GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME
(New Syllabus)

JUNE 2021 Session

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

JUNE 2021

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART I

Question 1

(a) Unique Ltd., a start-up company launched in the year 2019, manufactures electric two-wheelers. Jayco, the Company Secretary was discussing the corporate compliance framework of the company. One of the consultants suggested that the Compliance Chart is a vital part of the framework and the company must at present first focus on preparation of the Compliance Chart. Explain the activities in preparation of a compliance chart and its contents. (5 marks)

(b) Odee Ltd., a listed company has appointed two independent directors. As part of its familiarization policy it provides key updates and background about the company to the newly appointed directors. The directors have requested you as the Company Secretary of the company to explain the process of Corporate Compliance Reporting. Explain the process. (5 marks)

(c) Some financial institutions require a Report by the Company Secretary in practice on certain additional points relevant and important for them for cross verification of documents from the MCA records. Prepare a table for such items normally covered under the said report. (5 marks)

(d) Vijay is the Company Secretary of Gemmy Ltd. which is having an annual turnover of ₹500 crore for last three financial years. As part of annual certifications, he asked Mohan, a Practicing Company Secretary (PCS) to sign the latest annual return. Vijay refused to sign the annual return as he thinks that it should be done by Mohan, PCS. What are the requirements for Annual Return Certification by a Company Secretary in Practice? Is Vijay justified in saying so? (5 marks)

Answer 1(a)

The compliance chart of a company is prepared after considering the operations and the structure of the company as the compliance requirements for an organization are based on the type of organization, activity of the organization, scale of operations, industry, sector in which the company operates and laws which are specifically applicable to the company.

Broadly, the compliance chart is prepared by considering the following activities:

- Identification of compliances under applicable Laws, Rules and Regulations
- Risk Assessment

- Risk Mitigation (includes Training)
- Compliance Monitoring (includes Action Tracking)
- Compliance Reporting (includes Incident Management)

The Compliance Chart of any company must contain the complete information on compliance dashboard, which provide a detailed compliance procedure to the compliance executor, this information includes:

- Reference to the key compliance related laws, regulations, industry standards and compliance related policies and standards of the company;
- Concise statements that capture the relevant internal and external compliance obligations and the risks associated with those obligations;
- Inherent and managed risk level (critical, high, medium, low) of the identified obligations;
- The business processes or people to which the compliance obligations are linked or on which they have an impact;
- Specific compliance risk mitigation activities and compliance risk tracking and monitoring for managing the compliance obligations;
- To whom and how frequently compliance related results and findings are reported; and
- Clear ownership of the processes, activities and obligations outlined in the chart.

Such compliance chart must be practical and concise on the role and responsibilities of the management and of the compliance officer who is specifically responsible for existing and newly identified business activities.

Answer 1(b)

Any corporate compliance management framework encompasses the various steps relating to Compliance Identification, Compliance Ownership, Compliance Awareness, Compliance Reporting and Periodical Compliance MIS.

Under various business structures, actual process of compiling the information under various laws vary from company to company and is dependent on various factors such as number of units and scale of operations, size of company, number of business activities etc.

A brief process of the Corporate Compliance Reporting(CCR)mechanism is as under-

- Functional heads for reporting of various laws have to be identified. For example- the Company Secretary would be the functional head for reporting of Company Law, Listing Regulations and Commercial Laws. Similarly, the head of the personnel department canreport the compliances of labour and industrial laws and fiscal law compliance would be the domain of head of the finance/accounts departments.
- Each of the functional heads may collect and classify the relevant information

from the various units/ locations pertaining to their department and consolidate them in the form of a report.

- The report shall carry an affirmation from the functional heads that the said report has been prepared based on the inputs received from the various units/ offices and then list out the specific compliances/ non-compliances, as already circulated to the functional heads. Each of the functional heads should forward their respective compliance reports to the Company Secretary/Managing Director.
- The Company Secretary would then brief the Managing Director and with suitable inputs from the Company Secretary, the Managing Director would consolidate and present, under his signature, a comprehensive CCR to the board for its information, advice and noting. The whole process of CCR is contingent on the creation and implementation of comprehensive legal Management Information System (MIS).

In the process of the Compliance Reporting, the status of compliances or non-compliances, if any, should be communicated to the concerned functional head. Reporting of non-compliances ensures that appropriate corrective action can be timely taken by the responsible person.

Answer 1(c)

Cross Verification of Documents from the MCA Records

Some financial institutions require a report by Company Secretaries in Practice, on certain additional points relevant and important for them. A separate report can be given after inspecting or verifying the documents and records available with the Registrar and/ or the company. The points normally covered under such Report are:

S. No.	*Item*	*Records to be verified*
1.	Name of the Company	Memorandum of Association, Certificate of Incorporation or Fresh Certificate of Incorporation/Change of Name.
2.	Date of Incorporation	Certificate of Incorporation
3.	Company Number/ Corporate Identity Number	Certificate of Incorporation/Fresh Certificate upon change of name / Certificate of registration of Tribunal Order for shifting registered office to another State
4.	Address of Registered Office	INC-22, MGT-14 Resolution(s) of Board / General Body, INC-28 with copy of NCLT Order.
5.	Name and address of present directors (with their date of joining)	Articles of Association, DIR-12, Register of Directors
6.	Authorized Share Capital of the company divided into_____ Shares of Rs._____ each	Memorandum of Association, SH-7, MGT-14

7.	Paid-up Capital of the company divided into _____Shares of Rs.___each	MGT-14, PAS-3, Register of Members, Annual Return
8.	List of Members with details as to shares held by each of them. The names of directors to be specifically mentioned in such list of share-holders (List of members holding shares of a specified monetary threshold is also asked for in some cases).	PAS-3, Annual Return, Register of Members, Register of Directors.
9.	Provision in the Articles of Association as to affixation of common seal of the company. (Particulars as to the persons in whose presence the seal of the company can be affixed to any deed).	Articles of Association. If there is no specific cause and the Articles have adopted Table F, Clause 79 of Table F of Schedule-I of Companies Act, 2013 may be referred.
10.	Main Objects of the company.	Memorandum of Association
11.	Whether the Articles of the company contains provisions for nomination by the corporation a director on the board of the company.	Articles of Association of the company

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Answer 1(d)

According to section 92(1) of the Companies Act, 2013,every company shall prepare an annual return in the prescribed form containing the particulars as they stood on the close of the financial year regarding the matters provided in this section and signed by a director and the company secretary, or where there is no company secretary, by a company secretary in practice.

Under section 92(2) of the Companies Act, 2013 read with rule 11(2) of the Companies (Management and Administration) Rules, 2014, the Annual Return of a listed company or of a company having a paid up share capital of ₹10 crore or more or turnover of ₹50 crore

or more shall be certified by a Company Secretary in whole time practice in the Form No. MGT-8.

Annual Return certification by Company Secretary in practice is required by:

- Every listed company
- Every company having paid-up capital of ₹10 crore or more
- Every company having turnover of ₹50 crore or more

While signing and certification of the annual return, it is advisable to have different Professionals for Signing and Certification as maker and checker concept for the independent verification of the Annual Return. These two different signing mechanisms include one for the purpose of signing under section 92(1) and the other for certification under section 92(2) of the Companies Act, 2013.

However, where a company is having a Company Secretary then signing of the annual return as per section 92(1) shall be done by the Company Secretary in employment only, but not by the Company Secretary in Practice.

Therefore, by virtue of section 92(1) of Companies Act, 2013, the annual return is required to be signed by Vijay, Company Secretary of Gemmy Limited along with any one of its Director and Vijay is not justified on refusal to sign the annual return. However, by virtue of section 92(2) of the Companies Act, 2013 read with rule 11(2) of the Companies (Management and Administration) Rules, 2014, the Annual Return of this company shall be certified by a Company Secretary in whole time practice in the Form No. MGT-8 and such Certificate from the PCS shall be annexed to the Annual Return.

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

Question 2

(a) The Board of directors of Bee & Bee Ltd. was of the view that as the company was diversifying its operations, it should evaluate digitizing the books of accounts and other records. The Board sought views from the Company Secretary about the same and asked him to appraise them about the Document Management System including good documentation practices. Advise the Board as the Company Secretary. *(5 marks)*

(b) A to Z & Co. of qualified Company Secretaries is a recently set up professional firm. Tej, the Managing Partner wants to understand the criteria to be adopted by a professional as per KYC norms. Outline the key elements for incorporating KYC Policies. Also, explain any six important points in proper implementation of KYC. *(5 marks)*

(c) Axe Ltd., a company providing information technology and enabled services, had raised ₹1,200 crore through public issue of its equity shares and was listed on BSE and NSE. The company has also taken a loan of ₹500 crore from a consortium of bankers. As part of its due diligence process, the consortium has appointed you as a Practicing Company Secretary to prepare a search report relating to stock exchange compliances. Explain the procedure for such search report including the key documents to be analysed. *(5 marks)*

(d) Indian media and entertainment sector comprises mainly of film industry, animation industry and TV channels. Name any ten specific laws applicable to media and entertainment sector. (5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Shekh & Co. LLP, a Company Secretaries firm provides various secretarial and related consulting services. Arun has recently started a private equity fund and was looking for targets for investment. Arun requested Shekh & Co. LLP to examine documents of Jim Ltd. filed with Ministry of Corporate Affairs (MCA). Explain in brief the process of examination of documents registered on MCA 21 portal. (5 marks)

(ii) The audit of Financial Statements in respect of Spinex Ltd. for the year ended 31st March, 2021 was not completed due to difference of opinion on certain accounting matters between the Management and the Statutory Auditors. Hence, the company was not able to hold its Annual General Meeting (AGM) within the statutory timelines. As the AGM was not conducted, the Company Secretary was in a dilemma whether to file the Annual return. Advise the Company Secretary. (5 marks)

(iii) IT Ltd. acquired 99% equity shares in Zeb Ltd. on 1st February, 2021. Amongst other compliances the Company Secretary informed the finance team that the consolidated Financial Statements of IT Ltd. are required to be prepared and presented to the Board. The CFO asks the Company Secretary to prepare a brief note on compliances relating to the Financial Statements and forms to be filed with Registrar of Companies for discussion with the Statutory auditors. Outline the key points to be covered in the note and indicate the relevant forms to be filed. (5 marks)

(iv) Sames Ltd. is a recently listed company. To cater to the growing reporting requirements, the company recruited various professionals across its finance and secretarial team. The Company Secretary was requested to prepare a Compliance training and education programme for providing training to the new recruits. Briefly explain the objective and contents of such Compliance training programme. (5 marks)

Answer 2(a)

Document management refers to the process of managing and tracking of documents and records through an electronic or physical source of documents.

In an electronic repository, Document Management Systems (DMS) works by using a computer system and software to store, manage and track electronic documents and electronic images of paper-based information captured through the use of a scanner.

The term document management system can be defined as the software that controls and organizes documents of an organization. It incorporates document and content capture, workflow, document repositories and output systems, and information retrieval systems. Also, the processes used to track, store and control documents.

Advantages of DMS are as follows:

- Tracking on check-in/check-out by various officers
- Locking and unlocking of Document
- Simultaneous editing
- Document Version Control
- Roll-back options / Retrieve option
- Ease in Audit trail
- Annotation and Stamps

Good Documentation Practices

The term documentation includes any and all forms of documentation recorded by a person in professional capacity in relation to his professional duties and includes written and electronic records. Good documentation promotes good corporate governance practices and can help in improving the compliance level of the company and also the communication and dissemination of information between and across various stakeholders.

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

- Records should be completed at time of activity or when any action is taken;
- Superseded documents should be retained for a specific period of time;
- Concise, legible, accurate and traceable;
- Picture is worth a thousand words;
- Clear examples;
- Don't assume knowledge.

Legal Compliance : In case the documentation process involves maintenance of documents and records in electronic format then such documentation system shall additionally comply with the requirements mentioned in Sec 120 of the Companies Act, 2013 and applicable Rules issued thereunder. The System shall also be in compliance with the Information Technology Act, 2000.

Answer 2(b)

Suggested criteria to be adopted by Professional as KYC Norms

Generally, the KYC policies incorporating the following four key elements:

- Client Acceptance Policy;
- Client Identification Procedures;
- Client Monitoring Mechanism; and
- Risk management.

These are suggested measures, to be adopted by the professional while dealing with client and undertaken any assignment from a client/ prospective client. As a Code for good practice every professional should ensure that no fraud has been take place due to

adoption of the poor KYC norms. It is the duty of the professional proper checking of documents will be done in order to complete the requirement of KYC Norms.

Though, there is no settled manner for doing KYC by the professional, However the ICSI has prepared a policy on KYM, KYC norms, However, variation in the procedure for KYC of one time assignment and or for the regular client may be there.

The Professionals should take extra care with the foreign client, to ensure that all the rules and regulations are followed, according to the specified procedures for dealing with the foreign clients.

Proper implementation of KYC policies includes the following:

1. *Collation of Client information* : information about the identify and business structure of the client helps in ensuring that the professional can freely exercise and deliver their professional services in the best suited way.
2. *Due Diligence of the Client* : This helps in mitigation of various professional and legal risks associated with service provided to the client.
3. *Regularity of the KYC exercise* : The effectiveness of the KYC policy relies on its regularity as it can ensure that the data earlier collated about the client remains updated.
4. *Identification of Regularity Risks* : The KYC policy should be designed and updated regularly so as keep it aligned with the legal provisions applicable if any so as to avoid legal risks.
5. *Additional factors applicable for clients belonging to other countries* : in case of clients belonging to other countries, the information to be collated might be in a different format as may be required in that country. The KYC policy shall be flexible enough to deal with such variations in input data.
6. *Confidentiality of Client Data* : As part of KYC exercise the information provided by the clients may include sensitive data of the client which the client will be sharing in good faith. The policy shall contain appropriate measure to protect the client information thereby safeguarding the client as well as the firm (Against any possible action for unauthorized disclosure of client data.

Answer 2(c)

While preparing the Search and Status Report regarding Stock Exchanges, it is important for the professionals to conduct due diligence of the documents available in public domain on the NSE and BSE website in relation to the listed companies.

Procedure:

- *Preparing checklist* : The checklist should contain list of information required to understand the company's business, listing details, board meetings, results calendar, corporate actions, financial results, shareholding data, pledge data, scheme of arrangement etc.
- *Analysing all documents carefully* : This activity is important as it helps to analyse the nature of documents which are available on public domain with respect to

listing details, corporate actions, public notices, financial resultants, XBRL, sustainability reports, disclosures, offer document etc.

- *Verifying facts and confirm that the information is correct* : This activity is important to verify the legality of documents or information.
- *Drafting of status and search report* : The final report should contain all observations based on the information available, before the prospective buyer / investor. It should also contain all associated risks and liabilities along with strategies to deal with such issues which would help the prospective buyer / investor understand the pros and cons of the transaction.

Key documents to be analysed while preparing the search and status report on information/ documents available on NSE and BSE website:

- Corporate Announcements
- Corporate Actions
- Financial Results
- Board Meetings
- Shareholders Meetings
- Voting Results
- Results Calendar
- Shareholding Patterns
- Corporate Governance
- Disclosures
- Offer Documents
- Information Memorandum
  - QIP
  - Scheme of Arrangement
  - Companies listed under Direct Listing
  - Revocation
- Pledge Data
- Sustainability Reports
- Buyback / Redemption
- Public Notice - Compulsory Delisting

Answer 2(d)

Specific Laws applicable to the Media and Entertainment sector includes:

1) The Press and Registration of Books Act, 1867
2) The Registration of Newspaper (Central) Rules, 1956
3) Working Journalists and Other Newspaper Employees (Condition of Service) and Miscellaneous Provisions Act, 1955

4) The Working Journalists (Conditions of Service) And Miscellaneous Provisions Rules, 1957
5) The Working Journalists (Fixation of Rates of Wages) Act, 1958
6) The Newspaper (Price and Page) Act, 1956
7) The Delivery of Books and Newspapers (Public Libraries) Act, 1954
8) The Delivery of Books (Public Libraries) Rules, 1955
9) Press Council Act, 1978
10) Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharti)Act, 2007
11) The Copyright Act, 1957
12) The Cine-workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
13) The Cine-workers Welfare Cess Act, 1981
14) The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954
15) The Drugs and Magic Remedies (Objectionable Advertisements) Rules, 1955
16) The Young Persons (Harmful Publications) Act, 1956
17) The Dramatic Performances Act, 1876 (Relevant Provisions)
18) The Cinematograph Act, 1952
19) The Cinematograph (Certification) Rules, 1983
20) The Indecent Representation of Women (Prohibition) Act, 1986
21) The Indecent Representation of Women (Prohibition) Rules, 1987
22) The Prasar Bharati (Broadcasting Corporation of India) Act, 1990
23) The Cable Television Network (Regulation) Act, 1995
24) The Cable Television Network Rules, 1994

Answer 2A(i)

The Ministry of Corporate Affairs (MCA) website provides many information relating to the company. Some information are available without payment of fees like Name of the Company, CIN, Authorised and paid up capital, Name and address of the Directors etc. The website also provides for the viewing of document by public on payment of requisite fee. Public documents include the following:

- Incorporation documents
- Certificates, including Incorporation certificate and Charge creation, modification and satisfaction certificates
- Charge documents
- Annual Returns and Balance Sheet
- Change in directors and other e-forms

MCA website offers the facility to view documents and also search and other facilities of public documents. This facility is handy for users and banks and financial institutions while sanctioning loans. This facility enables viewing of public documents of companies for which payment has been made by user. The document can be accessed at any time

within 7 days after the payment has been confirmed. However, once the user has started viewing the first document of the company after the payment, the access to the documents will be available for only 3 hours, unless the documents are downloaded within those 3 hours. Documents once downloaded and saved by the user on his computer/ cloud will be permanently available for future access.

- User has to access My MCA portal (www.mca.gov.in) and register to the portal by creating a User ID and password
- login to the MCA portal through the link available on the home page.
- After logging in, click on the 'MCA Services" ' tab and in the drop down menu on it, click the "View Public Documents" button appearing under the "Document Related Services" segment.
- On the next page fill the necessary details of your company (for which the search is to be made) and proceed to make the payment for the online search.
- Once the Payment is made, go to "My Services" Tab. On this page, at the bottom, under the heading "Documents", the List of company names will be displayed, for which user have already paid for public viewing. It also displays
    - o Date of request i.e., the date, when user made the request to view the company document and the expiry date & time upto which the access is available to the user for the documents.
    - o Status of the request i.e., whether viewed or to view.
- Click on the view link under status field.
- The documents are grouped under five categories i.e., user has to click on the desired category under which the document falls.
- If more than one document is listed, the user can arrange them name wise or date wise.
- On clicking the document name, the document shall be displayed for viewing. The User can save the document on his computer hard drive/ cloud for future use.

The public documents under this facility are available for viewing by public on payment of requisite fee.

Answer 2A(ii)

According to section 92(4) of the Companies Act, 2013, where no Annual General Meeting (AGM) is held in a particular year, the Annual Return has to be filed within 60 days from the last day on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed.

Consequently, the company cannot excuse itself from the obligation to file the Annual Return on the plea of the AGM not having been held. As per the proviso to Section 403(1) if the Annual return under section 92 is not filed within the due date the same can be filed on payment of additional fee as may be prescribed, which shall not be less than ₹100 per day and different amounts may be prescribed for different classes of companies.

Where there is default on two or more occasions in submitting, filing, registering or

recording of the document, fact or information, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed and which shall not be lesser than twice the additional fee provided under the first or the second proviso as applicable.

Also, where a company fails or commits any default to submit, file, register or record any document, fact or information, before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

Thus, management cannot escape from the responsibility of filing the return, if the AGM is not held. Similarly, the responsibility cannot be abandoned even if the company is inoperative. This section casts an important obligation on the part of management to file the returns and can be relinquished only when the company is wound-up or its name struck-off from the Register maintained by the Registrar of Companies.

Answer 2A(iii)

Preparing consolidated financial statement

According to section 129(3) of Companies Act, 2013, where a company has one or more subsidiaries, it shall, in addition to its financial statements, prepare a consolidated financial statement.

Further, the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary in Form AOC-1.

Approval of Financial Statement by the Board

According to section 134 of the Companies Act, 2013, the financial statement, including consolidated financial statement, shall be approved by the Board of Directors before the same being signed for and on behalf of the Board. The resolution approving the said financial statements shall be filled in e-form MGT -14 pursuant to Sec 117(3)(g) read with Sec 179(3) of the Act.

Placing the Financial Statements in AGM

According to section 129(2) of the Companies Act, 2013, at every AGM of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

Filling of Financial Statements with ROC

As per Section 137 of Companies Act, 2013 & Rule 12(1) of Companies (Accounts) Rules, 2014, the company is required to file its financial statements, including consolidated financial statement along with all the required documents with the Registrar within 30 days of the date of AGM or in case financial statements are adopted in the adjourned AGM, within 30 days of the date of adjourned AGM.

If financial statements are not adopted at AGM or adjourned AGM, such unadopted financial statements along with the required documents shall be filed with the Registrar within thirty days of the date of AGM and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned AGM for that purpose.

If AGM is not held for any year, the financial statements along with the documents required to be attached under section 137(1) duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar in within 30 days of the last date before which the annual general meeting should have been held.

The Financial Statements shall be filled in E-form AOC-4 & E-form AOC-4 CFS.

Answer 2A(iv)

Objective of Compliance Training Program

A strong Compliance training and education programme reinforces the company's compliance culture. It builds awareness and understanding of compliance standards, procedures, guidelines and issues. The objective of Compliance training programme is to build awareness and understanding of:

- Company Framework, including the four conduct-related integrity risk areas;
- Roles and responsibilities outlined in the policies and framework;
- Critical and high compliance obligations identified in the Compliance Chart;
- The process for addressing compliance issues and reporting concerns, and
- Consequences of failing to meet compliance obligations.

An annual plan for Compliance Risk related training and education must be developed and updated, as necessary, and should indicate the target audience and training delivery method. Compliance Risk related training program should, to the extent possible, be integrated into the training plans.

Contents of Compliance Training Program

The plans for compliance training and education program must include:

- Concise statements that capture the relevant internal and external compliance obligations and the risks arising from those obligations;
- The business processes to which the compliance obligations are linked or on which they have an impact;
- Brief description of the training or education activity;
- Target audience (refresher for existing Employees, induction for new Employees, or Adhoc when required);
- Frequency of training or education activity

PART II

Question 3

(a) Neha, a Practicing Company Secretary was appointed as the Secretarial Auditor of Nex Ltd. Neha was issued an engagement letter, soon after his appointment. Later, the Management of the company reached out to Neha, seeking some changes to the engagement letter. Describe the details which should form part of the engagement letter. Can an engagement letter be changed after being issued ? (5 marks)

(b) Mega Ltd. has identified Helping Hands, a reputed NGO for executing its CSR activities as an implementation agency. However, one of the directors suggested it would be better if the company considers to go for a FCRA due diligence before finalizing and appointing the NGO. Explain in brief about the FCRA due diligence. (5 marks)

(c) As a Company Secretary, how would you deal with a complaint by the Registrar of Companies (ROC) and the Serious Fraud Investigation Office (SFIO) in a Special Court. (5 marks)

Answer 3 (a)

The Audit Engagement Letter shall inter alia include:

a. The objective and scope of the audit;

b. The responsibilities of the Auditor and the Auditee;

c. Written representations provided and/or to be provided by the Management to the Auditor, including particulars of the Predecessor or Previous Auditor;

d. The period within which the audit report shall be submitted by the Auditor, along with milestones, if any;

e. The commercial terms regarding audit fees and reimbursement of out-of-pocket expenses in connection with the audit; and

f. Limitations of audit, if any.

Where the objective and scope of the audit and responsibilities of the Management and of the Auditor have been established by law, the Audit Engagement Letter shall give a reference to the provisions of the relevant law along with a statement that the Management acknowledges and understands its responsibilities for preparation and maintenance of records and for devising proper systems to ensure compliance with the provisions of applicable laws, acts, rules, regulations and standards for the time being in force.

Changes in terms of engagement

- The Auditor shall not agree to a change in the terms of the Audit Engagement where there is no reasonable justification for doing so.
- If before completion of the assignment, the Auditor is requested by the Appointing Authority to change the scope of engagement, resulting in a lower level of assurance, the Auditor shall consider the appropriateness of carrying out the same.

- If the terms of the Audit Engagement are changed, the Auditor and the Appointing Authority shall agree on the new terms of the engagement by way of a supplementary/revised engagement letter or any other suitable form in writing.

As per Para 5.1 of CSAS-1, unless there is reasonable justification for doing so, the auditor shall not agree to change the terms of Audit Engagement. Further, if before completion of the assignment, the Auditor is requested by the Appointing Authority to change the scope of engagement, resulting in a lower level of assurance, the Auditor shall consider the appropriateness of carrying out the same.

As per Para 5.3 of CSAS-1, whenever there are changes in terms of Audit Engagement, the Auditor and Appointing authority shall agree on new terms of the engagement by way of supplementary / revised engagement letter or any other suitable form of writing.

Answer 3(b)

The Foreign Currency (Regulations) Act, 2010 (FCRA 2010), read with the Foreign Contribution (Regulation) Rules 2011(FCRR, 2011), as amended from time to time were enacted to regulate the inflow of foreign funds received by NGOs.

The FCRA, 2010 replaces the erstwhile Foreign Contribution (Regulation) Act of 1976.

The FCRA legislation state that an organization cannot receive funding from a foreign source, unless it is registered under the Foreign Currency (Regulations) Act, 2010 or has obtained specific permission for receiving such foreign contribution for a specific project. Also, the registered NGOs need to comply with various post-registration/ permission requirements, as detailed in the provisions of the FCRA 2010 and FCRR 2011.

It is necessary of the entities who receive foreign funding should review the updated FCRA norms and meet their compliance obligations meticulously to avoid any regulatory actions. The FCRA Due Diligence through a proper verification of the compliance status of the NGO gives a comfort to the company that if the NGO is chosen as the implementing agency for the CSR Activities of the Company, the activities done by the MGO for the company shall be within full compliance of FCRA legislations. The key aspects of the FCRA Due Diligence could be summarised as follows:

Scope of the Act on NGO's Activities : FCRA Legislation is applicable only if the NGO received foreign contributions.

Registration & Prior Approval : If the NGO has received foreign contributions, then it needs to be verified if the NGO has obtained Registration or has it obtained specific prior permission for the foreign contributions received by it and whether the underlying conditions, prescribed for such registration/ prior permission are being complied with or not.

Reporting Requirements : All NGOs receiving foreign contributions are required to file periodical returns with the FCRA Division of the Ministry of Home Affairs. All NGOs are required to submit their annual return. 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 should 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.

Due diligence of the NGO can be done by reviewing these annual returns and other compliances under the FCRA.

Answer to Question No. 3 (c)

The Registrar of Companies (ROC) and the SFIO are empowered to file complaint before a Magistrate if they are of an opinion that a particular company has been in default according to Companies Act, 2013 or is pursuing its activities violating the law of the land. They can file a complaint under section 190 of the Criminal Procedure Code, 1973. But the difference lies in how the complaint is treated.

The SFIO has been empowered under the section 212 of the Companies Act to file a complaint. The complaint of SFIO is treated as police report under section 173 of the Criminal Procedure Code, 1973. Whereas, the complaint filed by the Registrar of Companies is not considered as a police report but a private complaint under section 190 of the Criminal Procedure Code, 1973. The complaint by the ROC has to pass through the hurdle of pre-trial evidence on the same platform as that of the complaint of SFIO.

When a complaint is received by the Magistrate, the power to take cognizance on the basis of such complaint is provided under Section 190 of Criminal Procedure Code, 1973. However, further action on such complaint has to be taken under Sections 200-204 of Criminal Procedure Code, 1973.

Under Section 200 Criminal Procedure Code, 1973, the Magistrate has to record the statement of the complainant on oath, and also of other witnesses, if any. As the large number of complaints are filed by private individuals, many of which may be frivolous complaints. Therefore, it is considered necessary to verify the details of such complaints by examining the complainant on oath under Section 200 of Criminal Procedure Code, 1973. In certain “complaint" cases, action may have to be taken by the Magistrate under the provisions of Section 202 Criminal Procedure Code, 1973, i.e., an inquiry by the Magistrate himself or an investigation by police, etc. After these steps, if the Magistrate does not find sufficient ground or finds no prima facie case to proceed further, he may dismiss the complaint under Section 203 of Criminal Procedure Code, 1973; on the other hand, if he finds sufficient ground to proceed, he may issue process under Section 204 of Criminal Procedure Code, 1973.

The complaint filed by SFIO does not have to pass through the process of section 200 to 203 as mentioned above. After a complaint has been filed by the SFIO, it is treated as police report and it directly proceeds to the section 204 and the next stage of trial that is issuing of summons or warrants. Whereas the complaint filed by the ROC has to pass through the procedure mentioned under section 200 to 203 which causes a delay in the prosecution initiated by the ROC.

Question 4

(a) Define Speculation. How Suspicion is different from Speculation ?

(b) Distinguish between Meta-Ethics and Applied Ethics.

(c) ''To be efficient and effective, the internal auditor must have adequate independence.'' Comment.

(d) ''A fraud triangle is a tool used in forensic auditing.'' Elucidate.

(e) Raj, the Secretarial Auditor of Netcap Ltd. wants to seek external confirmations. Guide Raj about the steps involved in obtaining external confirmations.

(3 marks each)

Answer 4(a)

Speculation

The term Speculation is defined as act of trading in an asset or conducting a financial transaction that has a significant risk of losing most or all of the initial outlay with the expectation of a substantial gain. With speculation, the risk of loss is more than offset by the possibility of a huge gain, otherwise there would be very little motivation to speculate. It may sometimes be difficult to distinguish between speculation and investment, and whether an activity qualifies as speculative or investing can depend on a number of factors, including the nature of the asset, the expected duration of the holding period, and the amount of leverage.

Such as the Foreign Exchange Market, Bond Market, Stock Market and Specially the derivatives segment which comprises of futures and options contracts which is typically used by brokerages and high net worth individuals to bet on the direction of the markets. Due to this the Indian capital markets have tilted towards speculative instruments having implications of a high level of speculative trading activity compared to investment activity.

Suspicion

On the other hand, the term Suspicion is the positive tendency to doubt the trustworthiness of appearances and therefore to believe that one has detected possibilities of something unreliable, unfavorable.

Answer 4(b)

Meta-Ethics or "analytical ethics" deals with the origin of the ethical concepts themselves. It does not consider whether an action is good or bad, right or wrong. Rather, it questions – what goodness or rightness or morality itself is. It is basically a highly abstract way of thinking about ethics.

On the other hand, **Applied Ethics** deals with the philosophical examination, from a moral standpoint, of particular issues in private and public life which are matters of moral judgment. This branch of ethics is most important for professionals in different walks of life including doctors, teachers, administrators, rulers and so on. There are six key domains of applied ethics viz. Decision ethics {ethical decision making process), Professional ethics {for good professionalism}, Clinical Ethics {good clinical practices},

Business Ethics {good business practices}, Organizational ethics {ethics within and among organizations} and social ethics.

Answer 4(c)

Internal auditing, being an independent, objective assurance and consulting activity designed to add value to and improve an organisation's operations, the concept of independence is equally relevant for the internal auditor. Under the provisions of Companies Act, 2013, internal auditor may or may not be an employee of the company, but he evaluates the functioning of the management at different levels. Therefore, to be efficient and effective, the internal auditor must have adequate independence. It may be noted that by its very nature, the internal audit function cannot be expected to have the same degree of independence as is essential when the external auditor expresses his opinion on the financial information. To ensure his independence he is made responsible directly to the board of directors through audit committee. Such a channel of communication provides an independent mode whereby an internal auditor can communicate and share his views on the scope of internal audit, findings, etc. If internal auditor is made subordinate to lower-level management, his independence will be affected which will affect his functioning and effectiveness. An outsider, like a Chartered Accountant or a Company Secretary or a firm of Chartered Accountants or a firm of Company Secretaries, if acting as internal auditor, is likely to be more independent than an employee of the organization.

Answer 4(d)

A fraud triangle is a tool used in forensic auditing that explains three interrelated elements that assist the commission of fraud- Pressure (motive), opportunity (ability to carry out the fraud) and rationalization (justification of dishonest intentions). Fraud risk is the vulnerability a company/organisation has to those who are capable of overcoming the three elements in the fraud triangle. Fraud risk assessment is the identification of fraud risks that exist in the company/organisation. The planning involves the formulation of techniques and procedures that align with the fraud risk and fraud risk management.

Planning also includes the identification of the best way/mode to gather evidence. Thus, it is necessary that ample research should be done regarding certain investigative, analytical, and technology-based techniques, and also related legal process, with regard to the outcome of such investigation.

Answer 4(e)

External confirmation means Audit evidence obtained as a direct written response to the auditor from a third party (confirming party) on paper or electronic media or in any other form. External confirmation seeking steps are:

- Determine information to be confirmed / requested.
- Select appropriate confirming party.
- Design/format confirmation request.
- Send the request with follow up.

Question 5

(a) Mehar, a Chartered Accountant was working as a Manager in Finance team of

Sita Mining Ltd. Mehar was curious to know about the Secretarial Auditor comments on compliance with applicable laws and regulations. In the preliminary meeting, he asked Rohan, the Secretarial Auditor about the process of identification of applicable laws to the Company. Explain the process. (5 marks)

(b) Mayank has recently started as a Company Secretary in Practice. He has got an assignment of internal audit. Advise Mayank about internal audit and its stepwise approach. (5 marks)

(c) The Board of Directors of Vee Kay Ltd. has received a letter from a whistle blower alleging insider trading by few members amongst the Senior Management. The Board has appointed you to perform the insider trading audit. Explain the essential factors enabling review and reporting of insider trading audit. (5 marks)

Answer 5(a)

The identification of the compliance requirements under applicable laws is just one part of the auditor, but for the management of the company it is necessary to make sure there is sufficient evidence that the company is compliant with each and every one of them. For ensuring the compliance of the applicable laws the company:

- should have a documented inventory of every applicable law, regulation, contractual obligation and any other form of compliance requirement which needs to comply;
- should publish its compliance policy which should be supported by standards, procedures, and guidelines;
- should exchange emails with legal\compliance team, functional heads, compliance officers and others with information on compliance obligations and skills (e.g., Privacy, Procurement, HR, Finance, IT) concerning compliance matters in the information security context;
- should share related agendas, minutes or notes of meetings with those people on related matters;
- should place Internal reports concerning applicable compliance obligations, ideally with evidence that management is actively engaged in assessing the extent to which compliance is needed and aware of the risks of non-compliance;
- should conduct Compliance assessment\review\audit reports, noting the content, form, distribution, status.

For an auditor and the company, it is required to identify the applicable legal requirement of act, regulation but should also identify the sections applicable under such regulation.

Further, the legal compliance for a holding company/ subsidiary company/ joint venture company with diverse operations, the compliance requirement will vary from operation to operation based on the nature of the operations and the locations of the different operation and also based on the applicable legal instruments, and the applicable sections of the relevant laws referred in those legal instruments. The diverse operation and different geographical location may create a complexity in compliance.

Dealing with the amendment in the laws is another concern in fulfilling compliance

requirement, which requires that the company should keep up to date information on the compliance requirement with an information of the changes in the laws and regulations. Further, the legal team of the company should continuously communicate the effect of such changes on the Company, its holding, subsidiary, Joint Venture Company or any of the geographical area where the company operates.

Some of the regulators like MCA, RBI, SEBI, from time to time issue the Master Circulars, and Master Direction, Removal of Difficulties Order etc. which helps in identifying and figuring out the actual requirement of the law which needs to be complied with.

Answer 5(b)

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

Step-wise process

- Establish and communicate the scope and objectives for the audit to appropriate management.
- Develop an understanding of the business area under review. This includes objectives, measurements and key transaction types. This involves review of documents and interviews. Flow charts and narratives may be created if necessary.
- Describe the key risks facing the business activities within the scope of the audit.
- Identify control procedures used to ensure each key risk and transaction type is properly controlled and monitored.
- Develop and execute a risk-based sampling and testing approach to determine whether the most important controls are operating as intended.
- Report issues and challenges identified and negotiate action plans and solutions with management to address the problems.
- Follow-up on reported findings at appropriate intervals. Internal audit departments maintain a follow-up database for this purpose.

Answer 5(c)

In India the SEBI (Prohibition of Insiders Trading) Regulation, 2015 is the primary regulation which covers the insider trading activities.

Insider trading issues have resulted in significant importance in listed companies in the last few years. The directors, agents and other officers were found to be using insider information for profitably speculating in securities of their own company. The insider trading occurred due to (i) the possession of information by these people; (ii) before everybody else; (iii) regarding the changes in the economic condition of companies and particularly, regarding the size of dividends to be declared, or issue of bonus shares etc.

The SEBI (Prohibition of Insider trading) Regulations, 2015 provides that the board may appoint a qualified auditor to investigate into the books of account or the affairs of the insider or any other person as may be directed by the board. The auditor so appointed shall have the same powers of the inspecting authority as stated in insider trading regulations.

Also, SEBI has put in place a mechanism for preventing and controlling insider trading by putting primary responsibility to monitor and regulate insider trading activities on the company through the compliance officer and audit committee.

For the purpose of ensuring compliance with the insider trading regulations, the following would be some of the essential inputs to enable review and to report the status:

- Code of conduct, framed in the lines of model code specified in the schedule I of Insider Trading Regulations;
- Appointment of compliance officer:
- Responsibility discharged by the compliance officer, preservation of price sensitive information, closing of specific trading window;
- Prior approval of trading;
- Reporting requirement by the directors / officers / designated employees;
- Restricted list for trading;
- Disclosure by any person holding more than 5% of shares or voting rights and promoter or promoter group, code of corporate disclosure policy.

Question 6

(a) "A Peer Reviewer has to report under certain guidelines as prescribed by ICSI. The reporting is to done in three different forms". Discuss in brief the statement as given in the guidelines.

(b) You have made a presentation to the Risk Management Committee of your company about the various risks and the mitigation plans thereof. The committee has asked you to formulate the action plan to address the identified risks. Explain the points to be considered while formulating the action plan.

(c) "The audit checklist assists auditors in conducting a thorough, systematic and consistent audit." Briefly highlight the benefits of checklist. (5 marks each)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) Gee & Kay Ltd. has appointed Rajshekhar & Co., a Company Secretaries firm as the Secretarial Auditor for the year ended 31st March 2021. The Secretarial Audit of the company for the previous year was performed by Suryadev & Co Is Rajshekhar & Co., required to communicate with the previous auditor before accepting such engagement ? If yes, draft a letter to be addressed to the previous incumbent.

(ii) "After the exit meeting and the completion of the audit procedures, the auditor should prepare an executive summary of audit finding". Comment and list out points which should form part of executive summary.

(iii) Write a brief note on guidance criteria for verification of compliances under Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. (5 marks each)

Answer 6(a)

Reporting

The Peer Review Guidelines contains following provisions for reports of Peer Reviewer. The reporting is to be done in three different forms explained as under:

(i) Preliminary Report of Reviewer

- At the end of an on-site review, the reviewer shall, before making his report to the Board, communicate a preliminary report to the Practice Unit (in case he/she finds any deficiency in the systems and procedures of the Practice Unit in rendering Professional Services to the clients). The Reviewer shall report on the areas where systems and procedures had been found to be deficient or where noncompliance with reference to any other matter was noticed.
- The Practice Unit shall make submissions or representations, in writing to the Reviewer, concerning the preliminary report within 15 (fifteen) days from the date of receipt of preliminary report from Reviewer.

(ii) Final Report of Reviewer

(a) The Reviewer will submit a Final Report to the Board with a copy to the Practice Unit (the Reviewer's Report), incorporating the findings. The Final Report will be examined/inspected by the Board in terms of the degree of compliance with the Technical Standards by the reviewed Practice Unit. The model forms of such Final Reports shall be communicated to the Reviewer by the Board.

(b) The Board may, if deems fit, issue Peer Review Certificate to the Practice Unit. OR

(c) The Board, having regard to the Report and any submissions or representations attached to it, may make recommendations to the Practice Unit concerned regarding the application by it of Technical Standards; if it is of the opinion that:

(1) In case the review is related to a firm, any one or more or all of the partners in the firm may have failed to observe, maintain or apply, as the case may be, Technical Standards;

(2) In case the review is related to a member practicing on his own account, the member may have failed to observe, maintain or apply, as the case may be, Technical Standards; Then;

(3) Issue instructions to the Reviewer to carry out, within such period as may be specified in the instructions (which period shall not commence earlier than six months after the date on which the instruction is issued), a further Peer Review as regards the Practice Unit to which the report relates; and

(4) Specify in the instruction, the matters as regards which the review is to be carried out;

(d) The Board will make recommendations to the Practice Unit where: Based on the report of the Reviewer, it appears that the Practice Unit has satisfied all key control objectives, which the Board has determined and/or prescribed in respect of maintenance of/ adherence to Technical Standards but where further improvements could be made to internal quality control systems; and Based on the report of the reviewer, it appears that the Practice Unit has satisfied the major key control objectives but some weaknesses exist in others. The Practice Unit is expected to consider the recommendations for rectifying the weaknesses thus identified and informed by the Board and take all necessary actions to ensure that all key control areas are addressed.

(e) A follow up review will be required where the Practice Unit has not satisfied the Board that all the key control objectives have been maintained and where, in the view of the Board the deficiencies are likely to materially affect the overall quality of engagements of the Practice Unit. In such cases the Board will also make recommendations, which it expects the practice unit to implement in order to ensure the maintenance of Technical Standards. The implementation of these recommendations will be examined during the follow up review.

(iii) The Reviewer shall not communicate any Report(s) unless the examination of such Report(s) and related records has been made by him/her or by a partner or an employee of his/her firm.

Answer 6(b)

Once risks are identified, industry members must make a proper assessment of the issues that would arise if incidents occur, and take proportionate steps to minimise the likelihood of such issues resulting in consumer harm. Steps taken need not involve significant resources in advance.

Good process planning and/or staff training may have a positive impact on a company's ability to respond effectively when incidents do occur. Even matters that are perceived to be unlikely or appear minor can pose long term difficulties if businesses are under prepared to respond to matters that do arise.

The formulation of an action plan could be based on the following:

- To periodically test and/or monitor certain ‘risks' that would normally be associated to a particular service category (e.g., for a subscription service, it may be prudent to test the clarity of promotions, whether reminder messages have been sent, with delivery confirmation noted, and that 'STOP' commands have been properly processed);

- The frequency of such testing should reflect the risk posed by both the client and the service type. For example, a client with no breach history, or where none of the directors are linked to other companies with breaches, and low-risk service types (such as football score updates), would require far less monitoring than a client with an extensive breach history that provides a high- risk category of service (e.g., a subscription-based lottery alerts system with a joining fee);
- 'Mystery shopper' testing could be used as, and when, appropriate;
- Internal mechanisms to enable 'whistle-blowing' by staff, where appropriate;
- Putting in place internal checks that correlate with unusual patterns of activity which may indicate consumer harm (e.g., spikes in traffic and/or consumer complaints made directly to the provider about one specific service);
- Having a procedure to alter and address instances of non-compliant behaviour;
- Monitoring of the client's service to ensure that any directions given by the Phone-paid Services Authority have been complied with;
- Producing a compliance file, comprising of a written record of the assessment, the subsequent action plan and evidence of any monitoring and/or testing required by the plan having taken place. This record does not necessarily need to be lengthy (although this will depend on the client and the actions taken under the plan), but should be made available to the Phone-paid Services Authority upon request.

Answer 6(c)

The audit checklist assists auditors in conducting a thorough, systematic and consistent audit. The checklists are used to guide and help the auditor to assess whether evidence meets audit criteria.

It is important to remember that checklists are used to guide the auditor's and do not rigidly dictate exactly what is to be audited as in various event the auditor need to check beyond the checklist and the compliance requirement is different according to the nature and business of the company.

Accordingly, the audit checklists support the audit process in identification of the various compliance requirements and have their own benefits for the performance of the audit. Though for all organization a uniform checklist can be considered but same need to be customized as per the organization and the scope of the audit.

The benefits of the audit checklists are as under:

– Promote planning for the audit.

– Ensure a consistent audit approach.

– Act as a sampling plan and time manager.

– Serve as a memory aid.

– Provide a repository for notes collected during the audit process (audit field notes)

  o Audit checklists provide assistance to the audit process.

- Auditors need to be trained in the use of a particular checklist and be shown how to use it to obtain maximum information by using good questioning techniques.
- Checklists assist an auditor to perform better during the audit process.
- Checklists help to ensure that the audit is conducted in a systematic and comprehensive manner and adequate evidence is obtained.
- Checklists provide the structure and continuity to the audit and ensure that the audit scope is being followed.
- Checklists provide a means of communication and a place to record data for use for future reference.
- A completed checklist provides objective evidence that the audit was performed.
- A checklist provides a record.
- Checklists can be used as an information base for planning future audits.
- Checklists can be provided to the auditee ahead of the onsite audit.

Answer 6A(i)

Yes, Rajshekhar & Co. is required to communicate with the previous auditor i.e. Suryadev & Co. before accepting such engagement.

A specimen communication in this regard is given as under:

To

CS Suryadev & Co.

Address ……...

Dear Sir,

Sub.: Intimation in terms of Clause 8 of the First Schedule to the Company Secretaries Act, 1980

I, CS Rajshekhar Partner, M/s. Rajshekhar& Co., a firm of Company Secretaries have been approached by the Management of M/s. Gee & Kay Ltd. to provide the secretarial audit services (list of professional services) for the FY 2021-22. vide their letter No. ..... dated .....We understand that earlier the abovementioned professional services were being rendered by your good self to Gee & Kay Ltd. during the Financial Year 2020-21.

I/We request you to kindly take this communication as an intimation to be given to the previous incumbent in terms of Clause 8 of the First Schedule to the Company Secretaries Act, 1980.

Regards,

For M/s Rajshekhar& Co.,
Firm Unique Code
CS Rajshekhar

Membership No. ACS ..... / FCS ……..

COP No. …….

Date: …….

Place: .....

Answer 6A(ii)

After the exit meeting and the completion of the audit procedures, the auditor should prepare an Executive summary of audit findings. The summary explains the key audit issues, the category of risk, their resolution, agreed adjustments. After discussing the executive summary the audit certificate should be signed by the auditor and by the management or person authorized by the management of the company.

The executive summary is a high-level summary, which explains audit findings, while it is a concise document; it should contain sufficient information to stand alone as a summary of the evidence which supports audit team's conclusion on the appropriate form of audit certificate.

The executive summary should include:

i. a summary of the auditee's operations and purpose;

ii. a summary of the regularly framework within which the auditee operates;

iii. an explanation of the audit approach and the balance between test of controls and substantiveprocedures;

iv. a summary of the key risk identified;

v. a commentary on key balances;

vi. a commentary on the accounting policies and significant account areas;

vii. a summary of the result of audit procedures;

viii. details of areas where difficult questions of principle or judgement were involved;

ix. matters brought forward from previous year audit;

x. a summary of other important matters for attention;

xi. outstanding matters, for example, outstanding reappointment orders or letter authorizing agreed amendments to the financial statement;

xii. a summary of matters carried forward to the next years audit; and

xiii. a conclusion on the appropriate form of audit certificate.

The report should clearly mention the process name; significant findings with respect to the criteria, analysis of the consequences of the findings; and recommendations of the auditor. Each observation should be supported by a set of facts and each recommendation to the management should be supported by a business reasons for implementation.

Further, the replies on the auditor's observations and recommendation /comments of the management of the Auditee's company should be obtained and should be recorded

in the audit file. Also, in case where the auditor opinion is other than the unmodified opinion, the full rationale should be given in the executive summary.

Answer 6A(iii)

Verification of compliances under Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder

Under Foreign Exchange Management Act, 1999, the Central Government issued Foreign Exchange Management (Non-debt Instruments) Rules, 2019. Further, the Reserve Bank of India issued Foreign Exchange Management (Transfer or Issue of any foreign Security) Regulations, 2004 and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 as well as Foreign Direct Investment (FDI) Policy issued by DPIIT which are required to be complied with.

The Verification of Compliances includes:

- Permission for making investment by a person resident outside India, including foreign portfolio Investor, NRI or OCI on Repatriation basis/ Non-Repatriation basis etc.
- Purchase and sale of securities other than capital instruments by a person resident outside India
- Investment in a Limited Liability Partnership (LLP)
- Investment by a Foreign Venture Capital Investor (FVCI)
- Investment by a person resident outside India in an Investment Vehicle
- Investment in Depository receipts by a person resident outside India - Issue of Indian Depository Receipts (IDRs)
- Acquisition through a rights issue or a bonus issue
- Issue of shares under Employees Stock Options Scheme to persons resident outside India
- Issue of Convertible Notes by an Indian startup company
- Merger or demerger or amalgamation of Indian companies
- Transfer of capital instruments of an Indian company by or to a person resident outside India
- Pricing Guidelines
- Reporting requirements Advance Remittance Form, Form Foreign Currency-Gross Provisional Return, Annual Return on Foreign Liabilities and Assets, Form Foreign Currency-Transfer of Shares, Form Employees' Stock Option. Form Depository Receipt Return, Form LLP, Form Convertible Notes etc.
- Prohibited activities for investment by a person resident outside India
- Permitted sectors, entry routes and sectorial caps for total foreign investment.

***

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) ABCD Manufacturing and Exporting Ltd desires to use Masala Bonds for further Augmentation of funds. Would you guide the Company as to the concept and exceptions that bars raising funds through such bonds ?

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

(c) Could you explain with certain citations indicating exceptions to the Majority Rule Held in Foss Vs Harbottle (1843) 2 Hare 461 (Ch.) ?

(d) "Safeguarding the interest of creditors is considered while sanctioning reduction of capital under Section 66 of the Companies Act, 2013". Comment and analyse briefly. *(5 marks each)*

Answer 1(a)

Masala bonds are rupee denominated bonds sold to offshore investors, who assumes foreign exchange risk to earn higher interest rates compared with dollar based overseas bond. In 2017, Reserve Bank of India (RBI) revised the norms for masala bonds.

The RBI declared that from October 03, 2017 masala bonds will no longer form part of the limit for Foreign Portfolio Investment (FPI) in corporate bonds and it will form part of External Commercial Borrowings. However, Masala Bond Proceeds cannot be utilised for the purpose of Real Estate Activities, Capital Market or Domestic Equity Investment, Purchase of Land, certain activities prohibited as per Foreign Direct Investment guidelines and relending for the activities prohibited.

HDFC was the first to issue such bonds, followed by National Highways Authority of India and National Thermal Power Corporation. Thus, the raising of funds through Masala Bonds is to tap overseas cheap funds.

Answer 1(b)

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

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

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

Answer 1(c)

No need to take the views of majority if there is allegation of ultra vires acts by the Management held in *Dhaneswari Cotton Mills Ltd.* v. *Nilkamal Chakravarthy [1937] 7 Comp. Cas. 417 (Cal).*

Similarly, the allegation of fraud is an exception as was held in *Cook* v. *Deeks (1916)1AC 554 (PC).* Where majority is wrongdoer and pocket property of company, an individual shareholder has right to file a suit. *Menier* v. *Hooper's Telegraph Works (1874)9 Ch. App. 350 (CA).*

A minority of shareholder in saddle of power cannot be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. *Life Insurance Corp of India* v. *Escorts Ltd (1986) 59 Comp Cas. 548 (SC).*

Nevertheless, the principle of Majority Rule prevails normally as held in *Foss* Vs. *Harbottle [1843] 2 Hare 461 (Ch.)* until and unless proved beyond doubt the exceptions.

Answer 1(d)

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

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

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

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

Question 2

(a) "Documentation in a proper manner is the steppingstone and an important aspect in fulfilment of legal requirements and obligations in mergers and amalgamations"– analyse the statement indicating the important steps to be involved for successful completion of mergers or amalgamations. (5 marks)

(b) *"Profitability of any business is sensitive to several factors that prompts the analyst to prepare Sensitivity Analysis to help in Management decisions." Comment.* *(5 marks)*

(c) *There are certain departures in accounting aspects dealing with amalgamations or mergers as per IFRS – 3 in comparison to IND – AS 103. Enlist such variations briefly.* *(5 marks)*

OR (Alternate question to Q. No. 2)

Question 2A

(i) *"In case any combination is to be notified for ex post facto approval, it would defeat the very intendment of the provisions of the Competition Act, 2002 yet there are exemptions from compliance either under regulations or through notifications issued by the Central Government". Express your views on the statement.* *(5 marks)*

(ii) *MNP Ltd is a listed company and is in the process of merging SQW Ltd, not being a listed company. The management of MNP Ltd desires your suggestions and process in getting the No objection or observation letter from the concerned stock exchnage in the matter. Guide the management of MNP Ltd on the issue.* *(5 marks)*

(iii) *The valuation of NETWORKS LTD. was done by an investment Analyst. Based on an expected free cash flow of ₹54 million for the following year and an expected growth rate of 9%, the analyst has estimated the book value of the firm to be ` 1800 million. However, he committed a mistake of using the book values of debt and equity. You do not know the book value weights employed by him but you know that the firm has a cost of equity of 20% and a post-tax cost of debt of 10%. The market value of equity is thrice its book value, whereas the market value of its debt is nine-tenths of its book value. What is the correct value of the firm ?* *(5 marks)*

Answer 2(a)

In cases of a compromise or arrangement in connection with scheme for reconstruction of any company or companies or for amalgamation or merger of any two or more Companies, petitions need to be filed with National Company Law Tribunal (NCLT) in terms of Sections 230 to 232 of the Companies Act, 2013.

There is no definition of either merger or amalgamation in the Companies Act, 2013. Nevertheless, Central Government made Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 that guides effective steps for fruitful results.

Accordingly, steps involved are Drafting the scheme, approvals by Boards of directors of the companies involved, Stock Exchange approvals in case of Listed companies, Application to NCLT to convene meetings of members and creditors and convening of such meetings, No objections from Regional Director and Official Liquidator, Filing petition to NCLT for Approving Scheme and Obtaining orders and filing the orders with Registrar of Companies.

Answer 2(b)

Financial performance of any business depends on many factors. The needs of the customer with respect to the product or service are a major factor. Market competition is another factor. Government policies may change cost and hence the price. The product may face obsolescence due to new technologies. Cheaper alternatives may affect the customer preference.

Thus, the profitability of any business may be sensitive to any of the factors. If we take these factors as independent variables, then given a change in or more of the variables affect the profitability. This technique is known as "Sensitivity Analysis".

This technique can also be used to test the validity of any model. For example, in business valuation, there are variables such as discount rate, future growth rate, market share, beta value, required rate of return, etc. Each of these factors can be varied to test the business valuation model.

Answer 2(c)

The principles of IND-AS 103 Business Combination and IFRS -3 are same to a very great extent.

There are only few crave out in IND-AS 103 when compared to IFRS 3. They are as follow:

IFRS-3 excludes from its scope business combinations of entities under common control. IND- AS 103 gives the guidance in this regard.

IFRS-3 requires bargain purchase gain arising on business combination to be recognised in profit or loss account. IND-AS 103 requires that the bargain purchase gain to be recognised in other comprehensive income and accumulated in equity as capital reserve, unless there is no clear evidence for the underlying reason for classification of the business combination as a bargain purchase, in which case, it shall be recognised directly in equity as capital reserve.

The main reason for this carve out is, the recognition of such gains in profit or loss would result into recognition of unrealised gains as the value of net assets is determined on the basis of fair value of net assets acquired.

Answer 2A(i)

Prior approval from the Competition Commission of India is required to any combination as was held by Apex Court in *SCM Solifert Limited & Anr.* vs. *CCI (Civil Appeal No. 10678 of 2016).*

Section 6 (2) of Competition Act, 2002 requires filing of application within 30 days prior to combination. Such combination shall take effect after 210 days thereof or orders under Section 31, whichever is earlier.

Notification no. S.O. 2039(E) dated 29th June 2017 does away with time requirement of 30 days but to wait for orders by the Commission. In addition, notifications have been issued on 10-08-2017, 30-08-2017 and 22-11-2017 respectively granting exempting combinations relating for five years to Regional Rural Banks, Public sector Banks so also Public Sector Oil and Gas Bodies.

The provisions of section 6 of the Act do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

Categories of combinations mentioned in Schedule I to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section(2) of section 6 of the Act need not normally be filed.

Answer 2A(ii)

Any listed company desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal under Sections 230-234 and Section 66 of Companies Act, 2013, along with a non-refundable fee as specified in Schedule XI, with the concerned stock exchange for obtaining Observation Letter or No-Objection letter, before filing such scheme with any Court or Tribunal, in terms of requirements specified by the Securities & Exchange Board of India or concerned Stock Exchange from time to time.

The listed entity shall place the letter of the stock exchange before the Tribunal at the time of seeking approval of the scheme of arrangement. The validity of such letter is six months from date of issue. On sanction of the scheme by the Tribunal, order needs to be filed with the Stock exchange.

The listed entity shall ensure compliance with the other requirements as may be prescribed by the Securities & Exchange Board of India from time to time.

MNP Ltd is advised to comply the requirements as suggested.

Answer 2A(iii)

$$1800 = \frac{54}{(r \quad 0.09)} \Rightarrow \quad r = 0.12 \text{ or } 12\%.$$

$0.12 = [X * 0.20 + (1 - X) * 0.10]$

$X = 0.20$

X is the weight assigned to equity i.e. = 0.20

So, debt / equity = 0.8/0.2 = 4

Since the market value of equity is thrice its book value and the market value of debt is nine-tenths of its book value, the market value weights of equity and debt are:

0.2*3 / and 0.8 *0.9 = 0.6 and 0.72

Hence the WACC is:

[(0.6 / 1.32) * 0.20 + (0.72 / 1.32) * 0.10] = 0.1454 or 14.54 %

Hence the value of the firm is:

[54 / (0.1454 - 0.09)] = 974.7 million.

Question 3

(a) *Procedure as per Civil Procedure Code, 1908 need not be followed while trying Petitions, applications or appeals by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) – Do you agree ?*

(b) *Discuss the tax aspects on 'slump sale' and 'demerged company'.*

(c) *Explain issue of Sweat Equity shares and its valuation.*

(d) *Explain Competition Test (AAEC).*

(e) *HIJ Entertainment LLP desires to amalgamate as transferor with LMN Exhibitors Ltd. Is it permissible ?* *(3 marks each)*

Answer 3(a)

In terms of Section 424 of the Companies Act, 2013, neither the National Company Law Tribunal (NCLT) nor National Company Law Appellate Tribunal (NCLAT) is bound by the procedure as stated in Civil Procedure Code, 1908 in disposing any proceeding before it either under the Companies Act, 2013 or Insolvency and Bankruptcy Code, 2016 but shall be guided by the principle of natural justice.

NCLT or NCLAT has the power to regulate their own procedure. Any orders passed may be enforced like a decree and can be enforced by the Court having jurisdiction to execute. Further, Section 424(2) enlists similar powers of a Civil Court such as summoning, documents discovery, receiving affidavits, requisitioning any public document, examining witnesses etc.

Answer 3(b)

Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such cases.

As per section 50B of Income Tax Act, 1961 any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income tax as capital gains from the transfer of long term capital asset and shall be deemed to be the income of the previous year in which the transfer took place.

Demerged company has been defined under section 2(19AA) of the Income Tax Act, 1961. According to section 47(vib), where there is a transfer of any capital asset in case of demerger by the demerged company to the resulting company, such transfer will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

Answer 3(c)

Sweat equity shares are issued for consideration other than cash such as technical know-how, brand equity, design, patent or any other intangible asset. The intangible asset could come from promoters or director or even employees of the company.

Section 54 of the Companies Act, 2013, specifies the conditions under which sweat equity shares may be issued. The issue is to be authorised by a special resolution, the

number of shares to be issued, the recipients, and at least one year must have passed after the company had been incorporated.

Valuation of shares involves two steps -

1. Valuation of the share price; and

2. Valuation of the intangible assets,

The valuation of the share price shall be done by a registered valuer and the intangible asset also be valued by a registered valuer (say the intellectual property right i.e. the human resource value needs to be evaluated and added or considered).

Answer 3(d)

Section 5 of the Competition Act, 2002 explains combination. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons through acquisition of controlling shares, voting rights or assets.

However, section 6 of the Competition Act, 2002 declares a combination as void if it causes or is likely to cause an adverse effect on competition within the relevant market in India.

The Commission shall have due regard to all or any of the following factors listed under section 20(4) of the Competition Act, 2002 for the purpose of determining whether the combination causes or is likely to cause an 'appreciable adverse effect on competition in the relevant market. The adverse impact can be caused due to extent of barriers to entry in the market or degree of countervailing power in the market, level of combination and other derogatory market forces.

Answer 3(e)

Yes, it is permissible as was held in the Matter of Scheme of Amalgamation between *Real Image LLP* v. *Qube Cinema Technologies Private Limited*.

The National Company Law Tribunal, Chennai Bench in the order dated 11.06.2018 held that,

"…the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 is to facilitate the ease of doing business and create a desirable business atmosphere for companies and...

"For this purpose, both the Acts have provided provisions for merger or amalgamation of two or more LLPs and companies," noted the NCLT bench.

"If the intention of Parliament is to permit a foreign LLP to merge with an Indian company, then it would be wrong to presume that the Act prohibits a merger of an Indian LLP with an Indian company.

"Thus, there does not appear any express legal bar to allow/ sanction merger of an Indian LLP with an Indian company,"

National Company Law Tribunal, Chennai Bench taking such view decided by order dated 11th June 2018. The counsels submitted that Sections 60 to 62 of LLP Act and

Sections 230 to 234 of the Companies Act, empowers National Company Law Tribunal to sanction a scheme put by the applicant entities. The Bench noted that there is no express legal bar to permit or sanction merger of Indian LLP with an Indian Company

PART - II

Question 4

(a) 'Insolvency and Bankruptcy Code, 2016 cast upon certain obligations on Information Utilities' – Justify with your views. (5 marks)

(b) "Initiation of Corporate Insolvency Resolution Process puts brake on any other legal Proceedings against Corporate Debtor (CD) undergoing CIRP during the process." Offer your views on the statement. (5 marks)

(c) "An Information Memorandum in respect of affairs of the Corporate Debtor undergoing Corporate Insolvency Resolution Process is to be prepared in such a manner that incites the Resolution Applicant, but the facts stated therein need be true without any suppression or misinformation"– Would you amplify with your views ? Also discuss, if there is a need for taking a confidentiality undertaking from prospective Resolution Applicant while accessing any detailed information. (5 marks)

(d) "Debt restructuring involves a reduction of debt and an extension of payment terms or change in terms and conditions" – analyse the statement indicating that any Resolution plan need to be consented by the Committee of Creditors and approved by the National Company Law Tribunal (NCLT). (5 marks)

Answer 4(a)

Section 3(21) of the Insolvency and Bankruptcy Code, 2016 defines an "information utility" as a person who is registered with the Board as an information utility under section 210.

Obligation of Information Utilities are created pursuant to Section 214 of the Insolvency and Bankruptcy Code, 2016. Accordingly, the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 have been framed.

In short, Information Utility is a depository to create and store financial information through electronic means from financial or operational creditors on payment of prescribed fee. Section 215 made it obligatory for financial creditor and optional for operational creditor to submit the details to Information Utility.

All prescribed precautions are taken before storing information that is accessible to anyone on payment of fee. Further it is obliged to publish statistical data as required by Regulations. There needs to be inter-operability with other information Utilities so that the person accessing the data make sure as to authenticity. Section 216 enables the person who has fed original data to approach with reasons the Information Utility to update or modify the information.

Answer 4(b)

Section 14 of the Insolvency and Bankruptcy Code, 2016 empowers the adjudicating

authority to declare moratorium while passing the orders for initiating Corporate Insolvency Resolution Process (CIRP) against Corporate Debtor (CD).

On the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The effect of moratorium are deferred till conclusion of CIRP.

Thus, the statement is true to the extent stated above.

Answer 4(c)

Section 29 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lays down the preparation of an information memorandum as one of the main functions of the resolution professional.

An information memorandum is envisaged to be prepared in order for the resolution applicants to provide solutions for resolving the insolvency of the corporate debtor. Hence contents need to be filled in with correct facts without any suppression. At the same time, the contents need to be impressive so that the Resolution Applicant is motivated to put in funds and efforts for revival of the Corporate Debtor.

Section 29(2) further indicates authorisation to the Resolution Applicant to access detailed information only after receipt of confidentiality undertaking from such applicant. Thus, the information memorandum and further details are confidential to the Resolution Professional, Resolution Applicant and of course Adjudicating Authority.

Answer 4(d)

Corporate Restructuring is an inorganic business strategy where one or more aspects of a business are redesigned to improve commercial efficiency, manage competition effectively, drive faster pace of growth, ensure effective utilization of resources, and fulfilment of stakeholders' expectations.

Debt restructuring involves a reduction of debt and an extension of payment tenure or change in terms and conditions. Debt restructuring is more commonly used as a financial tool than compared to equity restructuring. As such in Corporate Insolvency Resolution Process the Committee of Creditors primarily consists of financial creditors.

Section 30(4) of Insolvency and Bankruptcy Code, 2016 envisages approval of the Resolution Plan by the Committee of Creditors before final approval by the Adjudicating Authority i.e., National Company Law Tribunal in terms of Section 33 of the Code.

Question 5

(a) XY Tractors Ltd is undergoing Corporate Insolvency Resolution Process. The Corporate Debtor does not have any financial creditors. Help the Interim Resolution Professional in constituting the committee of Creditors. (3 marks)

(b) YM Auto Ltd sends expression of interest as a Resolution Applicant and has been shortlisted by the Resolution Professional. Now YM Auto Ltd writes to Resolution Professional to provide Information Memorandum. The Resolution Professional seeks your guidance in this regard. Give your views. (3 marks)

(c) "A discharge order in case of individual or firm insolvency permits the debtor to start business afresh having freed from the qualifying debts of the insolvent past". Explain briefly the provisions relating to discharge order. (3 marks)

(d) "Any modification suggested by creditors need consent of the debtor in respect of Repayment plan in case of individual or firm insolvency". Comment briefly on the statement narrating the provisions in respect of conducting meetings and rights of secured creditors to attend. (3 marks)

(e) "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) has a provision for Right to Caveat". Explain briefly. (3 marks)

Answer 5(a)

The Interim Resolution Professional needs to refer to Regulation 16 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 that deals with situations where either the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor.

Accordingly, in the present case, Committee of Creditors consists of maximum eighteen largest operational creditors in order of value, one each representing workers and employees. Each member of the committee shall have voting share in proportion to the debt due either as creditor or representative for whom they represent to the total debt as explained. The committee formed and its members shall have same right, power, duties and obligations as a committee comprising of financial creditors and its members as the case may be.

Answer 5(b)

Section 29(2) of the of Insolvency and Bankruptcy Code, 2016 provides that the resolution professional shall provide to the resolution applicant access to all relevant information in physical and electronic form, provided such resolution applicant undertakes:

(a) to comply with provisions of law for the time being in force relating to confidentiality and insider trading;

(b) to protect any intellectual property of the corporate debtor it may have access to; and

(c) not to share relevant information with third parties unless clauses (a) and (b) above are complied with.

On submission of the undertaking by YM Auto Ltd. can be shared with the Information Memorandum prepared by the Resolution Professional.

Answer 5(c)

According to Section 79(2)(13) of the Insolvency and Bankruptcy Code, 2016 "discharge order" means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be.

Section 92 of the Insolvency and Bankruptcy Code, 2016 provides for the passing of a discharge order by the adjudicating authority at the end of the moratorium period for discharge of the debtor from the qualifying debts. Further, the discharge order shall also provide for the discharge of penalties, penal interest and other sums owed under any contract, in respect of the qualifying debts, from the date of the application for fresh start to the date of the discharge order. A discharge order discharges only the debtor. Such discharge order is recorded in the financial history of the debtor.

Section 92 does not discharge the debtor from any debt not included in 92 (2) and from any liability not included in Section 92(3).

Answer 5(d)

Section 108 of the Insolvency and Bankruptcy Code, 2016 provides for the conduct of meeting of creditors by the resolution professional. In the meeting, the creditors may decide to approve, modify or reject the repayment plan.

If modifications are suggested by the creditors, the Resolution Professional ensure that consent of the debtor is obtained for each modification.

The meeting of the creditors shall be conducted in accordance with the provisions of sections 108 to 111 of the Code. In the meeting of the creditors, the creditors may decide to approve, modify or reject the repayment plan. A secured creditor if attends any such meeting shall be deemed to have relinquished the security unless submits an affidavit for unsecured part of the debt, if any.

Answer 5(e)

Section 18C of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 deals with the right to lodge a caveat. It provides that:

(1) Where an application or an appeal is expected to be made or has been made section 17(1) or section 17A or section 18(1) or section 18B, the secured creditor or any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1),—

(a) the secured creditor by whom the caveat has been lodged (hereafter in this

section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1);

(b) any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made under sub-section (1).

(3) Where after a caveat has been lodged under sub-section (1), the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

(4) Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal referred to in sub-section (1) has been made before the expiry of the said period.

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

Question 6

(a) "Initiation of voluntary liquidation at the instance of Members or Creditors of the Corporate person intended to be liquidated but dissolution only subject to the orders of Adjudicating Authority National Company Law Tribunal". Examine the truth in the statement. (5 marks)

(b) RDX International Ltd is undergoing Corporate Insolvency Resolution Process. The Resolution Professional noticed large chunk of plant and machinery of the company are situate in a foreign country with which Government of India has bilateral relation. Resolution Professional seeks your guidance for the recovery of assets situated in the foreign country. Give your views. (5 marks)

(c) "All the assets that are in possession of the Corporate Debtor undergoing liquidation are to be taken into custody by the Liquidator". Would you analyse the statement ? (5 marks)

OR (Alternate question to Q. No. 6)

Question 6A

(i) "Filing of Statement of Affairs by the Directors of the Company on which a prima facie case is felt by the Tribunal, is a pre-requisite to oppose such winding-up Petition pending in terms of Companies Act, 2013". Furnish your views in brief.

(ii) "In terms of Insolvency and Bankruptcy Board of India (Liquidation Process)

Regulations, 2016 the liquidator can dispose of the assets only through online auction or spot Auction in a traditional manner". Do you agree ?

(iii) *"Resolution Plan needs approval of not only the Committee of Creditors but also by the Adjudicating Authority to make it legally binding." Comment the statement briefly detailing the law enabling Adjudicating Authority to approve the Plan.* *(5 marks each)*

Answer 6(a)

Section 59 of the Insolvency and Bankruptcy Code, 2016 provides details process from initiation to closing of voluntary liquidation of Corporate Person whether solvent or insolvent.

Solvent bodies need to file declaration of solvency test consent of creditors having two-third in value by a suitable resolution needs to be filed with Registrar of Companies.

The liquidator, being a registered Insolvency Professional, is appointed who shall issue public announcement within 5 days of appointment for inviting claims. Thus, voluntary liquidation is initiated at the instance of members or creditors. The liquidator on completion of liquidation process shall make an application to the National Company Law Tribunal for seeking orders for dissolution of the corporate person in voluntary liquidation in terms of Section 59(7). The Tribunal having been satisfied passes orders for dissolution as per Section 59(8). A copy of such order is forwarded within 14 days to Registrar of Companies by the Tribunal.

Answer 6(b)

Attention of the Resolution Professional can be drawn to the provisions of Section 234 and 235 of the Insolvency and Bankruptcy Code, 2016 (IBC). Section 234 envisages the Central Government to notify to recover properties of the Corporate Debtor or any such Guarantor situated in a country, with which there is a reciprocal arrangement subject to specified conditions. Section 235 of the IBC enables the Resolution Professional to apply to Adjudicating Authority in such situations. On filing such application, the authority after being satisfied as to the evidences produced, may issue a letter of request to the Court or other authority of the other country for a suitable action.

The current cross border insolvency framework in India is depend on entering in to Bilateral agreements with other countries. In the instant case, exists bilateral relation with the foreign nation and Resolution Professional may avail the provisions of Section 235.

Answer 6(c)

For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned, which will be called the liquidation estate in relation to the corporate debtor. The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors. All the assets of the Corporate Debtor in liquidation are to be taken into custody by the Liquidator on receipt of the order of appointment by National Company Law Tribunal.

Section 36 of the Insolvency and Bankruptcy Code, 2016 (IBC) elaborates the term Liquidation Estate. Accordingly, all such assets that are either in the possession of the Corporate Debtor at its own premises or any other place including encumbered assets,

intangible assets such as intellectual property rights, securities, insurance policies, any assets that have been recovered through proceedings for avoidable transactions and assets that have been relinquished by the secured creditors.

Liquidation Estate does not include assets held in trust for third parties, bailment contracts, and amounts due to workmen towards provident fund, pension or gratuity, leased assets, such other assets as prescribed. Liquidator needs to distinguish between assets that could be included and excluded for taking into custody.

Answer 6A(i)

Section 274 of the Companies Act, 2013 lays down that in case, where the Tribunal is satisfied that on a petition that the winding up of the company is to be made out, it may by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order which can be allowed a further period of thirty days in a situation of contingency or special circumstances.

In case of failure, the company and its directors may forfeit the right to file any objection and also liable for punishment of imprisonment and fine. For any prosecution for default by directors or officers of the Company, the complaint may be filed before the special court in terms of Section 274(5). As such, filing of Statement of Affairs by the directors is an absolute necessity in case the Company has objection points.

Answer 6A(ii)

Normally, liquidator has to dispose the assets of the Corporate Debtor through auction in a transparent manner and hence many liquidators resort to online auctions.

However, Regulation 32 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 enables the liquidator to dispose either on standalone basis, Slump sale, as set of assets or in parcels, as a going concern either the Corporate Debtor or its businesses.

Further, Regulation 33 of Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 prescribes the mode of Sale as specified in Schedule I to the Regulations. It need not be sale by auction but a private sale could be done in cases of perishable assets, assets value may deteriorate requiring immediate sale, assets may fetch more than reserve price in case of failed Auction or permission is obtained from the adjudicating authority.

Answer 6A(iii)

At first instance the Resolution Plan is approved by the Committee of Creditors with a Voting share of not less than sixty six percent as per Section 30 (4) of the Insolvency & Bankruptcy Code, 2016 (IBC). After approval, the Resolution Applicant shall make an Application to the Adjudicating Authority in terms of Section 30 (6) of IBC.

According to Section 31 of the IBC, If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under section 30(4) meets the requirements as referred to in section 30(2), it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in

force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

However, the Adjudicating Authority shall, before passing an order for approval of resolution plan, satisfy that the resolution plan has provisions for its effective implementation.

Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements, it may, by an order, reject the resolution plan.

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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) *Rahul and Rachna are husband and wife. They incorporated a Private Ltd. Company in the name of RR Industruies Pvt. Ltd. The paid-up capital of the company was ? 50 lakh, which they have contributed equally. The shares were held by them in their individual capacity. The Company's Board of directors consists of 10 directors. Rachna was designated as Managing Director (MD) and Chief Executive Officer (CEO) of the company and other directors were her father, mother, two brothers. The Rahul's father and mother were also occupying the position of director. Rest of the three directors were friends of Rachna. Rahul's status was only as a shareholder of the company, since he was engaged in the employment, occupying a good position there.*

After some time, due to some domestic issues, Rahul and Rachna got judicially separated (divorced). After getting divorced from Rahul, Rachna expelled the father and mother of Rahul from occupying the position of directorship from the company and inducted her relatives as directors. Rachna now started playing with the funds of the company for her personal use.

Now Rahul want to file an application with the National Company Law Tribunal (NCLT) for relief against oppression and mis-management prevailing in the company.

Whether Rahul can do so ? Quote the relevant provisions of the Companies Act, 2013. *(5 marks)*

(b) *Arun, an individual shareholder of M/s. BEL Ltd. is holding 2% of the voting rights. He made a complaint before the Adjudicating Authority that investments proposed to be made by the Company are without any adequate security and prayed for injunction to restrain the company from making such investments.*

Whether Arun will succeed in his attempt ? Explain with decided case law. *(5 marks)*

(c) *The Registrar of Companies, Mumbai sent an order to M/s. LRM Container Services Ltd. that it would conduct investigation relating to the financial matters of the Company for the Financial Year commencing from 2016 to 2019. The management of the company after internal discussions terminated its Finance Head and three more employees of the Finance and Accounts Dept. as they were In-charge of the Dept. of the Company during the said period.*

Comment on the action of the management of the company quoting the relevant provisions of the Companies Act, 2013. *(5 marks)*

(d) Raghunath was the General Manager (Forex) in a company named as Impex Overseas Ltd., during the period 1st January, 2018 to 31st March, 2020. He retired from the services of the company at the close of business on 31st March, 2020. Later on, it was revealed that during his tenure, the company has contravened some of the provisions of the Foreign Exchange Management, Act, 1999 (FEMA) and this happened due to non-compliance on the part of Raghunath.

The Company asked Raghunath to pay the penalty, but he denied and told that he is now, not in the service of the company and the company itself, is liable to pay the penalty. Advise the company about the legal provisions under FEMA in this regard. *(5 marks)*

Answer 1(a)

Section 241(1)(a) of the Companies Act, 2013 provides that any member of a company who complains that—

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

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the National Company Law Tribunal(NCLT), provided such member has a right to apply under section 244, for an order under Chapter XVI.

Section 244(1) of Companies Act, 2013 provides that the following members of a company shall have the right to apply under section 241, namely: –

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

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

In the given case, there are only two shareholders in the company holding the entire share capital in equal proportions and one shareholder i.e., Rahul want to file an application with the Tribunal. Here, Rahul is having one half of share capital (i.e., more than one tenth of the issued share capital as mentioned in section 244(1), hence he can very well file the application under Sec 241 of the Act with NCLT for seeking relief against the oppression and mismanagement in the company.

Answer 1(b)

Where the directors representing the majority of shareholders perform an illegal or ultra vires act, an individual shareholder has right to bring an action. The majority of shareholders have no right to confirm an illegal or ultra vires transaction of the company. In such case a shareholder has the right to restrain the company by an order or injunction of the court from carrying out an ultra vires act.

In *Bharat Insurance Ltd.* vs. *Kanhya Lal*, A.I.R. 1935 Lah. 792, the plaintiff was a shareholder of the Bharat Insurance Company. One of the objects of the company was "To advance money at interest on the security of land, houses, machinery and other property situated in India..."

The plaintiff complained that "several investments had been made by the company directors on behalf of the company without adequate security and contrary to the provisions of the memorandum and therefore, prayed for perpetual injunction to restrain it from making such investments".

The Court observed: "In all matters of internal management, the company itself is the best judge of its affairs and the Court should not interfere. But application of assets of a company is not a matter of internal management. As directors are acting ultra vires in the application of the funds of the company, a single member can maintain a suit"

Hence in the given case, Arun will succeed in his attempt.

Answer 1(c)

Section 218 of the Companies Act, 2013 provides protection to employees during investigation. During the course of any investigation and during pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company, such company, other body corporate or person shall not discharge or suspend or punish any employee without approval of the National Company Law Tribunal(NCLT).

This protection is available to employees during the investigation of the affairs or other matters of or relating to a company, other body corporate or person or of the membership, ownership of shares or debentures.

Following action are not permitted without approval of the NCLT:

(a) To discharge or suspend any employee;

(b) To punish any employee, whether by dismissal, removal, reduction in rank or otherwise; or

(c) To change the terms of employment to his disadvantage.

If the applicant does not receive within thirty days of making of application, the approval of the NCLT, only then applicant concerned may proceed to take against the employee the action proposed

If the applicant is dissatisfied with the objection raised by the NCLT, it may within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal. The decision of the Appellate Tribunal on such appeal shall be final and binding on the Parties concerned.

Hence, in the given case, management should not out rightly terminated the concerned head of the Finance Department and its employees. The company should have sought the prior approval of NCLT. The company may establish an internal enquiry committee, peruse such report, and the recommendation of the committee should be perused before NCLT for punishment or termination as per the involvement of the staff in the matter.

Hence, the action of management of LRM Container Services Ltd, is in violation of section 218 of the Companies Act, 2013.

Answer 1(d)

According to Section 42(1) of Foreign Exchange Management Act, 1999, where a person committing a contravention of any of the provisions of the said Act or of any rule, direction or order made there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention.

According to Section 42(2), where a contravention of any of the provisions of the said Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Thus, as per the above provisions, since Raghunath was in charge of forex Division at the time of occurrence of the contravention and it happened on account of his negligence, hence, he is also liable along with the company to be proceeded against and punished under the provisions of FEMA.

Accordingly, Raghunath shall be liable to pay the penalty leviable/levied on him by the appropriate authority under FEMA. However, as regards the penalty leviable/levied separately on the Company, the same cannot be recovered from Raghunath, except in accordance with the terms of his employment agreement, because Section 42 clearly holds the company as well separately liable for penalty in case of contravention.

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

Question 2

(a) During the course of Secretarial Audit, it was found that in one of the case of transmission of shares, the company took 4 months from the date of its lodgment. Discuss the provisions relating to the transmission of shares under the Companies Act, 2013.

Is there any change in the penal provision in the recent amendment made by the Companies (Amendment) Act, 2020 ? (4 marks)

(b) *Class Action suit can be filed by the Members only; this right is not available to the depositors of the company. Do you agree with the statement ? Discuss the relevant provisions under the Companies Act, 2013.* *(4 marks)*

(c) *A company, engaged in the real estate business, intend to come out with Initial Public Offer (IPO), filed a prospectus with the SEBI for its approval. In the prospectus, the company mentioned that it is having land bank in Mumbai and Pune and the proceeds of the IPO shall be utilised for the construction of residential flats at such places. Ashok invested in the IPO and also got the allotment. Later on it was discovered that company was not having any land bank either at Mumbai or at Pune. At the time of the issue of the prospectus, it had only entered into an agreement with the owner of the land for its redevelopment and thereafter construction of residential flats on lease basis. However, due to some disputes, the land owner refused to company to use the land for the aforesaid purposes.*

What recourse is available to Ashok, who had invested in the IPO ? *(4 marks)*

(d) *As per the provisions of the Indian Penal Code, 1860, "the offences relating to cheating, intention to deceive is to be proved and mere negligence is not cheating". Explain the main ingredients of the offence "cheating" with relevant case laws/ Judicial pronouncements.* *(4 marks)*

OR (Alternate question to Q. No. 2)

Question 2A

(i) *Explain the meaning of Exit Checks and Clawbacks.* *(4 marks)*

(ii) *The Bombay High Court ordered the CBI to conduct an investigation against a Public Sector Undertaking (PSU) Chief of the State Government who is involved in a corruption case. The State Government objected to the same as the matter is not referred to it besides no consent is obtained from the State Government in this matter. Under these circumstances, whether Central Bureau of Investigation (CBI) can proceed on its investigation ? Quote the relevant provisions of the law.*

(4 marks)

(iii) *Unique Auto Products Ltd., produces electric bikes, which is a new product. Its average per km. expenses in running the bike comes under rupee One. Due to its fuel economy and low cost, it enjoys almost the monopolistic situation in the relevant market. The cost of such bike to the company comes to ₹60,000 and the company is able to sale it in the market for ₹99,000 per bike. Looking to the announcement of the Govt of India to promote the electric bikes, some more producers entered in the market. However, due to weak demand of the electric bikes produced by other companies, the cost to these company was around ? 80,000 per bike.*

In order to enjoy the monopolistic situation, the Unique Auto Products Ltd., reduced the prices of its bike even below its cost price, so that it may remove the other new comers in the market, in a short run.

The other manufactures, made complaint before the Competition Commission of India (CCI) about the predatory price technique used by the Unique Auto Products Ltd. Comment, whether CCI can take action in such a situation ? *(4 marks)*

(iv) What is Disgorgement ? Who has the power to order disgorgement and under which circumstances ? *(4 marks)*

Answer 2(a)

Section 56(4)(c) of the Companies Act, 2013, provides that every company shall, unless prohibited by any provision of law or any order of court, tribunal or other authority, deliver the certificate of all securities transmitted, within a period of one month from the date of intimation of transmission.

The Companies (Amendment) Act, 2020 has made changes in the penal provisions contained in Section 56(6) in case of default, and the said amendment came into effect from 21st December, 2020. The amended section 56(6) of the companies Act, 2013 provides that where any default is made in complying with the provisions of sub-section (1) to (5) of section 56, the company and every officer of the company who is in default shall be liable to penalty of Rs. 50000/-.

Prior to this amendment, the provision was, where any default is made in complying with the provisions of sub-sections (1) to (5) of section 56 of the Act, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

Answer 2(b)

No, we do not agree with the statement provided in the question. In fact, the class action suit can be filed by the members as well as by the depositors. The relevant provisions are as under:

Class Action Suit by Members under Section 245(3)(i) of Companies Act, 2013

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

Class Action Suit by depositors under Section 245(3)(ii) of Companies Act, 2013

- The number of depositors required to file class action are more than 100 in number or more than such percentage of the total number of depositors as may be prescribed, whichever is less, or any depositor or depositors to whom the

company owes such percentage of total deposits of the company as may be prescribed.

- Thresholds are specified under Rule 84 of National Company Law Tribunal Rules, 2016 (amended on May 08, 2019) relating to class action suits under Section 245. The limits are as under:

In case of a company having a share capital, the requisite number of member or members to file said application shall be:

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

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

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

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

The requisite number of depositor or depositors to file said application shall be:

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

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

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

Answer 2(c)

Since, Ashok is the original allottee and he had relied on the information given in the prospectus, and invested in the Initial Publice Offer (IPO), he may initiate legal action against the company and its directors.

Section 37 of the Companies Act, 2013 provides that a suit may be filed or any other action may be taken under section 34 of the said Act(Criminal Liability for Mis-statements in Prospectus) or section 35 of the said Act (Civil Liability for Mis-statements in Prospectus) or section 36 of the said Act (Punishment for Fraudulently Inducing Persons to Invest Money) by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Section 34 of the Companies Act, 2013 provides for criminal liability for mis-statement in prospectus. According to this section, where a prospectus issued, circulated or distributed under chapter III of said Act, includes any statement which is untrue or misleading in from or context in which it is included or where any inclusion or omission or any matter is likely to mislead, every person who authorises the issue of such prospectus shall be liable for punishment for fraud under section 447 of the said Act.

Section 35 of Companies Act, 2013 provides civil liability for mis-statements in a prospectus. According to this section, where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who-

(a) Is a director of the company at the time of the issue of the prospectus;

(b) Has authorised himself to be named and is named in the prospectus as a director

of the company, or has agree to become such director, either immediately or after an interval of time;

(c) Is a promoter of the company;

(d) Has authorised the issue of the prospectus ; and

(e) Is an expert referred to in sub-section(5) of section 26,

Shall, without prejudice to any punishment to which any person may be liable under section 36 of the said Act, be liable to pay compensation to every person who has sustained such loss or damages.

Section 36 of Companies Act, 2013 provides for the punishment for fraudulently inducing persons to invest money. According to said section, any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading or deliberately conceals any material facts to induce another person to enter into or to offer to enter into-

(a) Any agreement for or with a view to acquiring disposing of subscribing for or underwriting securities; or

(b) Any agreement, the purpose of the pretended purpose of which is to secure a profit to any of the parties from the yield or securities or by reference to fluctuations in the value of securities; or

(c) Any agreement for or with a view to obtained credit facilities from any or financial institutions,

Shall be liable for action under section 447(Punishment for Fraud) of the said Act.

Ashok may initiate legal action against the company and its directors.

Answer 2(d)

Sections 415 to 420 of Indian Penal Code, 1860 deals with the offence of cheating. In most of the offences relating to property the accused merely get possession of thing in question, but in case of cheating, he obtains possession as well as the property in it.

Section 415 provides that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". A dishonest concealment of facts is a deception within the meaning of this section.

The main ingredients of cheating are as under:

1. Deception of any person.
2. (a) Fraudulently or dishonestly inducing that person:
    (i) to deliver any property to any person; or
    (ii) to consent that any person shall retain any property; or

(b) Intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

The Supreme Court in *Iridium India Telecom Ltd.* v. *Motorola Incorporated and Ors., (2005) 2 sec 14*5, has held that deception is necessary ingredient under both parts of section. Complainant must prove that inducement has been caused by deception exercised by the accused. It was held that non-disclosure of relevant information would also be treated a misrepresentation of facts leading to deception.

In *T. R. Arya* v. *State of Punjab, 1987 CrLJ 222*, it was held that negligencein duty without any dishonest intention cannot amount to cheating. A bank employee when on comparison of signature of drawer passes a cheque there may be negligence resulting in loss to bank, but it cannot be held to be cheating.

Answer 2A(i)

Exit interviews, particularly when employees are performing and are remunerated well, can raise red flags about possible involvement in fraud. Somewhere there are likely to be some answers which do not add up. The organization can then investigate.

Clawback provisions in employment agreements; which enable the company to recover incentive and additional compensation paid to executives are an effective deterrent tool, since executive compensation tends to be largely performance linked. Clawback provisions would provide for recovery of such compensation (usually other than the base salary) in case of fraudulent misrepresentation or misstatements.

The biggest fraud prevention mechanisms are, in reality growth oriented companies which have appropriate recognition and remuneration mechanisms and thus, a high employee morale. A positive community environment is difficult to quit, and even more difficult to ditch.

Answer 2A(ii)

The Central Bureau of Investigation (CBI) is an organization established under the Delhi Special Police Establishment Act, 1946 (DSPE Act). According to Section 2 of DSPE Act, CBI can suo-moto take up investigation of offences notified in section 3 only in the Union Territories.

Its basic jurisdiction is for Delhi and other Union Territories. However, in practice it can investigate matters all over India on request or by extension of jurisdiction under Section 5 of the said Act.

Taking up investigation by CBI in the boundaries of a State requires prior consent of that State, except within the extended areas under Sec 5, as per Section 6 of the DSPE Act.

The Central Government can authorize CBI to investigate such a crime in a State but only with the consent of the concerned State Government.

The High Courts and the Supreme Court have the jurisdiction to order a CBI investigation into an offence alleged to have been committed in a state without the state's consent, according to a five-judge constitutional bench of the Supreme Court in 2010.

The court clarified this is an extraordinary power which must be exercised sparingly, cautiously and only in exceptional situations.

Accordingly, CBI can proceed on its investigation, as directed by the Bombay High Court in above mentioned case, against PSU Chief of the State Government involved in corruption.

Answer 2A(iii)

Section 19 of the Competition Act, 2002, deals with the inquiry into certain agreements and dominant position of enterprises.

Section 19(1) provides that the Competition Commission of India (CCI) may inquire into any alleged contravention of the provisions contained in section 3(1) or 4(1) of the Acteither on its own motion or on -

(a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association: or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

Section 4 of the Competition Act, 2002 states that-

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position under section 4(1), if an enterprise or a group-

(a) directly or indirectly, imposes unfair or discriminatory

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service

Explanation (b) to Section 4(2) of the act further states that 'predatory price' means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, or production of goods or provision of services, with a view to reduce competition or eliminate the competitors.

In the given case, the Unique Auto Products, after entering the new entities in the market decided to sale the bikes below its cost price in order to remove the new comers. This act comes under the predatory price. Hence, the new entities can approach the CCI for granting relief from the abusing the dominance by the Unique Auto Products Ltd.

Hence,Competition Commission of India may take necessary action under Competition Act, 2002.

Answer 2A(iv)

Section 212(14A) and Section 224(5) of the Companies Act, 2013 provides that, in case of a fraud, where any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner,, the Central Government may file

an application before the National Company Law Tribunal(NCLT) for appropriate orders with regard to disgorgement of such assets, property, or cash, as the case may be, and also for holding directors, key managerial personnel, officers or other person personally liable without any limitation of liability. Section 212 deals with Investigation into Affairs of Company by Serious Fraud Investigation Office and section 224 is related Actions to be Taken in Pursuance of Inspector's Report.

Disgorgement is the act of giving up something such as the profits obtained by illegal or unethical acts on demand or by legal compulsion. Court can order wrongdoers to pay back to prevent unjust enrichment. Disgorgement is a civil remedy and not a punishment or punitive civil action. The purpose of such a remedy, as in securities cases, is to deprive the wrongdoer of his or her ill-gotten gains and to deter violations of the law.

NCLT may make order of disgorgement in the circumstances mentioned under above mentioned provisions.

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

Question 3

(a) PQR Ltd. failed to file return of allotment against the 16 lakh shares allotted by the Board of directors at its meeting held on 20th April, 2016 and got order for compounding of offence on 10th June, 2018. The company again failed to file return of allotment against the 11 lakh shares allotted by the Board of directors at its meeting held on 4th March, 2019. What options are available to the company in respect of this default ? (4 marks)

(b) SEBI issued an order against the directors of the Shyam and Company Ltd., a listed entity, against their failure to comply with the some of the provisions of the SEBI (LODR) Regulations, 2015 and levied penalty for the same.

However, the directors of the company are of the opinion the penalty levied by the SEBI for non-compliance of the provisions are not applicable to the company since these provisions came into effect after the amendment in the SEBI (LODR) Regulations, 2015 and company had complied with the old provisions, which were applicable on the company at the prevailing time.

Advise the company the legal recourse available to it, quoting the relevant provisions of the law.

(c) Under the Prevention of Money Laundering Act, 2002, the Adjudicating Authority assumes the powers of a civil court under the Code of Civil Procedure, 1908 while trying a suit relating to certain matters. Under what circumstances, the adjudicating authority can do so ? (4 marks)

(d) Explain what offences are cognizable and non-bailable under the Prevention of Money Laundering Act, 2002. (4 marks)

OR (Alternate question to Q. No. 3)

Question 3A

(i) What do you mean by 'Adjudicating' under the Companies Act, 2013 ? What factors Adjudicating Officer shall consider while adjudging quantum of penalty ?

(ii) Explain the meaning of Mediation and Conciliation. What is the difference between these two terms ?

(iii) What do you mean by compounding of offences ? Which offences can be compounded under the Companies Act, 2013 and which cannot ?

(iv) What is the procedure for compounding of contraventions under Foreign Exchange Management Act, 1999 ? (4 marks each)

Answer 3(a)

Interval between two similar offences for compounding under section 441of the Companies Act, 2013

Sec 441(2) of the Companies Act, 2013 expressly provides that if any offence which was committed by company or the officers was compounded under section 441 of the Act, and an offence similar to what was compounded earlier is committed again by a company or its officers within a period of three years from the date on which the earlier offence was compounded, then the provisions of section 441 will not be applicable and the company and the officers concerned will not be eligible for compounding again.

In other words, similar offence can be compounded only once in three yearsHence, in the given case, the company cannot go for compounding for non-filing of return of allotment. However, there is no such restriction imposed under section 454 on adjudicating a penalty by the adjudicating officer. The 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 this Act; 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.

According to section 460(b) of Companies Act, 2013, where any document required to be filed with the Registrar of Companies (ROC) under any provision of the Companies Act, 2013 is not filed within the time specified therein, the Central Government may, for reasons to be recorded in writing, condone the delay.

So, the option of adjudication and condonation of delay is available to the company.

Answer 3(b)

The recourse available to the company is to make an appeal before the Securities Appellate Tribunal (SAT).

Section 15T of the Securities Exchange Board of India Act, 1992 provides that any person aggrieved,—

(a) by an order of the SEBI made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or

(b) by an order made by an adjudicating officer under this Act or, (c) by an order of the Insurance Regulatory and Development Authority or the Pension Fund

Regulatory and Development Authority, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

According to section 15T(3) of the SEBI Act, 1992, every appeal under section 15T(1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the SEBI or the Adjudicating Officer or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed :

. It has been provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Section 15T(4) of the Act provides that on receipt of an appeal under section 15T(1), the SAT may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

Section 15T(5) of the Act provides that the SAT shall send a copy of every order made by it to the SEBI, or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be the parties to the appeal and to the concerned Adjudicating Officer.

Section 15T(6) provides that the appeal filed before the SAT under 15T(1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

Accordingly, Shyam and Company Ltd may prefer an appeal against the impugned order, before the Securities Appellate Tribunal.

Answer 3(c)

Section 11 of the Prevention of Money Laundering Act, 2002 provides that-

(1) The Adjudicating Authority shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company,and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) All the persons so summoned shall be bound to attend in person or through authorized agents, as the Adjudicating Authority may direct, and shall be bound

to state the truth upon any subject respecting which they are examined or make statements,and produce such documents as may be required.

(3) Every proceeding under section 11 shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code.

The adjudicating authority may assume the power of a civil court in under the Code of Civil Procedure, 1908 in accordance with above provisions.

Answer 3(d)

Explanation to section 45 of the Prevention of Money Laundering Act, 2002(PMLA) provides that for the removal of doubts, it is clarified that the expression "Offences to be cognizable and non-bailable" shall mean and shall be deemed to have always meant that all offences under PMLA shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973, and accordingly the officers authorised under PMLA are empowered to arrest an accused without warrant, subject to the fulfillment of conditions under section 19 of PMLA and subject to the conditions enshrined under this section.

Answer 3A(i)

The word “Adjudicating” has not been defined in the Companies Act, 2013.

“Adjudication” the legal process by which an arbiter or judge reviews evidence and argumentation, including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved..

Adjudication of Penalty under Companies Act, 2013 means the official imposing of penalty as prescribed under the respective sections of Companies Act, 2013 on the Company and its officers by the designated officer of Ministry of Corporate Affairs.

Under Section 454 of the Companies Act, 2013, the Central Government has appointed the Registrar of Companies / Regional Directors as the adjudicating officers for adjudging penalty under the provisions of this Act.

As per Ramanathan's Law Lexicon

“Adjudication” is the determination of matters in dispute by the decision of a competent court, arbitration of the determination of such matters by the decision of arbitrators, whose decision may not be binding until confirmed by a higher Court or assented to by the parties.

Factors determining the adjudging quantum of penalty are as under:

As per Rule 3(12) of the Companies (Adjudication of Penalties) Rules, 2014,

While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:

(a) size of the company;

(b) nature of business carried on by the company;

(c) injury to public interest;

(d) nature of the default;

(e) repetition of the default;

(f) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and

(g) the amount of loss caused to an investor or group of investors or creditors as a result of the default.

It has been provided that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Companies Act, 2013.

As per Rule 3(13) of the Companies (Adjudication of Penalties) Rules, 2014, in case a fixed sum of penalty is provided for default of a provision, the adjudicating officer shall impose that fixed sum, in case of any default therein.

Therefore, there is a boundary within which the adjudicating officer has to operate which is confined to only adjudging the quantum of penalty. He cannot wander into the area of ascertaining the merits and demerits of the offence or whether there is a violation of the provisions of the Companies Act, 2013 at all in the capacity of an adjudicating officer.

Answer 3A(ii)

Mediation

The term "mediation" has been defined under black law dictionary as "an act of a third person who interferes between two contending parties with a view to reconcile them or persuade them to adjust or settle their dispute".

Conciliation

The term "Conciliation" has been defined under black law dictionary as "The process of adjusting or settling disputes in a friendly manner through extra judicial mean".

Difference between Mediation and Conciliation

Mediation	*Conciliation*
Mediation is a structured process. The Mediator assists the disputants to reach a negotiable settlement. The Process results in signed agreement which decides the future behaviour of the parties. Further, the decision of the mediator is called “settlement”.	Conciliator brings the disputants to agreement through negotiation. Further, the Conciliator is appointed only after the dispute has arisen. The decision of the Conciliator is called “award”.
In mediation, the mediator does not suggest the manner of settlement to the parties. Any settlement arrived at using either process is voluntary. No settlement can be imposed by the mediator or conciliator.	The conciliation process is similar to mediation. But the conciliator suggests terms for settlement on evaluation of the issues discussed by the parties.

Answer 3A(iii)

Compounding is not defined in Companies Act, 2013 or Foreign Exchange Management Act, 1999 or SEBI laws. As per the Black's Law Dictionary, to "Compound" means "to settle a matter by a money payment, in lieu of other liability." As per this definition Compounding is akin to a Settlement Mechanism, a settlement by paying the penalty in lieu of facing the prosecution for the offence committed.

By looking into the provisions of the Corporate Laws which contain provision for compounding, it will be noted that compounding is an admission of guilt either voluntarily or on receipt of notice of default or initiation of prosecution. The defaulters agree to pay penalty which may be ordered by the Compounding authority to be paid.

Types of Compounding

To compound an offence, it is necessary to know the type of offence. Offence on a topic of compounding can be of two types:

(1) Compoundable offence; and

(2) Non-compoundable offence.

If the offence is compoundable, the same can be compounded as per the procedure prescribed and it is not possible to compound a non- compoundable offence.

As per Section 441 of the Companies Act, 2013:

Compoundable offence

Any offence punishable under that Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only or imprisonment and also with fine may be compounded. Thus, if the offence is punishable with fine only or imprisonment or fine or with fine alone can be compounded.

Non-compoundable offence

Any offence punishable under this Act (whether committed by a company or any officer thereof) being an offence punishable with imprisonment only or imprisonment and also with fine cannot be compounded.

Any offence otherwise compoundable cannot also be compounded if the investigation against such company has been initiated or is pending under this Act.

An offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section. If the offence is not similar, this restriction to compound will not apply. It may be noted that any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence and is eligible to be compounded.

Answer 3A(iv)

Central Government has notified the Foreign Exchange (Compounding Proceedings) Rules 2000 for the purpose of compounding of offences under section 15 of the Foreign

Exchange Management Act, 1999.It contains the detailed guidelines and procedure for compounding of offences under Foreign Exchange Management Act, 1999.

The broader process prescribed for compounding of offences under FEMA is as follows:

(1) Application is to be made to the appropriate compounding authority as per format given in the Foreign Exchange(Compounding Proceedings) Rules, 2000.

(2) Every application for compounding any contravention under this rule shall be made in Form to the along with a fee of Rs. 5000/- by Demand Draft in favour of compounding authority.

(3) The Compounding Authority may call for any information, record or any other documents relevant to the compounding proceedings.

(4) For the purpose of adjudging the quantum of amount on payment of which the the contravention shall be compounded, compounding fee, the Compounding Authority shall consider the guidance note provided for the purpose in the amended Rules.

(5) The Compounding Authority shall pass an order of compounding after affording an opportunity of being heard to all the concerned as expeditiously as possible and not later than 180 days from the date of application.. If the Enforcement Directorate is of the view that the proceeding initiated before it relates to a serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation, the Compounding Authority shall not proceed with the matter and shall remit the case to the appropriate Adjudicating Authority for adjudicating contravention under section 13 of FEMA. Further, the cases attracting the provisions under section 3(a) or those attracting special provisions under section 37(A) of the FEMA, 1999 - relating to assets held outside India in contravention of section 4, shall also not be eligible for compounding by the Reserve Bank.

Question 4

(a) Explain the powers of Enforcement Directorate to compound the contraventions under the provisions of Foreign Exchange Management Act, 1999. (4 marks)

(b) Discuss the General Liability Insurance Vs Professional Liability Insurance. What are the businesses and individuals benefitted by subscribing to a professional indemnity insurance policy ? (4 marks)

(c) Crisis management often requires decisions to be made within a short time frame, and often after an event has already taken place. In light of this statement, explain the meaning of Crisis Management and elaborate the (i) Crisis of Malevolence and (ii) Crisis of Organizational Misdeeds. (4 marks)

(d) Section 2(29) of the Companies Act, 2013 defines and declares what ''court'' means. For different purposes, different courts are the relevant courts. Elaborate this statement. (4 marks)

Answer 4(a)

If any Person contravenes provisions of Section 3(a) of Foreign Exchange Management Act, 1999.

(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.

Answer 4(b)

General Liability Insurance, like its name suggests, covers business from a few "general" lawsuits that any business could face. In a nutshell, it kicks in when a third party (i.e., anyone who doesn't work for a company) sues business over.

a) Bodily injuries they incurred on commercial premises.

b) Damage caused to their property.

c) Advertising injuries (e.g., slander, libel, misappropriation, and copyright infringement).

General Liability Insurance pays for legal expenses (lawyers' fees, court costs, and settlements or judgments). Again, any small-business owner, no matter their industry or the size of their business, can face these claims. That's why many consider this policy to be the keystone of a business protection plan.

Professional Liability Insurance (aka "Errors and Omissions Insurance" or "Malpractice Insurance") also lives up to its moniker. Its coverage focuses specifically on the lawsuits that stem from professional services.

Though this policy is especially important for service providers to carry, most small-business owners can benefit from its coverage. That's because Professional Liability Insurance shields from third-party lawsuits alleging.

a) Providing negligent professional services.

b) Failing to uphold contractual promises.

c) Providing incomplete or shoddy work.

d) Making mistakes or omissions.

These torts are among the most expensive any business owner can face. Professionals don't have to be at fault to be sued, either. All it takes is one unhappy client to name such business in a lawsuit to try to recoup the "losses" they incurred because of work. The Professional Liability policy ensures that the professional won't be on the hook for legal expenses, regardless of whether the claim holds water.

Answer 4(c)

Yes, it is true to say that Crisis management often requires decisions to be made within a short time frame, and often after an event has already taken place. Crisis management is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. Due to the unpredictability of global events, organizations must be able to cope with the potential for drastic changes in the way they conduct business.

Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization or its stakeholders. The study of crisis management originated with large- scale industrial and environmental disasters in the 1980s. It is considered to be the most important process in public relations.

In order to have a business continuity plan in the aftermath of a crisis, most firms start by conducting risk analysis on their operations. Risk analysis is the process of identifying any adverse events that may occur and the likelihood of the events occurring. By running simulations and random variables with risk models,, such as scenario tables, a risk manager can assess the probability of a risk occurring in the future, the best- and worst-case outcome of any negative event, and the damage that the company would incur should the risk actually happen..

Once the risk manager knows what's/he is dealing with in terms of possible risks and the impact to the firm, a plan is developed by the crisis management team to contain any emergency if and when it becomes a reality.

(i) Crisis of Malevolence

(a) Organizations face crisis of malevolence when some notorious employees take the help of criminal activities and extreme steps to fulfill their demands.

(b) Acts like kidnapping company's officials, false rumours all lead to crisis of malevolence.

(ii) Crisis of Organizational Misdeeds

(a) Crises of organizational misdeeds arise when management takes certain decisions knowing the harmful consequences of the same towards the stakeholders and external parties.

(b) In such cases, superiors ignore the after effects of strategies and implement the same for quick results. Crisis of organizational misdeeds can be further classified into following three types:

(i) *Crisis of Skewed Management Values* : Crisis of Skewed Management Values arises when management supports short term growth and ignores broader issues.

(ii) *Crisis of Deception* : Organizations face crisis of deception when management purposely tampers data and information. Management makes fake promises and wrong commitments to the customers. Communicating wrong information about the organization and products lead to crisis of deception.

(iii) *Crisis of Management Misconduct* : Organizations face crisis of management misconduct when management indulges in deliberate acts of illegality like accepting bribes, passing on confidential information and so on.

Answer 4(d)

Yes, it is true to say that Section 2(29) of the Companies Act, 2013 defines and declares what "court" means. For different purposes, different courts are the relevant courts.

High Court

Section 2(29)(i) states that Court means the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district court or district courts subordinate to that High Court under sub-clause (ii).

District court

Section 2(29)(ii) states Court means the district court, in cases where the Central Government has, by notification, empowered any district court to exercise all or any of the jurisdictions conferred upon the High Court, within the scope of its jurisdiction in respect of a company whose registered office is situate in the district.

Further, with specific reference to offences under the Companies Act, 2013, section 2(29) states as under:

- Section 2(29)(iii) states that Court means the Court of Session having jurisdiction to try any offence under this Act or under any previous company law;
- Section 2(29)(iv) states that Court means the Special Court established under section 435;
- Section 2(29) (v) states that Court means any Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law;

Thus, for the purpose of trying offences under the Companies Act, 2013 or as the case may be for offences arising under the Companies Act, 1956, there are only three courts - viz., the Court of Session; the Special Court if established or designated by Central Government under section 435 of the Companies Act, 2013 and the Court of the Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under the Companies Act, 2013 or any previous company law.

Question 5

(a) You are the Company Secretary of Nice Entertainment Ltd, a listed entity, engaged in the business of producing and trading of video games. The Board of directors

have asked you to prepare and submit before the Board a note on Directors and Officers Liability Insurance (D and O Insurance). Prepare a brief note for perusal before the Board narrating the key features of the D and O Insurance Policy.

(b) Explain the circumstances under which persons may be detained for period longer than three months without obtaining the opinion of Advisory Board as prescribed in the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. (8 marks each)

Answer 5(a)

MEMORANDUM BEFORE THE BOARD OF DIRECTORS

Subject: Directors and Officers Liability Insurance policy (D & O Insurance Policy)

This note is being perused before the Board of Directors highlight some key features of the Directors and Officers Liability Insurance Policy

What is Directors and Officers Liability Insurance?

Directors and Officers Liability Insurance (D&O) covers the cost of legal defense of directors, even in their individual capacity, when the company is unable to defend them. The D&O cover applies to former, present, and future members of the board of directors or any employee performing a managerial role.

Usually, the policy covers the following:

- Management Liability l Management indemnification
- Non-Profit Outside Directorship Liability
- Estates and legal representatives of incapacitated or deceased insured individuals covered
- Spousal Liability extension
- Cover for the creation or acquisition of new Subsidiary companies (effective from the date of acquisition or creation)

The D&O policy offers the following coverage:

- It covers any loss or damage that the company may incur because of actions mistakenly taken in the individual capacity as directors and officers under the Memorandum and Articles of Association.
- It includes loss or damage arising from claims made against directors and officers for any wrongful act done in their official capacity l It covers legal expenditure incurred with the written consent of the insurance companies arising out of the prosecution of any director or officer at any investigation, enquiry or other proceedings by the authority empowered to do so.
- It covers expenses incurred by the company's shareholders in pursuance of a claim against a director/ officer for which the insurance company is legally obliged to pay, as per the court's direction.
- It provides indemnity to the legal heirs or legal representatives of the director/ officer if the director or officer becomes insolvent.

SEBI (LODR) Regulations, 2015

The Regulations 25(10) of the SEBI (LODR) Regulations, 2015 provide that with effect from October 1, 2018, the top 500 listed entities by market capitalization calculated as on March 31 of the preceding financial year, shall undertake Directors and Officers insurance ('D and O insurance') for all their independent directors of such quantum and for such risks as may be determined by its board of directors.

Need of D&O Insurance Policy

It is essential for every company to have a director & office insurance (D&O), in order to have some peace of mind. If you haven't purchased the policy, we've put together the top reasons to buy a D&O insurance.

1. *Personal assets of directors are at risk* : If a director has been accused of breaching duties, their personal assets are at risk in case they don't have any D&O insurance.
2. *Defending a legal action is an expensive affair* : The legal costs and expenses in litigations involving directors are usually complex and costly.
3. *Investors can file a case against you* : It may sound unlikely, but things can go downward. If investors believe that they have incurred losses due to mismanagement of the company, they could approach the court to seek compensation. For instance, if any action of a director results in a drop-in share price, which leads to loss to shareholders and investors, then there is a high possibility that they may bring a class-action lawsuit against the company and directors.
4. *Employees can sue directors* : It is not only shareholders who can file a case against the directors as even employees reach the court to challenge the decision of the directors. It is a hard reality that in today's corporate world, there has been a rise in the number of cases filed by employees, related to sexual harassment or wrongful dismissal. For example, in 2016, a sacked software engineer won case against HCL Tech. The court called his dismissal unlawful and asked the company to reinstate the petitioner with continuity of service and paid full salary along with other benefits.
5. *Customers can take legal actions* : In some cases, customers also reach the court against misrepresentations made in the advertisement materials and deceptive trade practices.
6. *Enquiry initiated by regulatory authorities* : Regulatory bodies, like SEBI, Revenue Department, etc.; can initiate enquiry against directors.
7. *In case of bankruptcy or insolvency* : If faced with bankruptcy, creditors can pursue legal action against directors if they think that they have not acted in their best interest.
8. *Helps in attracting/retaining talent* : Not having a comprehensive D&O may discourage talented employees from joining the company as they know will not be guarded against any legal case if arise in future.
9. *D&O claims are not covered under any other policy* : Most of the people believe that D&O claims are also covered under other liability insurance plans like professional indemnity

Looking to benefits attached to the D&O Insurance Policy and the need of the hour to protect our worthy directors and key officers, the Board of Directors is requested to consider the buying of D&O Insurance Policy.

Submitted for perusal approval Please.

Sd/-

Company Secretary

Answer 5(b)

Section 9 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 deals with such matter. This section provides that-

(1) Notwithstanding anything contained in this Act, any person (including a foreigner) in respect of whom an order of detention is made under this Act at any time before the 31st day of July, 1999, may be detained without obtaining, in accordance with the provisions of sub-clause (a) of clause (4) of article 22 of the Constitution, the opinion of an Advisory Board for a period longer than three months but not exceeding six months from the date of his detention, where the order of detention has been made against such person with a view to preventing him from smuggling goods or abetting the smuggling of goods or engaging in transporting or concealing or keeping smuggled goods and the Central Government or any officer of the Central Government, not below the rank of an Additional Secretary to that Government, specially empowered for the purposes of this section by that Government, is satisfied that such person -

(a) smuggles or is likely to smuggle goods into, out of or through any area highly vulnerable to smuggling; or

(b) abets or is likely to abet the smuggling of goods into, out of or through any area highly vulnerable to smuggling; or

(c) engages or is likely to engage in transporting or concealing or keeping smuggled goods in any area highly vulnerable to smuggling, and makes a declaration to that effect within five weeks of the detention of such person

Explanation 1

In this sub-section, "area highly vulnerable to smuggling" means–

(i) The Indian customs waters contiguous to The States of Goa, Gujarat, Karnataka, Kerala, Maharashtra and Tamil Nadu and the Union territories of Daman and Diu and Pondicherry;

(ii) The inland area fifty kilometres in width from the coast of India falling within the territories of the States of Goa, Gujarat, Karnataka, Kerala, Maharashtra and Tamil Nadu and the Union territories of Daman and Diu and Pondicherry;

(iii) the inland area fifty kilometres in width from the India-Pakistan border in the States of Gujarat, Jammu and Kashmir, Punjab and Rajasthan;

(iv) the customs airport of Delhi; and

(v) such further or other Indian customs waters, or inland area not exceeding one hundred kilometres in width from any other coast or border of India, or such other customs station, as the Central Government may, having regard to the vulnerability of such waters, area or customs station, as the case may be, to smuggling, by notification in the Official Gazette, specify in this behalf.

Explanation 2

For the purposes of Explanation 1, "customs airport" and "customs station" shall have the same meaning as in clauses (10) and (13) of section 2 of the Customs Act, 1962 (52 of 1962), respectively.

(2) In the case of any person detained under a detention order to which the provisions of sub-section (1) apply, section 8 shall have effect subject to the following modifications, namely:–

(i) in clause (b), for the words "shall, within five weeks", the words "shall, within four months and two weeks" shall be substituted;

(ii) in clause (c),– (1) for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted; (2) for the words "eleven weeks", the words "five months and three weeks" shall be substituted;

(iii) in clause (f), for the words "for the detention", at both the places where they occur, the words "for the continued detention" shall be substituted.

A person may be detained for longer period than three months in accordance with the above mentioned provisions.

Question 6

(a) Zuber, who is a joint venture partner in a company, had surreptitiously used information acquired in the course of pursuing the joint venture in order to acquire property adjacent to the joint venture site for his own use. The price paid for such deal by the Zuber was from the genuine and disclosed sources of income.

Whether Zuber can be held liable for acquiring such property adjacent to the company ? Explain with the help of decided case law. (4 marks)

(b) One of the plant site location of PS Steel Ltd., is lying idle for some time and the company have no plan to use that site. Earlier on this site, the company was planning to set up a mini steel plant, but due to its non-connectivity with the rail/ road, the economic viability was not feasible, and it was decided by the Board of directors to dispose of such land. However, the sale of land requires the approval of the shareholders.

The Board of director of the PS Steel Ltd., authorized S. Kumar, the Real Estate Agent, to sale the land, knowing the fact that it requires the approval of the shareholders. The land was sold by S. Kumar much below the market price of the land prevailing in that area. The amount was deposited in the company's bank account which was subsequently withdrawn by the directors through cheques. Whether the act of directors are justified ? Comment on the basis of decided case law. (4 marks)

(c) Explain the role and functions of Public Prosecutors and the Company Prosecutors. (4 marks)

(d) Explain the Summons Case and Warrant Case. Whether court have power to convert Summons Case into Warrant Case and vice-versa ? (4 marks)

Answer 6(a)

Yes, Zuber can be held liable since it amounts to breach of fiduciary duty.

The facts of the case is similar to those of the case decide in the matter of *Say-Dee* v. *Farah Constructions Pty Ltd [2005] NSWCA 309*, In this case, a joint venture partner had surreptitiously used information acquired in the course of pursuing the joint venture in order to acquire property adjacent to the joint venture site for its own advantage. This conduct was in breach of fiduciary duty. In calculating the profits which the party in breach had made, the Court made an allowance in its favour for its entrepreneurial skill and efforts in taking advantage of and turning to profit the business opportunity it had appropriated to itself. This allowance was deemed appropriate despite the surreptitious way in which the errant fiduciary had behaved.

Answer 6(b)

In *J.K. Paliwal and Shri B.K. Paliwal* v. *Paliwal Steel Ltd. and Others*. The Principal Bench of the Company Law Board had found that a property of the company had been sold without any authorization by the Board of Directors or shareholders to sell have not been complied with and in addition the consideration was also inadequate. Further, it was observed that the transaction was sham and the sale consideration was deposited in the bank and was withdrawn on the same day. On these facts, in the above case, the Company Law Board held that the respondents have breached their fiduciary duties as directors.

The Company Law Board held that on the role of Directors, the law is well settled. In some respects, Directors resemble trustees. Equity prohibits a trustee from making any profit by his management, directly or indirectly. It is objectionable to use such power simply or solely for the benefit of directors or merely for an extraneous purpose like maintenance or acquisition of control over the affairs of the company. Directors are required to act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company. The fiduciary capacity within which Directors have to act enjoins upon them a duty to act on behalf of a company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have duty to make foil and honest disclosure to the shareholders regarding all important matters relating to the company.

In this case without getting the approval of the shareholders as required under the provisions of the Companies Act, the directors sold the properties of the company and shared the proceeds among themselves. This act is ultra vires and they are bound to return the proceeds to the company failing which they can be penalised under the provisions of the Companies Act.

Answer 6(c)

Public Prosecutor

Criminal cases are prosecuted by the State representing the public and the society.

Public prosecutors carry out the prosecution in such cases. The role of a prosecutor lies in placing before the court all the material and evidences, whether it helps the accused or otherwise.

Section 24(7) of the Code of Criminal Procedure, 1973(CrPc) states that a person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor only if he has been in practice as an advocate for not less than 7 years. Section 24(8) of CrPC states that the Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than 10 years as a Special Public Prosecutor.

The Office of the Public Prosecutor is a very responsible Office and he has an important role to play in the Criminal Justice Delivery System. The Public Prosecutors are to be independent, unbiased and impartial while conducting prosecution. The Public Prosecutor is not a Police Prosecutor in the sense that he is not a mouthpiece of the Police, for he is not an Advocate engaged by the State to conduct its prosecutions. Therefore, the Prosecutors cannot be allowed to be controlled either administratively or in any other mode by the Police Department". It was farther held that "as held repeatedly by the Hon'ble Supreme Court and various High Courts that there should be complete separation of Public Prosecutors, Additional Public Prosecutors, Special Public Prosecutors and Assistant Public Prosecutors from the control or supervision in any form by the Police as otherwise, such control or supervision would only invade into the independence of the institution of Prosecutors, which would only bring harm to the Criminal Justice Delivery System.

Company Prosecutor

Under the newly inserted section 443 of the Companies Act, 2013it has been provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may appoint generally, or for any case, or in any case, or for any specified class of cases in any local area, one or more persons, as company prosecutors for the conduct of prosecutions arising out of this act and the persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Code.

Answer 6(d)

Summons-case

As per section 2 (w) of the Code of Criminal Procedure, 1972, 'summons-case' means a case relating to an offence, and not being a warrant case. This implies that summons cases are cases relating to offences provided they are not warrant cases.

Warrant case

As per section 2 (x) of the Code of Criminal Procedure, 1973, 'Warrant- case' means a case relating to an offence punishable with death, imprisonment for a term exceeding two years. In other words, if the minimum punishment prescribed by any substantive law for an offence is an imprisonment for a term exceeding two years, the offence will be dealt with as a warrant case.

The basis of the classification is the seriousness of the offence to which the case

relates. A warrant case relates to a serious offence while a summons case relates to a comparatively less serious offence. It is for the same reason that the trial-procedure prescribed for a warrant case is very elaborate when compared to that prescribed for a summons case.

As per the Code of Criminal Procedure, 1973 in a summons case a summons is to be issued to the accused in the first instance and in a warrant case a warrant of arrest is normally to be issued for the arrest of the accused. The Code of Criminal Procedure, 1973 gives discretion to the Judicial Officer to depart from this general rule if the circumstances so demand in a particular case.

Power of Court to convert Summons Cases into Warrant Cases

As per Section 259 of the Code of Criminal Procedure, 1973 during the course of trial of a summons case relating to an offence punishable with imprisonment for a term exceeding six months, if the Magistrate opines that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant cases, the Magistrate may do so and proceed accordingly. In case the Magistrate forms an opinion that the case before him ought to be tried as a warrant case, he would commence the proceedings afresh.

Warrant case, being a serious offence, not to be converted as Summons Case.

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