GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME
(New Syllabus)

DECEMBER 2020

MODULE 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(Under the jurisdiction of Ministry of Corporate Affairs)
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

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PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2020

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART I

Question 1

(a) *A very pertinent question which arises for consideration is the extent of detailed verification that has to be resorted to before certifying the Annual Return. Being a Company Secretary, list the guiding principles which can be adopted while deciding about the extent of checking of Annual Return.*

(b) *Privacy of records and its control is the most important function for the Secretarial Department of an organization. Records of Contracts and Commercial Documents and Trade Secretes are to be kept confidentially. Describe the alertness to be observed with respect to keeping of said records.*

(c) *The continued adoption of web, mobile, cloud and social media technologies by the companies has increased opportunities for attackers for online frauds. Explain various types of online frauds.*

(d) *Travel and Tourism Industry in India is required to implement various laws. Examine the various laws applicable to such Industry.* *(5 marks each)*

Answer 1(a)

The Company Secretary is required to be considerably responsible, since he is bound by the certification in the Annual Return. A very pertinent question which arises for consideration is the extent of detailed verification that has to be resorted to before certifying the Annual Return.

Proper techniques of sample checking and test checking should be resorted to before forming a reasonable opinion. There are no specific modalities or stringent test practices applicable for certification of Annual Return. However, the following guiding principles can be adopted while deciding about the extent of checking that is required:

(i) The need for detailed checking is greatly reduced if a Company Secretary confirms that there are adequate measures of internal control and checks and balances built into the systems and procedures of the organization. For instance, the procedure for registration of share transfers could be so designed that the mistakes and errors committed at one stage are automatically detected and corrected by another, before the whole process is complete. The system could also provide for automatic cross- verification particularly in cases where the process is computerized.

(ii) The principle of materiality is another important concept. The sample chosen for detailed checking should be representative of the population, in statistical parlance.

Referring the example of share transfers again, instances of transfer of large blocks of shares could be chosen for detailed scrutiny. The busy period for transfer of shares in the year could also be identified and selected for sample checking.

(iii) 'High risk' areas could be identified and subjected to more extensive scrutiny than others. For instance, in the case of shares on which there are restrictions on transfer statutory or otherwise, a more extensive examination is warranted.

In conclusion, it may be pointed out that the ultimate responsibility of the document certified will rest with the professional. While the extent of checking is a matter of personal judgment. He should safeguard himself against any possible charge of negligence in respect of inaccurate or incomplete statements, certified by him.

Answer 1(b)

The alertness to be observed with respect to keeping records of Contracts & Commercial Documents and Trade Secretes is described as under:

1. In case of the business contracts, every detail of the arrangement should be treated with utmost confidentiality for both organization itself and also for the benefit of third party. If the contract has a confidentiality agreement, it could be breach of terms if an unauthorised person gets his hands on the physical copy of the contract. The contracts are full of commercially sensitive information such as the nature of the arrangement, the value of the services offered/received in the agreement, the names of the main contracting parties, etc.
2. The business should avoid sharing contracts unless strictly required, and limit physical copies. Business may consider using digital signatures for signing contracts in order to reduce unnecessary print-outs thereby ensuring confidentiality. While these are some of the most important documents required to be stored securely, the easiest and safest way to reduce the risk of a data breach is to implement a secure document retention policy specific to needs of the organisation.
3. The confidential business information such as "proprietary information" or "trade secrets" shall not be generally known to the public and would not ordinarily be available to competitors.Common examples of "trade secrets" include manufacturing processes and methods, business plans, financial data, budgets and forecasts, computer programs and data compilation, client/customer lists, ingredient formulas and recipes, membership or employee lists, supplier lists, etc. "Trade secrets" do not include information that a company voluntarily gives to potential customers, posts on its website or otherwise freely provides to others outside the company. If such confidential information is available in the wrong hands, it can be misused to commit illegal activity (e.g., fraud or discrimination), which can in turn result in costly lawsuits for the Company. The disclosure of sensitive employee and management information can lead to a loss of employee trust, confidence and loyalty. This will almost always result in a loss of productivity.

Answer 1(c)

The Continued adoption of web, mobile, cloud, and social media technologies has increased opportunities for attackers. These trends have resulted in the development of an increasingly boundary-less ecosystem within which companies operate and thus a much broader "attack surface" is exposed for the fraudsters to exploit. Various online frauds are explained as under:

1. *Hacking* : Hackers/fraudsters obtain unauthorized access to the card management system of the respective banking companies. Counterfeit cards are then issued for the purpose of money laundering.

2. *Phishing* : A technique used to obtain the cards i.e. Credit Cards, Debit Cards, Identity Cards, Security Access Cards etc. and personal details through a fake email. These cards are then used for committing the frauds.

3. *Pharming* : A similar technique where a fraudster installs malicious code on a personal computer or server. This code then redirects clicks you make on a website to another fraudulent website without your consent or knowledge.

4. *Vishing* : The vishing is a practice of making calls or leaving voice messages in order to obtain the personal information. In this type, fraudsters use the phone to solicit personal information and then misuse the information.

5. *Smishing* : It uses cell phone text messages to lure consumers in. Often the text will contain an URL or phone number. The phone number often has an automated voice response system and again just like phishing, the smishing message usually asks for your immediate attention.

6. *Debit card skimming* : A machine or camera is installed at an ATM which picks up card related information and PIN numbers when customers use their cards. This type of fraud is harmful for the Banking Companies to a very large extent.

7. Computer viruses: With every click on the internet, the systems of the company are open to the risk of being infected with nefarious software that is set up to harvest information from the company servers.

8. *Counterfeit instruments* : Fake cheques / Demand Drafts that look too good to be true are being used in a growing number of fraudulent schemes, including foreign lottery scams, cheque overpayment scams, internet auction scams and secret shopper scams.

Answer 1(d)

The laws applicable to the travel & tourism industry can broadly be classified in to the following categories:

1. *Legal and Regulatory Framework* : Laws relating to consumer protection; health; safety and security of travel and tourism customers. Legal Liability and Risk Management: Legal liability concepts; owner and director liability; guide and leader liability; risk assessment and controlling; risk mitigation; risk financing and insurance.

2. *Transport Legislation* : Laws relating to surface; sea and air transport laws in relation to carriage of passengers.

3. *Contract legislation in relation to Travel and Tourism customers* : Indian Contract Act, 1872, Partnership Act, 1932, Sale of Goods Act, 1930, Consumer Protection Act, 1986/2019 and Companies Act, 2013.

4. *Business Ethics in Travel and Tourism Sector* : CSR policy for travel and tourism businesses; corporate responsibility to shareholders versus stakeholders; personal versus social responsibility; stakeholder theory; determinants of social Responsibility of individuals and social groups; role of governance system. Emergence of corporate governance code; development of corporate governance code; development of Indian corporate governance.

5. *Forex Management* : Regulation and Management of foreign exchange: Foreign Exchange Management Act - realization and repatriation of foreign exchange; Foreign Exchange Rules in India.

6. *Medical Tourism* : Certification and Accreditation in Health and Medical Tourism, Ethical, Legal, Economic and Environmental issues in Health and Medical Tourism. Laws related to National Accreditation Board for Hospitals & Healthcare (NABH) and Joint Commission International (JCI).

7. *Event Laws & Permissions* : Permissions required for holding an event, general details, police permissions, traffic police, ambulance, fire brigade, municipal corporation, Indian Performing Rights Society(IPRS), Phonographic Performing License, Entertainment Tax, Permissions for open ground events, license for serving liquor.

8. *Other Laws* : Laws relating to Management of Tourism in Tribal Areas and Setting up Travel Agency & Tour Operation Unit.

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

Question 2

(a) ABC Ltd. is having a paid up capital of ₹1,000 crore and annual turnover of ₹2,500 crore. The company has asked you, as a Company Secretary in Practice, to advise it on preparation and finalization of its Compliance Management Framework. Give your advice.

(b) Jindal Brothers has constituted a Limited Liability Partnership (LLP) under the LLP Act, 2008. There are total 3 partners in the Firm. Jindal Brothers has approached you for maintaining the various books of accounts. Being a Company Secretary, make a brief note on Section 34 read with Rule 24, as per compliance requirement, under the LLP Act, 2008.

(c) While preparing the Search and Status Report, it is important for professionals to conduct due diligence of the intellectual property rights, as tremendous worth is associated with the intangible assets of the business. List the key areas to be analyzed while preparing such Search Report.

(d) State the procedure of KYC of directors in Form DIR-3 and mention the consequence of non-compliance in this regard. (KYC stands for 'Know Your Customer' or 'Know Your Client'). *(5 marks each)*

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Explain the process of Compliance Risk Mitigation indicating various risks of non-compliance. (5 marks)

(ii) Explain the role of a company secretary in Investor Education and Protection. (5 marks)

(iii) What do you mean by Good Documentation ? Give some examples of Good Documentation Practices as well as Poor Documentation Practices. (5 marks)

(iv) Jemez & Co. Ltd. has listed is Securitized Debt Instruments at a stock exchange. One of the directors has asked you, being the compliance officer of the company, to inform the obligations of the company regarding its Securitized Debt Instruments. Describe with reference to compliances under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. (5 marks)

Answer 2(a)

The corporate compliance management framework encompasses various steps relating to Compliance Identification, Compliance Ownership, Compliance Awareness, Compliance Reporting and Periodical Compliance Management Information System (MIS).

The Compliance Identification involves the identification of compliances under various legislations applicable to the company, in consultation with the functional heads. The legal team has to identify the legislations applicable to the company and identify the compliances that are required under each legislation or rules and regulations made there under.

The Compliance Ownership of the various compliances has to be described function wise and individual wise. Clear description of primary and secondary ownership is also very important. While the primary owner is mainly responsible for the compliance, the secondary owner (usually the supervisor of the primary owner) has to supervise the compliance. Ex: Secretarial Officer/Company Secretary may be primarily responsible.

The Compliance Awareness covers the establishment of the legal compliance management and creation of awareness of the various Legal Compliances amongst those responsible. Sometimes the compliances are handled by persons who are not fully aware of the requirements of the legislations and hence creating appropriate awareness amongst the owners is very important. This could be done in the form of meetings/ trainings explaining the various compliances or some manual containing the details of compliances. In the process of the Compliance Reporting status of Compliances or non-compliances should be communicated to the concerned. Reporting of non-compliances ensures that appropriate corrective action is being taken by the responsible person in case of the failure in doing compliances.

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Answer 2(b)

Brief Note on Section 34 read with Rule 24, as per compliance requirement, under the Limited Liability Partnership Act, 2008

According to Section 34 of Limited Liability Partnership Act, 2008, a Limited Liability Partnership shall maintain its books of accounts relating to its affairs for each year of its existence on cash basis or accrual basis and according to double entry system of accounting.

The LLP shall maintain its books of accounts at its registered office for a period of Eight years.

Rule 24 of Limited Liability Partnership Rules, 2009: The Books of Accounts of a limited liability partnership shall contain the following:

- particulars of all sums of money received and expended and the matters in respect of which the receipt and expenditure takes place;
- a record of the assets and liabilities;
- statements of cost of goods purchased, inventories, work-in-progress, finished goods and cost of goods sold: and
- any other particulars which the partners may decide.

Sub-rule (3) of Rule 24 of Limited Liability Partnership Rules, 2009 : The books of account of a limited liability partnership are required to be preserved for eight years from the date on which they are made.

Sub-rule (17) of Rule 24 of Limited Liability Partnership Rules, 2009 : The remuneration of an auditor appointed by the limited liability partnership shall be fixed by the designated partners or by following the procedure as laid down in the limited liability partnership agreement.

Sub-rule (4) Rule 24 of Limited Liability Partnership Rules, 2009 : For the purposes of sub-section (3) of section 34, every limited liability partnership shall file the Statement of Account and Solvency in Form 8 with the Registrar, within a period of thirty days from the end of six months of the financial year to which the Statement of Account and Solvency relates.

Sub-section (4) of Section 34 of LLP Act, 2008 read with sub-rule (8) of Rule 24, Limited Liability Partnership Rules, 2009:

The following limited liability partnerships, shall be required to get its accounts audited:

(i) whose turnover in any financial year exceeds forty lakh rupees, or

(ii) whose contribution exceeds twenty-five lakh rupees.

Answer 2(c)

Key areas to be analysed while preparing the search and status report relating to Intellectual Property Rights are as under:

(i) What domestic and foreign patents (and patents pending) does the company have?

(ii) Has the company taken appropriate steps to protect its intellectual property (including confidentiality and invention assignment agreements with current and former employees and consultants)?

(iii) Are there any material exceptions from such assignments (rights preserved by employees and consultants)?

(iv) What registered and common law trademarks and service marks does the company have?

(v) What copyrighted products and materials are used, controlled, or owned by the company?

(vi) Does the company's business depend on the maintenance of any trade secrets, and if so what steps has the company taken to preserve their secrecy?

(vii) Is the company infringing on (or has the company infringed on) the intellectual property rights of any third party, and are any third parties infringing on (or have third parties infringed on) the company's intellectual property rights?

(viii) Is the company involved in any intellectual property litigation or other disputes (patent litigation can be very expensive), or received any offers to license or demand letters from third parties?

Answer 2(d)

KYC (Know your Customers/Clients) of Directors is conducted by the MCA at the time of the Allotment of the Director Identification Number and earlier it was not mandatory for the Director to update their KYC on the subsequent change. With the insertion of Rule 12A in the Companies (Appointment and Qualification of Directors) Rules, 2014 every individual who has been allotted a Director Identification Number (DIN) as on 31st March of a financial year need to submit e-form DIR-3-KYC to the Central Government on or before 30th September of immediate next financial year. Some important points to be noted in respect of DIR-3 KYC are as under:

1. DIR-3 KYC is required to be filed by every individual who has been allotted DIN on or before 31st March, of a Financial Year.
2. Due date of filing of DIR-3KYC is on or before 30th September of immediate next financial year.
3. Prerequisite Mandatory Information for DIR-3 is as under:
   - Unique Personal Mobile Number
   - Personal Email ID.
4. Certification of DIR-3 KYC
   - First by the affixing Registered Digital Signature of respective person / Director
   - Certification by practicing professional by affixing Digital Signature (CS/CA/CMA)
5. Filing of DIR-3 KYC would be mandatory for Disqualified Directors as well.

The consequences of Non Compliances are as under:

a. If director fails to file DIR-3 KYC, the MCA21 system will mark all approved DINs (allotted on or before 31st March, 2018) against which DIR-3 KYC form has not been filed as 'Deactivated' with reason as 'Non-filing of DIR-3 KYC'.

b. MCA has notified 'Nil Fee' and 'late Fee of Rs. 5,000 (Applicable after the due date) for Filing e-Form DIR-3 KYC under rule 12A of the Companies (Appointment and Qualification of Directors) Rules, 2014.

Answer 2A(i)

Compliance Risk Mitigation is the process of developing and implementing controls such as standards, policies, procedures and guidelines to minimise or mitigate risks arising from compliance obligations. From time to time, the company may issue a policy that must be implemented at the local level. If a corporate policy does not encompass local obligations of any unit of the company, a local policy to facilitate the effective management of the identified compliance risk must be developed. Framework components, policies and procedures must be developed and communicated and should be placed on the prominent places in the organization, so employees understand their obligations (e.g. how to make a whistle blower report, complaints handling process, gifts, entertainment and anti-bribery procedures, etc.).

All documentation must be easily accessible to employees. Maintenance of the supporting material documents can be in the form of a manual, handbook or other physical or electronic means.

Various Risks of Non-compliance

The risks of non-compliance of the law are many which include the following:

1. Cessation of business activities.
2. Civil action by the authorities.
3. Punitive action resulting in fines against the company/officials.
4. Imprisonment of the errant officials.
5. Public embarrassment.
6. Damage to the reputation of the company and its employees.
7. Attachment of bank accounts.

Answer 2A(ii)

An informed investor is more precious than the investment. Investors provide the much needed capital which, combined with entrepreneurial skills, results in successful corporate. These corporates provide goods and services, taxes and employment, and fuel economic growth. Therefore, it is very important that investors are educated, enlightened and well informed to be able to take sound investment decisions and to protect their interests. Recognising the importance of shareholder rights and investor protection, the Companies Act, 2013 introduced some important changes to the company law regime in India and has plugged many loopholes. It upholds shareholders democracy and investor protection in many ways. A significant development has been the inclusion pertaining to 'Class Action Suit' (Section 245) to strengthen the concept of shareholders democracy.

The ICSI as a national body and its members as corporate governance professionals, have played a significant role in the area of investor education and protection. The role of a Company Secretary is also increased due to the developments in Investor Education & Protection laws. A glimpse of the roles of Company Secretaries are as under:

1. Under securities laws such as Securities Contracts (Regulation) Act, 1956, Depositories Act, 1996, regulations and guidelines issued by SEBI under SEBI Act, 1992, the authorities have made various provisions related to Investor Education & Protection. A Company Secretary has an important role in ensuring compliance with these provisions.

2. Under various laws for equity, debt listing, Indian Depository Receipts, company secretaries have been recognized to verify compliances and to issue certificates.

3. A better regulated capital market automatically brings development for the country and a strong regulated capital market instils confidence among the investors that their money is safe. The company secretaries are expected to exercise sensitive professional and moral judgments in all their activities, while carrying out their professional responsibilities. They should accept the obligation to act in a way that will serve public interest, honour public trust and demonstrate commitment to professionalism.

4. The Company Secretaries are expected to maintain and broaden public confidence and perform all professional responsibilities with the highest sense of integrity.

Answer 2A(iii)

The term documentation includes written and electronic records, audio and video tapes, emails, facsimiles, images (photographs and diagrams), charts, check lists, communication books, management reports, incident reports and working notes or any other type or form of documentation. The good documentation promotes good corporate governance practices and compliance level of the company and also improves communication and dissemination of information between and across various stakeholders. These guiding principles support professionals, employers, policy makers and managers in assessment, planning, execution and evaluation. Also, the good documentation practices and policies demonstrate the professional obligation, accountability and legal requirement to communicate and record client information and good secretarial practice.

Examples of Good Documentation Practices

The following are some of the examples of good documentations practices:

(a) Records are completed at time of activity or when any action is taken;

(b) Superseded documents retained for a specific period of time;

(c) Concise, legible, accurate and traceable;

(d) Picture is worth a thousand words;

(e) Clear examples;

(f) Do not assume knowledge.

Examples of Poor Documentation Practices

The following are some of the examples of poor documentations practices:

(a) Document with errors, correction, not signed/dated, and did not include a reason for the correction;

(b) Write-overs, multiple line-through and use of "White-out" or other masking device;

(c) Recording of events is not in sequence & tabled;

(d) Standards operating procedures as adopted by the professional is not authorised;

(e) The delegation of work is not recorded / documented;

(f) Out-of-specification procedure not detailed enough;

(g) Flow chart and /or check list not available.

Answer 2A(iv)

The Obligations of the Company under Securities Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015 of the company (Listed Entity) related to Securitised Debt Instruments are as under:

Sl. No.	*Under SEBI (LODR), 2015 Compliance*	*Regulation*	*Time Period*	*Obligation*
1.	Issue new securities	82(1)	Prior to issue new Securitised Debt Instrument.	Intimate the Stock exchange, of its intention to issue new securitized debt instruments either through a public issue or on private placement basis (if it proposes to list such privately placed debt securities on the Stock exchange) prior to issuing such securities.
2.	Intimation	82(2)	At least 2 working days before the board meeting excluding date of intimation & date of meeting	Intimate to the stock exchange(s), at least two working day s in advance, excluding the date of the intimation and date of the meeting, regarding the meeting of its board of trustees, at which the recommendation or declaration of issue of securitized debt instruments or any other matter affecting the rights or interests of

				holders of securitized debt instruments is proposed to be considered.
3.	Financial Information	82(3)	Within 7 days from the end of month/ actual payment date on monthly basis	It shall submit such statements, reports or information including financial information pertaining to Schemes to stock exchange within seven days from the end of the month/actual payment date, either by itself or through the servicer, on a monthly basis in the format as specified by SEBI from time to time:Provided that where periodicity of the receivables is not monthly, reporting shall be made for the relevant periods.
4.	Record Date	87(2)	At least 7 working days before the record date excluding the date of intimation & record date	It shall give notice in advance of atleast seven working days (excluding the date of intimation and the record date) to the recognised stock exchange(s) of the record date or of as many days as the Stock Exchange may agree to or require specifying the purpose of the record date.

PART II

Question 3

(a) *A series of financial crimes and frauds by some of its employees is alleged by a company. It is desired to gather legally tenable evidence and to fix the negligence and responsibility within the company, before taking action in the court of law. Which type of audit will you suggest in this case ? Explain.* *(5 marks)*

(b) *How monitoring and evaluation of effectiveness of the Organisation's Risk Management Process is carried out through internal audit ? Describe.* *(5 marks)*

(c) *Explain compliances specified in the Regulation 24A regarding applicability of secretarial audit under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. Also state the exemptions provided from this Regulation.* *(5 marks)*

Answer 3(a)

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

Due to recent corporate accounting scandals at various corporates forensic auditing gained tremendous significance in detecting frauds that may prevail in companies.

The term Forensic Audit refers to the specific guidance carried out in order to produce evidence. Forensic Audit task involves an investigation into the financial affairs of the entity and is often associated with investigation into the alleged fraudulent activity. The object of forensic auditing is to relate the findings of audit by examining and gathering legally tenable evidence and producing it to the Court. In the process the corporate veil is lifted in case of corporate entities to identify the fraud and the persons responsible for it. Forensic auditing involves application of audit skills to legally determine whether fraud has actually occurred. The entire process includes planning, gathering evidence, reviewing the evidence and reporting of the same. In the process it aims at naming the person(s) involved in the fraud with a view to take legal action.

Forensic Audit Report is statement of observation gathered & considered while proving conclusive evidence. It is a medium through which an auditor expresses his opinion under audit after the forensic audit investigation is completed.

A Forensic Audit is a comprehensive and systematic process involving a series of activities and tasks undertaken for establishing the accuracy and authenticity of the transactions under review. Therefore, Forensic Audit is suggested in the given situation.

Answer 3(b)

Internal auditing Professional Standards require the function to monitor and evaluate the effectiveness of the organization's risk management processes.

Generally, the risks fall under strategic, operational, financial reporting, and legal/ regulatory categories. Management performs risk assessment activities as part of the ordinary course of business in each of these categories. The Examples include: strategic planning, marketing planning, capital planning, budgeting, hedging, incentive payout structure, and credit/lending practices. Internal Audit function monitors, evaluate and report these risks timely enabling the organisations to take corrective measure in time. The finance department access the risk relating to account preparation, financial reporting and disclosures, corporate legal adviser often prepares comprehensive assessments of the current and potential litigation a company faces. Internal auditors may evaluate each of these activities, or focus on the processes used by management to report and monitor the risks identified. For example, internal auditors can advise management regarding the reporting of forward-looking operating measures to the board, to help identify emerging risks.

Answer 3(c)

Regulation 24A of SEBI (Listing Obligation and Disclosure Requirement) Regulation, 2015 specifies the provisions related to Secretarial Audit as under:

Every **listed entity** and its **material unlisted subsidiaries** incorporated in India shall undertake secretarial audit and shall annex with its annual report, a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed with effect from the year ended March 31, 2019.

The terms **"listed entity"** means an entity which has listed, on a recognised stock exchange(s), the designated securities issued by it or designated securities issued under schemes managed by it, in accordance with the listing agreement entered into between the entity and the recognised stock exchange(s).

Material subsidiary mean a subsidiary, whose income or net worth exceeds ten percent of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year.

Exemptions from Regulation 24A

Regulation 15 of SEBI (LODR) Regulations, 2015 provides for applicability of these regulations to chapter IV (Obligation of Listed Entity which has Listed its specified securities). Regulation 15(2) of the said regulations exempts few entities from the applicability of regulation 24A.

As per regulation 15 of the said regulations, the compliance specified in regulations 24A, shall not apply, in respect of –

(a) the listed entity having paid up equity share capital not exceeding rupees ten crore and net worth not exceeding rupees twenty five crore, as on the last day of the previous financial year

(b) the listed entity which has listed its specified securities on the SME Exchange.

However, in case of other listed entities, which are not companies, but body corporate or are subject to regulations under other statues, the provisions of regulation 24A shall apply to the extent that it does not violate their respective statutes and guidelines or directives issued by the relevant authorities.

Question 4

(a) Highlight inclusion of Emphasis of Matter (EOM) in an audit report.

(b) "Working papers should be prepared using the appropriate cross referencing." Justify.

(c) Explain the term 'conflict of interest' regarding audit engagement as per the Company Secretaries Auditing Standard (CSAS)-1.

(d) Differentiate Fine and Penalty as per the Companies Act, 2013

(e) What do you mean by Ethical Dilemma ? *(3 marks each)*

Answer 4(a)

Emphasis of matter (EOM) is included in the audit report to seek the attention of the reader, to make the reader aware about the specific instances which are not in the general course of business. Such matters can have the positive as well as negative impact on the affairs of the company in future. The purpose of an EOM paragraph is to

draw the users' attention to a matter already disclosed but the auditor believes that, it is fundamental to their understanding and should be a part of the report.

The following are examples of the matters which should be considered as emphasis of matter:

- An uncertainty relating to the future outcome of exceptional litigation or regulatory action.
- When there is uncertainty about exceptional future events, pending litigations.
- Early adoption of new accounting standards.
- Adoption of new technology.
- Recent changes in the regulatory environment.
- When a major catastrophe has had a major effect on the financial position.

Ideally, such matters should be the part of the Directors' Report or the Management Discussion and Analysis report prepared by the company. If the same is not disclosed by the company in the Directors' report or in Management Discussion and Analysis Report, the auditor may opt to place the same in the Auditor's Report.

Answer 4(b)

Working papers should be prepared using the appropriate cross referencing. A cross reference from the Audit Procedures to the primary working paper provides a reference to, from where the work was performed. It is not necessary to cross refer all work papers to the Audit Procedures, only the primary work paper should be cross referred. The primary work paper will then contain cross-references to other, supporting working papers, which provide additional information regarding the audit procedures performed, results, and conclusions reached.

Cross-references should be used to refer information useful in more than one place or to other relevant information including the source of information, composition of summary totals, or other documents or examples of transactions. To encourage conciseness of documents/information, only single copy of the working papers should be placed in working file for cross referencing.

Answer 4(c)

Conflict of Interest as per Company Secretaries Auditing Standard (CSAS-1)

The Auditor shall not have any substantial conflict of interest with the Auditee. Any conflict of interest, other than substantial conflict of interest, must be disclosed by the Auditor before accepting the Audit Engagement or as soon as the Auditor becomes aware of the same, as the case may be.

Conflict of Interest as per the CSAS means:

1. *Ownership* : Where the Auditor singly or along with partners, spouse, parent, sibling, and child of such person or of the spouse, any of whom is either dependent financially on such person, holds more than 2% in the paid up share capital or shares of nominal value of Rs. 50,000/-, whichever is lower or more than 2%

voting power, as the case may be, the same shall be considered as substantial conflict of interest.

2. *Financial Interest* : Where the Auditor is indebted to the Auditee for an amount of five lakh rupees or more. However, financial indebtedness arising out of ordinary course of business will not constitute conflict of interest. Indebtedness that may seriously impair the independence of the Auditor shall be considered as substantial conflict of interest.

3. *Past Employment Relationship* : Where an Auditor was in employment of the Auditee, its holding or subsidiary company and 2 (two) years have not lapsed from the date of cessation of employment, the same shall be considered as substantial conflict of interest.

Answer 4(d)

Difference between Fine and Penalty

The Companies Act, 2013 contains provisions for adjudication of penalties by officers of the Central Government as well as imposition of fine. Fine and penalty, though may sound similar, but in actual they are different. Fine can be imposed only by a Court of law/tribunal in a proceeding, but penalty may be levied even by an administrative office(r). Therefore, imposition of fine requires prosecution in a Court of law, whereas penalty may be imposed by way of adjudication. The process for imposing fine and levying penalty are also different. Penalties creates the liability on non-compliance of the provisions and Fine is imposed by way punishment.

Answer 4(e)

Ethical Dilemma

Dilemma means a situation in which a difficult choice has to be made between two courses of action, either of which entails contravening a moral principle. An ethical dilemma or ethical paradox is a decision-making problem between two possible moral imperatives, neither of which is unambiguously acceptable or preferable. The complexity arises out of the situational conflict in which obeying one would result in transgressing another.

Ethical Dilemma is the situation where a person's view regarding selecting an object or the alternative includes series of outcomes, which is very confusing. Each outcome has a serious overlapping outcome, which cannot be at a time wrong for one person but the same may be ethically wrong for the other.

An "absolute" or "pure" ethical dilemma only occurs when two (or more) ethical standards apply to a situation but are in conflict with each other. In ethical dilemma if we obey one decision then it would bring about disobeying another.

Ethical dilemma is also known as moral dilemma. Ethical dilemmas make the situations too difficult. A person has to choose only one way from two of them - a moral or an immoral way.

Question 5

(a) Write a note on establishment and functions of Quality Review Board under the Company Secretaries (Amendment) Act, 2006. (5 marks)

(b) "Audit as a monitoring device is essential in corporate governance also". Substantiate the statement. (5 marks)

(c) XYZ Limited has 9 directors on its Board. Registered office of the company is situated in Mumbai. 4 directors of the company reside outside Mumbai. The company held 7 board meetings during the financial year 2018-19. In all the meetings video conferencing facility was provided.

Prepare check list for verifying the compliances relating to video conferencing in relation to Notice, Quorum and the Matters not allowed through video conferencing. (5 marks)

Answer 5(a)

Note on Establishment and functions of Quality Review Board under Company Secretaries (Amendment) Act, 2006

Section 29A of the Company Secretaries Act, 1980(as amended by Company Secretaries (Amendment) Act, 2006) provides the provisions relating to establishment of Quality Review Board. They are as under:

1. The Central Government shall, by notification, constitute a Quality Review Board consisting of a Chairperson and four other members.
2. The Chairperson and members of the Board shall be appointed from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy.
3. Two members of the Board shall be nominated by the Council and other two members shall be nominated by the Central Government.

Section 29B of the Company Secretaries Act, 1980 (as amended by Company Secretaries (Amendment) Act, 2006) provides the provisions relating to functions of Quality Review Board. They are as under:

The Quality Review Board shall perform the following functions, namely:

1. to make recommendations to the Council with regard to the quality of services provided by the members of the Institute;
2. to review the quality of services provided by the members of the Institute including secretarial Audit services; and
3. to guide the members of the Institute to improve the quality of services and adherence to the various statutory and other regulatory requirements.

Answer 5(b)

Corporate Governance is a strategic activity that ensures that all the processes that are necessary for directing and controlling a business enterprise are implemented effectively. It is about ethical conduct in business. Corporate Governance deals with conducting the affairs of a company such that there is fairness to all stakeholders and that its actions benefit the greatest number of stakeholders. It is about openness, integrity and accountability.

Recent scandals in Indian Corporates have raised questions not only about the practices adopted by companies to solicit business but also about the standards of accountability in public administration including within the government machinery and institutions.

Corporate Governance provisions under the erstwhile listing agreement popularly known as the Clause 49 requirements have been overhauled by the Companies Act 2013, recent adoptions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations"). Schedule II of the said regulations have elaborated on the Corporate Governance measures and are applicable to the entities which are listed with recognized stock exchange(s). These regulations have aligned India's corporate governance regime with the developed countries.

Audit of corporate governance processes provides assurance to various stakeholders that all the required governance activities have been accomplished. The Stakeholders do not like to receive surprises and audit of corporate governance activities shall ensure the effective check mechanism on the supervisory and managerial layers of a business enterprise. Corporate Governance Audit mechanism works primarily through Audit Committee and the Auditor.

Need for Corporate Governance Audit (CGA)

The audit serves as a monitoring device and is essential in corporate governance also. The auditors view management as the primary driver of corporate governance and to ensure commitment of the Board in managing the company in a transparent manner.

The history indicates that well-governed companies receive higher market valuations. Improving corporate governance will also increase capital flows to companies; from domestic and global capital; equity and debt; and from public securities markets and private capital sources even the increased customer base. Therefore, the Corporate Governance Audit is essential in Corporate Governance.

Answer 5(c)

Checklist for verifying the compliances relating to video conferencing in relation to Notice, Quorum and matters not allowed through video conferencing

Notice

1. If the company provides audio-visual facility, check that the notice of the meeting informs the directors regarding the option available to them to participate through video conferencing mode or other audio visual means.
2. Provide necessary information to enable the directors to participate through video conferencing mode or other audio visual means.
3. The video conferencing is recorded and kept under safe custody.

Quorum

1. The quorum for a meeting of the Board of Directors of a company was present i.e. one third of its total strength or two directors, whichever is higher.
2. The participation of the directors by video conferencing or by other audio visual means was also counted for the purpose of quorum.

Provided that where there is quorum in a meeting through physical presence of directors, any other director may participate conferencing through video or other audio visual means.

The following matters are not allowed through video conferencing or other audio visual means in board meeting:

1. The approval of the annual financial statements.
2. The approval of the Board's report.
3. The approval of the prospectus.
4. The Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the Board under sub-section (1) of section 134 of Companies Act, 2013.
5. The approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

However, if physical quorum is present then company can take above matters also through video conferencing and allow other directors to participate in meeting.

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

Question 6

(a) Appraisal of management decisions involves a number of steps. Enumerate them.

(b) Snehal Sansthan a non-profit organization registered under Section 8 of the Companies Act, 2013 is enlisted under the Foreign Contribution (Regulation) Act, 2010 (FCRA) to procure foreign money. The organization is actively engaged in development of children of slum areas of Mumbai. For this purpose the organization is getting donation of $100K from Helping Hands, a social organization of California. As a Company Secretary in Practice, guide the organization about procurement and utilisation of this donation. Also state the due diligence and reporting requirements.

(c) Explain the planning stage of peer review process. (5 marks each)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) Describe auditing risk and its components.

(ii) State the obligation of the auditor to maintain confidentiality regarding auditee information.

(iii) ABC Limited is a non-compliant listed entity suspended under the Standard Operating Procedure for non-compliances under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. The company has complied with the requisite requirements after the date of suspension but failed to pay the applicable fine. State the procedure to be

followed by the recognized stock exchange for revoking the suspension of trading of its shares. Also state the consequences for failing to pay the applicable fine by the company. *(5 marks each)*

Answer 6(a)

Steps in Appraisal of Management Decision

In appraisal of management decision the following steps should be considered by the auditor:

1. Whether the management decision are well defined or not.
2. Whether the Objectives and desired output has been set out clearly and relate explicitly to the policy or strategy adopted by the company to help in post event evaluation of the management decisions. Ideally the objectives of every management decision should be specific, measurable, agreed, realistic and time-bound.
3. While taking decision, whether the management has considered the effect of the associated risks; time availability; scale and location; scope for alternative arrangements with other public bodies; degree of involvement of regulators and civic bodies; capacity of the market to deliver the required output; alternative asset uses; use of new or established technology; and environmental issues.
4. In case of the major investment decision, whether various possible options were considered and whether such potential options are analyzed and reviewed in terms of value, costs, benefits, risk and uncertainties of options.
5. Whether the options are selected after due analysis and a consensus decision is taken.
6. Whether the selected alternative has been implemented efficiently.
7. Whether ongoing review of management decision control and evaluation system is monitored.

Answer 6(b)

The guidelines for Foreign Funding are as under:

1. As per Section 17 of Foreign (Contribution) Regulation Act, 2010, NGOs have to open and maintain bank accounts, which will exclusively deal with the receipt and utilization of foreign contributions.
2. A separate set of accounts and records must be maintained, exclusively for these transactions.
3. The FCRA also mandates that foreign contributions must be utilized only for the purpose for which they were received.
4. Under Section 7 of Foreign (Contribution) Regulation Act, 2010, the transfer of contributions is not allowed. A person or entity is prohibited from transferring contributions to any other person, unless such transferee is authorized by the government to receive foreign contributions.

or

4. Under Section 7 of the Foreign Contribution (Regulation) Act, 2010 (as amended by the Foreign Contribution (Regulation) Amendment Act, 2020) No person who is registered and granted a certificate or has obtained prior permission under this Act and receives any foreign contribution, shall transfer such foreign contribution to any other person.

The Due Diligence & Reporting Requirements are as under:

The most important reporting requirement under FCRA is the submission of annual returns. All NGOs are required to submit their annual returns online with scanned copies of income and expenditure statement, receipt and payment account and balance sheet within nine months from the closure of the previous financial year. This return has to include all the details of the contributions received, namely:

- Source and manner in which it is received;
- Purpose for which it was received; and,
- Manner of usage of the contributions.

It is necessary for the entities who receive foreign funding to review the updated FCRA norms and meet their compliance obligations meticulously to avoid any regulatory actions. As once an entity appears under the government scanner for non-compliance, such organizations may face all manner of restrictions and regulatory obstacles.

Answer 6(c)

Planning Stage of Peer Review Process

On acceptance of the peer review by the selected reviewer, the Practice Unit will be notified. The reviewer may also require the Practice Unit to provide any other information the reviewer considers necessary to facilitate the selection of a sample of attestation services engagements, representative of the practice unit's client portfolio, for review.

- **Sample of Attestation services Engagements**

  (a) Sample selection is an important step in Peer Review Process. The selection shall be done diligently. An initial sample shall be selected by the reviewer from the complete attestation services client list. Practice units will be notified of the selection in writing about two weeks in advance, requesting the relevant records of the selected attestation services clients to be made available for review.

  (b) The initial sample may be reduced to a smaller actual sample for review at the stage of execution. However, if the reviewer considers that the actual sample does not cover a fair cross-section of the practice unit's attestation services engagements, he may make further selections.

- **Confirmation of visit**

  In consultation with the practice unit, date(s) will be set for the on-site review to be carried out. Flexibility will be permitted to ensure that practice units are not inconvenienced at especially busy periods. The on-site review date(s) will be arranged by mutual consent such that the review is concluded within sixty days of notification.

Answer 6A(i)

Auditing Risk

Auditing risk means that an auditor accepts / presumes some level of uncertainty in performing the audit work, which means that the auditor accepts the risk that the audit opinion given by the auditor might be wrong. Only a very small degree of audit risk would be acceptable as otherwise the audit process may lose its purpose.

The audit risk has three components:

Inherent Risk : Inherent risk is the susceptibility of a class of transaction to misstatement that could be material, individually or when aggregated with misstatements in other transaction, assuming that there were no related internal controls. For example, Genuineness of the related party transactions.

Control Risk : Control Risk is the risk that a misstatement that could occur in a class of transactions and that could be material individually or when aggregated with misstatement on other transaction, will not be prevented or detected and corrected on a timely basis by the internal control systems. For example, delay in the filing of forms.

Detection Risk : Detection Risk is the risk that an auditor's substantive audit procedures will not detect a misstatement that exist in class of transactions that could be material, individually or when aggregated with misstatement on other transaction. For example, while certification of e-form, the auditor has overlooked the compliance of the Secretarial Standards.

The auditor should maintain high level of assurance/confidence while expressing the audit opinion, and this is the most important steps in the audit planning to ensure that the audit team will gather competent, relevant and reasonable audit evidence at minimum cost.

There is an inverse relationship between materiality and the level of audit risk, that is, the higher the materiality level, the lower the audit risk and vice versa, Auditor should take note of the inverse relationship between materiality and audit risk when determining the nature, timing and extent of audit procedures.

Answer 6A(ii)

The auditors of a company while performing the audit assignment access various confidential information of the company and it is most important and required for the auditors to maintain confidentiality of the auditee information.

The principle of confidentiality imposes an obligation on the auditor to refrain from:

1. Disclosing information acquired as a result of professional relationships without proper and specific authority or unless there is a legal or professional right or duty to disclose.
2. Using information acquired as a result of professional relationships to their personal advantage or the advantage of third parties.
3. An auditor should maintain confidentiality even in a social environment. The auditor should be alert to the possibility of inadvertent disclosure, particularly in circumstances involving long association with a business associate or a relative.

4. An auditor should also maintain confidentiality of information disclosed by a prospective client or employer.

5. An auditor should also consider the need to maintain confidentiality of information within the firm or employing organization.

6. An auditor should take all reasonable steps to ensure that staff under the auditor's control and persons from whom advice and assistance is obtained respect the auditor's duty of confidentiality.

Answer 6A(iii)

Procedure to be followed by the recognised stock exchange for revoking the suspension of trading of shares

If the non-compliant listed entity complies with the requisite requirement(s) after the date of suspension and pays the applicable fine, the recognized stock exchange(s) shall revoke the suspension of trading of its shares by following the procedure mentioned below:

(i) If the non-compliant listed entity complies with the aforesaid requirement(s) and pays the applicable fine after trading is suspended in the shares of the non-compliant entity, the recognized stock exchange(s) shall, on the date of compliance, give a public notice on its website informing compliance by the listed entity. The recognized stock exchange(s) shall revoke the suspension of trading of its shares after a period of 7 days from the date of such notice.

While issuing the said notice, the recognized stock exchange(s) shall send intimation of notice to other recognized stock exchange(s) where the shares of the entity are listed. After revocation of suspension, the trading of shares shall be permitted only in 'Trade for Trade' basis for a period of 7 days from the date of revocation and thereafter, trading in the shares of the entity shall be shifted back to the normal trading category.

(ii) The recognized stock exchange(s) shall intimate the depositories to unfreeze the entire shareholding of the promoter and promoter group in such entity as well as all other securities held in the demat account of the promoter and promoter group, after three months from the date of revocation of the suspension.

The consequence for failing to pay applicable fine by the Company

If the non-compliant listed entity fails to comply with the aforesaid requirement(s)or fails to pay the applicable fine within 6 months from the date of suspension, the recognized stock exchange(s) shall initiate the process of compulsory delisting of the non-compliant listed entity in accordance with the provisions of the Securities Contracts (Regulation) Act, 1956, the Securities Contracts (Regulation) Rules, 1957 and the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 as amended from time to time.

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CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING-UP

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer ALL Questions.*

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

PART I

Question 1

(a) 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. Latter 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)

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

(c) John Ltd. is in the process of taking over Tony Ltd. Turnover of Tony Ltd as per latest financial statements is ₹800 Crore and assets value is ₹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)

(d) The Paid up Equity Share Capital of Zumba Ltd. is 1,00,000 shares of ₹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 preferential allotment to its directors as follows:

Ram 7000 shares and Mohan 1000 shares.

Define creeping acquisition and evaluate the requirement of public announcement in above case as per Securities and Exchange Board of India (Substantial Acquisition of Securities and Takeover) Regulations, 2011. (5 marks)

Answer 1(a)

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 dependent 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.

Answer 1(b)

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 aims 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.

Answer 1(c)

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 ₹350 Crore in India or turnover of not more than ₹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.

Answer 1(d)

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 open 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.

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

Question 2

(a) 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?

(b) 'Buy-back strategy' is nowadays being adopted by leading corporate bodies. Mention one case that has happened recently specifying the benefits of buy-back ?

(c) "Competition Commission of India takes into consideration various factors while assessing the adverse effect on competition."—Analyse briefly. (5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Ram Ltd. is considering Merger with Shyam Ltd. Ram Ltd. shares are currently traded at ₹20. It has 1,70,000 shares and its Profit After Taxes (PAT) amounts to ₹8,50,000. Shyam Ltd. has 40,000 shares having market price of ₹15 and its PAT is ₹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 ?

(ii) 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 favor, 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 ?

(iii) 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 ₹2,000 crore from ICICI Bank. Combined assets post merger would be ₹10,000 crore. Suggest the list of approvals required for getting the scheme of merger considered by the Tribunal. (5 marks each)

Answer 2(a)

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 relations 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.

Answer 2(b)

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-buyback 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.

Answer 2(c)

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.

Answer 2A(i)

(a) Calculation of New EPS of Ram Ltd.

Number of Equity shares to be issued to shareholders of Shyam Ltd: 40000 X 15/20 = 30000

Total Number of Shares in Ram Ltd after merger:

170000 + 30000 = 200000

Total EPS post-merger

850000 + 300000 = 1150000

Thus EPS post-merger is 1150000/200000 = ₹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-

Ram Ltd. – 850000/ 170000 = 5

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.

Or 40000 x 3 /2 = 60000

Total number of Shares after merger: 170000+60000 = 230000

EPS =1150000/230000 = ₹ 5

Earnings for Shareholders of Shyam Ltd after Merger = 60000 x 5 = ₹ 3, 00,000 that confirms to pre-merger earnings of Shyam Ltd.

Answer 2A(ii)

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 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.

Answer 2A(iii)

(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.

Question 3

(a) Between outbound merger and inbound merger, which one appears more beneficial to Corporate India ?

(b) Is External Reconstruction superior to Internal Reconstruction ?

(c) Suggest the regulations to be referred to in respect of Combinations under the Competition Act, 2002.

(d) "It would be almost impossible to use the Packman Defence in India." Comment.

(e) "There are certain practicalities which should be kept in mind while entering into a cross border merger." Briefly comment. (3 marks each)

Answer 3(a)

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.

In bound 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.

Answer 3(b)

(i) In 'Internal Reconstruction', the assets are re-valued, 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.

(ii) Internal Reconstruction (IR) is considered to be superior to External Reconstruction(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 acquisition and losing identity.

(iii) In many a case, Internal Reconstruction does not require approvals from Courts or tribunals that may require conducting meetings of classes of shareholders and creditors, except in a case of reduction of paid up capital.

Answer 3(c)

(i) 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 able to applicable to share subscription or financing facility by a public financial institution, foreign institutional investor, any bank or venture fund.

Answer 3(d)

(i) 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.

Answer 3(e)

Cross-border mergers do have practical difficulties hence certain practicalities need to be kept in mind. They are as under:

Companies involved in the cross boarder merger shall answer that Regulatory actions, if any, prior to the merger with respect to non-compliance, contravention, violation as the case may be of any Act, Rules and Regulation made thereunder.

Due diligence on the target firm, risk-benefit analysis and valuation of both sides to assess the compatibility.

Ensure that the other company is within the prescribed jurisdiction mostly in case of a outbound merger and also get familiarized with the regulatory and political landscape of the other company across the border.

PART II

Question 4

(a) 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)*

(b) 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 ₹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)*

(c) 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 contention of the suspended directors is justified. *(5 marks)*

(d) 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)*

Answer 4(a)

(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.

(v) 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.

Answer 4(b)

(i) As per first proviso to Section 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 Section 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 in to 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 Section 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.

Answer 4(c)

(i) Section 17 of the Insolvency and Bankruptcy Code 2016 (IBC) lists out the powers of an Interim Resolution Professional (IRP) to do all acts and execute documents in the name of corporate debtor (CD) for effective discharge of his responsibilities.

(ii) Section 17 (2) (e) of IBC specifies that the IRP is responsible for complying with the requirements under the law for the time being in force for the CD.

(iii) However Section 17 (1) (c) requires the officers and mangers of the CD shall

report to IRP for accessing documents and records. Officers include Directors that are suspended in terms of Section 17 (1) (b).

(iv) Although responsibility lies with IRP for compliance yet the suspended directors need to discharge their duties at the instructions of IRP.

(v) Thus in the given case the directors cannot claim their responsibility and they are duty bound to extend all cooperation to IRP for timely compliance.

Answer 4(d)

(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.

Question 5

(a) 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 ?

(b) How could the rights of dissenting shareholders to a scheme of merger be resolved ?

(c) What are the powers and obligations of a Liquidator regarding 'uncalled capital' or 'unpaid capital contribution' ?

(d) Are there any grounds to appeal against the approval of Resolution Plan by the Adjudicating Authority in terms of Insolvency and Bankruptcy Code, 2016?

(e) "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 each)

Answer 5(a)

(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.

Answer 5(b)

(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.

Answer 5(c)

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.

Answer 5(d)

(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.

Answer 5(e)

(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 non-existence of dispute is necessary in case of Operational Creditor.

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

Question 6

(a) United Nations Commission on International Trade (UNCITRAL) demonstrated as Guiding Role in respect of Insolvency Laws in Member Nations—Comment. (5 marks)

(b) 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)

(c) "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)

OR (Alternate question to Q. No. 6)

Question 6A

(i) Elucidate briefly the process of Notification to Foreign Creditors as per United Nations Commission on International Trade (UNCITRAL) Model Law.

(ii) As an Interim Resolution Professional (IRP) how could you constitute the Committee of Creditors of a Corporate Debtor (CD) having only operational creditors or all financial creditors, who submitted their claims, are found to be related parties of the CD ?

(iii) Briefly comment on the rights of Secured Creditors in a Repayment Plan under Section 105 of the Insolvency and Bankruptcy Code, 2016. (5 marks each)

Answer 6(a)

(i) '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.

Answer 6(b)

(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 whether 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.

Answer 6(c)

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 air craft as defined in clause (1) of Section 2 of Air Craft 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 sub-section (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.

Answer 6A(i)

(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.

Answer 6A(ii)

Regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations deals with the situation where the Corporate Debtor (CD) has either no financial debt or all financial creditors are related parties of CD.

The committee formed shall consist of members as under –

(a) eighteen largest operational creditors by value:

Provided that if the number of operational creditors is less than eighteen, the committee shall include all such operational creditors;

(b) one representative elected by all workmen other than those

(c) one representative elected by all employees

A member of the committee formed under this Regulation shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt.

A committee formed and its members shall have the same rights, powers, duties and obligations as a committee comprising financial creditors and its members, as the case may be.

Answer 6A(iii)

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.

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RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

Time allowed : 3 hours *Maximum marks : 100*

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

Question 1

(a) A Listed Company was awarded three contracts of drilling rigs. The value of contracts are substantial to the revenue of the Company. As per the normal procedure for bidding there was a time gap between the dates of declaration of the announcement as top bidder and the announcement of the award. This information is considered as 'Price Sensitive' until the stock exchanges were informed, but the company thought that it will inform only after declaration of official award of the contract. However, the officials of the Company were "RESTRICTED" from dealing in the shares of the company immediately after the announcement as top bidder.

In the meantime, the Managing Director of the company before submission of this information to the stock exchanges put this information on Facebook timeline and his friends on facebook made likes and some even bought shares.

As a Company Secretary elaborate based on a decided case, whether the posting of this on the Facebook timeline.

(i) Made the other friends a 'connected person'.

(ii) Whether this meant an access to 'Unpublished Price Sensitive Information'. (5 marks)

(b) An unlisted public company has Authorised Share Capital of 10,00,000 Equity voting shares of ₹10 each of same class. The subscribed and fully paid up Share Capital of the Company is 8,00,000 shares of ₹10 each. To comply with statutory provisions on dematerialisation of shares, the company applied for allotment ISIN with a depository for the entire authorised share capital instead of application for paid up share capital.

(i) Examine the validity of the process adopted by the Company quoting relevant provisions.

(ii) What is the penalty, if any, prescribed for violation of process in such cases under Securities Contracts (Regulation) Act, 1956. (5 marks)

(c) An Assistant Commissioner of Goods and Services Tax (GST) based on the returns filed by a taxable person is of the opinion that the taxable person has suppressed some transaction relating to goods/services and also claimed input Tax Credit in excess of his entitlement under the Goods and Services Act. Therefore, he authorised another officer in writing to inspect the place of business

of that taxable person. The taxable person has not allowed the authorised officer to enter his place of business, as he claimed that it is not tenable order u/s 67(1) of the CGST Act.

Do you agree with the argument of the taxable person, can the authorised officer inspect place of business. Quote relevant provisions to justify your answer. *(5 marks)*

(d) Competition Commission of India is proposing to initiate suo moto inquiry against a Company, which is controlling more than fifty percent of market share in the industry. List out the factors to be considered in determining the dominant position of an enterprise. *(5 marks)*

Answer 1(a)

The Securities Exchange Board of India (SEBI) by its order in the matter of Deep Industries Limited (DIL) has held that Sujay is an insider by way of his association with any officer of the company (in the given case the Managing Director) by way of frequent communication with him in their social capacity as evident in this case by frequent interactions including likes on the social media. Further in the said case it was also held that by virtue of this association and frequent communication, Sujay was reasonably expected to have access to the UPSI of DIL at the relevant period. Therefore, as per Regulation 2(1)(d)(i) of the Prohibition of Insider Trading Regulations, 2015, Sujay is a connected person and consequently is an Insider with respect to DIL.

(i) Yes, in view of the case law discussed above and Regulation 2(1)(d)(i) of the Prohibition of Insider Trading Regulations, 2015, the posting of the information on Facebook by the Managing Director, does made other Facebook friends a 'connected person' on the basis of Social Association.

(ii) Yes, in view of the above discussion, this meant the connected person are reasonably expected to have, directly or indirectly, an access to 'Unpublished Price Sensitive Information' by virtue of their association and frequent communication as evident in this case by likes on the social media, unpublished price sensitive information.

Answer 1(b)

(i) As a general rule inter alia the Depository Rules, Securities Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015 and under Sec 23F of the Securities Contract Regulation Act, 1956, the dematerialisation of more than the issued securities of a company or delivers in the stock Exchange the securities which is not listed in stock Exchanges are not permitted at all.

Further, according to Section 19E of Depository Act, 1996, if the company/ issuer fails to reconcile the records of dematerialised securities with all the securities issued, it shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees. The provisions of Section 28 of Depositories Act, 1996 provides that provisions of this Act shall be in addition to, and not in derogation of, any other law relating to the holding and transfer of securities.

Therefore, the process adopted by the company is invalid.

(ii) Section 23F of the Securities Contracts (Regulation) Act, 1956 provides that If any issuer dematerialises securities more than the issued securities of a company, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees.

Answer 1(c)

As per the provisions of section 67(1) of the Central Goods and Services Act, 2017, only the proper officer, not below the rank of Joint Commissioner may authorise in writing any other officer of central tax to inspect any places of business of the taxable person in case a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under Central Goods and Services Act, 2017 or has indulged in contravention of any of the provisions of the said Act or the rules made thereunder to evade tax under the said Act.

So, the Assistant Commissioner himself cannot pass such order, unless, duly authorised in writing by a Joint Commissioner or any other officer of higher rank.

Therefore, the argument of the taxable person is correct as in the absence of the written authorization from an officer of the rank of Joint Commissioner or above, the person authorised by Assistant Commissioner is not allowed to inspect the place of Business of the taxable person.

Answer 1(d)

Factors to be considered for determining dominant position of an enterprise

According to Section 19(4) of the Competition Act, 2002, the Competition Commission of India shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the said Act, have due regard to all or any of the following factors, namely:

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) Any other factor which the Commission may consider relevant for the inquiry.

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

Question 2

(a) A Bank lent money to borrowers against security of gold ornaments. The Gold ornaments were valued by a Gold Appraiser. The Bank lent 60% of the certified value of the gold. An employee of the Bank who is a man of integrity realised that the Gold Appraiser had colluded with the Loan Manager and the security provided was not 'gold ornaments' but 'gold plated ornaments'. Advise the employee on his course of action. (4 marks)

(b) A Shareholder of a Company brought an action for damages against the Company and its two Directors on the ground that they have been negligent in selling a property owned by the Company for ₹75 crore whereas its real value was ₹100 crore. Is this suit maintainable ? (4 marks)

(c) The Company Secretary of a Company was allotted quarters during the tenure of his employment. He has retired on 31st March, 2019. As per the terms of his employment, he is required to vacate his quarters within one month of his ceasing to be in employment. i.e. by 30th April, 2019. He seeks one year to vacate the premises on the ground of his children's education. The Company wants him to vacate as it has to allot it to the new Company Secretary. What would be your advice to the Company under the given circumstances ? (4 marks)

(d) During the course of investigation under Section 217 of the Companies Act, 2013 it is revealed that the company has taken loans worth ₹100 crore from a consortium of Banks in India and failed to repay them as per the terms of the loan agreement. Further, the Managing Director of the Company, who is a UK National has moved to London and is not responding to the inquiries by the Investigating Officer.

You are required to advise the Bank on the steps to be taken to collect evidence as well as to recover the money lent by the Bank to the Company. (4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

Comment :

(i) 'The term 'fraud' has been defined for the first time in the Companies Act, 2013' — Briefly, discuss the background and importance of the definition of 'fraud' under the Companies Act, 2013.

(ii) 'De-criminalisation of most offences under the Companies Act, 2013 is key to E-adjudication framework' — Elaborate highlighting recent developments in this context. *(iii) 'There is a difference in legislative intent for incorporating Section 441 and Section 454 under the Companies Act, 2013' — Discuss.*

(iv) 'The words "oppression" and "mismanagement" are not defined in the Act. The meaning of these words for the purpose of Company Law should be used in broad generic sense and not in any strict literal sense' — Discuss citing suitable case law. (4 marks each)

Answer 2(a)

The employee can make use of the vigil mechanism required to be established under Section 177 (9) of the Companies Act, 2013. The said section provides that listed and prescribed companies, shall establish a vigil mechanism for directors and employees to report genuine concerns in such manner as may be prescribed.

According to the above section, every listed company, companies which accept deposits from the public and companies which have borrowed money from banks and public financial institution in excess of ₹50 crores have to establish a vigil mechanism for directors and employees to report their genuine concerns about unethical behaviour / misconduct / actual or suspended faults / violation of rules/ guidelines.

Further, as per Section 177(10) of Companies Act, 2013, the vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. The proviso to this sub-section state that that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's report.The employee of the Bank can directly email his concern to the chairman of the Audit Committee as mentioned in the "Whistle Blower" & Vigil mechanism policy. All directors of employee are assured that this mechanism provides adequate safeguard against victimization of the concerned director/ employee.

Accordingly, the employee can inform the Chairman of the Audit Committee about the fraud, without any fear of victimization.

Answer 2(b)

The principle of non-interference as laid down in Foss vs. Harbottle (1843) 2 Hare 461, 67 ER 189 says no action can be brought by a member against the directors in respect of a wrong alleged to be committed by a company. The company itself is the proper party for such an action.

The general principle of company law is that every member holds equal rights with other members of the company in the same class.

The scale of rights of members of the same class must be held evenly for the smooth functioning of the Company. In case of difference (s) among the members the issue is decided by a vote of majority since the majority of members are in an advantageous position to run the company according to their command, the minorities are often oppressed. The company law provides for adequate protection when their rights are trampled by the majority. However, protection of minority is not generally available when the majority does anything in the exercise of the powers for internal administration of a Company, the courts will not usually interfere at the instant of the shareholders in matters of internal administration so long as they are acting within the powers conferred on them by the articles of the company

The facts of the case asked are similar to the case in Pavlides vs. Jensen (1956) where the minority shareholders brought an action for damages against three directors and against the company itself on the ground that they have been negligent in selling a mine owned by the company for £ 182,000 whereas its real value was £ 1000,000. It was held by the Judge that it was open to the company on the resolution of a majority of the shareholders to sell the mine at a price decided by the company and it is open to all the members of company by a vote of majority to decide that if the directors by their negligence or error of judgment has sold the company's mine at an undervalue, proceedings should not be taken against the company.

Accordingly, unless the Shareholder is a holder of majority of the shareholding of the Company, the suit will not be maintainable.

Answer 2(c)

According to Section 452(1) of the Companies Act, 2013, if any officer or employee of a company:

(a) Wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

Further as per section 452(2), the Court trying an offence under sub-section (1) may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to two years.

Accordingly, in this case, the company can file a case against the retired Company Secretary to deliver up the quarters within a time fixed by court.

He may also be asked to pay reasonable rent to the company for staying beyond the specified period. The retired Company Secretary will have no option but to leave the quarters within the time fixed by the court. He will also be liable to pay, as may be decided by the court.

Further, the Court may also order such officer or employee to undergo imprisonment for a term which may extend to two years.

Answer 2(d)

Steps to be taken to collect evidence and to recover the money lent by the Bank to the Company

According to Sec. 217 (11) of Companies Act, 2013, an application can be made by the inspector to the competent court in India, which may issue a letter of request to a court or authority in UK to deal with such request.

(i) to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case;

(ii) to record his statement made in the course of such examination;

(iii) to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and;

(iv) to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request.

The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

Every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

In order to protect the interest of lenders of money to the company assets, sufficient provisions are provided under Companies Act, 2013, which includes:

(i) *Freezing of Assets of Company on Inquiry and Investigation*

According to Section 221 of Companies Act, 2013, the tribunal on reference made to it by the Central Government in Connection with any inquiry or investigation into affairs of a company on any complaint made by members under Section 244 of the said act or a creditor having outstanding amount of not less than ₹ 1 lakh or any other person having a reasonable ground, may by order direct that transfer removal or disposal of funds, assets or properties of the company shall not take place during specified period not exceeding three years or may take place subject to such conditions or restrictions it may impose.

The tribunal may make such order, if it appears to the tribunal that the removal, transfer or disposal of funds, assets or properties of the company will be prejudicial to the interest of the company or shareholders or creditors or public.

(ii) *Imposition of Restrictions Upon Securities*

According to Section 222 of Companies Act, 2013, where it appears to the tribunal that there is good reason to find out the relevant facts about any securities issued to or by a company and the tribunal is of the opinion that such facts cannot be found out unless certain restrictions may be imposed the tribunal may by order, direct that the securities shall be subject to restrictions as it may deem fit for such period not, exceed by three years as may be specified in the order.

Answer 2A(i)

The JJ Irani Committee set up by the government in 2004 submitted its report in 2005 with far reaching recommendations. The recommendations of the committee have received shape in the Companies Act, 2013. One of the recommendations of the committee was that there should be deterrent penalties for companies that show irresponsible behavior or conduct fraudulent activities.

Fraud consists of some deceitful practice or wilful device, resorted to with an intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional (*Maher* v. *Hibernia Inst. Co.*, 67 N Y 292)

The Hon'ble Supreme Court of India in the matter of *Dr. Vimla* vs. *Delhi Administration* (29 November, 1962) citing Haycraft v. Creasy (1) LeBlanc, noted that: "by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial."

Till the commencement of the Companies Act, 2013, the term fraud was not defined in the Indian corporate laws. Even the Indian Penal Code, 1860, did not touch upon the fraud directly. Though, as per Section 17 of the Indian Contracts Act, 1872, the term "fraud" means an act committed by a party to a contract or with his connivance, or by his agent, with an intention to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Further, Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

According to regulation 2(1)(c) of SEBI(Prohibition of Fraudulent and unfair Trade Practices relating to Securities Market) Regulation, 2003 "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities. whether or not there is any wrongful gain or avoidance of any loss, and shall also include:

(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;

(2) a suggestion as to a fact which is not true by one who does not believe it to be true;

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) a promise made without any intention of performing it;

(5) a representation made in a reckless and careless manner whether it be true or false;

(6) any such act or omission as any other law specifically declares to be fraudulent,

(7) deceptive behaviour by a person depriving another of informed consent or full participation,

(8) a false statement made without reasonable ground for believing it to be true.

(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price. And "fraudulent" shall be construed accordingly;

Companies Act, 2013, formally defined the term "fraud" w.r.t. the corporate actions. As per sub-clause (i) to the Explanation to Sec 447 "fraud" in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss, wherein "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled and "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

Answer 2A(ii)

Ministry of Corporate Affairs (MCA) seeks to review offences under the Companies Act, 2013 as some of the offences may be required to be decriminalised and handled through an in-house mechanism, where a penalty could be levied in the events of default, which would also reduce the burden on the trail courts by allowing them to pay more attention on offences of serious nature.

The Key Recommendations of the MCA Committee on Review of Penal Provisions of Companies Act 2013 are as under:

(i) Restructuring of Corporate Offences to relieve Special Courts from adjudicating routine offences:

  (a) re-categorization of 16 out of the 81 compoundable offences by shifting them from the jurisdiction of special courts to an in-house E-adjudication framework wherein defaults would be subject to levy of penalty by the authorised adjudicating officer (Registrar of Companies);

  (b) remaining 65 compoundable offences to continue under the jurisdiction of special courts due to their potential misuse;

  (c) similarly, status quo recommended in respect of all non-compoundable offences, which relate to serious corporate offences;

  (d) instituting a transparent online platform for e-adjudication and E-publication of orders; and

  (e) Necessitating a concomitant order for making good the default at the time of levying penalty, to achieve better compliance.

The decriminalisation of the offence paved the way for e-adjudication framework. The system has become effective as the offences are decriminalised and the minor offences are dealt by e-adjudication framework.

Answer 2A(iii)

Both these sections are independent of each other. The question of one section overriding the other does not arise. They operate concurrently but not parallel. It means simultaneously.

According to section 441 of the Companies Act, 2013, notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under Companies Act, 2013 (whether committed by a company or any officer thereof) [not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine], may, either before or after the institution of any prosecution, be compounded by:

(a) the Tribunal; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed Rs. 25 Lakh, by the Regional Director or any officer authorised by the Central Government.

Further, Section 454 of the Companies Act, 2013, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of Companies Act, 2013, in the manner as may be prescribed and such adjudicating officer may, by an order:

(a) impose the penalty on the company, the officer who is in default, or any other person, as the case may be, stating therein any non-compliance or default under the relevant provisions of Companies Act, 2013; and

(b) direct such company, or officer who is in default, or any other person, as the case may be, to rectify the default, wherever he considers fit.

It may be noted that, Section 441 which deals with compounding and Section 454 which deals with adjudication are not same. The adjudicating officer has no power to compound. The Regional Director alone can compound. If Central Government has to authorize another officer for compounding it has to be under section 441(1)(b) and not under 454. The adjudicating officer u/s 454 can only adjudicate on the quantum of penalty. He has no right to go into the merits and demerits of the default.

Answer 2A(iv)

The words “oppression” and “mismanagement” are not defined in Companies Act, 2013. The meaning of these words for the purpose of Company Law may be used in a broad generic sense and not in any strict literal sense.

The meaning of the term “oppression as explained by Lord Cooper in the *Scottish case of Elder* v. *Elder & Western Ltd.*, (1952) Scottish Cases 49, which has been cited with approval by Wanchoo, J (afterwards C.J.) of the Supreme Court in *Shanti Prasad* v. *Kalinga Tubes*, (1965) 1 Comp. L.J. 193 at 204 is as under :

“The essence of the matter seems to be that the conduct complained of should at the lowest, involve a visible departure from the standards of fair dealing. on which every shareholder who entrusts his money to the company is entitled to rely.”

A similar relief was allowed by the House of Lord in *Scottish Co-operative Wholesale Society* v. *Mayer* (1959) AC 324. In this case, the society created a subsidiary company to enable it to enter in the rayon industry. Subsequently when the need for the subsidiary ceased to exist, the society adopted a policy of running down its business which depressed the value of its shares. The two petitioners who were managing directors and minority shareholders in the company successfully pleaded "oppression". The court ordered the society to purchase the minority shares at the value at which they stood before the oppressive policy started. This decision has also been followed in Re. H.R. Harmer Ltd., (1959) I WLR 62).

Minor acts of mismanagement, however, are not to be regarded as oppression. As far as possible, shareholders should try to resolve their differences by mutual readjustment. Moreover, the courts will not allow these special remedies to become a vexatious source of litigation.

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

Question 3

(a) Are the following offences compoundable and if yes, by whom ?

(i) Failure to maintain Register of Members and Debenture-holders

(ii) Fraudulently issuing duplicate share certificates

(iii) Failure to keep proper books of accounts

(iv) Tampering with minutes of meetings. (4 marks)

(b) Answer with reasons, under COFEPOSA, 1974 :

(i) Can Maharashtra Government order detention of a person in Gujarat ?

(ii) A detention order has been issued against a person on several grounds. Some of these grounds have been proved to be non-existent. Is the detention order still valid?

(iii) Can a person detained in Mumbai be shifted to Ahmedabad and detained there ?

(iv) Can any, restriction be imposed on a detained person with respect to communication with others ? (4 marks)

(c) One of a relative of an Authorised Officer under Prevention of Money Laundering Act (PMLA), annoyed by his neighbour, passes a false information to the authorized officer that his neighbour is keeping smuggled gold bars. Based on the information of his relative, authorised officer conducts search in the place and found nothing. Affected person claims that the search conducted by authorised officer is vexatious. Whether claim of the affected person is tenable. Briefly discuss the provisions under PMLA with punishment for vexatious search. (4 marks)

(d) An assessing officer who is empowered to impound the books of Accounts has impounded the books of Accounts under section 131(3) of the Income Tax Act, 1961 without writing and retained such books for one month for in-depth checking.

Comment upon the manner of impounding and retention of books, whether it is *valid or not with justification.* *(4 marks)*

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on:

(i) 'Consent Order' issued by SEBI.

(ii) 'Search' and 'Seizure' under Prevention of Money Laundering Act (PMLA).

(iii) 'Cognizable' and 'Non-bailable' offences under the Companies Act, 2013.

(iv) Inspection of accounts or records under Foreign Contribution (Regulation) Act, 2010. *(4 marks each)*

Answer 3(a)

(i) Failure to maintain register of members or debenture-holders

Since the offence is punishable under section 88(5) of Companies Act, 2013, only with fine, it is compoundable under section 441 of Companies Act, 2013, by Regional Director, if the total penalty amount, including the penalty in case of a continuing offence, leviable under Sec 88(5) does not exceeds Rs. 25 Lakhs. However, in other cases the offence can be compounded by National Company Law Tribunal including where the total penalty amount under section 88(5) exceeds Rs. 25 Lakh.

(ii) Fraudulently issuing duplicate share certificates

Since the offence is punishable under section 46(5) of the Companies Act, 2013 with fine only it is compoundable by under section 441 of Companies Act, 2013 by the National Company Law Tribunal.

(iii) Failure to keep proper books of accounts

The punishment was imprisonment or fine or both. Therefore, it was compoundable by the special court under the Companies Act, 2013.

Alternate Answer (iii)

However, as per Companies (Amendment) Act, 2020 dated 28th September, 2020, it is compoundable by Regional Director or National Company Law Tribunal.

(iv) Tampering with minutes of proceedings of meetings

This offence is punishable under section 118(12) of the Companies Act, 2013 and the prescribed punishment for the same is by way of imprisonment and fine. Therefore, this offence is not compoundable under section 441 of Companies Act, 2013.

Answer 3(b)

(i) According to section 6 of the The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA, 1974), no detention order shall be invalid on inoperative merely by reason that the person detained there under is outside the limits of the territorial jurisdiction of the Government or officer making the order of detention.

Therefore, the Maharashtra Government can order the detention of a person in Gujrat.

(ii) According to section 5A of COFEPOSA, 1974, an order of detention made on several grounds will not become Invalid or inoperative merely because one or more of these grounds but not all have been rendered to be irrelevant.

Therefore, in the instant case the detention order shall continue to be valid even though some of these grounds have been rendered invalid by virtue of having been proved non-existent.

(iii) According to section 5(b) of COFEPOSA, 1974, every person in respect of whom a detention order has been mode shall be liable to be removed from one place of detention in a state to any other state, provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State.

Therefore, the detained person can be shifted from Mumbai to Ahmedabad, subject to the permission from the appropriate Government.

(iv) In terms of Sec 5(a) of COFEPOSA, 1974, w.r.t. a person detained under the Act, the appropriate Government may, by general or special order, impose such restrictions on the detained person, as to maintenance, interviews or communicating with others.

Therefore, any restriction may be imposed on a detained person with respect to communication with others.

Answer 3(c)

In terms of Section 17 of Prevention of Money Laundering Act, 2002 (PMLA), where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person is in possession of any proceeds of crime involved in money-laundering then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to enter and search any building, place etc. where he has reason to suspect that such proceeds of crime are kept. In the present case, the Authorized officer, appears to have exercised his power without going to merits and also acted beyond his scope hence, and therefore, he will be liable for punishment under Section 62 of PMLA, if he is proved guilty.

Punishment for vexatious search Section 62 of PMLA

Any authority or officer exercising powers under this Act or any rules made thereunder, who, without reasons recorded in writing, -

(a) searches or causes to be searched any building or place; or

(b) detains or searches or arrests any person,

shall for every such offence be liable on conviction for imprisonment for a term which may extend to two years or fine which may extend to fifty thousand rupees or both.

Answer 3(d)

According to the proviso of section 131(3) of the Income Tax Act, 1961, an assessing officer, being an authority specified u/s 131(1), shall not:

- impound any books / documents without recording for doing so.
- retain such books of Accounts for a period more than 15 days working days without obtaining the approval of the Principal Commissioner / chief commissioner or Principal Director General or Director General or Principal commissioner or Commissioner or Principal Director or Director a therefore.

In the given case, the Assessing Officer has not recorded his reasons in writing. Further, the facts of the case do not indicate if the Assessing Officer obtained the permission of the Principal Commissioner / chief commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner or Principal Director or Director, before retaining the books of accounts for more than 15 days. Accordingly, the actions of assessing officer is not valid in the eye of law.

Answer 3A(i)

Consent order means an order setting aside administrative or civil proceedings between the regulator and a person who may prima facie be found to have violated securities laws. It may settle all issues or reserve an issue or claim, but it must precisely state what issues or claims are being reserved A consent order may or may not include a determination that a violation has occurred. Consent order provides flexibility of wider array of enforcement and remedial actions which will achieve the twin goals of an appropriate sanction remedy and deterrence without resulting to litigation lengthy proceedings and consequent delays. Consent orders cannot be construed as waiver of statutory powers by Securities Exchange Board of India (Board). The board always has the right to proceed for appropriate action if it cannot achieve its objectives through consent order. The provisions of Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 regulate the issuance of Consent/ Settlement Orders.

Answer 3A(ii)

Search and seizure

Section 17(1) ofthe Prevention of Money Laundering Act, 2002 (PMLA)

Where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section of 17, on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person:

(i) has committed any act which constitutes money-laundering, or

(ii) is in possession of any proceeds of crime involved in money-laundering, or

(iii) is in possession of any records relating to money-laundering, or

(iv) is in possession of any property related to crime,

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to:

(a) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

(b) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available:

(c) seize any record or property found as a result of such search;

(d) place marks of identification on such record or (property, if required or make or cause to be made extracts or copies therefrom,

(e) make a note or an inventory of such record or property;

(f) examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act.

According to sub-section (1A) of Section 17 of PMLA, where it is not practicable to seize such record or property, the officer authorised under sub-section (1), may make an order to freeze such property whereupon the property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned:

Provided that if, at any time before its confiscation under sub-section (5) or sub-section (7) of section 8 or section 58B or sub-section (2A) of section 60, it becomes practical to seize a frozen property, the officer authorised under sub-section (1) may seize such property.

Answer 3A (iii)

Cognizable and non-bailable offence under Companies Act, 2013

In terms of Sec 439 of the Companies Act, 2013, notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under the Companies Act, 2013 except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the Criminal Procedure Code, 1973. However, No court shall take cognizance of any offence under the Companies Act, 2013 which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder or a member of the company, or of a person authorised by the Central Government in that behalf. Provided that the court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India. Provided further that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

Section 212(6) of Companies Act, 2013, provides that offence covered under section 447 of Companies Act, 2013 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail: Provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence referred to in sub-section (6) of section 212 except upon a complaint in writing made by-

(i) the Director, Serious Fraud Investigation Office; or

(ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

Answer 3A(iv)

Inspection of accounts or records

According to Section 23 of Foreign Contribution (Regulation) Act, 2010, if the Central Government has, for any reason, to be recorded in writing, any ground to suspect that any provision of this Act has been or is being, contravened by –

(a) any political party, or

(b) any person; or

(c) any organisation; or

(d) any association,

it may, by general or special order, authorise such Gazetted Officer, holding a Group A post under the Central Government or such other officer or authority or organisation, as it may think fit (hereinafter referred to as the inspecting officer), to inspect any account or record maintained by such political party, person, organisation or association, as the case may be, and thereupon every such inspecting officer shall have the right to enter in or upon any premises at any reasonable hour, before sunset and after sunrise, for the purpose of inspecting the said account or record.

Question 4

(a) 'Companies Act, 2013 allows settlement of disputes even through Mediation and Conciliation' — Enumerate the matters which cannot be referred to Mediation and Conciliation. (4 marks)

(b) 'Under the Companies Act, 2013, where a Company seeks compounding before institution of any prosecution, no prosecution shall be instituted in relation to such offences either by Registrar of Companies or any person authorised by the Central Government' — Discuss the objective of providing Compounding, immunity and its economic benefits. (4 marks)

(c) 'Though the term 'settlement' is widely used in stock exchanges and securities market, Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 has different meaning to it' — Discuss and also brief on the terms of settlement as per aforesaid regulations. (4 marks)

(d) 'There are monetary limits for each authority to compound the offence' — Enumerate the powers of Reserve Bank of India and Enforcement Directorate to compound contraventions. (4 marks)

Answer 4(a)

Matters not to be referred to the mediation or conciliation

As per Rule 30 of Companies (Mediation and Conciliation) Rules, 2006, the following matters shall not be referred to mediation or conciliation, namely:

(a) the matters relating to proceedings in respect of inspection or investigation under Chapter XIV of the Act; or the matters which relate to defaults or offences for which applications for compounding have been made by one or more parties.

(b) cases involving serious and specific allegations of fraud, fabrication of documents forgery, impersonation, coercion etc.

(c) cases involving prosecution for criminal and non-compoundable offences.

(d) cases which involve public interest or interest of numerous persons who are not parties before the Central Government or the Tribunal or the Appellate Tribunal as the case may be.

Answer 4(b)

The Companies Act, 2013 does not define or for that matter the Companies Act, 1956, did not define the word compounding" or the terms "compounding or composition of offences". The dictionary meaning of the word "compounding" means "on prosecution, a prosecutor of an offence accepting anything of value, say a monetary fine, under an agreement not to prosecute the victim or to hamper the prosecution of an offence". To compound would simply mean to come to a settlement or agreement".

As per the Black's Law Dictionary, "to compound" means "to settle a matter by a payment of money in lieu of any other liability." This definition represents the concept of compounding as a Settlement Mechanism, a settlement by paying the fine to the concerned compounding authority in lieu of facing the prosecution for the offence committed. However, on analysis of section 621A of the erstwhile Companies Act, 1956, or section 441 of the Companies Act, 2013, we can infer that compounding is nothing but admission of guilt by the person accused of violation of law. In the process of compounding, the person may either suo moto or on receipt of notice of default /initiation of prosecution, admits the commission of default and makes an application for compounding of the alleged offence. The defaulters agree to pay the fine which may be ordered by the Central Government.

Compounding is essentially a compromise or arrangement between administrator of the enactment and person committing an offence. Compounding crime consists of payment of some consideration (termed as compounding fees) in return for an agreement not to prosecute one who has committed an offence.

History of Compounding in Companies Act

The term "Compounding of offences" found its way into the Companies Act in the year 1988 when the Companies Act, 1956, was amended with the insertion of a new

Section 621 A under the recommendation of Sachar Committee vide the Companies (Amendment) Act, 1988. The amendment provided for composition of certain offences for the first time under that Act. Earlier all offences under that Act were required to be tried by the Court (Section 622) on a complaint filed by the Registrar or by a shareholder of the Company, or by a person authorized by the Central Government in that behalf (Section 621). On the recommendations of Sachar Committee and on the enactment of Companies Act, 1956, the offences under the Act were categorized as under:

Category I: Offences punishable with fine only;

Category II: Offences punishable with imprisonment or with fine or with both; and

Category III: Offences punishable with imprisonment

Offences under Category I were compoundable without the Court's permission by the Regional Director or the erstwhile Company Law Board depending upon whether the quantum of fine exceeded Rs.50,000/- (after amendments) or not.

Offences under Category II was compoundable by the above authorities with the permission of the Court only and offences under Category III were not at all compoundable but had to go through the trial in the Court.

The above categorization has been carried forward in section 441 by the Companies Act, 2013 with some modifications.

In case, where the maximum amount of fine which may be imposed for such offence does not exceed twenty-five lakh rupees, Can be compounded by the Regional Director or any officer authorised by the Central Government.

Answer 4(c)

The terms Settlement, is commonly used in the stock exchanges and stock market to mean as payment of consideration and completion of a market transaction. However, in the context of SEBI (Settlement Proceedings) Regulations, 2018 (hereinafter referred to as "The Settlement Regulations")the term "settlement" is used more as a mechanism for dealing with the arrears of cases pending before the SEBI while providing flexibility of a wider array of enforcement actions which will achieve twin goals of an appropriate sanction and deterrence without resorting to long-drawn litigation before SEBI, SAT and Courts etc.

Regulation 9 of the Settlement Regulations provides that:

(1) The settlement terms may include a settlement amount and/or non-monetary terms, in accordance with the guidelines specified in Schedule-II of SEBI (Settlement Proceedings) Regulations, 2018.

(2) The non-monetary terms may include the following:

   (a) Suspension or cessation of business activities for a specified period;

   (b) Exit from Management;

   (c) Disgorgement on account of the action or inaction of the applicant;

   (d) Refraining from acting as a partner or officer or director of an intermediary or as an officer or director of a company that has a class of securities regulated by the Board, for specified periods,

(e) Cancel securities and reduce holdings where the securities are issued fraudulently, including bonus shares received on such securities, if any, and reimburse any dividends received, etc.;

(f) Lock-in of securities;

(g) Implementation of enhanced policies and procedures to prevent future securities laws violations as well as agreeing to appoint or engage an independent consultant to review internal policies, processes and procedures;

(h) Provide enhanced training and education to employees of intermediaries and securities market infrastructure institutions;

(i) Submit to enhance internal audit and reporting requirements.

(3) The settlement amount, excluding the legal costs and disgorged amount, shall be credited to the Consolidated Fund of India.

(4) The application fee referred to in sub-regulation (2) of regulation 3 and the legal costs, if any, forming part of the settlement amount shall be credited to the Securities and Exchange Board of India General Fund.

Explanation. – Legal costs shall include liquidated costs, as may be determined by the Board, in respect of costs for obtaining appropriate orders from the Tribunal or Court under sub regulation (2) of regulation 24.

(5) The amount of profits made or losses avoided by the applicant that may be disgorged as part of the settlement terms, shall be credited to the Investor Protection and Education Fund.

Answer 4(d)

Power of Reserve Bank to Compound Contravention

According to the Foreign Exchange Management Act, 1999, read with Rule 4 of the Foreign Exchange (Compounding Proceedings) Rules, 2000, if any person contravenes any provisions of the said Act except clause (a) of Section 3 of the Act:

(a) in case where the sum involved in such contravention is ten lakhs rupees or below, by the Assistant General Manager of the Reserve Bank of India;

(b) in case where the sum involved in such contravention is more than rupees ten lakhs but less than rupees forty lakhs, by the Deputy General Manager of Reserve Bank of India;

(c) in case where the sum involved in the contravention is rupees forty lakhs or more but less than rupees one hundred lakhs by the General Manager of Reserve Bank of India;

(d) in case the sum involved in such contravention is rupees one hundred lakhs or more, by the Chief General Manager of the Reserve Bank of India;

It may be noted that a contravention shall be compounded only if the amount involved in such contravention is quantifiable.

Power of Enforcement Directorate to Compound Contravention

According to Rule 5 of the Foreign Exchange (Compounding Proceedings) Rules, 2000, if any person contravenes provisions of Section 3(a) of Foreign Exchange Management Act.

(a) in case where the sum involved in such contravention is five lakhs rupees or below, by the Deputy Director of the Directorate of Enforcement;

(b) in case where the sum involved in such contravention is more than rupees five lakhs but less than rupees ten lakhs, by the Additional Director of the Directorate of Enforcement;

(c) in case where the sum involved in the contravention is rupees ten lakhs or more but less than fifty lakhs rupees by the Special Director of the Directorate of Enforcement;

(d) in case where the sum involved in the contravention is rupees fifty lakhs or more but less than one crore rupees by Special Director with Deputy Legal Adviser of the Directorate of Enforcement;

(e) in case the sum involved in such contravention is one crore rupees or more, by the Director of Enforcement with Special Director of the Enforcement Directorate.

Provided further that no contravention shall be compounded unless the amount involved in such contravention is quantifiable.

Question 5

(a) 'In today's environment, directors and officers are exposed to risk of personal financial loss as a result of serving a Director or Officer of the Companies' — Discuss the statement and also elaborate on tools available for mitigation of such risks.

(b) 'Managing Social media is one of the important facets of present Brands' — Discuss the statement quoting live incident(s) and as a Company Secretary suggest briefly, the ways for managing such crisis. (8 marks each)

Answer 5(a)

It is true that in today's environment, directors and officers of companies are exposed to risk of personal financial loss as a result of serving as a Director or Officer of the Companies. There are risks involved in business decisions they make while discharging their duties. These risks exposes the Directors & Officers to the risk of liabilities and litigation. The business environment now a days is uncertain. Therefore it is advisable to use the tool of 'Director & Officer' Liability Insurance.

Directors & Officers (D&O) liability insurance is insurance coverage intended to protect individuals from personal losses if they are sued as a result of serving as a director or officer of a business. It can also cover the legal fees and other costs the organisation may incur as a result of such a suit.

Directors and officers liability insurance can be obtained for who serves as a Director or an Officer of any organisation including Non-profit organisation. Directors may also face liability under Income tax, Forex laws, SEBI, PF and Shops and Establishment Act

etc. D&O policies can take different forms depending on the nature of the organisation and the risk it faces. Ideally one should choose an Insurance company with deep experience in this specialised field. The Policies are generally purchased by the organisation to cover a group of individuals rather than individuals themselves. Policies can be written to insure against a variety of hazards but they generally make exclusion for Fraud and other criminal activity.

The advantages of having such a policy may be summed up as follows:

1. Protects personal assets of Directors and Officers from risk of loss caused by breach of their duties, while acting in good faith
2. Saves legal and other expenses incurred in litigation
3. If investors believe that they have suffered losses due to mismanagement of the company they could approach the court for compensation.
4. Employees may sue directors for their wrong decisions.
5. Customer can take legal actions for misrepresentations made in the advertisement materials and deceptive trade practices.
6. Enquiries may be initiated by regulatory authorities like SEBI/ Revenue dept., can sue losses to directors
7. In case of Bankruptcy or Insolvency creditors may take action against the directors in their personal capacity.
8. Having a D&O policy, helps the organization in retaining / attracting talent.

By having a D&O policy, we can cover losses caused to company on the above mentioned circumstances.

Answer 5(b)

The United Airlines PR Crisis

The conflict occurred in United Airlines flight number 3411, which departed from Chicago to Louisville on April 9, 2017. Before passengers began boarding, it was announced that the flight was overbooked. United needed to put their employees on this plane. So, they asked for volunteers to give up their seats in exchange for $400 US, a free hotel room and a ticket for a flight the next day. No one volunteered. When boarding was complete, it was announced that four passengers had to leave the plane. Again, no one volunteered, so the company decided to choose passengers randomly. Two of the passengers left, and one refused. The one who remained said that he was a doctor and needed to get to his patients. When he refused to leave the plane, he was forcefully dragged from his seat and was struck in the process. The crisis started when a cell phone video recording of the incident was published on social media.

How the crisis was managed?

When United realized that they couldn't get out of the scandal, the CEO Oscar Munoz commented on the situation. He apologized for having to re-accommodate" the customer. The statement of CEO Oscar Munoz is as under: "This is an upsetting event

to all of us here at United. I apologize for having to re-accommodate these customers. Our team is moving with a sense of urgency to work with the authorities and conduct our own detailed review of what happened.

"We are also reaching out to this passenger to talk directly to him and further address and resolve this situation."

This statement provoked a new wave of crisis. United's social media audience accused him of being disrespectful and of misidentifying the cause of the problem. Instead of apologizing for forcing the passenger to deplane, Munoz apologized for his inconvenience. The company's social media audience was indignant. They satirized the situation, created memes and GIFs, and made jokes.

What's more, United lost more than $800 Million in revenue. United wasn't able to manage the crisis by themselves, and they had to hire a professional crisis management team.

Takeaway from the Case

In United's case, the CEO apologized, but his words caused even more indignation than before. Why was that? The instance that occurred on the plane was quite traumatic to those that witnessed it personally and those that saw it on video. It deserved a heartfelt response, but the tweet showed a lack of understanding and accountability. In United's case, the CEO's apology sounded as if he didn't actually care, and their audience immediately felt it.

Suggestion for managing Social media

Online apologies have to be carefully crafted. Think of the emotions that need to be addressed and consider your words carefully - "how could this be offensive"? An apology should not sound like a press-release. When a brand makes a mistake they need to own up to it and let the public know that they are going to address it and ensure it never happens again.

Question 6

(a) *Registrar of Companies (RoC) prosecuted a Director of a Public Sector Undertaking under the provisions of the Companies Act, 1956 for non-filing of Balance Sheet and Annual Return. The Director pleaded before the Court that the RoC has not followed appropriate procedures while prosecuting him. Whether pleadings of the Director is tenable. Elaborate the provisions of CrPC citing relevant case law.* *(4 marks)*

(b) *A Director of a Limited Company was prosecuted before Metropolitan Magistrate for certain offences involving a punishment up to 3 years imprisonment under the provisions Companies Act, 2013. The Director contended that Metropolitan Magistrate is not the appropriate Authority to try this case. Whether this contention of the Director is valid ? Referring the relevant provisions of the Companies Act, 2013, discuss the powers of various Courts to try the offences under the Companies Act, 2013.* *(4 marks)*

(c) *Upon prosecution for offences under the Companies Act, 2013, High Court awarded Managing Director of a Company an imprisonment of 3 months. A Director*

of the Company approaches you seeking advice on filing an appeal against the order of the High Court. Referring to relevant provisions of CrPC, advice the Director. *(4 marks)*

(d) *Food Department prosecuted a Director of a Multi-National Company for certain offences. The Case went upto Supreme Court, wherein the Director contended that though he is one of the Director of the Company, he was not in-charge of operations of the Company and hence, cannot be prosecuted. Discuss with relevant case law, if any.* *(4 marks)*

Answer 6(a)

Section 197 of Criminal Procedure Code, 1973, provides that the sanction of the appropriate government is required in order to take cognizance of any offence which is allegedly committed by a person who, at the time of commission of the offence, was employed by the Central Government or a State Government.

The Andhra Pradesh High Court in the matter of A*ndhra Pradesh State Essential Commodities Corporation Limited* v. *Registrar of Companies* [2002] 38 SCL 1016 (AP). quashed the criminal prosecution for an offence under section 220 of the Companies Act, 1956 against the directors of a public sector undertaking on the ground that the necessary sanction for prosecuting the directors under Section 197 of the Criminal Procedure Code, 1973 has not been obtained.

Therefore, the pleadings of the Director are tenable.

Answer 6(b)

The moot point under Section 436 of the Companies Act, 2013 is that the offences under the Companies Act, 2013, which are punishable with imprisonment of two years or more are triable only by the Special Court established under section 435 of the Companies Act, 2013. In terms of Sec 435(2)(b) of the Act, it is only in the case of offences punishable with imprisonment of a term less than two years, the provision empowers a Judicial Magistrate of First class or a Metropolitan Magistrate to try the offence.

As per Sec 435(2) (a) of the Act, only a single judge holding office as Session Judge or Additional Session Judge, is authorised to hear cases involving offences punishable under this Act with imprisonment of two years or more. The Special Court need not be an altogether new Court established for this purpose. It could be an existing court designated as a Special Court by Notification issued under section 435 of the Companies Act, 2013.

In the given case, the Director is being prosecuted by a Metropolitan Magistrate for offences involving punishment upto 3 yrs and therefore the said Metropolitan Magistrate is not empowered under the Act for hearing such a case. Therefore, the contention of the director is valid.

Answer 6(c)

Section 376(a) of Criminal Procedure Code, 1973, states that there shall be no appeal against any order of sentence of a High Court if the punishment awarded is a sentence of imprisonment for a term not exceeding 6 months or of a fine exceeding INR 1000/-.

The proviso under section 376 of Criminal Procedure Code, 1973, states that appeal would however lie in the following situations:

(i) that the person convicted has been ordered to furnish security to keep the peace; or

(ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or

(iii) that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.

As per the above provisions the Appeal cannot be filed in the given case, unless the case falls under proviso of Section 376 of Criminal Procedure Code, 1973.

Answer 6(d)

If the Company has officer-in-default specified under Sec 2(60) of the Companies Act, 2013 other Directors cannot be held liable.

In *Pepsico India Holdings Private Limited* v. *Food Inspector and Anr.* [2011] 161 CompÑas 197 (SC), the Supreme Court held that it is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company.

Therefore, the Director is right in contending that though he is one of the Director of the Company, he was not in-charge of operation of the Company and hence cannot be prosecuted in the absence of any specific allegations regarding his role in the management of the Company.

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