of such application.

(iii) If the Asset Reconstruction Company (ARC) is holding investments for qualified institutional buyers, after cancellation of registration, it shall be deemed to be ARC until it repays the entire investments held by it together with interest, if any, within such period as the RBI directs.

Q27: An Asset Reconstruction Company is subject to audit and inspection by Reserve Bank of India (RBI). Elucidate the powers of RBI in this regard under SARFAESI Act, 2002. (5 marks)

PAST YEAR QUESTION DECEMBER 2021

Answer: Section 12 B of the SARFAESI Act, 2002 deals with the powers of Reserve Bank of India to carry out audit and inspection of an Asset Reconstruction Company (ARC), which are given below: -

(1) The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

(2) It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection under sub-section (1).

(3) Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order—

(a) remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or

(b) appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company:

Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.

(4) It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control

and to provide him such statements and information relating to affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

Q28: “Any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor”. Explain the procedure for enforcement of security interest under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI). (5 marks)

PAST YEAR QUESTION JUNE 2019

Answer: Section 13 of SARFAESI Act, 2002 deals with enforcement of security interest by a creditor which provides as under:

(a) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under section 13(4) of the Act.

(b) If on receipt of the notice, the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. In case the borrower fails to discharge his liability in full within the period specified above, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

- (i) take possession of the secured assets of the borrower
- (ii) takeover the management of the business of the borrower
- (iii) appoint any person (hereafter referred to as the manager)
- (iv) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Q29: Explain the powers and procedures available to secured creditors under Section 13 of the SARFAESI Act for enforcing security interest. Also mention the rights of borrowers and procedural safeguards under this section.

Answer: Section 13 of the SARFAESI Act, 2002 empowers a secured creditor to enforce its security interest without court intervention, notwithstanding anything in Section 69 or 69A of the Transfer of Property Act, 1882 (**Section 13(1)**).

If a borrower defaults in repaying a secured debt and the account is classified as a Non-Performing Asset (NPA), the creditor can serve a notice in writing demanding full repayment within 60 days (**Sect on 13(2)**).

This provision does not apply to borrowers who have raised funds via debt securities, in which case the debenture trustee may enforce the security interest (first proviso to Sect on 13(2)).

The notice must include the amount due and details of the secured assets to be enforced (**Sect on 13(3)**).

If the borrower responds with a representation or objection, the secured creditor must reply with reasons for non-acceptance within 15 days, though such reply does not confer any legal right to challenge it before a tribunal at this stage (**Sect on 13(3A)**).

If the borrower fails to repay within the notice period, the secured creditor may exercise rights under Sect on 13(4), which include:

- (a) taking possession of the secured assets,
- (b) taking over management of the borrower's business (only where the business is the security),
- (c) appointing a manager to manage the assets, and
- (d) requiring third parties to pay amounts owed to the borrower directly to the creditor.

Any such payment is considered a valid discharge (**Sect on 13(5)**).

- If a property sale fails due to low bids, the creditor may authorize an officer to bid in the auction (**Sect on 13(5A)**), and
- if the creditor becomes the purchaser, the price is adjusted against the loan (**Sect on 13(5B)**).
- Acquisition of immovable property is subject to Sect on 9 of the Banking Regulation Act (**Sect on 13(5C)**).

Any transfer made under Sect on 13(4) vests full ownership rights in the transferee (**Sect on 13(6)**).

All costs and expenses incurred by the creditor can be recovered from the borrower and are paid first out of sale proceeds (**Sect on 13(7)**), with the remaining amount going to the borrower or other entitled parties.

Importantly, if the borrower repays all dues before publication of the auction notice, the secured asset cannot be sold or transferred, and no further steps for sale can be taken (**Sect on 13(8)**).

In joint financing cases, no action under Sect on 13(4) can be taken unless 60% or more of the creditors (by value) agree (**Sect on 13(9)**).

Where the sale proceeds are insufficient, the creditor may apply to the Debt Recovery Tribunal or competent court to recover the balance (Sect on 13(10)).

The creditor may also proceed directly against guarantors or pledged assets without first taking action under Sect on 13(4) (Sect on 13(11)).

Lastly, once a Sect on 13(2) notice is served, the borrower cannot sell, lease, or transfer the secured assets without the prior written consent of the creditor.

Q30: "Demand Notice" under Security Interest (Enforcement) Rules 2002. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Demand Notice

A demand notice under the Security Interest (Enforcement) Rules, 2002 is a formal notice demanding that the person to whom the notice is addressed perform an alleged legal obligation such as paying a sum of money or acting on a contractual commitment.

Service of demand notice

Rule 3(1) provides that the service of demand notice as referred to in sub-section (2) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service.

Q31: "The term 'default' under SARFAESI Act and the Insolvency and Bankruptcy Code, 2016 are different and based on purpose of the Acts." Examine the statement by analyzing the definition under the both Acts. (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: As per section 3(12) of Insolvency and Bankruptcy Code, 2016 the term "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

Further, SARFAESI Act defines term "default" as

I. non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor; or

II. non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities.

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them and the purpose of this Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court. One of the objectives of SARFAESI Act is to provide a mechanism for banks and other financial institutions to recover secured assets.

On the other hand, the purpose of Insolvency & Bankruptcy Code, 2016 is to offer a market directed, time-bound mechanism to resolve insolvency and run the corporate debtor as a going concern, wherever possible, or exit, where required. The IBC deals with the reorganization and insolvency resolution of corporate debtors (CDs), partnership firms, and even individuals. The IBC also provides an exit mechanism for a corporate person that has not defaulted, through a voluntary liquidation process.

The statement given in the question is correct as the objectives of both Acts are different and term 'default' is required to be read with the purpose of both Acts in relevant context.

Q29: Define Security interest.

Answer: Security interest means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—

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

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset. **[Sect on 2(1)(zf)]**

Q32: Explain the measures provided to the secured creditor for taking possession and selling the secured asset in terms of Sect on 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002). (5 marks)

PAST YEAR QUESTION JUNE 2022

OR

Assistance to take possession of secured assets from the Chief Metropolitan Magistrate or the District Magistrate under (SARFAESI) Act, 2002. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereto and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

- (a) Take possession of such asset and documents relating thereto; and
- (b) Forward such asset and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly formed by the authorized officer of the secured creditor, declaring that -

- i. the aggregate amount of financial assistance granted and the total claim of the bank as on the date of filing the application;
- ii. the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- iii. the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- iv. the borrower has committed default in repayment of the financial assistance granted aggregating the specific amount;
- v. consequent upon such default in repayment of the financial assistance in the account of the borrower has been classified as a nonperforming asset;
- vi. affirming that the period of sixty days' notice as at the period of sixty days' notice as required by the provisions of sub-section (2) section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- vii. The objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- viii. The borrower has not made any repayment of the financial assistance in spite of the above notice and the authorized officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- ix. That the provisions of the Act and the rules made thereunder had been complied with.

Alternate Answer,

Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 provides for assistance for taking possession of secured asset from the Chief Metropolitan Magistrate or the District Magistrate.

In simple terminology, the essence and meaning of Section 14 of the Act is that a secured creditor may seek the help and assistance of the Chief Metropolitan Magistrate or the District Magistrate for the purpose of taking over of the possession of the secured asset or property instead of resorting to recovery of the asset by means of self-help.

Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing to the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction any such secured asset or other documents relating thereto, may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him.

- Take possession of such asset and documents relating thereto; and
- Forward such asset and documents to the secured creditor.

An application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor.

On receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall satisfy the contents of the affidavit and pass suitable orders for the purpose of taking possession of the secured assets.

Q33: What are the powers and duties of the District Magistrate (DM) or Chief Metropolitan Magistrate (CMM) when they receive an affidavit from the Authorised Officer to take possession of secured assets?

Answer: When the Authorised Officer (usually from a bank or financial institution) submits an affidavit asking for help to take possession of a secured asset (like a mortgaged property), the District Magistrate (DM) or Chief Metropolitan Magistrate (CMM) has the following duties and powers:

1. Time Limit for Act on:

- They must pass an order within 30 days of receiving the application to help take possession.
- If they cannot do it within 30 days due to reasons beyond their control, they can take more time — but not more than 60 days in total. The reason must be recorded in writing.

2. Old Pending Cases:

- If the case was already pending before the DM or CMM before this law came into effect, then the requirement to submit an affidavit does not apply.

3. Power to Authorise Officers:

- The DM or CMM can authorise a subordinate officer to:
 - Take possession of the property and related documents.
 - Hand over the property and documents to the secured creditor (like a bank).

4. Use of Force if Needed:

○ The DM or CMM can use necessary force, or allow force to be used, to take possession of the property.

5. Protect on from Legal Challenge:

Any actions taken by the DM, CMM, or their authorised officers cannot be challenged in court.

Q34: Define Financial assistance, Financial lease and Secured creditor.

Answer: Financial assistance means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution including funds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities. **[Sect on 2(1)(k)]**

Financial lease means a lease under any lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor's right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where the lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be. **[Sect on 2(1)(ma)]**

Secured creditor means—

- (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- (ii) debenture trustee appointed by any bank or financial institution; or
- (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iv) debenture trustee registered with the Board and appointed for secured debt securities; or
- (v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance. **[Sect on 2(1)(zd)]**

Q35: What happens when a secured creditor or asset reconstruction company takes over the management of a borrower's business under the SARFAESI Act?

Answer: As per **Sect on 15 of the SARFAESI Act, 2002**, when the management of a borrower's business is taken over by an Asset Reconstruction Company (ARC) or a secured creditor, they have the power to appoint new people to run the business. This happens after they publish a notice in both an English newspaper and a local language newspaper where the borrower's main office is located.

Depending on the type of borrower:

(a) If the borrower is a company (as defined in the Companies Act, 1956), the secured creditor can appoint new directors for that company.

(b) If the borrower is not a company, they can appoint an administrator to manage the business.

Once the notice is published:

1. All existing directors or managers are removed from their positions automatically, whether they are part of a company or any other business setup.
2. Any management contract between the borrower and those directors or managers also ends automatically.
3. The new directors or administrators must take control of all property, assets, and legal claims of the business. From the date the notice is published, all these assets are considered to be legally in their custody.
4. These newly appointed directors or administrators will have full authority to manage the business. They will exercise all powers that the former directors or management had—whether those powers came from the company's internal documents (like the memorandum or articles of association) or from any other source.

In short, after takeover and publication of the notice, the entire control of the borrower's business shifts to the new team appointed by the creditor or ARC, and the old management loses all authority.

Q36: What restrictions apply to the shareholders and company management when a secured creditor takes over the management of a borrower company under Section 15 of the SARFAESI Act, 2002? Also, explain when the secured creditor is required to restore the management back to the borrower.

Answer: According to Section 15 of the SARFAESI Act, 2002, when a secured creditor takes over the management of a borrower's company (as defined under the Companies Act, 1956), certain special rules apply, even if the company's Articles of Association or the Companies Act says otherwise.

- Shareholders of the company or any other person cannot appoint or nominate new directors after the takeover.
- If shareholders pass any resolution in their meetings, it will not be valid or effective unless the secured creditor approves it.
- No one can file a winding-up petition or request to appoint a receiver for the company in any court without the consent of the secured creditor.

Once the secured creditor fully recovers the loan, they must return the management of the company or business to the original borrower.

However, there is one important exception: If the secured creditor (either alone or along with others like asset reconstruction companies, financial institutions, or assignees) has converted

part of their loan into shares and has gained controlling interest in the company, then they do not have to return the management to the borrower.

Q37: A bank took over the management of XYZ Ltd., in terms of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and appointed six directors, consequently removing Vaibhav, an executive director of XYZ Ltd. Vaibhav claimed following amounts:

(i) ₹ 25 lakh as a compensation for loss of office; and

(ii) ₹ 6 lakh towards his unpaid salary for the last three months. Whether Vaibhav is entitled to compensation for loss of office and unpaid salary? Give reasons in support of your answer.

(3 marks)

PAST YEAR QUESTION JUNE 2023

Answer: Section 16(1) of the SARFAESI Act provides that notwithstanding anything to the contrary contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office or for the premature termination under this Act of any contract of management entered into by him with the borrower.

Further, According to Section 16(2), nothing contained in sub-section (1) shall affect the right of any such managing director or any other director or manager or any such person in charge of management to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

In view of the above legal provision Vaibhav, the removed director of XYZ Limited can claim his unpaid salary, but he cannot claim any compensation for loss of office.

Q38: A bank took over the management of a Company in terms of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and appointed 5 directors consequently removing Suresh, an executive director. Suresh demanded compensation for loss of office as well as his unpaid salary for the last 2 months. Will he be entitled for compensation for loss of office and unpaid salary? (3 marks)

PAST YEAR QUESTION DECEMBER 2020

Answer: (i) Section 16(1) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) disentitles any director, manager or Managing Director from claiming any compensation for loss of office.

(ii) According to Section 16(2) of the Act, the aforesaid provision does not affect the rights of such person to recover from the business of borrower, moneys recoverable otherwise than by way of compensation.

(iii) In the given case, Suresh, the removed executive director can claim his unpaid salary but not any compensation for loss of office.

Q39: What is the remedy available under Sect on 17 of the SARFAESI Act, 2002, to a person aggrieved by the act ons of a secured creditor under Sect on 13(4)? Explain the process, t me limits, and powers of the Debts Recovery Tribunal (DRT).

Answer: According to Sect on 17(1) of the SARFAESI Act, 2002, if a borrower or any other person is aggrieved by the act on taken by a secured creditor under Sect on 13(4) (such as taking possession of the secured asset, taking over management, appoint ng a manager, or selling the asset), they may fle an applicat on to the Debts Recovery Tribunal (DRT) within forty-f ve days from the date the measure was taken. The applicat on must be f led along with a prescribed fee, which may be dif erent for the borrower and for other applicants. However, mere communicat on of reasons by the secured creditor for reject ng object ons raised under Sect on 13(3A) does not give the right to apply to the DRT.

As per Sect on 17(1A), the applicat on must be f led in the DRT having jurisdict on over the area where:

- (a) the cause of act on, wholly or in part, arises;
- (b) where the secured asset is located; or
- (c) the branch or any other of ce of a bank or f nancial inst tut on is maintaining an account in which debt claimed is outstanding for the t me being.

According to Sect on 17(2), the DRT will examine whether the act on taken by the secured creditor under Sect on 13(4) is in accordance with the SARFAESI Act and the rules made under it.

If the DRT f nds that the creditor has not followed the law, it may pass an order under Sect on 17(3) to:

- a) declare the recourse to any one or more measures referred to in sub-sect on (4) of sect on 13 taken by the secured creditor as invalid; and
- b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an applicat on under sub-sect on (1), as the case may be; and
- c) pass such other direct on as it may consider appropriate and necessary in relat on to any of the recourse taken by the secured creditor under sub-sect on (4) of sect on 13.

On the other hand, if the DRT f nds that the creditor's act on was proper and legal, then under Sect on 17(4), the creditor is ent tled to cont nue with the recovery process, despite anything to the contrary in any other law.

Where any person claiming tenancy or lease rights over the secured asset f les an applicat on under Sect on 17(1), the DRT—under Sect on 17(4A)—can examine whether such lease or

tenancy:

- a) has expired or stood determined; or
- b) is contrary to sect on 65A of the Transfer of Property Act, 1882; or
- c) is contrary to terms of mortgage; or
- d) is created af er the issuance of not ce of default and demand by the Bank under sub- sect on (2) of sect on 13 of the Act; and

If any of these are true, the DRT may reject such tenancy claims and pass appropriate orders. As per Sect on 17(5), the DRT should dispose of the applicat on within 60 days. However, if needed, it may extend the period for valid reasons recorded in writ ng, but the total period cannot exceed 4 months. If the case is st ll not decided within 4 months, any party may approach the Appellate Tribunal (DRAT) to direct the DRT for speedy disposal.

Finally, as per Sect on 17(7), the DRT shall, wherever applicable, follow the procedures laid down under the Recovery of Debts Due to Banks and Financial Inst tut ons Act, 1993 and its rules while hearing such applicat ons.

Q40: Oriental Bank of India (OBI) extended loan of Rs.20 crore to Aamran Fabricators Ltd. (AFL). Debt Recovery Tribunal (DRT) has issued order against AFL for recovery of outstanding dues amount ng to Rs. 28.5 crore as against the claim of Rs. 30 crore f led by OBI. Aggrieved by the order of Debt Recovery Tribunal, AFL wants to f le appeal in Debts Recovery Appellate Tribunal under sect on 18 of the Securit sat on and Reconstruct on of Financial Assets and Enforcement of Security Interest Act, 2002. Explain the pre-condit ons to be fulf lled for f ling of an appeal against the order of DRT. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Sect on 18 of the SARFAESI Act, 2002 provides that any person aggrieved, by any order made by the Debts Recovery Tribunal under sect on 17, may prefer an appeal to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal. The Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Inst tut ons Act, 1993 (51 of 1993) and rules made thereunder.

It may be noted that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal f f y per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. Appellate Tribunal may, for the reasons to be recorded in writ ng, reduce the amount to not less than twenty-f ve per cent. of debt referred above.

Q41: What does the SARFAESI Act state about the validity of fees collected for appeals made to the Debts Recovery Tribunal or the Appellate Tribunal before the 2004 Amendment?

Answer: According to the Validation of Fees Levied clause under the SARFAESI Act, any fees collected for filing an appeal before the Debts Recovery Tribunal (DRT) or the Appellate Tribunal (DRAT) before the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, shall be considered to have been validly levied and collected. This means that even if the legal provision for charging such fees was added later (through amendments to Sections 17 and 18), it will be assumed that the law was always in force at the relevant time. In other words, all such fee collections are legally valid, as if the amended law had already existed when the fees were charged.

Q42: “The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) has a provision for Right to Caveat”. Explain briefly. (3 marks)

PAST YEAR QUESTION AUGUST 2021

OR

Right to lodge a “Caveat” under (SARFAESI) Act, 2002. (5 marks)

PAST YEAR QUESTION JUNE 2017

Answer: Section 18C of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 deals with the right to lodge a caveat. It provides that:

(1) Where an application or an appeal is expected to be made or has been made under section 17(1) or section 17A or section 18(1) or section 18B, the secured creditor or any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1),—

(a) the secured creditor by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1);

(b) any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1).

(3) Where after a caveat has been lodged under sub-section (1), the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

(4) Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal referred to in sub-section (1) has been made before the expiry of the said period.

Q43: What does Section 18B of the SARFAESI Act, 2002 provide regarding the right of the borrower to receive compensation and costs?

Answer: As per Section 18B of the SARFAESI Act, 2002, if the Debts Recovery Tribunal, District Judge, Appellate Tribunal, or the High Court finds—during proceedings under Section 17, 17A, 18, or 18A—that the possession of secured assets taken by the secured creditor was not in accordance with the law, and directs that the asset be returned to the borrower or the aggrieved person, then that person is entitled to receive compensation and costs. The amount of compensation and cost will be decided by the respective Tribunal or Court.

Q44: What is the Central Registry under Section 20 of the SARFAESI Act, 2002? What is its purpose and how does it relate to other registration laws?

Answer: Under Section 20 of the SARFAESI Act, 2002, the Central Government may set up a Central Registry through a notification, with effect from a specified date. This registry is established to maintain records relating to transactions of securitisation, reconstruction of financial assets, and the creation of security interests under the SARFAESI Act. The Central Registry will have its own official seal, and its head office will be located at a place notified by the Central Government. For convenience, the government may also set up branch offices of the Central Registry in other locations and may define territorial limits within which each office will function.

It is important to note that the provisions related to the Central Registry in the SARFAESI Act are additional to other existing laws, such as the Registration Act, 1908, the Companies Act, 1956, the Merchant Shipping Act, 1958, the Patents Act, 1970, the Motor Vehicles Act, 1988, and the Designs Act, 2000. These provisions do not override the existing laws and do not affect the priority or validity of charges already registered under those laws.

Q45: Who is the Central Registrar under the SARFAESI Act, 2002, and what are their responsibilities?

Answer: Under the SARFAESI Act, 2002, the Central Government may appoint a person through a notification to act as the Central Registrar. The Central Registrar is responsible for handling the registration of transactions related to securitisation, reconstruction of financial assets, and the creation of security interests over properties under the Act. Additionally, the Central Government can appoint officers, with appropriate designations, to assist the Central Registrar. These officers will work under the supervision and direction of the Central Registrar and will perform the functions authorized by him under the provisions of this Act.

Q46: “Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)” is a legislation for fast recovery of debt by the secured creditors but there are certain exceptions—briefly elucidate with at least 5 circumstances, where the legislation cannot be applied. (5 marks)

PAST YEAR QUESTION DECEMBER 2020

OR

The provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 do not apply to certain cases. List out six such cases where the provisions of the Act do not apply. (5 marks)

PAST YEAR QUESTION JUNE 2015

OR

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

PAST YEAR QUESTION DECEMBER 2016

OR

“Banks and financial institutions do have free hands to take possession of assets of a defaulting debtor under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002”. Are there any exceptions to the statement under the Act? Explain. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: Section 31 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) excludes the following for the purpose of attachment or enforcement under the said Act.

- (i) A lien on any goods, money or security given by or under the Indian Contract Act, 1872 or Sale of Goods Act, 1930 or any law for the time being in force;
- (ii) A pledge of immovable within the meaning of Section 172 of Indian Contract Act, 1872;
- (iii) Creation of any security in any aircraft as defined in clause (1) of Section 2 of Aircraft Act, 1934;
- (iv) Creation of security interest in any vessel as defined in clause (55) of Section 3 of Merchant Shipping Act, 1958;
- (v) Any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;
- (vi) Any property not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to subsection (1) of Section 60 of Code of Civil Procedure, 1908;
- (vii) Any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (viii) Any security interest created on agricultural land;
- (ix) Any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

Q47: What does Sect on 3 of the SARFAESI Act, 2002 provide regarding the establishment and composit on of Debts Recovery Tribunal?

Answer: As per Sect on 3 of the SARFAESI Act, 2002, the Central Government has the power to establish one or more Tribunals, called Debts Recovery Tribunals (DRTs), through a not f cat on. These Tribunals are established to exercise the jurisdict on, powers, and authority given to them under this Act or under any other law, including the Insolvency and Bankruptcy Code, 2016. The government also decides the areas of jurisdict on for each Tribunal to handle applicat ons within specif c regions.

Each Tribunal consists of only one person, known as the Presiding Of cer, who is appointed by the Central Government. However, the government may also authorize:

- The Presiding Of cer of another Tribunal established under any other law to also act as the Presiding Of cer of a DRT, or
- A judicial Member from another Tribunal to perform the funct ons of a Presiding Of cer in the DRT.

Q48: What jurisdict on, powers, and authority are given to the Debts Recovery Tribunals and Appellate Tribunals under Sect on 17?

Answer: Under Sect on 17, the Debts Recovery Tribunal (DRT) exercises the jurisdict on, powers, and authority to entertain and decide applicat ons made by banks and f nancial inst tut ons for the recovery of debts due to them. This power is applicable from the appointed day not f ed by the Central Government.

Addit onally, the Tribunal is also empowered to handle cases under Part III of the Insolvency and Bankruptcy Code, 2016, which deals with insolvency resolut on for individuals and partnership f rms. The DRTs are also required to have circuit sit ngs in all district headquarters to increase accessibility.

The Appellate Tribunal has the power to hear appeals against any order passed by the DRT. It also has the jurisdict on to hear appeals against the orders made by the Adjudicat ng Authority under Part III of the IBC, 2016, again start ng from a date appointed by the Central Government.

Q49: In which jurisdict on can a bank or f nancial inst tut on f le an applicat on to recover a debt, and what are the condit ons related to withdrawal of such applicat ons?

Answer: A bank or f nancial inst tut on can f le an applicat on for recovery of debt before the Debts Recovery Tribunal (DRT) within the local limits of any of the following:

- (a) Where the branch or of ce of the bank is maintaining the account in which the debt is outstanding.
- (aa) Where the defendant (borrower), or all defendants (if more than one), reside, carry on business, or work for gain.

(b) Where any one of the defendants, in case of multiple borrowers, resides, does business, or works.

(c) Where the cause of action, either fully or partially, arises.

A bank may also withdraw the application made before the DRT (either before or after the 2004 Amendment) with the Tribunal's permission, if it wishes to take action instead under the SARFAESI Act, 2002, provided no SARFAESI action was taken earlier.

The DRT must dispose of such withdrawal requests within 30 days. If the Tribunal refuses permission, it must give written reasons.

Also, in the case of a multi-State cooperative bank, it has the option to proceed under the Multi-State Cooperative Societies Act, 2002, instead of using the DRT mechanism. If such a bank already filed an application with the DRT and now wants to switch to the Cooperative Societies route, it can do so with permission of the Tribunal, which must also dispose of this request within 30 days and record reasons if it refuses.

Q50: What do Sections 19(2) and 19(3) of the RDBFI Act say about multiple claims by banks and the form of application to the DRT?

Answer: According to Section 19(2), if a bank or financial institution has already filed an application before the Debts Recovery Tribunal (DRT) to recover debt from a borrower, and another bank or financial institution also has a claim against the same borrower, then the second bank may join the proceedings at any stage before the Tribunal passes the final order. To do this, it must submit a separate application to the same Tribunal.

As per Section 19(3), any application made under Section 19(1) or 19(2) must be in the prescribed format and must include true copies of all documents relied upon—such as loan agreements or certified bank statements. It must also be accompanied by the prescribed fee, which may vary depending on the amount of debt being recovered.

However, if the case was transferred to the Tribunal under Section 31(1), the requirement of fees does not apply. Also, for the purpose of Section 19, the term “documents” includes bank statements or entries from bankers' books that are duly certified under the Bankers' Books Evidence Act, 1891.

Q51: What does Section 19(3A) of the RDBFI Act, 1993 require from the applicant, and what are the powers of the Tribunal after receiving such application?

Answer: As per Section 19(3A) of the Recovery of Debts and Bankruptcy Act, 1993, any bank or financial institution filing an application for recovery of debt before the Debts Recovery Tribunal (DRT) must provide specific information. The applicant must:

- (a) Mention the details of the debt that is secured by any security interest over the properties or assets of the borrower (defendant), along with the estimated value of such secured assets.
- (b) If the value of the secured assets is not enough to cover the debt, the applicant must also provide details of any other assets or properties owned by the borrower.

(c) If even those are insufficient, the applicant should request the Tribunal to direct the borrower to disclose other properties or assets owned by them.

Additionally, if the case is settled before the final order, the applicant can be granted a refund of the fee paid, at a rate prescribed by the rules.

Once such an application is received, the Tribunal will issue a summons to the borrower (defendant) with the following directions:

- To explain within 30 days why the relief asked for by the bank should not be granted.
- To disclose any other properties or assets apart from what has already been mentioned by the bank.
- To not deal with or sell any of these disclosed assets until the matter is finally decided by the Tribunal.

Even if the property is under security interest, the borrower is not allowed to sell or lease those assets (or other disclosed properties) after receiving the summons—unless it is in the ordinary course of business and only with the Tribunal's prior approval. The Tribunal will not grant approval without notifying the applicant bank and giving it a chance to object.

If the borrower does sell any asset in the ordinary course of business, they must deposit the sale proceeds into an account with the bank or financial institution holding the security interest.

Q52: What does Sect on 19(5) of the RDBFI Act require from the defendant after summons is issued, and what actions can the Tribunal take?

Answer: As per Sect on 19(5) of the Act, when the Debts Recovery Tribunal (DRT) sends summons to the borrower (defendant), they must file a written statement of their defence within 30 days from the date of service of summons. This written statement may also include a set-off (Sect on 19(6)) or counterclaim (Sect on 19(8)), and must be supported with original or certified copies of the documents being relied upon.

In exceptional cases, the Tribunal may allow up to 15 more days to file the written statement, provided the reasons are recorded in writing.

If the borrower discloses any property or asset on the directions of the Tribunal, then the rules under Sect on 19(4A) apply, which includes restrictions on dealing with the property.

In case of non-compliance with Tribunal's order (under Sect on 19(4)(ii)), the Presiding Officer may order civil imprisonment for up to three months of the person or officer in default, after giving them a chance to be heard. The term "*officer who is in default*" is defined as per Sect on 2(60) of the Companies Act, 2013.

After the written statement is filed (or time has expired), the Tribunal will fix a hearing date for:

- Admission or denial of documents,
- Review of any interim orders passed earlier under Sect on 19(4).

If the borrower admits full or part al debt, the Tribunal can order payment of that admit ed amount within 30 days. If they fail, the Tribunal can issue a recovery cert f cate under Sect on 19(22) for the admit ed amount.

Q53: What does Sect on 19(6) of the RDBFI Act say about the defendant's right to claim a set-of ?

Answer: As per Sect on 19(6), if the defendant (borrower) wants to claim a set-of against the demand made by the bank or f nancial inst tut on, they can do so only at the f rst hearing, unless the Tribunal permits it later. A set-of means that the defendant has a legally recoverable amount that the bank or applicant also owes to them.

To claim this set-of , the defendant must submit a writ en statement detailing the amount and include all support ng documents and evidence. This writ en statement will be treated like a counter-lawsuit, so that the Tribunal can set le both the original claim and the set-of in a single f nal order.

Q54: What is a counter-claim under Sect on 19(8) and what are the consequences if the defendant tries to avoid debt recovery?

Answer: According to Sect on 19(8) of the RDB Act, a defendant (borrower) can raise a counter-claim against the bank or f nancial inst tut on, which is dif erent from a set-of . This can include any legal claim or demand—even for damages—that arose before or af er the bank's applicat on was f led, as long as it's before the defendant f les his defence or the deadline to f le defence ends.

This counter-claim is treated like a cross-suit, so the Tribunal can pass one f nal order for both the original loan recovery claim and the counter-claim.

Under Sect on 19(10), the bank or f nancial inst tut on (applicant) can respond to the counter-claim by f ling a writ en statement, and under Sect on 19(10A), all pleadings (applicat on, defence, counter-claims, replies, etc.) must be supported by an af davit signed by the person f ling it. Witness af davits must also be f led at the same t me as the main applicat on or reply. If facts or claims are not backed by af davit, the Tribunal will not accept them as valid evidence.

Addit onally, under Sect on 19(12)–(18), if the Tribunal believes that the defendant is trying to delay or avoid repayment by hiding or damaging assets, it can order him to:

- Furnish security,
- Produce the property or its value, or
- Show why security should not be furnished.

If the defendant fails to do so, the Tribunal can order at achment (seizure) of such property. If such at achment is ordered without following the process in law, it is void.

For disobedience or breach of Tribunal orders (under Sect ons 19(12), (13), or (18)), the Tribunal can:

- At ach the person's propert es, and
- Detain him in civil prison for up to 3 months.

Q55: What are the orders that can be issued by The Debt Recovery Tribunal (DRT) once the dues have been finalised to be paid. If the DRT has issued a certificate of recovery against a Company and such company is under liquidation. What orders can be issued by the DRT to recover the dues? (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: When it is proved to the satisfaction of the Debt Recovery Tribunal (Tribunal) that the claim of the applicant has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant has repaid or agreed to repay the claim of the applicant, further, the Tribunal may after giving the applicant and the defendant, an opportunity of being heard, in respect of all claims, set off or counter-claim, if any, and interest on such claims, within thirty days from the date of conclusion of the hearings, pass interim or final order as it deems fit which may include order for payment of interest from the date on which payment of the amount is found due up to the date of realisation or actual payment. The Tribunal after it appeared to be just and convenient, the Tribunal may, by order.

- a. Appoint a receiver of any property
- b. Remove a person from the possession or custody of the property,
- c. Commit the same to the possession, custody or management of the receiver
- d. Confer upon the receiver all such powers as the Tribunal thinks fit
- e. Appoint a commissioner for preparation of inventory

Where a certificate of recovery is issued against a company as defined under the Companies Act, 2013 and such company is under liquidation, the Tribunal may by an order direct that the sale proceeds of secured assets of such company be distributed in the same manner as provided in section 326 of the Companies Act, 2013 or under any other law for the time being in force.

Q56: What powers does the Tribunal have under Sections 19(20) to 19(25) regarding final orders, sale of assets, and recovery?

Answer: According to Section 19(20) of the RDB Act, after hearing both the applicant (bank/financial institution) and the defendant (borrower), the Debt Recovery Tribunal (DRT) can pass interim or final orders within 30 days after the conclusion of the hearing. The order can include interest from the date the amount became due until the actual payment is made. If it's found that the debt has been partly or wholly settled through a written and signed agreement or compromise between the parties, the Tribunal shall pass an order recording this settlement (Section 19(20A)).

As per Section 19(20AA), while passing the final order, the Tribunal will clearly specify the secured assets of the borrower and instruct the Recovery Officer to sell those assets and distribute the sale proceeds according to Section 19(20AB).

The order of priority for distributing sale proceeds of secured assets is as follows:

1. Expenses for preservation and sale of the secured assets (like valuation, auction, etc.);
2. Dues of the bank or financial institution.

Note: If Insolvency and Bankruptcy Code, 2016 proceedings are underway, then sale proceeds will be distributed as per IBC (Sect on 19(20AB), Explanat on).

Under Sect on 19(21), the Tribunal must send a copy of the f nal order and recovery cert f cate to both part es. A recovery cert f cate (under Sect on 19(22)) is signed by the Presiding Of cer and has the same legal value as a court decree. It can be used to initiate:

- Winding up of a company,
- Insolvency proceedings against individuals or partnerships.

As per Sect on 19(23), if the secured property is located in mult ple jurisdic ons, the Tribunal can send the recovery cert f cate to other Tribunals for execut on. If any Tribunal receives such a cert f cate but has no jurisdic on, it must return it to the issuing Tribunal.

Q57: What are the provisions of Sect on 19A regarding electronic f ling and service in DRT and Appellate Tribunals?

Answer: According to Sect on 19A of the Act, the Central Government can make rules allowing or requiring the f ling of recovery applicat ons, documents, and writ en statements in electronic form. This means that from the date not f ed, and before certain Debts Recovery Tribunals (DRTs) or Appellate Tribunals, part es may be required to:

- Submit applicat ons, writ en statements, and other pleadings electronically, using digital signatures for authent cat on;
- Receive summons, not ces, or other communicat ons through electronic means, which are also duly authent cated.

Further, any interim or f nal order of the Tribunal or Appellate Tribunal displayed on their of cial website will be treated as public not ce of that order. If the order is sent via email to the registered email ID of the part es, it will be considered as properly served.

The Central Government may also decide whether electronic f ling is to be the only method, or it may be allowed along with physical f ling.

The not f ed Tribunal or Appellate Tribunal must maintain either its own website or use a common portal to facilitate electronic f ling. All direct ons and orders must be properly uploaded and displayed on such websites.

Q58: Fair Deal Ltd. (FDL) is aggrieved by the order of the Debt Recovery Tribunal (DRT). The management of FDL has decided to fle an appeal against the order of DRT. Advise. (5 marks)
PAST YEAR QUESTION DECEMBER 2015

OR

Subrata, one of the guarantor for debt facilit es taken by Great Herald Ltd. Is aggrieved by an order of Debt Recovery Tribunal. Advise him about the further course of act on. (5 marks)
PAST YEAR QUESTION JUNE 2016

Answer: Sect on 20 of the Recovery of Debts and Bankruptcy Act, 1993 provides that any person who is unhappy with an order passed by the Debts Recovery Tribunal (DRT) can fle an appeal before the Appellate Tribunal, unless the order was passed with the consent of both part es—in such cases, no appeal is allowed.

The appeal must be filed within 30 days from the date when the person received a copy of the order. It must be in the prescribed format and must include the prescribed fee. However, if the appeal is filed after 30 days, the Appellate Tribunal may still accept it, if it is convinced there was a valid reason for the delay.

Once the Appellate Tribunal receives the appeal (including those under Section 181 of the Insolvency and Bankruptcy Code, 2016), it will give both sides a chance to be heard, and can then either confirm, modify, or set aside the DRT's order.

The Appellate Tribunal must send a copy of its order to both parties and to the concerned DRT. Finally, the law encourages the Appellate Tribunal to dispose of the appeal within six months from the date it was received.

Alternate Answer,

In view of this provision, Subrata being aggrieved by the order of Debt Recovery Tribunal may appeal to Appellate Tribunal having jurisdiction in the matter.

Q59: Subrata, one of the guarantors for debt facilities taken by Krishna Ltd., is aggrieved against the order of recovery of the Debt Recovery Tribunal (DRT). He intends to initiate action against the order of recovery of the DRT. Advise him about the next course of action. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

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

In the cases of *Pravin Gada v. Central Bank of India* [2013] 176 Comp Cas 101(SC), *Allahabad Bank v. Canara Bank* [2000] 101 Comp Cas 64 (SC) and *Rajasthan Financial Corporation v. Official Liquidator* [2005] Com Cas 387(SC), Supreme Court held that anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal.

The Debts Recovery Tribunal has the powers under the 1993 Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of powers under sections 25 to 28 of the 1993 Act.

Q60: What are the requirements for deposit of debt amount under Section 21 when filing an appeal to the Appellate Tribunal?

Answer: As per Section 21 of the Act, if a person (such as a borrower) wants to file an appeal before the Appellate Tribunal against an order passed by the Debts Recovery Tribunal (DRT), they must first deposit 50% of the total debt amount as determined by the DRT under Section 19.

However, the Appellate Tribunal has the power to reduce this amount, but it cannot go below 25% of the debt amount. This reduction is allowed only if the Tribunal records proper reasons in writing.

Q61: What are the procedural powers of the Tribunal and the Appellate Tribunal under Sect on 22?

Answer: As per Sect on 22 of the Act, the Tribunal and the Appellate Tribunal are not bound by the Civil Procedure Code, 1908. Instead, they follow the principles of natural justice and have the authority to regulate their own procedures, including deciding where to hold sittings. They have powers similar to those of a civil court, including:

- Summoning and examining witnesses on oath
- Requiring discovery and production of documents
- Receiving evidence via affidavits
- Issuing commissions to examine witnesses/documents
- Reviewing decisions
- Dismissing applications for default or deciding ex parte
- Setting aside such dismissals or ex parte orders

All proceedings before these Tribunals are deemed to be judicial proceedings under Sections 193, 228, and 196 of the IPC. The Tribunal is also considered a civil court under Sect on 195 and Chapter XXVI of the CrPC, 1973.

Q62: Procedure as per Civil Procedure Code, 1908 need not be followed while trying Petitions, applications or appeals by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) – Do you agree? (3 Marks)

PAST QUESTION ANSWER AUGUST 2021

OR

The National Company Law Tribunal and the National Company Law Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908. Explain. (3 Marks)

PAST QUESTION ANSWER AUGUST 2021

Answer: In terms of Sect on 424 of the Companies Act, 2013, neither the National Company Law Tribunal (NCLT) nor National Company Law Appellate Tribunal (NCLAT) is bound by the procedure as stated in Civil Procedure Code, 1908 in disposing any proceeding before it either under the Companies Act, 2013 or Insolvency and Bankruptcy Code, 2016 but shall be guided by the principle of natural justice.

NCLT or NCLAT has the power to regulate their own procedure. Any orders passed may be enforced like a decree and can be enforced by the Court having jurisdiction to execute. Further, Sect on 424(2) enlists similar powers of a Civil Court such as summoning, documents discovery, receiving affidavits, requisitioning any public document, examining witnesses etc.

Alternate Answer:

According to Sect on 424 of the Companies Act, 2013, the National Company Law Tribunal and the National Company Law Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016 the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit

Q63: Who can represent a bank or a defendant before the Tribunal or Appellate Tribunal under Sect on 23?

Answer: As per Sect on 23, both parties in proceedings before the Tribunal or the Appellate Tribunal have the right to legal representation. A bank or financial institution may authorize one or more legal practitioners or its officers to act as Presenting Officers to represent them before the Tribunal or Appellate Tribunal. Similarly, the defendant may appear in person or authorize legal practitioners or officers to present their case.

Q64: Debt Recovery Tribunal has passed an order for recovery of Rs. 5 crore against Prism Ltd. and its directors. What modes of recovery are available to recovery officer? Advise. (5 marks)

PAST YEAR QUESTION JUNE 2016

Answer: Sect on 25 provides for modes of recovery of debts. It states that the Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of sect on 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:

- a) appointing a receiver for the management of the movable or immovable properties of the defendant;
- b) any other mode of recovery as may be prescribed by the Central Government;
- c) attachment and sale of the movable or immovable property of the defendant;
- d) taking possession of property over which security interest is created or any other property of the defendant and appointing receiver for such property and to sell the same;
- e) arrest of the defendant and his detention in prison;

Q65: Can the defendant challenge the recovery certificate before the Recovery Officer under Sect on 26? What powers does the Presiding Officer have after issuing the certificate?

Answer: According to Sect on 26 of the Recovery of Debts and Bankruptcy Act, 1993, once a Recovery Certificate is issued:

- The defendant cannot dispute the correctness of the amount mentioned in the certificate before the Recovery Officer, and no objections on other grounds will be accepted.

- However, the Presiding Officer of the Tribunal has the power to:
 - Withdraw the certificate, or
 - Correct clerical or arithmetical mistakes in the certificate, even after it has been issued.
- Any such withdrawal or correction must be intimated to the Recovery Officer by the Presiding Officer.

Q66: Under what conditions can recovery proceedings be stayed after the issuance of a recovery certificate under Sect on 27?

Answer: As per **Sect on 27** of the Recovery of Debts and Bankruptcy Act, 1993:

- Even after a Recovery Certificate is issued, the Presiding Officer may grant time for payment if:
 - The defendant makes a minimum 25% down payment of the amount mentioned in the certificate, and
 - Provides an unconditional undertaking to pay the balance within a reasonable time, accepted by the applicant bank or financial institution.
- The Recovery Officer must stay recovery proceedings during this granted time.
- If the defendant agrees to pay and proceedings are stayed, they lose the right to appeal the Tribunal's order.
- If the defendant defaults in payment, the stay is lifted and the Recovery Officer resumes recovery.
- The Presiding Officer must inform the Recovery Officer about:
 - Any payments received after issuance of the certificate, or
 - Any extended time granted.
- If an appeal results in modification or reduction of the amount:
 - The Presiding Officer shall stay recovery of the reduced portion until the appeal is resolved.
 - Once the appeal is finalized, the certificate shall be amended or withdrawn, as necessary.

Q67: What are the additional modes of debt recovery available to the Recovery Officer under Sect on 28 of the Recovery of Debts Act, 1993?

Answer: Sect on 28 empowers the Recovery Officer to use additional methods to recover debt, apart from those listed in Sect on 25. These include:

1. Recovery from a Third Party:

- If someone owes money to the defendant, the Recovery Officer can direct that person to deduct the debt amount and pay it to the Recovery Officer.
- This does not apply to amounts exempt from attachment (like wages, pensions etc. under Sect on 60 of CPC).

2. Notice to Persons Holding Money for Defendant:

- The Recovery Officer can issue a notice to anyone who:
 - Owes or may owe money to the defendant; or
 - Holds or may hold money on behalf of the defendant;
- Such person must pay the money (up to the debt amount) to the Recovery Officer when due.

- This applies even to joint accounts unless proven otherwise.

3. Rules Regarding Notice:

- A copy of the notice is sent to the defendant and in case of joint accounts, also to joint holders.
- The person receiving the notice must comply—no document like passbook, receipt, etc. is needed for payment.
- Any new claim on that money after the notice is invalid.
- If the recipient denies holding/owing money via an affidavit and it is found false later, they can be personally liable.

4. Consequences of Non-Compliance:

- Failure to comply makes the person a “defendant in default”.
- The Recovery Officer can then treat it like recovery from the original defendant using Sections 25, 26, or 27.

5. Other Powers:

- Can ask courts holding money for the defendant to release it.
- Can ask companies or individuals to declare their assets via affidavit.
- Can use distraint and sale of movable property per Income-Tax Act’s Third Schedule.

Q68: What is the procedure to appeal against the order of the Recovery Officer under the Recovery of Debts Act, 1993?

Answer: Any person aggrieved by an order passed by the Recovery Officer under Sections 25 to 28 of the Recovery of Debts Act, 1993 may file an appeal to the Debts Recovery Tribunal (DRT).

The appeal must be filed within 30 days from the date of issue of the order copy.

Upon receiving the appeal, the Tribunal shall:

- Give the appellant an opportunity of being heard;
- Conduct inquiry as it deems fit; and
- May confirm, modify, or set aside the Recovery Officer's order.

Q69: "Recovery Officer acts in an arbitrary manner." Analyse the statement in the light of the provisions of Recovery of Debts and Bankruptcy Act, 1993 citing judicial pronouncements, if any. (5 marks)

PAST YEAR QUESTION DECEMBER 2017

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

Provided that any reference under the said provisions and the rules to the ‘assessee’ shall be construed as a reference to the defendant under the Recovery of Debt and Bankruptcy Act. On a challenge the Apex court in the case of *UOI vs. Delhi High Court Bar Association and*

Others (2002) 4 SCC 275, observed that “by virtue of sect on 29 of the Act, the provisions of Second and Third schedule to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 have become applicable for the realization of dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income-tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer acts in an arbitrary manner. Hence statement given is denied. Furthermore, Sect on 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any order of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner.

Q70: What is the requirement for filing an appeal under Sect on 30A of the Recovery of Debts Act, 1993?

Answer: Under Sect on 30A, if a person from whom a debt is due to a bank or financial institution wishes to file an appeal against an order of the Recovery Officer under Sect on 30, then:

The appeal shall not be entertained by the Debts Recovery Tribunal (DRT) unless the person has deposited 50% of the amount of debt due, as determined by the Tribunal under Sect on 19.

Q71: What does Sect on 31 of the Recovery of Debts Act, 1993 provide for regarding transfer of pending cases?

Answer: Sect on 31 of the Recovery of Debts and Bankruptcy Act, 1993 provides that:

- All suits or proceedings pending before any court, immediately before the establishment of a Debt Recovery Tribunal (DRT), which fall within the jurisdiction of the DRT, shall stand transferred to the Tribunal on the date of its establishment.
- However, this does not apply to:
 - Appeals pending before courts, and
 - Recovery cases of multi-State co-operative banks pending before the commencement of the 2012 Amendment, which shall continue under the Multi-State Co-operative Societies Act, 2002.
- The civil court shall forward all records to the Tribunal, and the Tribunal will proceed with the matter either:
 - From the same stage it was before transfer, or
 - From any earlier stage it deems fit.

Q72: What is the purpose of Sect on 31A under the Recovery of Debts and Bankruptcy Act, 1993?

Answer: Sect on 31A empowers the Debt Recovery Tribunal (DRT) to assist in execut ng old court decrees. It states that if a civil court had passed a decree or order before the 2000 Amendment, and it has not yet been executed, the decree-holder can apply to the Tribunal to recover the amount.

Upon receiving the applicat on, the Tribunal may issue a cert f cate of recovery to the Recovery Of cer, who will then recover the amount as if it were a regular debt under the Act.

This sect on ensures that old decrees (which may have been delayed in execut on) can st ll be enforced ef ciently through the DRT system.

Q73: What does Sect on 31B of the Recovery of Debts and Bankruptcy Act, 1993 provide with regard to the rights of secured creditors?

Answer: This sect on gives secured creditors (like banks and f nancial inst tut ons holding a mortgage or charge on a borrower's assets) priority over:

- o All other creditors, and
- o Government dues, such as taxes, cesses, and rates owed to the Central/State Government or local authorit es.
- This means that if the borrower's secured assets are sold, the money recovered must frst be used to pay the secured creditor, before paying any other debts or government dues.
- Except on: If there is a case under the Insolvency and Bankruptcy Code, 2016, then the distribut on of money from sale of assets will follow the priority order given in the IBC, not this Act.

Q74: "The Insolvency and Bankruptcy Code, 2016 will prevail over the Securit sat on and Reconstruct on of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002)." Examine the statement with the help of decided Case laws. (3 marks)

PAST YEAR QUESTION JUNE 2022

Answer: In the case of **Canara Bank v. Sri Chandramoulisvar Spg. Mills (P) Ltd.**, the NCLAT while referring to Supreme Court's verdict in Innovent ve case has ruled that when two proceedings are init ated, one under the Insolvency and Bankruptcy Code, 2016 (the Code) and the other under the SARFAESI Act, 2002, then the proceeding under the Code shall prevail.

Q75: Explain the object ve and procedural requirements for issuance of Public Not ce under sect on 102 of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

OR

What are the procedural requirements for issuance of Public Not ce under Sect on 102 of the Insolvency and Bankruptcy Code, 2016? (5 marks)

PAST YEAR QUESTION DECEMBER 2022

Answer: The object ve of sect on 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. Sect on 102 provides for the issuance of a public not ce by the Adjudicat ng Authority invit ng claims from the creditors of the debtor.

Issuance of public not ce - According to sub-sect on (1) of sect on 102 of the Code, the Adjudicat ng Authority shall issue a public not ce within seven days of passing the order under sect on 100 invit ng claims from all creditors within twenty-one days of such issue.

According to sub-sect on (3) of sect on 102 of the Code, such not ce shall be-

- (a) published in at least one English and one vernacular newspaper which is in circulat on in the state where the debtor resides;
- (b) af xed in the premises of the Adjudicat ng Authority; and
- (c) placed on the website of the Adjudicat ng Authority.

Inclusion of certain details - According to sub-sect on (2) of sect on 102 of the Code, the not ce under sub-sect on (1) shall include-

- (a) details of the order admit ng the applicat on;
- (b) part culars of the resolut on professional with whom the claims are to be registered; and
- (c) the last date for submission of claims.

Q76: EST Ltd. is aggrieved by the order of Nat onal Company Law Tribunal (NCLT) and seeks your advice for further steps in the mat er.

PAST YEAR QUESTION JUNE 2019

Answer: As per sect on 421 of the Companies Act, 2013, EST Ltd. can prefer appeal to the Nat onal Company Law Appellate Tribunal (NCLAT). The appeal shall be f led within a period of forty-f ve days from the date on which a copy of the order of the Nat onal Company Law Tribunal (NCLT) is made available to EST Ltd. and shall be in such form, and accompanied by such fees, as may be prescribed.

The NCLAT may entertain an appeal af er the expiry of the said period of forty-f ve days from the date aforesaid, but within a further period not exceeding forty-f ve days, if it is sat sf ed that the appellant EST Ltd. was prevented by suf cient cause from f ling the appeal within that period.

On the receipt of an appeal the NCLAT shall, af er giving the part es to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks f t, conf rming, modifying or set ng aside the order appealed against. The NCLAT shall send a copy of every order made by it to the NCLT and the part es to appeal.

As per sect on 423 of the Companies Act, 2013, if EST Ltd. is further aggrieved by the order of the NCLAT, it may fle an appeal to the Supreme Court within sixty days from the date of receipt of the order of the NCLAT on any quest on of law arising out of such order.

Q77: "The of cial liquidator cannot have recourse to the doctrine of elect on. He can challenge the order passed by the recovery of cer and appeal under the Recovery of Debts

Due to Banks and Financial Institutions Act, 1993 but cannot approach the company court to set aside the auction or confirmation of sale when the same has been confirmed by the recovery officer under the Act."

Comment on the above statement giving the options, if any, available to the official liquidator in this regard. (5 marks)

PAST YEAR QUESTION JUNE 2015

Answer: In the cases of *Pravin Gada v. Central Bank of India* [2013] 176 Comp Cas 101(SC), *Allahabad Bank v. Canara Bank* [2000] 101 Comp Cas 64(SC) and *Rajasthan Financial Corporation v. Official Liquidator* [2005] Com Cas 387(SC), Supreme Court held that anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal.

The Debts Recovery Tribunal has the powers under the 1993 Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of powers under sections 25 to 28 of the 1993 Act. Thus, the auction, sale and challenge are completely codified under the 1993 Act, regard being had to the special nature of the legislation.

The official liquidator has a role under the 1956 Act. He protects the interests of the workmen and the creditors and, hence his association at the time of auction and sale is appropriate. He has been conferred locus to put forth his stand in these matters. Since it is the Debts Recovery Tribunal which would have the exclusive jurisdiction when a matter is agitated before the Debts Recovery Tribunal, the official liquidator does not have a choice either to approach the Debts Recovery Tribunal or the company court. The language of the 1993 Act, being clear, provides that any person aggrieved can prefer an appeal. The official liquidator whose association is mandatorily required is indubitably a person aggrieved relating to the action taken by the Recovery Officer which would include the manner in which the auction is conducted or the sale is confirmed. Under these circumstances, the official liquidator cannot have recourse to the doctrine of election. He has only one remedy, i.e., to challenge the order passed by the Recovery Officer before the Debts Recovery Tribunal and further appeal under the 1993 Act and not approach the company court to set aside the auction or confirmation of sale when a sale has been confirmed by the Recovery Officer under the 1993 Act.

Q78: SARFAESI Act is a complete code in itself and there is no lacuna or ambiguity in it to warrant reading something more into it or to borrow anything from the Companies Act. Comment on the statement in light of decided case laws.

(5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: *Pegasus Assets Reconstruction (P) Ltd v. Haryana Concast Ltd.*, civil appeal nos. 3646 of 2011, 9293-9294 OF 2014 AND 14736 TO 14738 of 2015, date December 29, 2018, [2015] 64 taxmann.com 394 (SC)

Considering section 283 of the Companies Act, 2013 read with section 13 of the SARFAESI Act, 2002, the Supreme Court in the matter of winding-up and custody of company's property

opined that SARFAESI Act, 2002 is a complete code in itself and there is no lacuna or ambiguity in it to warrant reading something more into it or to borrow anything from Companies Act, 2013. The Court mentioned that as per section 13 of the SARFAESI Act, a secured creditor has right to enforce its security interest without intervention of Court or Tribunal and the powers under Companies Act, 2013 cannot be wielded by Company Judge to interfere with proceedings by a secured creditor who has opted to stay outside winding-up process to realize its secured interests as per provisions of SARFAESI Act.

Q79: M/s Speed Airways Pvt Ltd. a borrower, filed a case before a civil court that Diligent Bank, a secured creditor, has not issued any letter to the company for demanding of repayment of loan and stating its intent on to enforce the secured interest. Rather, fraudulently transferred the funds from its account to another company only to classify it as NPA as per the provisions of SARFAESI Act, 2002. In the light of the decided case, state whether the case is maintainable. (5 marks)

PAST YEAR QUESTION JUNE 2018

Answer: Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

The facts of present case are similar to case of *M/s Golf Technologies (P). Ltd. & Anr v. Axis Bank Ltd. & Ors (Del)* where the issue was that the company stated that the letter dated 31st December, 2012 was not issued and that it was fraudulently created by the bank, hence the transfer of monies from the plaintiff's account to M/s Tulip Telecom Limited was wrong and the said amount was depleted from their account only to classify it as an NPA. This according to the plaintiff amounts to fraud and would form the basis of the maintainability of the present suit.

The ground alleged in the suit is fraud by the bank played upon the plaintiff. Suit was dismissed on the ground that civil court has no jurisdiction to decide the case which Debt Recovery Tribunal has power except in case of fraud. Court was of the view that the ground of fraud raised by the plaintiff can be duly addressed in proceedings under Section 17 of the Act.

Accordingly, the case of *M/s Speed Airways Pvt. Ltd.* will not be maintainable in the court. It can approach Debt Recovery Tribunal.

CHAPTER 25 AS PER ICSI MODULE

WINDING-UP BY TRIBUNAL

Q1: Distinguish between winding up under the Companies Act, 2013 and liquidation in terms of the Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION JUNE 2022

Answer: Winding up is a means by which the dissolution of a company is brought about. The main purpose of winding up of a company is to realize the assets and pay the company's debts expeditiously and fairly in accordance with the law. If any surplus is left, it is distributed among the members in accordance with their rights. The Companies Act, 2013 shall continue to govern winding up of companies on various grounds excluding inability to pay debts.

On promulgation of the Insolvency and Bankruptcy Code, 2016 the clause relating to ground of inability to pay their debts and provision relating to voluntary winding up of Companies have been deleted. Liquidation is defined as a process by which the life of a company is brought to an end in legal terms, after which it will be properly administered by a liquidator for the benefit of its creditors, members, and other stakeholders. The Insolvency and Bankruptcy Code also exclusively governs the insolvency resolution and liquidation of corporates.

Part II- Chapter III & Chapter V of the Insolvency and Bankruptcy Code, 2016 deals with Liquidation Process and Voluntary Liquidation of Corporate Persons respectively.

Q2: What is the meaning of "winding up" under the Companies Act, and how have the provisions relating to voluntary winding up evolved with the enactment of the Insolvency and Bankruptcy Code, 2016?

Answer: The term "**winding up**" refers to the legal process through which a company ceases its operations, its assets are liquidated, liabilities are paid off, and any remaining surplus is distributed among shareholders. However, "winding up" was not defined in the Companies Act, 2013 or even in the Companies Act, 1956.

The Eleventh Schedule of the Insolvency and Bankruptcy Code (IBC), 2016 inserted subsection (94A) into section 2 of the Companies Act, 1956, defining winding up as "a proceeding by which a company is dissolved."

Earlier, voluntary winding up was governed by Sections 304 to 323 of the Companies Act, 2013. However, these sections were omitted by the IBC, 2016, transferring the entire regime of voluntary liquidation to the IBC framework.

Now, voluntary liquidation is governed by Section 59 of the Insolvency and Bankruptcy Code, 2016, read with the IBBI (Voluntary Liquidation Process) Regulations, 2017.

Under the IBC, voluntary liquidation applies only to corporate persons (companies, LLPs) which have no debt or are solvent and intend to liquidate themselves voluntarily, subject to approval of shareholders/partners and after making necessary declarations of solvency.

Q3: Write a short note on winding up under the Companies Act, 2013 with special reference to Insolvency and Bankruptcy Code, 2016. (5 marks)

PAST YEAR QUESTION DECEMBER 2018

Answer: Winding-up under the Companies Act, 2013

The Companies Act, 2013 contains provisions for winding-up of companies on various grounds including inability of companies to pay their debts. The notification of the Insolvency and Bankruptcy Code, 2016 has deleted the provisions in the Companies Act, 2013 regarding winding-up of companies on the ground of inability to pay their debts and those relating to voluntary winding-up of companies and detailing the requirements for insolvency resolution of corporate persons and voluntary winding-up in the Code itself. The Code will exclusively be governing the insolvency resolution and liquidation of corporates.

The Companies Act, 2013 shall continue to govern winding-up of companies on various other grounds excluding inability to pay debts. Sections 270 to 288, Sections 290 to 303, Section 324 and Sections 326 to 365 of Chapter XX of the Companies Act, 2013 contain the provisions related to winding-up of the company.

Q4: Are 'winding-up' and 'dissolution' synonymous? Discuss. (5 marks)

PAST YEAR QUESTION DECEMBER 2016

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

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

Q5: "Inability to pay debts was generally a ground for moving an application for winding up of a Company under the Companies Act, 1956. But such a ground no longer exists under the

Companies Act, 2013". State the circumstances which compel a company to be wound up under the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION JUNE 2018

OR

Write notes on the Four grounds on which a company may be wound-up. (4 marks)

PAST YEAR QUESTION JUNE 2015

Answer: One of the salient features of the winding-up provisions of the Companies Act, 1956 was the power of the Court to wind-up the company being "unable to pay its debts" under section 433(e) of the said Act. There is a significant departure in Companies Act, 2013 in which Section 272 is amended by the Insolvency and Bankruptcy Code, 2016.

Accordingly, a company may be wound-up by National Company Law Tribunal under Section 271:

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(a) If the company has, by special resolution, resolved that it be wound up by the Tribunal.

(b) If the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(c) If, on an application by the Registrar or any other person authorized by the Central Government, the Tribunal is of the opinion that the company's affairs have been conducted fraudulently or the company was formed for fraudulent or unlawful purposes, or persons in charge have been guilty of fraud, misfeasance or misconduct, and it is proper to wind up the company.

(d) If the company has defaulted in filing its financial statements or annual returns with the Registrar for the immediately preceding five consecutive financial years.

(e) If the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Q6: Who may file a petition for winding up of a company under Section 272 of the Companies Act, 2013?

Answer: As per Section 272, the following persons may file a petition to the Tribunal for winding up of a company:

(a) The company itself;

(b) Any contributory or contributories (i.e., shareholders);

(c) All or any of the persons mentioned in clauses (a) and (b);

(d) The Registrar of Companies;

(e) Any person authorised by the Central Government in this behalf;

(f) In case of clause (b) of Section 271 (i.e., acting against sovereignty, security, or public order), the Central Government or a State Government may file the petition.

Q7: What are the powers of the Tribunal on receipt of a winding-up petition under Section 272?

Answer: Under Section 273(1) of the Companies Act, 2013, the Tribunal may pass any of the following orders within 90 days from the date of presentation of the petition:

- (a) Dismiss it, with or without costs;
- (b) Make any interim order as it thinks fit;
- (c) Appoint a Provisional Liquidator till the making of the winding-up order;
- (d) Make an order for winding up the company with or without costs;
- (e) Pass any other order as it thinks fit.

Q8: Is the company given an opportunity before appointing a provisional liquidator?

Answer: Yes, before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford it a reasonable opportunity to make representations, unless the Tribunal, for special reasons recorded in writing, decides to dispense with such notice.

Q9: Can the Tribunal refuse to make a winding-up order if the company has mortgaged assets?

Answer: No, the Tribunal shall not refuse to make a winding-up order only on the ground that the company's assets have been mortgaged for an amount equal to or exceeding the value of assets, or that the company has no assets.

Q10: When may the Tribunal refuse to make a winding-up order under just and equitable ground?

Answer: As per Section 273(2), if the petition is filed on the ground that it is just and equitable to wind up the company, the Tribunal may refuse the order if:

1. It believes some other remedy is available to the petitioner(s), and
2. The petitioners are acting unreasonably in seeking winding up instead of pursuing that other remedy.

Q11: "Filing of Statement of Affairs by the Directors of the Company on which a prima facie case is felt by the Tribunal, is a pre-requisite to oppose such winding up Petition pending in terms of Companies Act, 2013". Furnish your views in brief. (5 marks)

PAST YEAR QUESTION AUGUST 2021

Answer: Section 274 of the Companies Act, 2013 lays down that in case, where the Tribunal is satisfied that on a petition that the winding up of the company is to be made out, it may by an order direct the company to file its objections along with a statement of its affairs within

thirty days of the order which can be allowed a further period of thirty days in a situation of contingency or special circumstances.

In case of failure, the company and its directors may forfeit the right to file any objection and also liable for punishment of imprisonment and fine. For any prosecution for default by directors or officers of the Company, the complaint may be filed before the special court in terms of Section 274(5). As such, filing of Statement of Affairs by the directors is an absolute necessity in case the Company has objection points.

Q12: Who can be appointed as a Company Liquidator in the case of winding up by the Tribunal under Section 275 of the Companies Act, 2013? What are the qualifications, responsibilities, and obligations of the liquidator after appointment?

Answer: Under Section 275 of the Companies Act, 2013, when a company is being wound up by the Tribunal, the Tribunal is required to appoint a Company Liquidator to conduct the winding-up process.

Under Section 275(1) of the Companies Act, 2013, when the Tribunal passes an order for winding up of a company under Section 273, it is mandated to appoint a Company Liquidator. The appointment can be either an Official Liquidator or a liquidator from the panel maintained by the Tribunal. As per Section 275(2), the liquidator (whether appointed provisionally or finally) must be chosen from among the Insolvency Professionals registered under the Insolvency and Bankruptcy Code, 2016.

Where the Tribunal appoints a Provisional Liquidator, Section 275(3) empowers it to limit or restrict the liquidator's powers through the appointment order or a later order; however, in absence of such restrictions, the provisional liquidator shall enjoy the same powers as the Company Liquidator.

The terms and conditions of the appointment, including the fee payable, shall be specified by the Tribunal based on factors like the nature of the task, the experience and qualifications of the liquidator, and the size of the company as provided in Section 275(5).

Furthermore, according to Section 275(6), upon appointment, the liquidator is required to submit a declaration within 7 days disclosing any conflict of interest or lack of independence with respect to his appointment to the Tribunal. This obligation continues for the entire term of the appointment.

Additionally, under Section 275(7), if a Provisional Liquidator had already been appointed under Section 273(1)(c), the Tribunal may confirm such appointment and designate him as the Company Liquidator for conducting the entire winding-up process.

Q13: X was appointed as an official liquidator of ABC Company Ltd. at the time of passing of the order of winding up by NCLT. After a few months, X suffered a cardiac arrest and due to his sudden demise, his position has become vacant.

Elucidate the powers of Tribunal w.r.t removal and replacement of liquidator in place of X under Section 276 of the Companies Act, 2013. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

OR

The Tribunal has the powers to remove the provisional liquidator or the Company Liquidator. Mention the grounds where the Tribunal may exercise its powers in this regard. (3 marks)

PAST YEAR QUESTION DECEMBER 2021

OR

Elaborate the circumstances in which a liquidator can be removed by the Tribunal. (5 marks)

PAST YEAR QUESTION DECEMBER 2022

OR

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

PAST YEAR QUESTION DECEMBER 2017

OR

Agastu Industries Limited, a medium sized company had been facing financial difficulties for the past few years due to poor management and an inability to cope with its increasing operational costs. Also the company's funds were being used for personal expenses of the directors like purchase of high end vehicles and other non-business related expenditures. These actions led to a significant depletion of company's cash reserves. The company had to finally face a liquidation order from NCLT.

The NCLT appointed Mr. Jayant Nanda as liquidator to wind up the company and liquidate its assets.

However, it came to the light that Mr. Jayant Nanda had prior business relationship with one of the major creditors PQR Corporation and he is giving preferential treatment to PQR Corporation by prioritizing its claims over those of other creditors and possibly negotiating assets sales at lower prices to benefit PQR Corporation.

A group of creditors filed a petition in the Hon'ble Delhi High Court for removal of Mr. Jayant Nanda as the liquidator accusing him of conflict of interest. Discuss the validity of the petition in the light of the provisions of the Companies Act, 2013.

(5 marks)

PAST YEAR QUESTION JUNE 2025

Answer: Section 276 of the Companies Act, 2013 lays down that the Tribunal may on reasonable cause being shown and for reasons to be recorded in writing, the tribunal may remove the provisional liquidator or the Company liquidator, on any of the following grounds:

- a. Misconduct
- b. Fraud or misfeasance
- c. Professional Incompetence for failure to exercise due care and diligence in performance of the powers and functions
- d. Inability to act as provisional liquidator as the case maybe company liquidator
- e. Conflict of interest or lack of independence during the term of his appointment that would justify removal

Further, in the event of death, resignation or removal of the liquidator the tribunal may transfer the work assigned to him to another Company liquidator for reasons to be recorded in writing.

In the present case also, due to sudden demise of Mr. X, the Tribunal may transfer the work assigned to Late Mr X to another Company liquidator for reasons to be recorded in writing.

Alternate Answer,

In the present case, the petition may be filed before the NCLT and not before the Hon'ble High Court as the same is within the powers of NCLT. The NCLT, *for reasons to be recorded in writing*, may remove the Mr. Jayant Nanda, the Company liquidator, if found guilty of giving preferential treatment to PQR Corporation by prioritizing its claims over those of other creditors and possibly negotiating assets sales at lower prices to benefit PQR Corporation.

Q14: What are the obligations and procedural steps under Section 277 of the Companies Act, 2013, after the Tribunal passes a winding-up order or appoints a provisional liquidator?

Answer: Under Section 277 of the Companies Act, 2013, the following procedural steps and obligations arise after the Tribunal passes a winding-up order or appoints a provisional liquidator:

1. Information by Tribunal:

The Tribunal shall inform the Company Liquidator or Provisional Liquidator and the Registrar of Companies (RoC) within seven days from the date of the order.

2. Act on by Registrar: Upon receiving the order, the Registrar must:

- Make an endorsement in the records related to the company, and
- Notify in the Official Gazette that such an order has been passed, and
- In case of a listed company, inform the concerned stock exchange(s).

3. Effect on Employees: The winding-up order is treated as a notice of discharge to all officers, employees, and workmen unless the business is being continued.

4. Constitution of Winding Up Committee: The Company Liquidator, within three weeks from the date of the order, must apply to the Tribunal to constitute a Winding Up Committee.

5. Composition of the Winding Up Committee: The committee shall consist of:

- (i) The Official Liquidator attached to the Tribunal
- (ii) A nominee of secured creditors
- (iii) A professional nominated by the Tribunal

6. Purpose of Committee: The Winding Up Committee is responsible for assisting and monitoring the progress of the liquidation proceedings.

Q15: What are the roles and functions of the Company Liquidator and the Winding Up Committee during the liquidation process under the Companies Act, 2013?

Answer: Under the Companies Act, 2013 (specifically read with Section 277 and related provisions), the Company Liquidator plays a central role in the winding-up process, and is supported by a Winding Up Committee, which assists and monitors the progress of liquidation.

Roles and Functions of the Winding Up Committee:

The Company Liquidator acts as the convener of the committee. The committee assists and monitors liquidation in the following areas:

- (i) Taking over assets
- (ii) Examination of the statement of affairs
- (iii) Recovery of property, cash or any other assets, including derived benefits
- (iv) Review of audit reports and company accounts
- (v) Sale of assets
- (vi) Finalisation of the list of creditors and contributories
- (vii) Compromise, abandonment and settlement of claims
- (viii) Payment of dividends (if any)
- (ix) Any other function as the Tribunal may direct

Report ng Requirements:

- The Company Liquidator must place a monthly report before the Tribunal along with the minutes of the Winding Up Committee meetings, duly signed by the attending members.
- A draft final report must be prepared by the Liquidator for review and approval by the committee.
- Upon approval, the final report is submitted by the Company Liquidator to the Tribunal, which may then pass a dissolution order for the company

Q16: What is the effect of a winding-up order passed by the Tribunal under Section 278 of the Companies Act, 2013?

Answer: The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

Q17: What is the legal effect on suits and legal proceedings when a winding-up order is passed under Section 279 of the Companies Act, 2013?

Answer: When the Tribunal passes a winding-up order or appoints a provisional liquidator, then:

- No new court case or legal action can be started against the company, and
- Any case that is already going on cannot continue
- Unless permission is taken from the Tribunal.

The Tribunal has to decide on such permission within 60 days.

Exception:

This rule does not apply to any case that is already going on in the Supreme Court or High Court.

Q18: What report is the Company Liquidator required to submit under Sect on 281(1) of the Companies Act, 2013, and within what time frame?

Answer: As per Sect on 281(1), when the Tribunal passes a winding-up order or appoints a Company Liquidator, the liquidator must submit a report to the Tribunal within 60 days from the date of the order.

The report must include 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.

As per Sect on 281(2), the report must include how the company was promoted or formed and state whether, in the liquidator's opinion, any fraud was committed by promoters or officers.

As per Sect on 281(3), the liquidator must also report on the viability of the business or steps that may be necessary for maximising the value of the company's assets.

As per Sect on 281(4), the liquidator may submit additional reports if necessary.

As per Sect on 281(5), any person claiming to be a creditor or contributory has the right to inspect the liquidator's report and take copies or extracts by paying the prescribed fee.

Q19: What are the powers of the Tribunal under Sect on 282 of the Companies Act, 2013, upon receiving the report of the Company Liquidator?

Answer: Sect on 282 outlines various directions the Tribunal may issue based on the report of the Company Liquidator during winding-up proceedings. The powers of the Tribunal are summarized below:

Sect on 282(1): The Tribunal shall fix a time limit to complete the winding-up process and dissolve the company. It may revise this time limit if it believes continuation is not advantageous or economical.

Sect on 282(2): The Tribunal may order the sale of the company as a going concern or sale of its assets/parts thereof. It may also appoint a sale committee (comprising creditors, promoters, and others) to assist the Company Liquidator.

Sect on 282(3): If a fraud is reported by the Liquidator, Central Government, or any person, the Tribunal shall order an investigation under Sect on 210. Based on the findings, it may take action under Sections 339 to 342 or direct the Liquidator to file a criminal complaint.

Sect on 282(4): The Tribunal may order protective or enhancement measures to safeguard the value of the company's assets.

Sect on 282(5): The Tribunal may issue any other order or direction as it considers necessary or appropriate.

Q20: What are the responsibilities of the Company Liquidator or Provisional Liquidator regarding the custody of company's properties under Sect on 283?

Answer: Upon the winding up order made by the tribunal the Company liquidator or the provisional liquidator take into his or its custody or control all the property, effects and actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company which shall be deemed to be in the custody of the tribunal from the date of the order for the winding up of the company.

Q21: What are the provisions related to the Advisory Committee in the process of company winding up under Sect on 287 of the Companies Act, 2013?

Answer: As per Sect on 287 of the Companies Act, 2013, the provisions regarding the Advisory Committee during winding up are as follows:

1. **Constitution of Advisory Committee [Sect on 287(1)]:** While passing an order for winding up, the Tribunal may direct the formation of an Advisory Committee to Advise the Company Liquidator, and to Report to the Tribunal on matters as directed.
2. **Composition of the Committee [Sect on 287(2)]:** The Advisory Committee shall consist of not more than 12 members, comprising Creditors, Contributories, or Other persons, in such proportions as the Tribunal deems fit considering the company's circumstances.
3. **Meeting for Constitution [Sect on 287(3)]:** The Company Liquidator must convene a meeting of creditors and contributories (based on the company's records) within 30 days of the winding-up order to assist the Tribunal in determining the committee's composition.
4. **Right of Inspection [Sect on 287(4)]:** The Advisory Committee has the right to inspect the books of account, documents, assets, and properties of the company at reasonable times.
5. **Meeting Procedure [Sect on 287(5)]:** The manner of convening meetings, procedures to be followed, and other operational aspects of the Advisory Committee shall be as prescribed by rules.

6. Chairing of Meetings [Sect on 287(6)] : All meetings of the Advisory Committee shall be chaired by the Company Liquidator.

Q22: What are the powers and duties of the Company Liquidator in a winding-up by the Tribunal as per Sect on 290 of the Companies Act, 2013?

Answer: As per Sect on 290 of the Companies Act, 2013, the Company Liquidator, appointed during winding up by the Tribunal, has the following powers and duties, subject to directions from the Tribunal:

- (a) Carry on the business of the company if required for effective winding up.
- (b) Perform all acts and execute documents (like deeds, receipts) in the company's name and use its seal if needed.
- (c) Sell the company's movable/immovable property and actionable claims via public auction or private deal.
- (d) Sell the entire undertaking of the company as a going concern.
- (e) Raise money using the company's assets as security.
- (f) Start or defend legal proceedings in the name of the company.
- (g) Invite and settle claims of creditors and employees, and distribute sale proceeds as per legal priority.
- (h) Inspect the company's records filed with the Registrar or any authority.
- (i) Prove and claim in a contributory's insolvency for amounts due, and receive dividends from their estate.
- (j) Draw, accept, or endorse negotiable instruments like cheques or promissory notes on behalf of the company.
- (k) In his official name, obtain letters of administration for a deceased contributory to recover amounts due.
- (l) Appoint professionals or agents for help in performing his duties or protecting company assets.
- (m) Sign or verify documents necessary for: (i) winding up; (ii) asset distribution; and (iii) fulfilling his duties.
- (n) Apply to the Tribunal for directions as needed for the winding-up process.

Q23: What does Sect on 291 of the Companies Act, 2013 provide regarding professional assistance to the Company Liquidator?

Answer: As per Sect on 291 of the Companies Act, 2013, the Company Liquidator is empowered to seek professional assistance for the proper conduct of winding-up proceedings. The section provides the following:

Sect on 291(1): The Company Liquidator may, with the sanction of the Tribunal, appoint one or more professionals such as Chartered Accountants, Company Secretaries, Cost Accountants, Legal Practitioners, or any other professionals. These professionals are appointed on such terms and conditions as may be necessary to assist the Liquidator in performing his duties.

Sect on 291(2): Any person so appointed must immediately disclose to the Tribunal any conflict of interest or lack of independence in the prescribed form regarding his appointment.

Q24: What are the provisions under Sect on 292 of the Companies Act, 2013, regarding the exercise and control of the powers of the Company Liquidator?

Answer: Under Sect on 292 of the Companies Act, 2013, the exercise and control of the powers of the Company Liquidator during the winding up process is governed as follows:

Sect on 292(1): The Company Liquidator must act in accordance with the directions given by creditors or contributories at a general meeting, or by the advisory committee, during the administration and distribution of assets.

Sect on 292(2): If there is any conflict between directions given by the general meeting of creditors/contributories and the advisory committee, the directions of the general meeting will prevail.

Sect on 292(3): The Company Liquidator:

(a) May summon meetings of creditors or contributories whenever he thinks fit to ascertain their wishes.

(b) Shall summon such meetings when directed by a resolution or on request in writing by not less than one-tenth in value of the creditors or contributories.

Sect on 292(4): Any person aggrieved by an act or decision of the Company Liquidator may apply to the Tribunal, which may confirm, reverse, or modify the act/decision and pass any further just order as needed.

Q25: What are the provisions under Sect on 293 of the Companies Act, 2013 regarding the books to be maintained by the Company Liquidator?

Answer: Under Sect on 293 of the Companies Act, 2013, the following provisions apply:

Sect on 293(1): The Company Liquidator shall keep proper books in the prescribed manner, wherein entries or minutes of proceedings at meetings and other prescribed matters must be recorded.

Sect on 293(2): Any creditor or contributory, subject to the control of the Tribunal, may inspect such books either personally or through an agent.

Q26: What are the provisions under Sect on 294 of the Companies Act, 2013 related to the audit of the Company Liquidator's accounts?

Answer: Under Sect on 294 of the Companies Act, 2013, the audit of the Company Liquidator's accounts is governed by the following provisions:

Sect on 294(1): The Company Liquidator must maintain proper and regular books of account, including all receipts and payments made by him, in the prescribed form and manner.

Sect on 294(2): The Liquidator shall, at least twice a year, present to the Tribunal an account of receipts and payments in duplicate, verified by a declaration, in the prescribed form.

Sect on 294(3): The Tribunal shall cause the accounts to be audited, and the Liquidator must furnish vouchers and required information. The Tribunal may inspect any books of account at any time.

Sect on 294(4): After audit, one copy of the accounts shall be filed with the Tribunal, and the other copy shall be delivered to the Registrar, available for inspection by creditors, contributories, or interested persons.

Sect on 294(5): If the company is a Government company, the Liquidator must send a copy of the audited accounts to:

- (a) Central Government, if it is a member;
- (b) State Government, if it is a member; or
- (c) Both, if both are members.

Sect on 294(6): The Liquidator must print the audited accounts or a summary, and send a printed copy by post to every creditor and contributory.

However, the Tribunal may exempt this requirement if it deems fit.

Q27: What are the provisions of Sect on 295 of the Companies Act, 2013 regarding payment of debts by contributories and the extent of set-off allowed during winding up?

Answer: Sect on 295 provides as follows:

Sect on 295(1): After the passing of a winding up order, the Tribunal may require any contributory (on the list of contributories) to pay any money due to the company, whether from him or from the estate he represents. This is exclusive of amounts payable by him due to any call under the Act.

Sect on 295(2)(a): In the case of an unlimited company, the Tribunal may allow a set-off of money due to the contributory (or his estate) from the company, provided it arises from an independent contract or dealing with the company (not from dividends or profits as a member).

Sect on 295(2)(b): In the case of a limited company, such a set-off is allowed only to a director or manager whose liability is unlimited, or to his estate.

Sect on 295(3): In the case of any company, once all creditors have been paid in full, any amount due to a contributory from the company may be allowed to be set off against any subsequent call made on him.

Q28: What power does the Tribunal have under Sect on 298 of the Companies Act, 2013 regarding costs during winding up?

Answer: Under Sect on 298 of the Companies Act, 2013, if the assets of a company are insufficient to satisfy its liabilities, the Tribunal has the power to order that the costs, charges, and expenses incurred during the winding-up process be paid out of the company's assets, in such order of priority among them as the Tribunal considers just and proper.

Q29: What powers does the Tribunal have under Sect on 299 of the Companies Act, 2013 to summon persons suspected of having company property or information?

Answer: Sect on 299(1): Power to summon persons:

Tribunal may summon any officer or person suspected of having company's property, books, papers, being indebted, or capable of giving relevant information.

Sect on 299(2): Examination on oath:

Tribunal may examine summoned persons on oath (orally, via written interrogatories, or affidavit), record their answers in writing, and require them to sign.

Sect on 299(3): Production of books/papers:

Tribunal can order the production of books or papers; any claimed lien shall not be affected by such production. Tribunal can adjudicate lien issues.

Sect on 299(4): Report by liquidator:

Tribunal may ask the liquidator to submit a report on debts or company property in possession of others.

Sect on 299(5)(a): Order to pay company's debt If a person is found indebted, Tribunal can order payment to the provisional or official liquidator on terms it finds just.

Sect on 299(5)(b): Order to deliver company property If in possession of company property, Tribunal can order delivery to the liquidator on just terms.

Sect on 299(6): Penalty for non-appearance:

If a summoned person fails to appear without valid reason, Tribunal may impose appropriate costs.

Sect on 299(7): Execution of Tribunal orders:

Orders under 299(5) are executable like civil court decrees under the CPC, 1908.

299(8): Discharge from liability:

A person who complies with a Tribunal order under 299(5) is discharged from all liability related to that debt/property, unless stated otherwise.

Q30: What are the provisions under Sect on 300 of the Companies Act, 2013 regarding the examination of promoters, directors, etc., during winding up?

Answer: Sect on 300 of the Companies Act, 2013 empowers the Tribunal to examine promoters, directors, or officers of the company during the course of winding up, particularly in cases involving suspected fraud. The key provisions are as follows:

1. **Initiation of Examination [Sect on 300(1)]:** If the Company Liquidator submits a report stating that, in his opinion, fraud has been committed by any person in the promotion, formation, business, or conduct of the company's affairs since its formation, the Tribunal may summon that person to appear before it for examination on a specified date.
2. **Participation of Liquidator and Legal Assistance [Sect on 300(2)]:** The Company Liquidator must participate in the examination and, if specially authorised by the Tribunal, may employ legal professionals to assist during the proceedings.
3. **Examination on Oath [Sect on 300(3)]:** The summoned person shall be examined under oath and must answer all questions put by the Tribunal or allowed by it.
4. **Rights of the Person Examined [Sect on 300(4)]:**

(a) The person is entitled to receive a copy of the Company Liquidator's report at his own cost before the examination.

(b) He may also engage, at his own expense, a Chartered Accountant, Company Secretary, Cost Accountant, or Legal Practitioner (as recognised under Section 432) to represent him during the examination. These professionals may also ask questions as permitted by the Tribunal to help the person explain or clarify his answers.

Q31: What powers does the Tribunal have under Section 301 of the Companies Act, 2013 regarding the arrest of persons attempting to abscond during winding up proceedings?

Answer: The Tribunal, if satisfied that a contributory or a person having property, accounts or papers of the company in his possession is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, the tribunal may cause –

- (a) the contributory to be detained until such time as the tribunal may order; and
- (b) his books and papers and movable property to be seized and safely kept until such time as the tribunal may think fit.

Q32: What is the process for dissolution of a company by the Tribunal under Section 302 of the Companies Act, 2013, and what are the circumstances in which such an order can be passed?

Answer: As per Section 302 of the Companies Act, 2013, the dissolution of a company is the final step in the winding-up process. The process and legal provisions are as follows:

1. Application for Dissolution – [Section 302(1)]

When the affairs of a company have been completely wound up, the Company Liquidator shall file an application to the Tribunal seeking an order for the company's dissolution.

2. Tribunal's Power to Dissolve – [Section 302(2)]

The Tribunal may:

- On receiving an application from the Company Liquidator, or
- Suo motu, if it is of the opinion that it is just and reasonable in the circumstances of the case, pass an order that the company shall be dissolved from the date of the order. The company shall stand dissolved accordingly.

3. Filing with Registrar – [Section 302(3)]

A copy of the dissolution order must be submitted by the Company Liquidator to the Registrar within 30 days of the order. The Registrar shall then record a minute of dissolution in the register related to the company.

4. Penalty for Default – [Section 302(4)]

If the Company Liquidator fails to forward the dissolution order to the Registrar within the specified period, he shall be liable to a fine up to ₹5,000 for every day of default.

Case Law: Mathew Philip v. Malayalam Plantation Ltd. (1994) – Kerala High Court

The Kerala High Court in this case laid down three situations in which a company can be dissolved:

1. **Complete Winding Up:** When the affairs of the company have been entirely wound up.
2. **Lack of Funds or Assets:** When the Liquidator is unable to continue the process due to inadequate resources.
3. **Other Practical Reasons:** When the Tribunal opines that the Liquidator cannot proceed further due to any other valid reason.

Q33: What is considered a fraudulent preference under Sect on 328 of the Companies Act, 2013, and what actions can the Tribunal take in such cases?

Answer: Under Sect on 328(1) of the Companies Act, 2013, if a company gives preference to a creditor, surety, or guarantor for any debts or liabilities, and does anything that results in placing that person in a better position than they would have been in the event of liquidation, and such act was done within six months before making the winding up application, the Tribunal may treat the transaction as a fraudulent preference.

If the Tribunal is satisfied that such a transaction is a fraudulent preference, it may pass an order to restore the position as it would have been if the preference had not been given.

As per Sect on 328(2), if there is a transfer of property (movable or immovable), delivery of goods, payment, or execution of any act done by or against the company within six months before filing for winding up, and it constitutes a preference, the Tribunal may declare such transaction invalid and take steps to restore the earlier position.

Q34: What are the liabilities and rights of a person who has been fraudulently preferred under Sect on 331 of the Companies Act, 2013?

Answer: Under Sect on 331(1) of the Companies Act, 2013, when a company is being wound up and a transaction made after the commencement of the Act is declared invalid under Sect on 328 as a fraudulent preference, the person preferred (who has an interest in property mortgaged or charged to secure the company's debt) will be treated as if he had undertaken to be personally liable as a surety for the debt. This liability is limited to the extent of the mortgage or charge or the value of his interest, whichever is less.

As per Sect on 331(2), the value of such interest is to be determined as on the date of the transaction, assuming it is free from all encumbrances other than the mortgage or charge securing the company's debt.

Sect on 331(3) provides that the Tribunal has jurisdiction to determine disputes regarding such fraudulent preference payments between the person who received the payment and the surety or guarantor, and may grant relief even if it's not necessary for the winding up. The Tribunal may also permit adding the surety or guarantor as a third party to such proceedings. Sect on 331(4) states that the above provisions shall apply similarly to non-monetary transactions as well.

Q35: Companies (Winding-up) Rules, 2020 allow certain classes of companies to close their business by making a winding-up application to Central Government without going to NCLT.

Explain the summary procedure for liquidation under Companies (Winding-up) Rules, 2020. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Summary Procedure for liquidation

These rules allow following classes of companies to close their business by making a winding-up application to Central Government without going to NCLT.

Companies accepting deposit and having total outstanding deposits	up to Rs.25 lacs*
Companies having total outstanding loan including secured loan	up to Rs.50 lacs*
Companies having total turnover	up to Rs.50 crores*
Companies with paid-up capital	up to Rs.1 Crore*

**based on latest audited balance sheet.*

In addition, companies having book value of assets up to Rs.1 Crore [currently specified under section 361(1)(i)] of the Companies Act, 2013, can also approach Central Government for liquidation.

The provisions of the Rules related to filing and audit of the Company Liquidator's accounts and its procedure (rule 91 to 99 of the rules) and disposing of assets (rule 165 to 167 of the rules) shall be applicable to above class of companies with modification that the word 'Tribunal' shall be considered as 'Central Government'.

Other procedural aspects are as under:

- The rules lay down the process for meeting of creditors and contributories of the company, and specify the scenarios in which creditors can vote.
- The rules make it necessary for all the money lying in the bank account of Company liquidator which is not immediately required for the purposes of winding up, to be invested in government securities or in interest bearing deposits in any scheduled bank.
- The rules lay down the procedure for maintenance of registers and books of accounts by the Company liquidator.
- The rules also outline the procedure for creditors to prove their debts and claims against the company and if the proof of such debt gets rejected by the Company liquidator, there is also a provision and process for creditor to make an appeal to Tribunal.

Q36: Ritu Housing Finance Company Limited initiated Corporate Insolvency Resolution Process against its corporate debtor Raj Infrastructure Limited under section 7 of The Insolvency and Bankruptcy Code, 2016. The National Company Law Tribunal dismissed the application as not maintainable. The reason given was that winding up proceedings have already been initiated by the High Court. Quoting any decided case law confirm whether the application under section 7 of the Code is maintainable when winding up proceedings against the corporate debtor have already been initiated? (5 marks)

PAST YEAR QUESTION DECEMBER 2023

Answer: In the decided case of *Indiabulls Housing Finance Limited V/s Shree Ram Urban Infrastructure Limited*, the winding up proceedings against the corporate debtor had already been initiated by the Bombay High Court. Further, the fresh application for insolvency proceedings has been filed with NCLT Mumbai bench, which in turn had dismissed the application as the same was not maintainable in view of the fact that Hon'ble Bombay High Court already initiated the winding up proceedings. The corporate debtor appealed before National Company Law Appellate Tribunal and the tribunal examined the judgments and opined that once second stage i.e. liquidation (winding-up) proceedings has already been initiated, the question of reverting back to the first stage of Corporate Insolvency Resolution Process or preparation of Resolution Plan does not arise.

While arriving at its judgment, the NCLAT relied on the case of *Forech India Pvt. Ltd. vs. Edelweiss assets reconstruct on Company Ltd. & Anr.*, wherein the tribunal observed that if a Corporate insolvency resolution has started or on failure, if liquidation proceeding has been initiated against the Corporate debtor, the question of entertaining another application under Section 7 or Section 9 against the same very Corporate debtor does not arise, as it is open to the 'Financial Creditor and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

However, the matter went on appeal before the Hon'ble Supreme Court which declared by its judgment that the proceedings under Section 7 or 9 of the Code are independent proceedings and shall remain unaffected by the winding-up proceedings of the Companies Act.

Thus, based on the above judgement given by Hon'ble Supreme Court, application filed by Ritu Housing Finance Company Limited under section 7 of the IBC code is maintainable.

Q37: What did the NCLAT observe and order in the case of *Amar Remedies Limited* regarding suppression of material facts under the Insolvency and Bankruptcy Code, 2016?

Answer: In the case of *Amar Remedies Limited*, the corporate applicant filed an application before the NCLT, Mumbai Bench under Section 10 of the Insolvency and Bankruptcy Code, 2016, suppressing the material fact that a liquidation order had already been passed in a winding-up petition against the corporate debtor.

The NCLAT, Mumbai Bench observed that the applicant knowingly suppressed a material fact, thereby acting in contravention of Rule 10 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The act was held to be punishable under Section 77(a) of the IBC.

Accordingly, the Tribunal:

- Directed the Registrar of Companies (ROC) to initiate prosecution against the applicant under Section 77(a) of the Code.
- Rejected the application with costs of ₹10 lakh, payable by the applicant to the Prime Minister's National Relief Fund.

Q38: Labour union of MG Textile Ltd. (MGL) filed a winding-up petition for unpaid wages of workmen. Will the petition be maintainable? Based on case laws, give

your opinion as to the workers' right in winding-up. (5 marks)

PAST YEAR QUESTION DECEMBER 2015

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

Q39: Lalit Hardware Ltd. (LHL) was ordered to be wound-up and Nayan was appointed as the official liquidator. The official liquidator sought to sell the goods, which were imported by availing duty exempt on granted in favour of 100% export oriented unit under the scheme without payment of any customs duty by bonding the goods to the Department. Since export obligations were not fulfilled, the Commissioner of Customs claimed recovery of customs duty and central excise duty and requested the official liquidator to incorporate in the sale notice that the removal of the goods are subject to payment of duty components as the goods are bonded goods. Official liquidator refused to accept this condition. The Commissioner of Customs filed writ petition seeking prevention of removal of goods without settlement of customs duty, central excise duty and interest payable thereon.

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

PAST YEAR QUESTION DECEMBER 2015

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

CHAPTER 26 AS PER ICSI MODULE

Strike Off and Restoration of Name of the Company and LLP

Q1: Sarvam Technologies Pvt. Ltd. is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under Section 455 of the Companies Act, 2013. The Board of directors of Sarvam Technologies Pvt. Ltd. intend to file an application for removal of name of company from the Register of Companies (ROC). The Board of directors called a meeting of shareholders and 66% of the shareholders in terms of paid-up capital gave their consent to the proposal and thereafter the application was filed with ROC.

Discuss the tenability of the application filed with ROC for removal of name. (5 marks)

PAST YEAR QUESTION DECEMBER 2024

Answer: A company through its board of directors, can file an application for removal of name of company from the Register of Companies on the following grounds:

- (a) Where a company has failed to commence its business within one year of its incorporation; or
- (b) Where a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013; or
- (c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation. This provision is applicable to companies incorporated after 02nd November, 2018; or
- (d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9) of the Companies Act, 2013.

Before making an application to the ROC for removal of the name of the company, the board of directors of the company shall take all the steps necessary in order to extinguish all its liabilities. Approval of the shareholders by way of special resolution or consent of *seventy-five percent* members in terms of paid-up share capital is also required to be taken for filing an application to the ROC for the removal of the name of the company from the Register of Companies.

In the case of a company regulated under a Special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

In the particular case, since the proposal has been approved by only 66% of the shareholders in terms of paid-up capital as against the required percent of 75%, the ROC will reject the application for removal of name of company from register of members.

Q2: What is the procedure to be followed by the Registrar of Companies (ROC) for striking of the name of a company on suo motu basis under Sect on 248(1) of the Companies Act, 2013?

Answer: The ROC may strike of a company's name on suo motu basis under Sect on 248(1) of the Companies Act, 2013, following the steps detailed below:

1. Service of Not ce (Form STK-1):

The ROC sends a not ce of its intent on to remove the name of the company from the Register to the company and all its directors, cit ng the reasons for proposed act on.

The not ce is sent by registered post with acknowledgment due or speed post to the addresses available on record.

2. Reply to the Not ce:

The company and its directors may submit their representat on along with support ng documents within 30 days of the not ce, explaining why the company's name should not be removed.

3. Considerat on of Representat on:

The ROC shall consider the reply received. If not sat sf ed, the ROC may proceed with the strike of process.

4. Publicat on of Not ce of Strike Of (Form STK-5 and STK-5A):

A public not ce of proposed strike of must be:

- Placed on the of cial website of the Ministry of Corporate Af airs (MCA);
- Published in the Of cial Gazet e;
- Published in one English and one vernacular newspaper with wide circulat on in the state of the company's registered of ce. Public object ons, if any, are to be submit ed within 30 days from publicat on.

5. Int mat on to Regulatory Authorit es:

The ROC must inform: Income Tax Department, Central Excise Department, and Service Tax Department, so they can raise object ons (if any) within 30 days of such int mat on.

6. Striking Of / Removal of Name:

If no object ons are received within the prescribed period, and unless suf cient cause is shown by the company, the ROC may proceed to strike of the company's name from the register.

7. Provision for Realisat on of Amount Due:

Before striking of , the ROC must ensure:

- Adequate provisions are made for recovery of dues and discharge of liabilit es.
- The ROC may obtain undertakings from directors or management, and
- The assets of the company will remain available for payment of liabilit es even af er dissolut on.

8. Not ce of Dissolut on (Form STK-7):

The f nal not ce of striking of and dissolut on is published in the Of cial Gazet e and Placed on the MCA website. Upon publicat on, the company stands dissolved.

Q3: What is the process and restrict on for striking of a company by filing an application under Sect on 248(2) of the Companies Act, 2013?

Answer: Under **Sect on 248(2)** of the Companies Act, 2013, read with **Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016**, a company that is not operational can **voluntarily apply** for removal of its name from the Register of Companies. This provides an **easy and cost-effective exit route** for non-working companies that no longer wish to continue their legal existence.

Key Features of the Process:

- This strike off is a **voluntary process** initiated by the company.
- The company must **extinguish all liabilities** before making the application.
- The application must be made in **Form STK-2** along with prescribed fee and documents.
- It is intended for companies **which are non-operational** for a period of time.
- It results in **dissolution** of the company after approval and publication by the ROC.

Companies that Cannot Apply under Sect on 248(2):

The following types of companies are prohibited from availing this strike off process:

- (i) Listed Companies;
- (ii) Companies registered under sect on 8;
- (iii) Companies having charges which are pending for satisfaction;
- (iv) Companies whose application for compounding is pending for compounding of offences committed by the company or any of its officers in default;
- (v) Companies against which any prosecution for an offence is pending in any court;
- (vi) Vanishing Companies;
- (vii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
- (viii) Companies where inspection or investigation is ordered and being carried out or actions or such order are yet to be taken up or were complete but prosecutions arising out of such inspection or investigation are pending in the court;
- (ix) Companies which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
- (x) Companies where notices under sect on 234 of CA 1956 or 206 or 207 of the CA 2013 have been issued by the Registrar or Inspector and reply thereto is pending or report under sect on 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the court.

Q4: On what grounds can a company, through its Board of Directors, file an application for removal of its name from the Register of Companies under Sect on 248(2) of the Companies Act, 2013?

Answer: A company through its board of directors, can file an application for removal of name of company from the Register of Companies on the following grounds:

- (a) Where a company has failed to commence its business within one year of its incorporation;
- or

(b) Where a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013; or

(c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation. This provision is applicable to companies incorporated after 02nd November, 2018; or

(d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9).

Before making an application to the ROC for removal of the name of the company, the board of directors of the company shall take all the steps necessary in order to extinguish all its liabilities. Approval of the shareholders by way of special resolution or consent of seventy five percent members in terms of paid up share capital is also required to be taken for filing an application to the ROC for the removal of the name of the company from the Register of Companies. In the case of a company regulated under a Special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

Q5: Try & Win Ltd company has applied to Registrar of Companies (ROC) for striking of its name from register of companies on 22nd July, 2023. Company has recently [on 26th June 2023] shifted its registered office from Patna to Kolkata. What are legal provisions in this context? Elucidate. (5 marks)

PAST YEAR QUESTION JUNE 2024

Answer: Section 249 of the Companies Act, 2013 lays down provision in which a company cannot apply for strike of the name of the company under Section 248(2) of the Act:

The Company shall not make any application for the strike of the company, if at any time in the previous 3 months, the company has done any of the below mentioned activities:

- i. Has changed its name; or
- ii. Has shifted its registered office from one State to another; or
- iii. Has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business; or
- iv. Has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement; or
- v. has made an application to the Tribunal for the sanctioning of a scheme of compromise or arrangement and the matter has not been finally concluded; or
- vi. is being wound up under Chapter XX of the Companies Act, 2013 or under the Insolvency and Bankruptcy Code, 2016.

An application for striking of the name of the company under Section 248(2) of the Companies Act shall be withdrawn by the company or rejected by the ROC as soon as the above stated conditions are brought to notice. In case of violation of the above provision, the company shall be punishable with fine which may extend to one lakh rupees.

Q6: What is the procedure for striking of the name of a company by way of an application to the Registrar of Companies (ROC) under Section 248(2) of the Companies Act, 2013?

Answer: The board of directors of the company shall follow the following procedure for removal of name of the company from the Register of Companies maintained by the ROC:

(i) Call and hold Board Meeting to pass Board resolution for the purpose of striking of the name of the company from the Register maintained by the ROC, subject to the approval of the shareholders of the company, and to authorize any director to file an application and for fixing date, time and venue for the Extraordinary General Meeting of the shareholder.

(ii) After passing of Board resolution, if there is any liability in the company, the company will set off / pay all its liabilities.

(iii) Every director of the company should sign and execute indemnity bond duly notarised by every director in Form STK 3 and Affidavit in Form STK 4. In case director is a foreign national or non resident Indian, the documents should be notarized or apostilled or consularised.

(iv) Company should get the statement of accounts in Form STK-8 containing the assets and liabilities of the company made up to a day, not more than thirty days before the date of application. Such a statement should be certified by a Chartered Accountant.

(v) General Meeting should be held on the day, date, time and venue as fixed earlier for passing of the special resolution.

(vi) Within thirty days from the date of the passing of the special resolution in the General Meeting or after obtaining consent, company should file MGT-14.

(vii) Approval of concerned authorities is required in case of a company regulated by any other authority.

(viii) Thereafter, an application for removal of the name of the company shall be made in Form STK-2 along with the fee of ten thousand rupees.

Q7: What are the requirements for filing an application for removal of name of a company under Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: As per Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, the procedure and conditions for filing an application for striking of the name of a company under Section 248(2) of the Companies Act, 2013 are as follows:

1. Filing of Form STK-2:

- The application must be filed in Form STK-2 to the Registrar, Centre for Processing Accelerated Corporate Exit (C-PACE).
- A fee of ₹10,000 must be paid along with the form.

2. Filing of Overdue Returns (Mandatory Precondition):

- The company must file all overdue financial statements (Section 137) and annual returns (Section 92) up to the end of the financial year in which it ceased to carry on business.
- If ROC has already initiated action under Section 248(1), then all pending filings under Sections 137 and 92 must be completed before filing the STK-2 application.
- However, once notice under Section 248(5) is issued by the ROC (for publication of name removal), the company cannot file STK-2 under Rule 4(1).

3. No Object on Certificate (NOC) from Regulatory Authorities [Rule 4(2)]:

If the company is regulated by any of the following authorities, it must submit a No Object on Certificate (NOC) from the relevant authority along with the STK-2 application:

- Non-Banking Financial Companies (NBFCs) – governed by the Reserve Bank of India Act, 1934
- Housing Finance Companies – under the National Housing Bank Act, 1987
- Insurance Companies – under the Insurance Act, 1938
- Capital Market Intermediaries – regulated by the SEBI Act, 1992
- Collective Investment Scheme (CIS) Companies – under the SEBI Act, 1992
- Asset Management Companies (AMCs) – under the SEBI Act, 1992
- Any other company regulated under any other prevailing law

Q8: What documents must accompany the application in Form STK-2 as per Rule 4(3) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: As per **Rule 4(3)** of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, an application filed in **Form STK-2** under **Section 248(2)** must be accompanied by the following documents:

(i) indemnity bond duly notarised by every director in Form STK 3;

Provided that in case of a -

(a) Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments; or

(b) subsidiary of a Government company, referred to in clause (a), in which the entire paid up share capital is held by that Government company, a duly notarised indemnity bond in Form STK-3A shall be given by an authorised representative, not below the rank of Under Secretary or its equivalent, in the administrative Ministry or Department of the Government of India or the State Government, as the case may be, on behalf of the company.

(ii) a statement of accounts in Form No. STK-8 containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;

(iii) Affidavit in Form STK 4 by every director of the company;

(iv) a statement regarding pending litigations, if any, involving the company.

As per Rule 4(3A), the Registrar, Centre for Processing Accelerated Corporate Exit (C-PACE), established under Section 396(1), shall have nationwide jurisdiction for:

- Processing and disposal of applications filed in Form STK-2

- And all matters related thereto under Section 248 of the Act

Thus, all strike-off applications will be centrally handled by C-PACE, regardless of the location of the company.

Q9: What is the procedure followed by the Registrar if the application in Form STK-2 is found to be defective or incomplete under Rule 4(4) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: According to Rule (4) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

(a) Where the Registrar, on examining the application made in Form STK-2, finds that it is necessary to call for further information or finds such application or any document annexed therewith is defective or incomplete in any respect, he shall inform to the applicant to remove the defects and re-submit the complete Form within fifteen days from the date of such information, failing which the Registrar shall treat the Form as invalid in the electronic record, and shall inform the applicant, accordingly.

(b) After the re-submission of the Form or document, if the Registrar finds that the Form or document is defective or incomplete in any respect, he shall give further time of fifteen days to remove such defects or complete the Form, failing which the Registrar shall treat the Form as invalid in the electronic record and shall inform the applicant, accordingly.

(c) Any re-submission of the application in Form STK-2 made prior to the commencement of the Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022 shall not be counted for the purposes of reckoning the maximum number of re-submissions of such Form.

Q10: What is the manner of filing an application for removal of the name of a company under Rule 5 and Rule 6 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: As per Rule 5 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

(1) The application in Form STK 2 shall be signed by a director duly authorised by the Board in their behalf.

(2) Where the director concerned does not have a registered digital signature certificate, a physical copy of the form duly filled in shall be signed manually by the director duly authorised in that behalf and shall be attached with the Form STK 2 while uploading the form.

Form to be Certified

Rule 6 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that the Form STK 2 shall be certified by a Chartered Accountant in whole time practice or **Company Secretary in whole time Practice** or Cost Accountant in whole time practice, as the case may be.

Q11: What is the manner of publication of notice for striking of the name of a company under Rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: According to Rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016:

(1) The notice under sub-section (1) or sub-section (2) of section 248 shall be in Form STK 5 or STK 6, as the case may be, and be-

(i) placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard;

(ii) published in the Official Gazette;

(iii) published in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

Provided that in case of any application made under sub-section (2) of section 248 of the Act, the company shall also place the application on its website, if any, till the disposal of the application. Provided further that the publications of notice under clause (iii) of this sub-rule, in respect of cases falling under sub-section (1) of section 248 shall be in Form No. STK 5A.

(2) The Registrar of Companies shall, simultaneously intimate the concerned regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking of the names of such companies and seek objections, if any, to be furnished within a period of thirty days from the date of issue of the letter of intimation and if no objections are received within thirty days from the respective authority, it shall be presumed that they have no objections to the proposed action of striking of or removal of name.

Q12: What are the provisions regarding notarisation and publication of notice in case of strike off and dissolution of a company under Rules 8 and 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016?

Answer: Manner of Notarisation, Apostillation or Consularisation of Indemnity Bond and declaration in case of Foreign Nationals or Non-Resident Indians

Rule 8 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that if the person is a foreign national or non-resident Indian, the indemnity bond, and declaration shall be notarised or apostilled or consularised.

Notice of Striking Off and Dissolution of Company

Rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 states that the Registrar shall cause a notice under sub-section (5) of section 248 of striking of the name of the company from the register of companies and its dissolution to be published in the Official Gazette in Form STK 7 and the same shall also be placed on the official website of the Ministry of Corporate Affairs.

List of STK forms

Sr. No.	Name of Form	Purpose	Governed By
1	Form STK-1	Notice by ROC for removal of name of a company from the Register of Companies	Section 248(1) of the Companies Act, 2013 & Rule 3
2	Form STK-2	Application by company to ROC for removing its name from the Register of Companies	Section 248(2) of the Companies Act, 2013 & Rule 4(1)
3	Form STK-3	Indemnity Bond (to be given individually or collectively by every director)	Rule 4(3)(i)
4	Form STK-4	Affidavit (to be given individually by every director)	Section 248(2) & Rule 4(3)(iii)
5	Form STK-5	Public Notice (ROC suo motu action)	Section 248(1) & (4) & Rule 7
6	Form STK-5A	Public Notice in newspapers for strike-off by ROC	Section 248(1) & (4) & Rule 7(1)
7	Form STK-6	Public Notice for voluntary application for strike-off by company	Section 248(2) & (4) & Rule 7
8	Form STK-7	Final Notice of Striking Off and Dissolution	Section 248(5) & Rule 9

Q13: What can a company do if its name is wrongly struck off by the Registrar of Companies (ROC), and how can it be restored?

Answer: The ROC can suo moto, after issuing the notice under section 248(1) of the Act, strike off the name of the company. It may so happen that the name of the company may be struck off from the Register of Companies by the ROC even though the company is an active company due to non-filing of reply to the said notice. In such a case, the directors of such a company have no option but to approach National Company Law Tribunal ("NCLT") by making an appeal for the restoration of the name of the company in the Register of Companies maintained by the ROC. The legal provisions related to restoration of name of the struck off companies are given in Section 248 to 252 of the Act read with Rule 87A of the NCLT (Amendment) Rules, 2017 and the Companies (Removal of Name of Companies from the Register of Companies) Rules, 2016.

Q14: Who can appeal for restoration of a company's name and what is the time limit to file such an appeal?

Answer: Any person aggrieved by the order of the ROC may file an appeal before the Tribunal within 3 years of the order passed by ROC and if the Tribunal is of the opinion that the removal of name of company from the Register is not justified in view of the absence of any of the

grounds on which the order was passed by the ROC, it may pass an order for restoration of the name of the company in the Register of Companies after giving a reasonable opportunity of making representations and of being heard to the ROC, the company and all the persons concerned.

Q15: Who can apply to the NCLT for restoration of a company's name after it has been struck off, and what is the process?

Answer: There are two ways a company's name can be restored in the Register of Companies by applying to the National Company Law Tribunal (NCLT):

1. By ROC (Registrar of Companies):

The ROC can apply to NCLT within 3 years from the date of striking off. This can be done if the ROC finds that the company's name was removed by mistake or based on wrong information given by the company or its directors.

2. By the Company, its Members, Creditors, or Workmen:

They can apply to NCLT within 20 years from the date when the company's name was published as dissolved in the Official Gazette.

The NCLT may restore the company if:

The company was still doing business or was active at the time of strike off, or

It is fair and just to restore the name of the company.

After NCLT Passes the Order:

The company must file the Tribunal's order with the ROC within 30 days. The ROC will then restore the name in the Register and issue a fresh certificate of incorporation.

Q16: What are the provisions for striking off the name of a Limited Liability Partnership (LLP) from the Register of LLPs?

Answer: The provisions for removing or striking off the name of an LLP from the Register are given under:

- Section 75 of the Limited Liability Partnership Act, 2008, and
- Rule 37 of the LLP Rules, 2009.

These are similar to the rules under Section 248 to 252 of the Companies Act, 2013, which deal with the removal of company names.

Q17: What is the legal process for striking off the name of an LLP that is not doing business?

Answer: If an existing LLP is not doing any business or operations for one year or more, it can apply to the Registrar of Companies (ROC) to strike off its name from the register.

1. Voluntary Application (Form 24):

- The LLP must file Form 24 with the consent of all partners.
- This is done to close the LLP officially and remove its name from the ROC records.

2. ROC's Suo Moto Act on:

- If the Registrar believes that an LLP is not doing business for 2 years or more, the ROC can take suo moto act on (on its own) to remove the name of the LLP.

3. Opportunity of Being Heard:

- Before striking off the name, the ROC must give a reasonable opportunity to the LLP and all its partners to explain their case.

Q18: When and how can the ROC strike off the name of an LLP on suo moto basis?

Answer: If an LLP is not doing any business or operations for 2 years or more, and the Registrar of Companies (ROC) has reason to believe this, the ROC can remove the name of the LLP from the Register on its own (suo moto) under Section 75 of the LLP Act, 2008 read with Rule 37 of the LLP Rules, 2009.

Procedure ROC follows to strike off an LLP name suo moto:

Step	Description
1. Notice by ROC	ROC sends a notice to the LLP and all partners explaining the reason for proposed strike-off.
2. Reply to Notice	LLP/partners must send a reply within 1 month with documents to explain why name should not be removed.
3. Consideration of Reply	ROC will consider the reply . If not satisfied, it may proceed with strike-off.
4. Public Notice	ROC publishes a public notice on MCA website for 1 month, inviting objections from public.
5. Strike Off Name	If no valid objection is received, ROC may strike off the LLP name from the register .
6. Realisation of Dues	Before striking off, ROC ensures all dues are paid or provision is made. Undertakings may be taken from partners.
7. Notice of Dissolution	ROC publishes the notice of dissolution in the Official Gazette . The LLP is legally dissolved from that date.

Q19: How can an LLP apply for voluntary strike off of its name from the Register of LLPs?

Answer: If a Limited Liability Partnership (LLP) has not been carrying on any business or operation for one year or more, it can voluntarily apply to the ROC (Registrar of Companies) to strike off its name from the register.

This process is done under Section 75 of the LLP Act, 2008 and Rule 37 of the LLP Rules, 2009 by filing Form 24.

Step-by-Step Procedure:

Step	Details
1. Hold Partner Meeting	Conduct a meeting and get consent from all partners to apply for strike off and authorize a partner to file Form 24.
2. Clear Filings	Ensure all annual returns (Form 8, Form 11) are filed up to the end of the financial year in which business stopped.

Step	Details
3. Get Approvals (if any)	If the LLP is regulated by a Special Law (e.g., SEBI, RBI), obtain necessary approvals.
4. Prepare Documents	Submit these with Form 24: • CA-certified Statement of Accounts (Nil assets & liabilities) • Latest IT return copy (if applicable) • Initial LLP Agreement and amendments (if not already filed) • Affidavit by Designated Partners (jointly/severally) confirming: - No business since [date] - No liabilities or bank accounts (or closed with proof) - No IT returns filed (if never done business) Detailed application giving reason for closure Authority letter signed by all partners
5. MCA Website Notice	MCA will publish a notice on its website for 1 month for public objections.
6. ROC Action	If no objections are received, ROC will strike off the LLP name from the Register.
7. Realisation of Dues	ROC will ensure all dues and liabilities are cleared or provisioned before approving the strike off.
8. Final Dissolution	After strike off, a notice is published in the Official Gazette. The LLP is legally dissolved from that date.

Q20: Will the liabilities of the partners of an LLP continue even after the LLP is struck off from the register?

Answer: Yes, the liabilities of all designated partners of the LLP will continue even after the LLP is struck off and dissolved. These liabilities can be enforced as if the LLP had not been dissolved.

Q21: Can the NCLT still wind up an LLP that has been struck off from the Register?

Answer: Yes, the Tribunal (NCLT) still has the power to wind up an LLP even if its name has been struck off from the register. The strike-off does not affect the Tribunal's power to order winding up if required.

Q22: What if an active LLP is struck off by ROC due to incorrect information or mistake?

Answer: If an LLP is struck off suo moto by the ROC under Section 75 — either inadvertently or due to incorrect information furnished — and it is actually still active, then:

- There is no provision in the LLP Act, 2008 or LLP Rules, 2009 for restoration like there is under the Companies Act.

- The only remedy is for the LLP or its partners to file a writ petition in the High Court under Article 226 of the Constitution of India.
- The High Court may pass an order for restoration of the LLP's name in the Register, if justified.

Q23: Define the following terms:

- a) **Defunct company**
- b) **Vanishing Company**
- c) **Cessation of commercial operation**

Answer:

a) Defunct company: A company which has failed to commence business operations within one year from the date of registration without any proper reason, which is beyond the control of the company or where a company has no assets or liabilities. Again, if a company is not filing its balance sheet for many years, then also it will be termed as a defunct company.

b) Vanishing Company: A company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.

c) Cessation of commercial operation: It is the date from which the Limited Liability Partnership ceased to carry on its revenue generating business and the transactions such as receipt of money from debtors or payment of money to creditors, subsequent to such cessation will not form part of revenue generating business.



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