

Chapter 1 - Company Formation & Conversion

Question 1:

Minu Limited was incorporated by furnishing false information. As per the Companies Act, 2013, state the power of the Tribunal in this regard.

[Dec-2017, MTP June-2018, Dec-19]

Answer:

According to section 7(7) of the Companies Act, 2013: Incorporation by furnishing of incorrect information: Without prejudice to the provisions of sub-section (6), where a company has got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants,—

- (a) pass such orders, as it may think fit, for regulation of the management of the company including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or
- (b) Direct that liability of the members shall be unlimited; or
- (c) Direct removal of the name of the company from the register of companies; or
- (d) Pass an order for the winding up of the company; or
- (e) Pass such other orders as it may deem fit.

Provided that before making any order under this sub-section.—

- (i) the company shall be given a reasonable opportunity of being heard in the matter; and
- (ii) The Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

Question 2:

Robertson Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is doing online business through telemarketing in India. Whether it will be treated as a Foreign Company under the Companies Act, 2013? Explain.

[Dec-17, MTP June-2018]

Answer:

According to section 2(42) of the Companies Act, 2013, "foreign company" means a company or body corporate incorporated outside India which -

- (a) has a place of business in India whether by itself or through an agent, physically through electronic mode; and
- (b) conducts any business activity in India in any other manner.

According to the Companies (Registration of Foreign Companies) Rules, 2014: "electronic mode" means carrying out electronically based, whether main server installed in India or not, including, but not limited to -

- (a) Business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits subscriptions in securities in India or from citizens of India;
- (c) financial settlements, web based marketing, advisory and transactional services data base services and products, supply chain management;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) All related data communication services whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

Looking to the above description, it can be said that being involved in business activity through telemarketing, Robertson Ltd., will be treated as foreign company.

Question 3:

- (i) Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited.
- (ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company.
- Examine with reference to the provisions of the Companies Act, 2013 whether MN Limited and PQ Limited can be considered as Government Company.

[Dec-17]

Answer:

According to section 2(45) of the Companies Act, 2013, "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

- (i) The Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited. In this case, MN Limited is not a Government company because the holding of the Central Government and Government of Maharashtra is 40% which is less than the 51% prescribed under the definition of Government Company. The holding of the government company in MN Limited of 20% cannot be taken into account while counting the prescribed limit of 51%.
- (ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company

In this case, PQ Limited is a government company as the definition of Government Company clearly specifies that a Government Company includes a company which is a subsidiary company of a Government company. Whether the subsidiary should be a wholly owned subsidiary or not is not clearly mentioned under the definition of the Government company under section 2(45).

Question 4:

The common seal is a seal used by the Corporation as the symbol of its incorporation and also a statutory requirement for a company. Comment

[Dec-18]

Answer:

The common seal acts as the official signature of the company. Prior to the companies (amendment) Act, 2015, the common seal is a seal used by corporation as the symbol of its incorporation and also a statutory requirement for a company. As a departure from this concept, the companies (amendment) Act, 2015 has deleted the requirement of having common seal compulsorily.

After this Amendment, in case a company does not have a common seal, the Authorisation shall be made by two directors or by a director and a company secretary, wherever the company has appointed a company secretary.

Question 5:

A company incorporated outside India having shareholders who are all Indian citizens. Examine and state whether the above company can be considered as "Foreign Company" under the Companies Act, 2013.

[Dec-18]

Answer:

A company incorporated outside India, will not be deemed to be a foreign company even though all the shareholders are Indian citizens, unless it has a place of business in India.

Question 6:

The Secretary of a company issued a share certificate to 'Prem' under the company's seal with his own signature and the signature of a Director forged by him. 'Prem' borrowed money from 'Amar' on the strength of this certificate. 'Amar' wanted to realise the security and requested the company to register him as a holder of the shares. Explain whether 'Amar' will succeed in getting the share registered in his name. Explain with the help of the doctrine of 'Indoor management' in brief.

[Dec-18]

Answer:

The doctrine of Indoor Management is laid down in the Royal British Bank vs. Turquand (1956) 6E&B 327 case in which the directors of RBB (Royal British Bank) gave a bond to one T (Turquand) without the required resolution being passed. The Articles empowered the directors to issue such bonds under the authority of a proper resolution. In fact no such resolution was passed. It was decided in the case that notwithstanding the non-passing of the required resolution, T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed. Thus, the persons dealing with the company are entitled to assume that the acts of the directors or the officers of the company are validly performed, if they are within the scope of their apparent authority.

However, this doctrine is not applicable where the person dealing with the company has notice of irregularity or when an instrument purporting to be enacted on behalf of the company is a forgery.

In the instant problem, the doctrine of indoor management will not apply as the certificate is a forgery which does not give a good title to Prem and thereby to Amar. Hence, Amar will not succeed in getting the share registered in his name.

Question 7:

X & Co. is a LLP firm wants to convert their firm into a corporate entity as per the provisions contained in Sec. 366 of the Companies Act, 2013 and the Companies (Authorized to Registered) Rules, 2014. They have conducted a meeting for conversion of and to decide the name of the company summoned for the purpose of registering the LLP. In the meeting 1/4th partners want for the conversion into a Pvt. Ltd company, and $\frac{3}{4}$ th partners want for a new corporate entity with the word "Public Limited". There are 6 partners in the firm. Recommend an appropriate decision and steps to be taken by the firm.

[MTP Dec-23]

Answer:

An LLP can be converted into a Pvt. Ltd. Company as per the provisions contained in section 366 of the companies act 2013 and the companies (Authorised to Registered) Rules, 2014.

This steps can be initiated in 2 ways as enumerated below:

- (i) Incorporation of a new corporate entity.
- (ii) Conversion of existing entity (e.g. LLP/Partnership Firm) into a Company There are various requirements which need to be satisfied for converting an LLP into a private Ltd.
 1. An LLP must have at least 7 partners (however as per Companies Amendment Act, 2017 LLP with 2 partners can be converted into company).
 2. Approval from all partners is required.
 3. Advertisement in newspaper is to be done in a local and national newspaper.
 4. No objection certificate (NOC) is required from ROC where such LLP is registered.

However, if an LLP crosses an annual turnover of Rs.40 lakhs or a capital contribution of more than Rs.25 lakhs, the compliance requirements for LLP and Private Limited Company become almost similar, making the private limited company a better choice. Further that a company with less than 7 members shall register as a private company, whether the majority is for a new corporate entity with the word "Public Limited".

The following steps to be taken by the firm:

1. Hold a meeting of the partners to decide the name of the company. To authorize partners to take all steps necessary and to execute all papers, deeds, documents etc. pursuant to register of the LLP as a Company. The major advantages are that the business can be run under the same name as that of the LLP except that in addition to the name of LLP the words Limited or private limited has to be added. The accepted name by the authority will be valid for 60 days.
2. After obtaining name approval, apply for Digital Signature Certificate (DSC) and Director Identification Number (DIN) for the member of the LLP who will be the directors of the Private Limited Company after conversion. In case of non-applicability of DIN, the applicant needs to provide address proof, identity proof and photographs along with the application. Therefore, obtain DIN directly through filing incorporation form.
3. Further, Form URC-1 needs to be filed by the applicant; furnish the following list of documents along with the form URC-1.

- Provide details such as name, address and shares held by the members along with the member's list.
 - Provide details such as Name, Address, DIN, passport number along with an expiry date of all the directors of the Private Limited Company.
 - An affidavit is required from the first directors of the Private Limited Company stating that they are not banned from being a director.
 - Also, file all mandatory documents with the Registrar of Companies for the registration of the company.
 - Note: The details provided by the company should be complete, correct and accurate to the best of their knowledge.
 - Copy of Limited Liability Partnership agreement with a list containing the name and address of the partners of LLP and a certified copy of registration which is duly verified by at least two designated partners of LPP is required.
 - The statement with the details of the nominal share capital of the firm and the number of shares separated, the number of shares taken and the amount remitted for each share and the name of the firm with the word private limited to be provided.
 - The no-objection certificate from all the creditors has to be provided.
 - Duly certified accounts statement of the company by the auditor, which should not be less than six days from the date of application and the copy of the newspaper advertisement is required.
4. Draft the Memorandum of Association (MOA) and Articles of Association (AOA) and submit to the Registrar of Companies. After the approval of the company name, the Register of Companies sanctions the form URC-1.

Question 8:

Briefly describe the steps for formation of an OPC in the light of the provision of the Companies Act, 2013.

[MTP June-23 Set-1]

Answer:

Formation of One Person Company (OPC)

- (i) The memorandum of OPC shall indicate the name of the other person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.
- (ii) The other person whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be filed with Registrar of companies at the time of incorporation.
- (iii) Such other person may be given the right to withdraw his consent
- (iv) The member of OPC may at any time change the name of such other person by giving notice to the company and the company shall intimate the same to the Registrar
- (v) Any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- (vi) No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company.
- (vii) No minor shall become member or nominee of the OPC or can hold share with beneficial interest. Such Company cannot be incorporated or converted into a company under Section 8 of the Act. Though it may be converted to private or public companies in certain cases. The procedure of conversion is given in the Rules 6 & 7 of the Companies (Incorporation) Rules, 2014.
- (viii) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of anybody corporate.
- (ix) OPC cannot convert voluntarily into any kind of company unless 2 years have expired from the date of incorporation, except where the paid up share capital is increased beyond Rs.50 lakh or its average annual turnover during the relevant period exceeds Rs.2 crore.
- (x) If One Person Company or any officer of such company contravenes the provisions, they shall be punishable with fine which may extend to Rs.10,000 and with a further fine which may extend to Rs. 1,000 for every day after the first during which such contravention continues.

Rule 3 of the Companies (Incorporation) Rules 2014 says, only a natural person who is an Indian citizen whether resident in India or otherwise:-

- (i) shall be eligible to incorporate a One Person Company;

- (ii) Shall be a nominee for the sole member of a One Person Company. Where a natural person, being member in One Person Company accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in rule 3(2) within a period of 180 days. Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in rule 3(2) within a period of 180 days.

Question 9:

Explain the doctrine of "Indoor Management". How is it opposite to doctrine of "Constructive Notice"?

[MTP June-23 Set-2]

Answer:

Doctrine of Indoor Management- The rule of Indoor Management is important to persons dealing with a company through its directors or other persons. They are entitled to assume that the acts of the directors or other officers of the company are validly performed, if they are within the scope of their apparent authority. So long as an act is valid under the articles, if done in a particular manner, an outsider dealing with the company is entitled to assume that it has been done in the manner required. The above mentioned doctrine of Indoor Management has limitations of its own. The law will assume that that information which an outsider has reasonable access to and should have known with minimal efforts before dealing, cannot be a basis of indoor management case in his favour.

In consequences of the registration of the memorandum and articles of association of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents. This is because these documents are construed as 'public document' under Section 399 of the Companies Act, 2013. Accordingly, if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into transaction, which is ultra vires to these documents, he must do so at his peril. Where the articles provide that a bill of exchange must be signed by two directors, if the bill is actually signed by one director only the holder thereof cannot claim payment thereon.

Thus, the doctrine of constructive notice and indoor management go hand in hand. On one hand, the doctrine of constructive notice protects the company from the outsiders; on the other hand, the principle of indoor management offers protection to the outsiders while dealing with the affairs of the company.

But, doctrine of constructive notice refers to the idea that everyone involved with a business has knowledge of the company's articles of association. It reduces liability, assuming that because the company's information is public record, it should have been known by everyone entering into the contract. The doctrine of constructive notice protects the company against the claim of third parties while the doctrine of indoor management protects the third parties against the company procedures.

However, the doctrine of constructive notice is not a positive one but a negative one like that of estoppel of which it forms parts. It operates only against the person who has been dealing with the company but not against the company itself. Persons in charge of management cannot be prevented from wrong doing on the pretext that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. Thus, the doctrine is a 'cloud' for the strangers. The doctrine of indoor management has been recognized in the case of Royal British Bank v. Turquand (1856) 6 E&B 327 All ER Rep (435), While an ordinary person dealing with a company is bound to assume that the requisite compliance or delegation of powers to the person dealing on behalf of the company has been made, he need not probe beyond what is ostensible and evident from the actions.

Question 10:

Discuss-Conversion of companies already registered.

[MTP June-2020 Set-1]

Answer:

According to Section 18 of the Companies Act, 2013, a company may convert itself in some other class of company by altering its memorandum and articles of association. Following is the law with respect to the conversion of the companies already registered.

- (a) By alteration of memorandum and articles: A company of any class registered under this Act may convert itself as a company of other class under this Act by alteration of memorandum and articles of the company in accordance with the provisions of this Chapter.
- (b) File an application to the Registrar: Wherever such conversion of companies is required to be done, the company shall file an application to the Registrar, who shall after satisfying himself that the provisions applicable for registration of companies have been complied with, close the former registration of the company.
- (c) Issue a certificate of incorporation: After registering the required documents, issue a certificate of incorporation in the same manner as its first registration.
- (d) No effect on the debts, liabilities etc. incurred before conversion: The registration of a company under this Section shall not affect any debts, liabilities, obligations or contracts incurred or entered into, by or on behalf of the company before conversion and such debts, liabilities, obligations and contracts may be enforced in the manner as if such registration had not been done.

Question 11:

What do you mean by 'Small Company'?

[MTP June-2017, MTP Dec-2017]

Answer:

According to Section 2 (85) of Companies Act, 2013 a "small company" means a company, other than a public company:

Paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees. Or Turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.

Provided that nothing in this clause shall apply to:

- (i) Holding company or a subsidiary company.
- (ii) A company registered under Section 8, or
- (iii) A company or body corporate governed by any special Act.

As per the latest rules prescribed by the Central Government, in case of a small company the paid up share capital shall not exceed Rs.4 crores and turnover shall not exceed Rs.40 crores.

Some of the advantages enjoyed by the small companies are:

- Holding of two board meetings instead of four-one each in the first and second half years and the gap between the two meetings should not be more than 90 days. (section 173(5))
- Not required to give cash flow statements with the financial statements (section 2(40)).

Question 12:

'OPC is enabling entrepreneur(s) carrying on the business in the Sole Proprietor form of business to enter into a corporate framework.' - Discuss

[MTP Dec-2018]

Answer:

This is very true that through One Person Company (OPC) a businessman can enter into a Corporate Framework from the Sole Proprietor form of business. The concept of OPC is new to this era of the corporate world. In very simple sense, In OPC, a single person could constitute a company. The new Companies Act, 2013 has done away with redundant provisions of the previous Companies Act, 1956, and provides for a new entity in the form of OPC, while empowering the Central Government to provide a simpler compliance regime for small companies.

The introduction of OPC in the legal system is a move that would encourage corporatisation of micro-businesses and entrepreneurship. Whereas a Sole Proprietorship firm is also one person business but there are no legal

formalities. A Sole Proprietorship means an entity which is run and owned by one individual and where there is no distinction between the owner and the business.

The Companies Act, 2013 classifies companies on the basis of their number of members into OPC, private company and public company. A private company requires a minimum of two members. In other words, an OPC is a kind of private company having only one member.

As per section 2(62) of the Companies Act, 2013, —One Person Company means a company which has only one person as a member. Section 3(1) (c) of the Companies Act, 2013 lays down that a company may be formed for any lawful purpose by one person. In other words, one person company is a kind of private company. An OPC shall have a minimum of one director. Therefore, an OPC will be registered as a private company with one member and one director. By virtue of section 3(2), an OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company.

Also we can mention that, according to Section 2 (62) of the Companies Act, 2013 One_Person Company means a company which has only one person as a member. A company formed under one person company may be either:

- a) A company limited by shares, or
- b) company limited by guarantee, or
- c) An unlimited company.

OPC is a hybrid of Sole-Proprietor and Company form of business, and has been provided with concessional/relaxed requirements under the act.

Question 13:

What are the documents etc. to be delivered to the Registrar of Companies (MCA) by foreign companies for registration?

[June-17]

Answer:

Documents to be delivered to registrar "by foreign companies [Section 380(1)]. Every foreign company shall, within 30 days of establishment of its place of business in India. Deliver to the Registrar for registration.

- 1) A certified copy of the Charter. Statutes or Memorandum and Articles, of the Company or other instruments constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language.
- 2) The full address of the Registered or Principal Office of the Company.
- 3) A list of the director's and secretary of the Company containing such particulars as may be prescribed. In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules. 2014 provide that the list of directors and secretary or equivalent (by whatever name called) of the Foreign Company shall contain the following Particulars for each of the persons included in such list, namely:
 - (a) Personal name and surname in full.
 - (b) Any former name or names and surname or surnames in full.
 - (c) Father's name or mother's name and spouse's name.
 - (d) Date of birth.
 - (e) Residential address.
 - (f) Nationality.
 - (g) If the present nationality is not the nationality of Origin, his nationality of origin.
 - (h) Passport Number, date of issue and country of issue, (if a person holds more than one passport then details of all passports to be given)
 - (i) Income-tax permanent account number (PAN), if applicable.
 - (j) Occupation, if any.
 - (k) Whether directorship in any other Indian company. (Director Identification Number (DIN), Name Corporate Identity Number (CIN) of the company in case of holding directorship).
 - (l) Other directorship or directorships held by him.
 - (m) membership number (for Secretary only), and
 - (n) E-mail ID.

- 4) The name and address or the names and addresses of one or more persons resident in India authorized to accept, on behalf of the company, service of process and any notices or other documents required to be served on the company.
- 5) The full address of the office of the company in India which is deemed to be its principal place of business in India.
- 6) Particulars of opening and closing of a place of business in India on earlier occasion or occasions.
- 7) Declaration that none of the directors of the company or the authorized representative in India has ever been convicted or debarred from formation of companies and management in India or abroad, and
- 8) Any other information, as may be prescribed.

Question 14:

Delegare Limited incorporated in Singapore desires to establish a place of business at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, state the documents which are required to be furnished on behalf of the company, on the establishment of a place of business at Mumbai.

[Dec-21]

Answer:

Under Section 380 (1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents:

- (i) A certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English Language, a certified translation thereof in the English Language.
- (ii) the full address of the registered or principal office of the company,
- (iii) A list of the directors and the secretary of the company containing such particulars as prescribed under the Companies (Registration of Foreign Companies) Rules, 2014,
- (iv) The name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company
- (v) The full address of the office of the company in India which is deemed to be its principal place of business in India
- (vi) Particulars of opening and closing of a place of business in India on earlier occasion or occasions,
- (vii) Declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad and
- (viii) Any other information as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

Question 15:

The e-forms rolled out by the Ministry of Corporate Affairs (MCA) under the provisions of the Companies Act, 2013 and rules framed thereunder are mandatorily numbered alpha-numeric. Explain this concept.

[June-19]

Answer:

In order to facilitate easy understanding of the e-forms being rolled out under the provisions of Companies Act, 2013 and Rules made thereunder, forms under the Companies Act are mandatorily numbered alpha-numeric. Initial of forms is to be started with alphabet of two or three letters based on the subject of the Chapter, followed by serial number of the form. This will define the nature of the forms and would be easy to recognize.

Chapter 2 - Investment & Loans

Question 1:

The Board of Directors of Stepping Stones Publications Ltd. at a meeting held on 15.01.2014 resolved to borrow a sum of Rs.15 crores from a nationalized bank. Subsequently the said amount was received by the company. One of the Directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:

- (i) Share Capital Rs.5 crores
- (ii) Reserves and Surplus Rs.5 crores
- (iii) Secured Loans Rs.15 crores
- (iv) Unsecured Loans Rs.5 crores

Advise the management of the company.

[Dec-17]

Answer:

According to the provisions of Section 180(1) (c) of the Companies Act, 2013, there are restrictions on the borrowing powers to be exercised by the Board of directors. According to the said section, the borrowings should not exceed the aggregate of the paid up capital and free reserves. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case the proposed borrowing of Rs. 15 crores will exceed the limit mentioned. Thus, the borrowing will be beyond the powers of the Board of directors.

Thus, the management of Stepping Stone Publications Ltd., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1) (c) of the Companies Act, 2013. Then the borrowing will be valid and binding on the company and its members.

Question 2:

ABC Ltd. having a net worth of Rs.80 crores and turnover of Rs.30 crores wants to accept deposits from public other than its members. Referring to the provisions of the Companies Act, 2013, state the conditions and the procedures to be followed by ABC Ltd. for accepting deposits from public other than its members.

[June-18]

Answer:

Acceptance of deposit from public: According to section 76 of the Companies Act, 2013, a public company, having net worth of not less than 100 crore rupees or turnover of not less than 500 crore rupees, can accept deposits from persons other than its members subject to compliance with the requirements provided in subsection (2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe.

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

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

Since, ABC Ltd. has a net worth of Rs.80 crores and turnover of Rs.30 crores, which is less than the prescribed limits, hence, it cannot accept deposit from public other than its members. If the company wants to accept deposits from public other than its members, it has to fulfil the eligibility criteria of net worth or Turnover or both and then the other conditions as stated above.

Question 3:

State the prohibitions on Acceptance of Deposits from Public as specified u/s 73 of the Companies Act
[MTP Dec-20]

Answer:

- a) Under Section 73, provisions as to acceptance of deposits by companies have been considerably modified and made more stringent in the Companies Act, 2013. On and after the commencement of this Act, no company shall invite, accept or renew deposits under this Act from the public except in a manner provided under this Chapter. Provided that nothing in this Sub-Section shall apply to a banking company and non-banking financial company as defined in the Reserve Bank of India Act, 1934 and to such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf.
- b) A company may, subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subject to the fulfilment of the following conditions, namely:
 - (i) Issuance of a circular to its members including therein a statement showing the financial position of the company, the credit rating obtained, the total number of depositors and the amount due towards deposits in respect of any previous deposits accepted by the company and such other particulars in such form and in such manner as may be prescribed.
 - (ii) Filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular.
 - (iii) Depositing such sum which shall not be less than fifteen per cent of the amount of its deposits maturing during a financial year and the financial year next following, and kept in a scheduled bank in a separate bank account to be called as deposit repayment reserve account.
 - (iv) providing such deposit insurance in such manner and to such extent as may be prescribed, certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits, and
 - (v) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company. Provided that in case where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as „unsecured deposits“ and shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits.
- c) Every deposit accepted by a company under Sub-Section (2) shall be repaid with interest in accordance with the terms and conditions of the agreement referred to in that Sub-Section.
- d) Where a company fails to repay the deposit or part thereof or any interest thereon under Sub-section (3) the depositor concerned may apply to the Tribunal for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.
- e) The deposit repayment reserve account referred to in clause (c) of Sub-Section (2) shall not be used by the company for any purpose other than repayment of deposits.

Question 4:

XYZ Ltd is an investment company whose principal business is an acquisition of shares and debentures of other companies. The following figures were derived from the books of XYZ Ltd:

Assets:

Investments in shares and debentures	Rs.95 Lakh
Other Assets	Rs.105 Lakh
Total	Rs.200 Lakh
Income:	
Income from Investment Business	Rs.12 Lakh
Other Income	Rs.18 Lakh
Total	Rs.30 Lakh

- (i) Whether the company is an investment company as per Section 186 and eligible to claim exemption given there under?
- (ii) The Board of Directors of XYZ Ltd, is considering the proposal for making the investment in ABC Ltd. The company has 5 directors on Board and in the Board meeting 4 directors were present, 3 of them gave the consent to the proposal and one director abstained from voting. Comment on the same.

[Dec-22]

Answer:

- (i) As per the explanation given under section 186 of the Companies Act, 2013, an investment company means a company whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment In shares, debentures or other securities constitute not less than fifty per cent of its total assets, or if its income derived from investment business constitutes not less than fifty per cent as a proportion of its gross income.

Facts: In light of the above explanation, the assets of XYZ Ltd. in form of Investment in shares or debentures is less than fifty percent of the total assets of the company and also the income derived from the investment business is less than fifty percent of the total Income of the company. Hence, either of the two conditions need to be satisfied to make an investment company and, in this case, neither of this condition is satisfied. So, XYZ Ltd. cannot be an Investment company for the purpose of Section 186.

- (ii) As per section 186 (5) of the Companies Act, 2013, no investment shall be made or loan or guarantee or security given by the company, unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting is obtained. So, in this case the Board of Directors of XYZ Ltd. while considering the proposal for making the investment in ABC Ltd. has not complied with the provision of section 186(5) of the Companies Act, 2013, where the consent of all the directors present at the meeting is required. The resolution of the board of directors therefore is not valid and has no legal effect.

Chapter 3 - Dividends

Question 1:

Referring to the provisions of the Companies Act, 2013, examine the validity of the following: The Board of Directors of ABC Limited proposes to declare dividend at the rate of 20% to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of this Act.

[Dec-17]

Answer:

Prohibition on declaration of dividend: Section 123(6) of the Companies Act, 2013, specifically provides that a company which fails to comply with the provisions of section 73 (Prohibition of acceptance of deposits from public) and section 74 (Repayment of deposits, etc., accepted before the commencement of this Act) shall not, so long as such failure continues, declare any dividend on its equity shares.

In the given instance, the Board of Directors of ABC Limited proposes to declare dividend at the rate of 20% to the equity shareholders, in spite of the fact that the company has defaulted in repayment of public deposits accepted before the commencement of the Companies Act 2013. So according to the above provision, declaration of dividend by the ABC Limited is not valid.

Question 2

BET Ltd. incurred loss in business up to current quarter of financial year 2017-18. The company has declared dividend at the rate of 11%, 16% and 18% respectively in the immediate preceding three years. In spite of the loss, the Board of Directors of the company have decided to declare interim dividend @ 15% for the current financial year. Examine the decision of BET Ltd. stating the provisions of declaration of interim dividend under the Companies Act, 2013.

[Dec-18]

Answer:

Interim Dividend: According to section 123(3) of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

In the instant case, interim dividend by BET Ltd. shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. $(11+16+18)/3=45/3=15\%$]. Therefore, decision of Board of Directors to declare 15% of the interim dividend for the current financial year is tenable.

Question 3

Simplex Ltd. has a credit balance of 10,00,000 in Securities Premium Reserve. It did not earn profit during the year and thus was unable to declare dividend. Bapi, the accountant of the Company, suggested that Securities Premium Reserve of 10,00,000 may be used for payment of dividend. Comment.

[June-19]

Answer:

According to section 52 of the Companies Act, 2013, where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a "securities premium account" and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

The securities premium account may be applied by the company—

- (a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;
- (b) in writing off the preliminary expenses of the company;
- (c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;
- (d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or
- (e) For the purchase of its own shares or other securities, under section 68. As such dividend cannot be declared.

Question 4:

The Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company's Annual General Meeting. In the meantime, the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investments for the company. As a result, dividend was paid to shareholders after 45 days. Examining the provisions of the Companies Act, 2013, state:

- (i) Whether the act of directors is in violation of the provisions of the Act and also the consequences that shall follow for the above act of directors?
- (ii) What would be your answer in case the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder?

[Dec-19]

Answer:

According to section 124 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

Further, according to section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default is liable for the punishment under the said section.

In the present case, the Board of Directors of XYZ Company Limited at its meeting declared a dividend on its paid-up equity share capital which was later on approved by the company's Annual General Meeting. In the meantime, the directors at another meeting of the Board decided by passing a resolution to divert the total dividend to be paid to shareholders for purchase of investment for the company. As a result, dividend was paid to shareholders after 45 days.

- i. Since, declared dividend has not been paid or claimed within 30 days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.
- ii. The Board of Directors of XYZ Company Limited is in violation of section 127 of the Companies Act 2013 as it failed to pay dividend to shareholders within 30 days due to their decision to divert the total dividend to be paid to shareholders for purchase of investment for the company.

Consequences: The following are the consequences for the violation of above provisions:

- (b) Every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years and shall also be liable for a fine which shall not be less than one thousand rupees for every day during which such default continues.
- (c) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.

If the amount of dividend to a shareholder is adjusted by the company against certain dues to the company from the shareholder, then failure to pay dividend within 30 days shall not be deemed to be an offence under Proviso to section 127 of the Companies Act 2013.

Question 5:

The Board of Directors of Nimbahera Chemicals Limited proposes to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company mentioning the relevant provisions of the Companies Act, 2013.

[June-17 & MTP Dec-2017]

Answer:

The first proviso to 123 (1) of the Companies Act, 2013 provides that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, under the Companies Act, 2013 the amount transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. Therefore the company is free to transfer any part of its profits to reserves as it deems fit.

Question 6:

What is the procedure which has to be followed by the company while transferring unpaid or unclaimed dividend from unpaid dividend account to IEPF.

[MTP June-2020]

Answer:

The following procedure should be followed by the company while transferring unpaid or unclaimed dividend from unpaid dividend account to IEPF:

- (1) Section 124(5) of the Act, provides that any money transferred to the unpaid dividend account of a company which remains unpaid or unclaimed for a period of seven years from the date of such transfer is required to be transferred by the company along with interest accrued, if any, thereon to the Investor Education and Protection Fund (IEPF) established under Section 125.
- (2) The amount shall be remitted into the specified branches of State Bank of India or any other nationalized bank along with challan (in triplicate) within a period of 90 days of such amount becoming due to be credited to the IEPF. The Bank will return two copies duly stamped to the Company as token of having received the amount and the company shall file one such copy of challan to the authority.
- (3) The company shall send a statement of amount credited to Investor Education and Protection Fund in Form DIV 5 to the authority which administer the fund and the authority shall issue a receipt to the company as evidence of such transfer.
- (4) On receipt of this statement, the authority shall enter the details of such receipts in a register maintained by it in respect of each company every year and reconcile the amount.
- (5) The company shall keep a record consisting of names, last known addresses of the persons entitled to receive the same, the amount to which each person is entitled, folio number/ client ID, certificate number, beneficiary details etc. of the persons in respect of whom amount has been remain unpaid or unclaimed for 7 years and transferred to IEPF. Such record shall be maintained for a period of 8 years from the date of such transfer to IEPF and authority shall have the powers to inspect such records.

Question 7:

Discuss punishment for failure to distribute dividends.

[MTP June-2019 & MTP Dec-2019]

Answer:

Punishment for failure to distribute dividends (Section 127)

Section 127 of the Companies Act, 2013 came into force on 12th September, 2013 which provides for punishment for failure to distribute dividend on time. According to this section:

- (a) Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within thirty days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years.
- (b) He shall also be liable for a fine which shall not be less than 1,000 rupees for every day during which such default continues.

- (c) The company shall also be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.
- (d) However, the following are the exceptions under which no offence shall be deemed to have been committed:
1. Where the dividend could not be paid by reason of the operation of any law.
 2. Where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him.
 3. Where there is a dispute regarding the right to receive the dividend.
 4. where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder, or
 5. Where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company. This section shall apply to the Nidhi's company, subject to that where the dividend payable to a member is one hundred rupees or less, it shall be sufficient compliance of the provisions of the section, if the declaration of the dividend is announced in the local language in one local newspaper of wide circulation and announcement of the said declaration is also displayed on the notice board of the Nidhi's for at least three months [Vide Notification no. 465(E) dated 5th June 2015].

Question 8:

WILSON Limited is facing loss in business during the current Financial Year 2015-16. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Examine the applicable provisions of the Companies Act, 2013 and state whether the Board of Directors can do so.

[MTP June-2018]

Answer:

Declaration of Interim Dividend; According to Section 123(3) of the Companies Act, 2013. The Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

In the given case the company is facing loss during the current financial year 2015-16. In the immediate preceding three financial years, the company declared dividend at the rate of 8%, 10% and 12%. As per the above mentioned provision, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. $8+10+12=30/3=10\%$]. Therefore, decision of Board of Directors to declare 12% of the interim dividend for the current financial year is not tenable.

Question 9

Discuss the provisions of Companies Act, 2013 regarding declaration of dividend.

[MTP Dec-2019]

Answer:

Declaration of Dividend [Section 123 of Companies Act, 2013]

(1) No dividend shall be declared or paid by a company for any financial year except -

- (a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of both

Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or

- (b) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the free reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves.

Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.

- (2) For the purposes of clause (a) of sub-section (1), depreciation shall be provided in accordance with the provisions of Schedule II.

- (3) The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

- (4) The amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.

- (5) No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash:

Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company:

Provided further that any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of the dividend.]

Question 10:

XYZ Ltd, having inadequate profits, proposes to declare 10% equity dividend out of its current profits and its free reserves.

Following are the data drawn from the latest audited financial statements as at 31st March 2019:

17,500 Preference shares of Rs.100 each fully paid; (Dividend @9%)

7,00,000 Equity shares of Rs.10 each

General reserves: Rs.21,00,000

Capital Reserves: Rs.3,50,000

Securities Premium: Rs.3,50,000

Surplus (P&L): Rs.63,000 (Excluding current year's profit given below)

Net profit for the year: Rs.3,57,000

Average rate of return for the last three years: 15%

Average rate of dividend during the 3 years: 15%

The company has declared dividends in each of the 3 preceding financial years.

In the light of the information given above, analyzing and applying the provisions of the Companies Act, 2013 and the applicable rules made thereunder, calculate the minimum amount that is required to be withdrawn from free reserve by XYZ Ltd. For declaring 10% dividend to the equity shareholders.

[Dec-22]

Answer:

The minimum amount that the Company is required to withdraw from free reserves is Rs 4,37,500.

Chapter 4 - Accounts & Audit

Question 1:

The Board of Directors of a company have filed a complaint with the Institute of Chartered Accountants of India against their Statutory Auditors for their failing to attend the Annual General Meeting of the Shareholders in which audited accounts were considered. Comment.

[Dec-17]

Answer:

Auditors Attendance at Annual General Meeting: As per Section 146 of the Companies Act, 2013, it is right of the auditor to receive notices, and other communications relating to any general meeting and to be heard at such meeting, relating to the matter of his concern, however, it is duty of the auditor to attend the same or through his authorised representative unless otherwise exempted.

In the instant case, the Board of Directors of a company have filed a complaint with the Institute of Chartered Accountants of India against their statutory auditors for their failing to attend the Annual General Meeting of the Shareholders in which audited accounts were considered.

In view of above discussed provisions of section 146, the statutory auditor of the company should attend the general meetings either through himself or through his authorised representative.

Question 2:

What is the role of the Audit Committee vis-a-vis the statutory auditor when the company wishes to engage them to perform certain engagements not restricted under Section 144?

[Dec-17]

Answer:

According to section 177(5), the Audit Committee is empowered to:

(1) call for the comments of the auditors about:

- (A) internal control systems,
- (B) the scope of audit, including the observations of the auditors, (C) review of financial statement before their submission to the Board,

(2) Discuss any related issues with the internal and statutory auditors and the management of the company. Audit committee should review the annual financial statements and submit the same to the Board with its recommendations, if any.

Question 3:

Interior Pvt. Ltd. is a manufacturing company having turnover of 210 crore but having maximum outstanding loan from public financial institution of Rs.90 crore only during the preceding financial year. You are required to state whether the company is liable for internal audit as per the provisions of the Companies Act, 2013.

[Dec-17]

Answer:

Applicability of Provisions of Internal Audit : As per section 138 of the Companies Act, 2013, read with rule 13 of Companies (Audit and Auditors) Rules, 2014 every private company shall be required to appoint an internal auditor or a firm of internal auditors, having-

- (i) turnover of two hundred crore rupees or more during the preceding financial year; or
- (ii) outstanding loans or borrowings from banks or public financial institutions exceeding one hundred crore rupees or more at any point of time during the preceding financial year;

Thus, either of the condition is required to be satisfied for the applicability of the provision. The internal auditor to be appointed shall either be a chartered accountant whether engaged in practice or not or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the companies auditor may or may not be an employee of the company.

Interior Pvt. Ltd. is having turnover of Rs.210 crore and maximum outstanding loan from public financial institution of Rs.90 crore during the previous financial year, here in the case, the turnover is over and above

two hundred crore rupees i.e. either of the condition in respect of turnover or outstanding loans is satisfied. Therefore the company is liable for internal audit as per section 138 of the Companies Act, 2013.

Question 4:

Mr. Faithful is an auditor of Daga Ltd. While auditing the accounts of the Daga Ltd. for 2016- 2017, he finds manipulation of fund around Rs.2 crore committed by the officers of the company against the Daga Ltd. Examine in the light of the Companies Act, 2013 the way frauds are required to be reported by Mr. Faithful and the duty of the Daga Ltd. in relation to reporting of such frauds.

[Dec-18]

Answer:

Reporting of frauds by auditor and other matters : As per section 139 read with rule 13 of the Companies (Audit and Auditors) Rules, 2014, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officer or employees, the auditor shall report the matter to the Central Government.

The auditor shall report the matter to the Central Government as under:-

- (i) The auditor shall report the matter to the Board or the Audit Committee, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;
- (ii) On receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;
- (iii) In case the auditor fails to get any reply or observations from the board or the Audit Committee within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations ;
- (iv) The report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an email in confirmation of the same;
- (v) The report shall be on the letter-head of the auditor containing postal address, email address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and
- (vi) The report shall be in the form of a statement as specified in Form ADT-4.

Details of each of the fraud reported to the Audit Committee or the Board during the year shall be disclosed in the Board's Report by the company :-

- (a) Nature of Fraud with description;
- (b) Approximate Amount involved ;
- (c) Parties involved, if remedial action not taken; and
- (d) Remedial actions taken.

Question 5:

An Audit Committee of a Public Limited Company constituted under section 177 of the Companies Act, 2013 submitted its report of its recommendation to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyse whether

- (i) The Board is empowered not to accept the recommendations of the Audit Committee.
- (ii) If so, what alternative course of action, would be Board resort to?

[Dec-18]

Answer:

- (i) As per Section 177(2) and (3) of the Companies Act, 2013 an audit committee must be formed within a year of the commencement of the Act or within a year of the incorporation of a company as the

case may be, and will consist of at least 3 directors out of which the independent directors shall constitute the majority.

Under section 177(8) the Board's Report which is laid before a general meeting of the company under section 134(3) where the financial statements of the company are placed before the members, must disclose the composition of the audit committee and also where the Board has not accepted any recommendations of the audit Committee the same shall be disclosed along with the reasons therefor. Therefore, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and with legitimate reasons.

- (ii) If the Board does not accept the recommendations of the Audit Committee, it shall disclose the same in its report under section 134(3) placed before a general meeting of the company.

Question 6:

State briefly the power of Tribunal in case Auditor acted in a Fraudulent Manner.

[Dec-18]

Answer:

Power of Tribunal in case Auditor acted in a Fraudulent Manner. As per sub-section (5) of the section 140 of the Companies Act, 2013, the Tribunal either suomoto or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a fraudulent manner or abetted or colluded in any fraud by or in relation to, the company or its directors or officers, it may, by order, direct the company to change its auditors.

However, if the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

It may be noted that an auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447 of the said Act.

It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to the company or its director or officers.

Question 7:

X Ltd. appointed CA Innocent as a statutory auditor for the company for the current financial year. Further the company offered him the services of actuarial, investment advisory and investment banking which was also approved by the Board of Directors. Comment.

[Jun-18]

Answer:

Services not to be Rendered by the Auditor: Section 144 of the Companies Act, 2013 prescribes certain services not to be rendered by the auditor. An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be, but which shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely:

- (i) accounting and book keeping services;
- (ii) internal audit;
- (iii) design and implementation of any financial information system;
- (iv) actuarial services;
- (v) investment advisory services;
- (vi) investment banking services;
- (vii) rendering of outsourced financial services;
- (viii) management services; and
- (ix) Any other kind of services as may be prescribed.

Further section 141(3)(i) of the Companies Act, 2013 also disqualify a person for appointment as an auditor of a company who is engaged as on the date of appointment in consulting and specialized services as provided in section 144.

In the given case, CA Innocent was appointed as an auditor of X Ltd. He was offered additional services of actuarial, investment advisory and investment banking which was also approved by the Board of Directors. The auditor is advised not to accept the services as these services are specifically notified in the services not to be rendered by him as an auditor as per section 144 of the Act.

Question 8:

M/s RST and Co., a firm of Chartered Accountants, comprising of three partners R, S and T are Statutory Auditors of 50 companies as per details given below:

- (i) Small Companies — 10
- (ii) Private Companies having paid-up share capital of less than Rs.100 Crores — 20
- (iii) Private Companies having paid-up share capital of more than Rs.100 Crores — 15
- (iv) Public Companies — 5 Mr.

R signs the Balance Sheet of 10 Small Companies and 10 Private Companies having paid-up share capital of less than Rs.100 Crores. Mr. S signs the Balance Sheet of 10 Private Companies having paid-up share capital of less than Rs.100 Crores and 5 Private Companies having paid-up share capital of more than Rs.100 Crores. Mr. T signs the Balance Sheet of 10 Private Companies having paid-up share capital of more than Rs.100 Crores and 5 Public Companies.

What is the maximum number of audits that the firm as a whole can accept and what is the maximum number of audits each individual partner can accept?

[June-19]

Answer:

Ceiling on Number of Audit: As per section 141(3)(g) of the Companies Act, 2013, a person shall not be eligible for appointment as an auditor if he is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty Companies other than one person companies, dormant Companies, small Companies and private Companies having paid-up share capital less than Rs. 100 crores.

As per section 141(3)(g), this limit of 20 Company audits is per person. In the case of an audit firm having 3 partners, the overall ceiling will be $3 * 20 = 60$ Company audits. Sometimes, a chartered accountant is a partner in a number of auditing firms. In such a case, all the firms in which he is partner or proprietor will be together entitled to 20 Company audits on his account. Therefore, maximum number of audits that the firm M/S. RST & CO. as a whole can accept is 60 and maximum number of audits each individual partner can accept is 20 i.e. other than one person Companies, dormant Companies, small Companies and private Companies having paid-up share capital less than Rs.100 crores.

In the given case, CAR is holding appointment in 20 Companies, i.e. 10 small companies and 10 private Companies having paid up share capital of less than Rs.100 crores, whereas CA S is having appointment in 15 Companies i.e. 10 private Companies having paid up share capital of less than Rs.100 crore and 5 private Companies having paid up share capital of more than Rs.100 crore and CA T is having appointment in 5 public Companies and 10 private Companies having paid up share capital of more than Rs.100 crores. In aggregate all three partners are having 50 audits.

As per section 141(3)(g) applying the above provisions, an auditor can accept more appointment as auditor = ceiling limit as per section 141(3)(g) - already holding appointments as an auditor.

Hence (1) CA R can accept 20 more audits. (2) CA S can accept $20 - 5 = 15$ more audits and (3) CA T can accept $20 - 15 = 5$ more audits.

As per the facts of the case, M/S. RST & CO. is already having 20 Company audits and they can also accept 40 more Company audits. In addition, they can also conduct the audit of one person Companies, small Companies, dormant Companies and private Companies having paid up share capital less than Rs. 100 crores. As per section 141(3)(g) of the Companies act, 2013, M/S. RST & CO. can accept appointment as an auditor of 40 more Companies as under:

Total number of Audits available to the Firm	= 20 * 3 =	60
Number of Audits already taken by all the partners in their individual capacity	= 0 + 5 + 15 =	20
Remaining number of Audits available to the firm	=	40

Question 9:

Explain how the provisions of the Companies Act, 2013 relating to Audit Committee will help in achieving some of the objectives of Corporate Governance.

[June-19]

Answer:

Companies, particularly public listed companies raise huge amounts of monies from the members of the public and public financial institutions. They owe it to all the vast number of persons and institutions who have reposed their faith in them and have invested in them, that their faith is rewarded both in terms of annual return and in terms of wealth appreciation in real terms. In order to achieve this it is vital to have the highest quality of corporate governance in the conduct of affairs of such companies. Thus, the role of audit committees have been enhanced, their responsibilities made more objective and the accountability, has increased substantially.

In this context the provisions of the Companies Act, 2013 have been framed to improve corporate governance standards and protect the interests of the public and the financial institutions who have invested in companies. These provisions may be highlighted as under:

1. The constitution of Audit Committees under section 177(2) requires the majority representation from independent directors. In other words, persons from within the management cannot form a majority in the Committee, thereby making the functioning of these committees more transparent;
2. The proviso to section 177(2) further requires the majority of members and the chairperson of the Audit Committees to be persons who can understand financial statements. This enables a meaningful exercise of the committee's functions by knowledgeable persons thereby increasing the effectiveness of such committees.
3. Now the terms of reference or the minimum, scope of work of an Audit Committee has been laid down in the act itself under section 177(4). By doing this the vagueness and doubt in the role and functions of such committees has been removed.
4. The Audit Committee shall have authority to investigate, into any matter in relation to the areas of its scope of functioning or referred to it by the Board and for this shall have power to obtain professional advice from external sources and have full, access to information contained in the records of the company. This provides the Audit Committee to function with a high degree of effectiveness by accessing external professional advice and the records of the company.
5. The recommendations of the Audit Committee are binding' on the Board to take appropriate corrective actions. In case the Board of Director refuses to accept the recommendations of the Audit Committee, it bound to disclose the same with the reasons for non-acceptance, in Its report to the members of the company under section. 134 (3) which relates to the Directors Report on Financial Statements to the members of the company.

It will be seen from the above provisions of the Companies Act, 2013 that efforts have been made to make such committees more impartial, effective and accountable which will enable the company to improve the quality of its corporate governance thereby improving accountability and avoiding financial impropriety.

Question 10:

The auditors of a company refuses to make their report on the annual accounts of a company before it is signed on behalf of the Board of Directors. Advise the company.

[June-17]

Answer:

The auditor is right. Theoretically, accounts are presented to auditors only after they are approved by the Board and signed by authorized persons. The auditor is only expected to submit his report on the accounts presented to him for audit after conducting an examination of the necessary documents, analyzing relevant information and test checking accounting records in order to be able to form an opinion of the financial statements presented to him. In practice, the checking of accounts is already completed before accounts are approved by the Board. Auditor informally approves the draft account with notes etc., before the accounts are approved by the Board. However, auditor signs the accounts only after these are approved by Board and signed by persons authorized by Board of the company.

Question 11:

Whether XBRL is mandatory in all the Companies. If not, state the Companies where XBRL is mandatory.

[June-17]

Answer:

XBRL applies to the following companies:

- 1) All Public listed companies in India and their Indian subsidiaries.
- 2) All companies having a paid up Capital of Rs.5 Crores and above.
- 3) All companies having Turnover of INR 100 Crores and above.

Question 12:

What are the advantages of XBRL?

[June-17]

Answer:

Advantages of XBRL

XBRL offers major benefits at all stages of business reporting and analysis. The benefits are seen in automation, cost saving, faster, more reliable and more accurate handling of data, improved analysis and in better quality of information and decision making. XBRL enables producers end-consumers of financial data to switch resources away from costly manual processes; typically involving time consuming comparison, assembly and re-entry of data. They are able to concentrate effort on analysis aided by software which can validate" and 'process XBRL information. XBRL is a flexible language, which is intended to support, all current aspects of reporting in different countries and industries. Its extensible nature means that it can be adjusted to meet particular business requirements, even 'at the individual organization level.

All types of organizations can use XBRL to save costs and improve efficiency in handling business and financial information. Because XBRL is extensible and flexible, it can be adopted to a wide variety of different requirements. All participants in the financial information supply chain can benefit, whether they are preparers, transmitters or users of business data.

XBRL is set to become the standard way of recording, storing and transmitting business financial information. It is capable of use throughout the world, whatever the language of the country concerned, for a wide variety of business purposes. It will deliver major cost savings and gains in efficiency, improving' processes in companies; governments and other organizations.

Question 13:

Describe the classes of companies which are outside the purview of the Company Auditor Report Order (CARO) under the Companies Act 2013.

[MTP Dec-23]

Answer:

MCA has notified now Companies (Auditor's Report) Order, 2020 on 25th February, 2020 which replaced CARO, 2016. It is a new format of reporting of statutory audit having additional reporting requirements decided in consultation with National Financial Reporting Authority (NFRA) CARO, 2020 is applicable for all statutory audits commencing on or after 1.4.2020 corresponding of Financial Year 2019-20.

- The following classes of companies are outside the purview of the CARO 2020:
- (a) Banking company as defined under Section 5 (c) of the Banking Regulation Act, 1949.
 - (b) Insurance company as defined under the Insurance Act 1938.
 - (c) Company licensed to operate under Section 8 of the Companies Act 2013 (companies registered with charitable object).
 - (d) A one-person company (OPC) as defined under clause (62) of Section 2 of Companies Act 2013 (OPC means a company which has only one person as a member).
 - (e) A small company under Section 2 (85) of the Companies Act, 2013.
 - (1) As per sec 2(85) of Companies Act 2013 small company means a company, other than a public company:
 - Paid up share capital of which does not exceed ₹50 lakhs or such higher amount as may be prescribed which shall not be more than ₹10 crores, and
 - Turnover of which as per its last profit and loss account does not exceed ₹2 crores or such higher amount as may be prescribed which shall not be more than ₹100 crores.
 - (2) The following company shall not qualify as a small company:
 - A holding company or a subsidiary company.
 - A company registered under Section 8 of the Act.
 - A company or body corporate governed by any special act.
 - (f) The auditor of following type of Private Companies are not required to comment on the matter prescribed under CARO 2020:
 - (1) A private company which is not holding or subsidiary company of a public company, and
 - (2) A private company having a paid up capital and reserve and surplus not more than ₹1 crore as on the balance sheet date, and
 - (3) A private company which does not have total borrowing exceeding ₹1 crore from any bank and financial institution at any point of time during the financial year, and
 - (4) A private company which does not have total revenue exceeding ₹10 crores during the financial year.

Note: Such revenue means revenue as disclosed in scheduled III to the Companies Act, 2013 and includes revenue from discontinuing operation.

Question 14:

Illustrate the process of appointment of first auditors in the case of Government Company under section 139(7) of "The Companies Act, 2013".

[MTP Dec-23]

Answer:

As per section 139(7), in case of a Government company, the manner of appointment of first auditor shall be as follows:

- i. In the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the CAG within 60 days of registration of the company.
- ii. In case, CAG does not appoint the first auditor within the said period of 60 days, the Board shall appoint the first auditor within next 30 days.
- iii. Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

Question 15:

On recommendation of the Board of Directors of Joy Company Ltd, Mr Rajeev is appointed at the company's annual general meeting held on 01-Oct-2015 as the company's auditor for a period of 10 years. A resolution

to this effect was passed unanimously with no vote against the resolution. Explain the provisions of the companies' act, 2014 relating to the appointment and re-appointment of auditors:

- (i) Examine the validity of the above resolution
- (ii) What shall be your answer in case an audit firm R & Associate is appointed as the company's auditor?

[MTP Dec-2017]

Answer:

Appointment of Auditor [Section 139 of the Companies Act, 2013 and the Companies (Audit and Auditors) Rules, 2014]:

Section 139(2) of the Companies Act, 2013, provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint:

(i) An individual as auditor for more than one term of five consecutive years; and (ii) An audit firm as auditor for more than two terms of five consecutive years.

The Companies (Audit and Auditors) Rules, 2014 has prescribed the following classes of companies for the purposes of section 139(2):

- (1) All unlisted public companies having paid up share capital of rupees 10 crore or more;
- (2) All private limited companies having paid up share capital of rupees 20 crore or more;
- (3) All companies having paid up share capital of below threshold limit mentioned in (1) and (2) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crores or more.

- (i) In the above question, on recommendation of the Board of Directors of Joy Company Limited, Mr. Rajeev is appointed at the company's Annual General Meeting held on 1st October, 2015 as the company's auditor for a period of 10 years. As per the above provisions of the Companies Act, 2014, the appointment of Mr. Rajeev as auditor of the company for 10 years is not valid because an individual shall not be appointed as auditor for more than one term of five consecutive years. The said resolution is not valid.

Note: [As the question does not specify the status of the company whether listed or unlisted; amount of paid up share capital, public borrowings from financial institutions, banks or public deposits are not known; it is assumed that Joy Company Limited is a listed company or within the prescribed classes of companies specified under the above said Rules].

An audit firm can be appointed as an auditor for two terms of five consecutive years. This means that a firm can be appointed for five years and thereafter may be appointed/ reappointed for further five years. The total period for which a firm can be appointed is 10 years. A firm cannot be appointed as auditor for ten years by single resolution. Thus, the appointment of R & Associate as the company's auditor for ten years a single resolution is not valid.

Question 16:

What is Internal Audit and who can be appointed as Internal Auditor?

[MTP Dec-2017, MTP June-2017]

Answer:

There was no provision under the Companies Act, 1956 for Internal Audit. Section 138 of the Companies Act, 2013 came into force from 1st April, 2014 which provides for it. According to Section 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014:

Companies required to appoint Internal Auditor

- i. The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate [As amended vide notification no. G.S.R. 742(E) dated 27th July, 2016], namely:
 1. Every listed company.
 2. every unlisted public company having:
 - a. Paid up share capital of Rs.50 crore or more during the preceding financial year, or
 - b. Turnover of Rs.200 crore or more during the preceding financial year, or
 - c. Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 crores or more at any point of time during the preceding financial year, or

- d. Outstanding deposits of Rs.25 crore or more at any point of time during the preceding financial year, and (c) every private company having:
 - (i) Turnover of Rs.200 crore or more during the preceding financial year, or
 - (ii) Outstanding loans or borrowings from banks or public financial institutions exceeding Rs. 100 crore or more at any point of time during the preceding financial year.
- ii. The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.

Following persons can be appointed as Internal Auditor:

- (a) Internal Auditor shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. Here, the term Chartered Accountant shall mean a Chartered Accountant whether engaged in practice or not.
- (b) The internal auditor may or may not be an employee of the company.

Question 17:

Mr. Kamal, a Chartered Accountant, was appointed by the Board of Directors of Reliable Limited as the First Auditor. The company in General Meeting removed Mr. Kamal without seeking the approval of the Central Government and appointed Mr. Naresh as Auditor in his place. Examine the validity of the appointment with reference to the provisions of Companies Act, 2013.

[MTP June-2018]

Answer:

Removal of first auditor: Section 140(1) stipulates that any auditor appointed under Section 139 may be removed from office before the expiry of his term by passing special resolution in general meeting, after obtaining the previous approval of the Central Government in that behalf.

Provided that before taking any action under subsection (i) of Section 140, the auditor concerned shall be given a reasonable opportunity of being heard. The first auditors appointed by Board of Directors can be removed in accordance with the provision of Section 140(1) of the Companies act, 2013. Hence the removal of the first auditor appointed by the Board without seeking the approval of the Central Government is invalid. The company contravened the provision of the Act.

Question 18:

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to certain conditions. Elucidate those conditions to omnibus approval for related party transactions.

[Dec-2023]

Answer:

Omnibus approval for related party transactions on annual basis (Rule 6A)

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions, namely -

- (1) The Audit Committee shall, after obtaining approval of the Board of Directors, specify the criteria for making the omnibus approval which shall include the following, namely:
 - (a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year
 - (b) The maximum value per transaction which can be allowed.
 - (c) extent and manner of disclosures to be made to the Audit Committee at the time of seeking omnibus approval
 - (d) Review, at such intervals as the Audit Committee may deem fit, related party transaction entered into by the company pursuant to each of the omnibus approval made.
 - (e) Transactions which cannot be subject to the omnibus approval by the Audit Committee.

- (2) The Audit Committee shall consider the following factors while specifying the criteria for making omnibus approval, namely:
- Repetitiveness of the transactions (in past or in future).
 - Justification for the need of omnibus approval.
- (3) The Audit Committee shall satisfy itself on the need for omnibus approval for transactions of repetitive nature and that such approval is in the interest of the company.
- (4) The omnibus approval shall contain or indicate the following:
- Name of the related parties.
 - Nature and duration of the transaction.
 - Maximum amount of transaction that can be entered into.
 - the indicative base price or current contracted price and the formula for variation in the price, if any, and
 - any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:
- Provided that where the need for related party transactions cannot be foreseen and aforesaid details are not available, the audit committee may make omnibus approval for such transactions subject to their value not exceeding 1 crore per transaction.
- (5) Omnibus approval shall be valid for a period not exceeding one financial year and shall require fresh approval after the expiry of such financial year.
- (6) Omnibus approval shall not be made for transactions in respect of selling or disposing of the undertaking of the company.
- (7) Any other conditions as the Audit Committee may deem fit.

It is to be noted that the proviso to the Section 188 provides that a company, whose paid-up capital is more than Rupees Ten crore or is proposed to enter into transactions exceeding such sums as prescribed under Rule 15 of the Companies (Meetings of Board and its Powers) Rules 2014, cannot enter into the transactions, except with the previous approval of shareholders by way of resolution. The transactions, as prescribed under Rule 15(3), which require prior approval of Shareholders.

Question 19:

Explain the particulars required to be contained in Directors Responsibility Statement as per provision of the Companies Act, 2013.

[June-19, MTP June-2017]

Answer:

Contents of Directors Responsibility Statement [Section 134(5) of the Companies Act, 2013]: The Directors' Responsibility Statement referred to in 134(3) (c) shall state that—

- in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
- the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
- the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;
- the directors had prepared the annual accounts on a going concern basis;
- The directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively. Here, the term "internal financial controls" means the policies and procedures adopted by the

company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information; and

6. The directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

Question 20:

Shri R K Chauhan is MD of Dowell Co. Ltd. The audit is going on and there are many issues which the auditor is pointed out which are being clarified but Auditor is not satisfied with the answer. MD wants to know how the auditor can be removed. Auditor also is not comfortable and have threatened to resign. In such situation, MD wants clarification on legal provisions of various situations.

- (i) Can the Auditor be removed? What is the procedure?
- (ii) What happens if the auditor resigns?
- (iii) What happens if the auditor gives a qualified report?

(ICMAI Study Material)

Answer:

The auditor appointed under Section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government by making an application in E-Form ADT-2 and shall be accompanied with the prescribed fees. The application shall be made to the Central Government within 30 days of the resolution passed by the Board. The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution. The auditor concerned shall be given a reasonable opportunity of being heard.

- (i) If an auditor is removed, anew auditor has to be appointed by The Board In casual vacancy, thereafter in the next general meeting.
- (ii) If the Auditor has resigned from the company, he shall file within a period of 30 days from the date of resignation, a statement in the form ADT-3 with the company and the Registrar. The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement.
- (iii) If the auditor gives a qualified report, the same has to be replied by the Directors as annexure to Board Report and shall be circulated/ placed in AGM.

Chapter 5 - Board of Directors & Key Managerial Personnel

Question 1:

B B Ltd. is a listed company and it has been served with notice for appointment of small shareholders' director. Referring to the provisions of the Companies Act, 2013, advise on the following:
What is the tenure of small shareholders' director and whether he can be reappointed as such, after expiry of his tenure? Also state whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders' director.

[Dec-17]

Answer:

The tenure of small shareholder's director shall not exceed a period of 6 consecutive years and on the expiry of the tenure, such director shall not be eligible for re-appointment.

A small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office on a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

Question 2:

X was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2014. Examine in this connection.

(A) Can 'X' be appointed for life as Managing Director?

(B) Is it possible for the company in general meeting to remove 'X' from his office of directorship during his life time?

[Dec-17]

Answer:

(a) Under section 196(2) of the Companies Act, 2013 lays down that no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No concession or exception is allowed by the Act to private companies.

Hence, 'X' cannot be appointed as Managing Director for life in a private company.

(b) Section 169(1) of the Companies Act, 2013 empowers the company to remove a director, by ordinary resolution before the expiry of his period of office after giving him an opportunity of being heard. This section applies to both public and private companies. It applies to all directors except a director appointed by the Tribunal under section 242 of the Act. The above provision applies to the Managing Director also as he is a director of the company and the member of its Board of Directors. Hence, it is possible for the company in general meeting to remove 'X' before the expiry of his term of office by an ordinary resolution.

Question 3:

Mr. Balu is a CEO in a public company. State whether the limits on managerial remuneration under section 197 of the Companies Act, 2013 and schedule V apply to Mr. Balu.

[Dec-18]

Answer:

Section 197 applies with regard to remuneration of directors including MD/WTD and Manager. Schedule V provides conditions with regard to appointment and remuneration of MD/WTD and Manager. Therefore, the provisions related to the managerial remuneration are not applicable on all KMP's i.e. to CEO, CFO or CS but they are applicable only to MD/WTD and Manager. So, Section 197 & Schedule V, shall not apply to Mr. Financer.

Question 4:

Mr. X is a Whole Time Director (WTD) in a Super Ltd. He is also Whole Time Director (WTD) in its subsidiary company. Discuss the validity of Mr. X as WTD in its subsidiary company.

[Dec-18]

Answer:

As per section 203(2) of the Companies Act, 2013, every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.

A whole-time key managerial personnel shall not hold office in more than one company at the same time except in its subsidiary company [Section 203(3)]. So accordingly, Mr. X can validly hold the position of Whole time Director in the subsidiary of Super Ltd.

Question 5:

Comment with reference to the provisions of the Companies Act, 2013 in respect of the following:-

Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited, for an independent director, as an alternate director.

On the request of bank providing financial assistance, the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director.

Articles of Association of the Company do not confer upon the Board of Director any such power. Further, there is no agreement between the company and the bank for any such nomination.

[Dec-18]

Answer:

According to first proviso to section 161(2) of the Companies Act, 2013, no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.

In the present case, Mr. P who is not qualified to be appointed as an independent director is appointed by the Board of Directors of XYZ Company Limited; for an independent director, as an alternate director. Thus, the said appointment is not valid.

According to section 161(3) of the Companies Act, 2013, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company, subject to the articles of a company.

In the present case, on the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the company do not confer upon the Board of Directors any such power and further there is no agreement between the company and the bank. Thus, the appointment of Mr. Peter as nominee director is not valid as Articles do not confer upon the Board of Directors any such power.

Question 6:

Excel Limited is a listed company with a turnover of Rs.60 crores in Financial Year 2016-2017. The Company appoints Ms. R as the Women Director on 1st March, 2017. Ms. R is already a Director in twelve companies including ten Public Companies. State briefly whether the appointment of Ms. R in Excel Limited is valid as per provision of the Companies Act, 2013.

[Dec-18]

Answer:

Number of directorships: As per section 165(1) of the Companies Act, 2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

In the instant case, Ms. R was appointed as a women director on 1st March, 2017 in Excel Limited. She was already holding directorship in twelve companies including ten public companies.

As Ms. R was already a director in ten public companies, her appointment in Excel Limited is not valid as it will lead to her directorship in 11 public companies. In this case, either she can choose between the companies in

which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies to maintain the limit of holding of directorship.

Question 7:

There are four directors in Shine Paper Limited. Mr. Madhav, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Evaluate whether he will be treated as Managing Director of the company. Also recommend the procedure of appointment of a Managing Director in a company in the light of the Companies Act, 2013.

[June-18]

Answer:

Managing Director [Section 2(54)]: Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

- (a) virtue of articles of a company, or
- (b) an agreement with the company, or
- (c) A resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or
- (iii) to draw and endorse any negotiable instrument or
- (iv) To sign any certificate of share or (v) to direct registration of transfer of any share.

In the instant case, Mr. Madhav, a director in Shine Paper Limited has been, authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Hence, according to explanation to section 2(54), Mr. Madhav will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a managing director [Section 196(4)]

1. Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting. 2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.
2. In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
3. The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
4. A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

Question 8:

Vijay, a director, resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time. What would be the status of Vijay if the company fails to intimate about the resignation of Vijay to RoC?

[June-18]

Answer:

Resignation of Director (Section 168 of the Companies Act, 2013)

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of

resignation from a director, intimate the Registrar in Form DIR -12 and post the information on its website, if any.

Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in FORM DIR-11 along with the prescribed fee. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, Vijay, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Vijay to RoC, even then the resignation of Vijay shall take effect from the date on which the notice is received by the company or the date, if any, specified by Vijay in the notice, whichever is later.

Question 9:

The Promoters of M/s Soma Limited, a listed public company propose to have the strength of the Board of Directors as eleven. They also propose to make the Managing Director and Whole Time Directors as directors not liable to retire by rotation. Advice on the following matters as per the provisions of the Companies Act, 2013:

- (i) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?
- (ii) For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

[June-19]

Answer:

- (i) According to section 152(6)(c) of the Companies Act, 2013, 1/3rd of such of the Directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the number nearest to the 1/3rd shall retire from office. Therefor the Directors liable to retire by rotation are $11 \times 2/3$ i.e. 7.3 or 8. (No. of directors to retire at AGM: $8 \times 1/3$ i.e. 2.67. Hence nearest to 1/3rd is 3).
- (ii) According to section 160 of the Companies Act, 2013, a person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 days before the meeting, left at the registered office of the Company, a notice in writing under his hand signifying his candidature as a director.

In the instant case, one nomination was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received i.e. 14th day. Hence, the contention of the directors are valid.

Question 10:

State briefly with reference to the applicable provisions of the Companies Act, 2013 read with rules thereunder whether an unlisted Public Company which is a wholly owned Subsidiary Company will be required to appoint Independent Directors.

[June-19]

Answer:

As per section 149(6) read with Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the public Companies of prescribed class shall require to appoint minimum 2 independent directors. However, vide Notification number G.S.R. 839(E) dated 5th July 2017 an amendment was issued through the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017. It provided that an unlisted

public Company which is a joint venture, a wholly owned subsidiary or a dormant Company will not be required to appoint independent Directors.

Question 11:

Explain the concept of KMP (Key Managerial Personnel) as introduced by the Companies Act, 2013.

[June-19]

Answer:

As per the provisions of section 203(1) of the companies Act 2013, every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel.

- (a) Managing Director or chief executive officer or manager and in their absence, a whole-time Director;
- (b) Company secretary; and
- (c) Chief financial officer

Question 12:

Soma Nidhi Limited proposes to reappoint Mr. X, a director who has completed a term of 10 consecutive years as a Director of the Nidhi. State your views the validity of the above proposals with reference to Nidhi Rules, 2014 formulated under Companies Act, 2013.

[Dec-19]

Answer:

According to Rule - 17 of the Nidhi Rules, 2014, the Director of a Nidhi shall hold office for a term up to ten consecutive years on the Board of Nidhi and he shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director.

Hence, in the instant case Soma Nidhi Limited cannot reappoint Mr. X as a director for a period of two years after completion of ten consecutive years.

Question 13:

On the ground of conviction for an offence dealing with related party transaction. Mr. Bat was disqualified to hold the directorship in XYZ Limited. The Board filled up the vacancy by appointing Mr. Samarth as a director on 3rd April, 2018 which was subsequently approved by the members in the immediate next general meeting. Unfortunately, Mr. Samarth expired on 15th May, 2018 after working about 40 days as a director. The Board now wishes to fill up the said vacancy by appointing Mr. Ball in the forthcoming meeting of the Board. Advise the Board on the validity of the following appointments as per the provisions under the Companies Act, 2013:

- (i) Appointment of Mr. Samarth in place of Mr. Bat.
- (ii) Appointment of Mr. Ball in place of Mr. Samarth.

[Dec-19]

Answer:

Section 161(4) of the Companies Act, 2013 provides that if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

- (i) In view of the above provisions, in the given case, the appointment of Mr. Samarth in place of the disqualified director Mr. Bat was in order. In normal course, Mr. Samarth could have held his office as director up to the date to which Mr. Bat would have held the same.
- (ii) As per facts, Mr. Samarth expired on 15th May, 2018 and again a vacancy has arisen in the office of director owing to death of Mr. Samarth who was appointed by the board and approved by members to fill up the casual vacancy resulting from disqualification of Mr. Bat. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board

cannot fill in the vacancy arising from the death of Mr. Samarth. So cannot appoint Mr. Ball in the office of Mr. Samarth.

The Board may however appoint Mr. Ball as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorises the board to do so, in which case Mr. Ball will hold the office up to the date of the next annual general meeting or the last date on which the AGM should have been held, whichever is earlier.

Question 14:

The Articles of Association of a listed company provides for fixed payment of sitting fee for each meeting of Directors subject to maximum of Rs.30,000. In view of the increased responsibilities of Independent Directors of listed Companies, the Company proposes to increase the sitting fee to Rs.45,000 per meeting. Advise the company about the requirement under the Companies Act, 2013 to give effect to the proposal.

[Dec-19]

Answer:

Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of Rs. 1 lakh per meeting of the Board or committee thereof.

Further, the Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

From the above, it is clear that fee to independent directors can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in the Board Meeting and altering the Articles of Association by passing Special Resolution.

Question 15:

Runway Infrastructure Limited entered into a contract with Royal forgings (a partnership firm), in which wife of Mr. Patrick, a director of the Runway Infrastructure Limited is a partner. The contract is for supply of certain components by the firm for a period of three years with effect from 1st September, 2018 on credit basis. Explain the requirements under the Companies Act, 2013, which should have been complied with by Runway Infrastructure Limited before entering into contract with Royal forgings.

What would be your answer in case Royal forgings is a private limited company in which wife of Mr. Patrick is holding shares?

[Dec-19]

Answer:

The contract for supply of components entered into between Runway Infrastructure - Limited and Royal forgings, a partnership firm (in which wife of Mr. Patrick, a director of the company is a partner) attracts Section 184,188 and 189 of the Companies Act 2013.

As per Section 188, company cannot enter into contract with firm for supply or purchase of goods or material where director of company or his relative is partner of firm without approval of Board of directors at board meeting. As per Section 184, interested directors must disclose his interest at board meeting at which said business is to be discussed. Interested directors should not take part in the discussion or voting at board meeting. If he does vote, his vote shall not be counted. In case of Private limited Company interested director can participate in the board meeting after disclosure of interest.

As per Section 189, prescribed particulars of the contract must be entered into the Register of Contract in which directors are interested in Form MBP-4. Every entry made in Register should be authenticated by Company Secretary of company or any other person authorised by Board. After each entry in the register, it shall be placed before the next board meeting and shall be signed by all the directors present thereat

Based upon discussion of the above provisions:

If the value of the contract or transaction is exceeded than limit specified, prior approval of shareholders is required to be obtained. Question does not suggest value of transaction. Assuming that it is within limits specified under the Act consent of shareholders is not required.

If Royal forgings is a private limited company: The provision of Section 188 are applicable to it as the director's wife (i.e. Patrick's wife) is member of Royal forgings private limited.

Section 184 is not applicable as Mr. Patrick, director of runway Infrastructure Limited is neither director nor holding any shares in Royal Forgings Private Limited. Shares held by Mr. Patrick's wife are not to be considered. Hence the provisions of Section 184 are not attracted.

Question 16:

Can a Company pay compensation to its Directors for loss of office? Explain briefly the relevant provisions of the Companies Act, 2013 in this regard.

[June-17]

Answer:

A company can pay compensation to its directors for loss of office as provided in sections 202 of the Companies Act, 2013. Under section 202, such compensation can be paid only to managing director, director holding the office of the manager and to a whole time director but not to others. The compensation payable shall be on the basis of average remuneration actually-earned by such director for three years, or such shorter period as the case may be, immediately preceding the ceasing of holding of such office and shall be for the unexpired portion of his term or for three years whichever is shorter. No such payment can be made, if winding up of the company is commenced before or commences within 12 months after he ceases to hold office if the assets of the company on the winding up, after deducting expenses thereof, are not sufficient to repay to the shareholders the share capital (including the premium, if any) contributed by them. However, no payment of compensation can be made in the following cases:

- (a) where a director resigns on the ground of amalgamation or reconstruction and is appointed the office of managing director or manager or other officer of such reconstructed or amalgamated company,
- (b) where the director resigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid,
- (c) where the director vacates office under section 167 of the Companies Act, 2013,
- (d) where the winding up of the company is due to the negligence of the director concerned,
- (e) where the director has been guilty of any fraud or breach of trust,
- (f) Where the director has instigated or has taken part directly or indirectly in bringing about, the termination of his office.

Question 17:

Mr. X is a director of ABC Ltd. He has approached Housing Finance Co. Ltd. for the purpose of obtaining a loan of Rs.50 lacs to be used for construction of building of his residential house. The loan was sanctioned subject to the condition that ABC Ltd. should provide the guarantee for repayment of loan instalments by Mr. X. Advise Mr. X.

[June-17]

Answer:

According to section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person. Thus, Mr. X is not allowed for loan of Rs.50 Lacs against guarantee by the company ABC Ltd.

Question 18:

Earth Developers Private Limited, a Bengaluru based company is regular in filing its annual return as well as financial statements and has four directors but so far no managing director has been appointed. Due to the manifold increase in the construction work undertaken by the company in the last two years, it is urgently felt that a managing director needs to be appointed. Accordingly, Mr Pranav was appointed as MD by the

Board of Directors at its meeting, specifying the terms and conditions including monthly remuneration, payable to him. Enumerate on the requirement and validity of an appointment of Mr. Pranav in the given scenario, in the context of relevant law.

[Dec-21]

Answer:

Section 196(4) requires that the terms and conditions of appointments of a Managing Director and the remuneration payable to him shall be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Part I of the Schedule V.

Therefore, there is no requirement regarding the approval of appointment of Mr. Pranav as MD in the Earth Developers Private Limited, at the immediate next general meeting of the shareholders. Therefore his appointment as MD in the Earth Developers Private Limited is valid.

Question 19:

Mr. Vikram, a Director of M/S Tube light Limited has made default in filing of annual accounts. Accounts and annual returns with the Registrar of Companies for a continuous period of 3 financial years ending on 31st March 2016. Examine the validity of the following under the Companies Act, 2013.

- i) Whether Mr. Vikram can continue to be a Director of M/S Tube light Limited (defaulting company) and also M/S Green light Limited where he is also a Director.
- ii) State whether he can be reappointed as Director in these two companies.
- iii) What would be your answer be in case Mr. Vikram is a nominee Director of a Public Financial Institution?
- iv) What would be your answer in case the defaulting company (i.e. M/S Tube light Limited) is a private limited company ?

[Dec-21]

Answer:

Disqualifications for Appointment of Director

According to Section 164 (2) of the Companies Act 2013 a person who is or has been a director of a company which

- has not filed the financial statements or annual returns for any continuous three financial years or
- Has failed to repay the deposits accepted by it or pay interest thereon due date or redeem its debentures on due date or pay interest due thereon or pay any dividend declared and such failure continues for one year or more. Shall not be eligible to be reappointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Further, pursuant to Section 167(1) (a) of the companies' act 2013, the office of a director shall become vacant in case he incurs any of the disqualification specified in Section 164. The company joint reading of both the Sections i.e. 164(2) and 167 (1) (a), we may decide the case as under

- i) In the first case Mr. Vikram cannot continue to be director of the defaulting company namely M/s Tube light Ltd. whereas in Green light Ltd., he can continue as a director because that company is not defaulting company
- ii) Further, Mr Vikram is a Director of Tube light Ltd. and Green Light Ltd. Tube Light Ltd did not file financial statements for a continuous period of three financial years ending 31 march 2016. This failure constitute a disqualification under Section 164(2) and consequently Mr Vikram will not be eligible for reappointment in Tube light Ltd. and Green light Ltd for a period of five years from the date on which the said company incurs the default.
- iii) In case Mr. Vikram is a nominee director of a Public Financial Institution then in such case section 164 is not applicable
- iv) **In case Tube light Ltd is a Private Ltd Company.** According to Section 164(3) a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub section (1) and (2) of Section 164.

Thus in this case the answer would be same as above i.e. Mr Vikram has to vacate his office of directorship from Tube light Ltd and Green light Ltd and cannot be reappointed in both the companies for a period of 5 years from the date on which the said company incurs the default.

Question 20:

Summarize the disqualifications of a director under section 164 of the Companies Act 2013.

[MTP Dec-23]

Answer:

According to Section 164 Disqualifications for appointment of Director are -

- (1) A person cannot be appointed as director of a company in any of the following cases:
 - a) He is of unsound mind and stands so declared by a competent court.
 - b) He is an undischarged insolvent.
 - c) He has applied to be adjudicated as an insolvent and his application is pending.
 - d) He has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence etc.
 - e) he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years, or
 - f) He has not complied with sub-section (3) of section 152 which requires a director to have a Director Identification Number under section 154.
 - g) He has not complied with the provisions of 165(1) relating to holding of maximum number of directorship. In such case the penalty of Rs.5,000 for each day of continuing failure. It may be noted that no person can hold office of director including alternate director is more than 20 including maximum 10 in public company.
- (2) No person who is or has been a director of a company which:
 - a) has not filed financial statements or annual returns for any continuous period of 3 financial years, or
 - b) has failed to repay the deposits or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared on preference shares and such failure to pay or redeem continues for 1 year or more, however, such director shall not incur the disqualification for a period of 6 months from the date of appointment.
- (3) Section 164 is not applicable to Government Company.
- (4) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164 as stated above [i.e., point (1) and (2) above].
- (5) However, the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) [given in point (1) above] shall not take effect:
 - a) For 30 days from the date of conviction or order of disqualification.
 - b) where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed of, or
 - c) Where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed of.

Question 21:

List the provisions of the Companies Act 2013 regarding appointment of directors of a public limited company.

[MTP June-23 Set-1]

Answer:

- (1) Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. [Section 152 (1)] In case of a One Person Company, an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section. [Section 152 (1)]

- (2) Every director shall be appointed by the company in general meeting, unless any specific method of appointment is provided in the Articles of Association. [Section 152 (2)].
- (3) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154. [Section 152 (3)].
- (4) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) and a declaration that he is not disqualified to become a director under this Act. [Section 152 (4)].
- (5) A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within 30 days of his appointment in Form DIR-12 along with the fee as prescribed [Section 152(5)]
- (6) The Ministry of Corporate Affairs has clarified via Notification No. 463(E) and 466(E) dated 5th June, 2015, that section 152 (5) shall not apply:
 - a. where appointment of such director is done by the Central Government or State Government, as the case may be.
 - b. To a section 8 company.

Question 22:

There are four directors in Shine Paper Limited. Mr. Madhav, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Evaluate whether he will be treated as Managing Director of the company. Also recommend the procedure of appointment of a Managing Director in a company in the light of the Companies Act, 2013.

[MTP June-2020]

Answer:

Managing Director [Section 2(54)]: Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

- (a) virtue of articles of a company, or
- (b) an agreement with the company, or
- (c) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or
- (iii) to draw and endorse any negotiable instrument or
- (iv) to sign any certificate of share or
- (v) To direct registration of transfer of any share.

In the instant case, Mr. Madhav, a director in Shine Paper Limited has been, authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Hence, according to explanation to section 2(54), Mr. Madhav will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a managing director [Section 196(4)]

1. Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.
3. In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.

4. The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
5. A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

Question 23:

Appointment of Alternative director and Nominee Director.

[MTP June 2019, MTP Dec-2019]

Answer:

Alternate Director [Section 161 (2)]

Section 161(2) of the Companies Act, 2013 provides for appointment of Alternate director. According to this section:

- i. The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person to act as an alternate director in place of another director (original director) during his absence for a period of not less than 3 months from India.
- ii. A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.
- iii. No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.
- iv. An alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office if and when the original director returns to India.
- v. If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director

Nominee Director [Section 161 (3)]

Section 161(3) of the Companies Act, 2013 provides for appointment of Nominee director. According to this section: Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

Question 24:

State the Rule of keeping 'Women Director' in the Board.

[MTP Dec-2017]

Answer:

At least one woman director shall be on the Board of such class or classes of companies as may be prescribed.
[Second proviso to section 149(1)]

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director:

Every listed company.

Every other public company having.

- (a) paid-up share capital of one hundred crore rupees or more; or
- (b) Turnover of three hundred crore rupees or more.

A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation.

Further, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Example: in XYZ Ltd., an intermittent vacancy of the women director arises on 15th June, 2015. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than the date of the next Board meeting or three months from the date of such vacancy whichever is later. If after the vacancy, the immediate Board meeting was held on 14th August, 2015, then the vacancy shall be filled-up by 14th August, 2015 or by 14th September, 2015 (3 months from the date of such vacancy) whichever is later. In this case it shall be filled up by 14th September, 2015. If after the vacancy, the immediate Board meeting was held on 14th October, 2015 then the vacancy shall be filled-up by 14th October, 2015 or by 14th September, 2015 whichever is later. In this case it shall be filled up by 14th October, 2015.

Explanation: For the purposes of this rule (woman director on board), it is clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

Question 25:

Mr. Rao is a director Rawa Ltd. He has approached Housing Finance Co. Ltd. for a loan amounting to Rs.60 lacs, to be utilised for the construction of his personal residence. The authorities if Housing Finance Co. Ltd. sanctioned the loan on condition that Rawa Ltd. should be the guarantor of Mr. Rao; in case he fails to repay the loan. Is it justified? Advise Mr. Rao.

[MTP Dec-2017]

Answer:

According to Section 185 of the Companies Act, 2013, no company shall, directly or indirectly advance any loan including any loan represented by a book debt; to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person. Thus, Mr Rao is not allowed for taking the specified amount of Rs. . 60 lacs against the guarantee by Rawa Ltd.

Question 26:

Can a Company pay compensation to its Directors for loss of office? State briefly the respective provisions of The Companies Act, 2013 in this regard.

[MTP Dec-2017]

Answer:

A company can pay compensation to its Directors for loss of office as provided in Section 202 of The Companies Act, 2013. Under Sections 202, such compensation can be paid only to the Managing Director, Director holding the office of the manager and to a whole time Director but not to others. The compensation payable shall be on the basis of average remuneration actually earned by such Director for three years or such shorter period as the case may be, immediately preceding the ceasing of holding of such office and shall be for the unexpired portion of his term or for three years whichever is shorter. No such payment can be made if winding up of the company is commenced before or commences within 12 months after he ceases to hold office if the assets of the company on the winding up after deducting expenses thereof are not sufficient to repay to the shareholders the share capital (including the premium, if any) contributed by them. However, no payment of compensation can be made in the following cases:

- (i) where a director resigns on the ground of amalgamation or reconstruction and is appointed the office of managing director or manager or other officer of such reconstructed or amalgamated company,
- (ii) where the director resigns his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid,
- (iii) where the director vacates office under Section 167 of The Companies Act, 2013,
- (iv) Where the winding up of the company is due to the negligence of the director concerned,
- (v) Where the director has been guilty of any fraud or breach of trust,
- (vi) Where the director has instigated or has taken part directly or indirectly in bringing about the termination of his office.

Question 27:

Zeda Company Ltd in its Annual General Meeting appointed all its directors by passing one single resolution. No objection was made to the resolution. Examine the validity of the appointment of directors explaining

the relevant provisions of the Companies Act, 2013. Will it make any difference, if Zeda Company was a private company?

[MTP Dec-2017]

Answer:

Under section 162(1) of the Companies Act, 2013, at a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it. From the above provision of law, it is mandatory for the company to first get a unanimous approval of the company on the appointment of more than one director by a single resolution. In the given case, no such motion was put to vote at the meeting and passed unanimously. Merely not raising any objection is not the same as active unanimous approval.

Further, according to section 162(2), a resolution moved in contravention of subsection (1) shall be void, whether or not any objection was taken when it was moved. Hence, in the given case the appointment of all the directors made by a single resolution at the AGM is void. The Ministry of Corporate Affairs has clarified via Notifications No.464(E) dated 5th June, 2015, that section 162 of the Companies Act, 2013, shall not apply to a private company. Thus, if Zeda would have been a private company, then provisions of section 162 shall not be attracted.

Question 28:

Under what circumstances is a director deemed to have vacated the office of Directorship?

[MTP Dec-2017]

Answer:

(1) The office of a director shall become vacant in case [Section 167(1)]:

- (i) He incurs any of the disqualifications specified in section 164.
- (ii) He absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board.
- (iii) He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested.
- (iv) He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184.
- (v) He becomes disqualified by an order of a court or the Tribunal.
- (vi) He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months. It is further provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court.
- (vii) He is removed in pursuance of the provisions of this Act.
- (viii) He, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(2) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than Rs.1,00,000 but which may extend to Rs.5,00,000, or with both. [Section 167 (2)].

(3) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. [Section 167 (3)].

(4) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1). [Section 167 (4)].

Question 29:

XYZ Company Ltd in its Annual General Meeting appointed all its directors by passing one single resolution. No objection was made to the resolution. Examine the validity of the appointment of directors explaining the

relevant provisions of the companies act' 2013. Will it make any difference, if XYZ Company was a private company?

[MTP June-2017]

Answer:

Under section 162(1) of the Companies Act, 2013, at a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

From the above provision of law, it is mandatory for the company to first get a unanimous approval of the company on the appointment of more than one director by a single resolution. In the given case, no such motion was put to vote at the meeting and passed unanimously. Merely not raising any objection is not the same as active unanimous approval.

Further, according to section 162(2), a resolution moved in contravention of subsection (1) shall be void, whether or not any objection was taken when it was moved. Hence, in the given case the appointment of all the directors made by a single resolution at the AGM is void.

The Ministry of Corporate Affairs has clarified via Notifications No, 464(E) dated 5th June, 2015, that section 162 of the Companies Act, 2013, shall not apply to a private company. Thus, if XYZ would have been a private company, then provisions of section 162 shall not be attracted.

Question 30:

State with reference to the relevant provisions of the Companies Act, 2013 whether the following persons can be appointed as a Director of a Company:

- (i) Mr. Arvind Swamy who has huge personal liabilities far in excess of his Assets and Properties has applied to the court for adjudicating him as an insolvent and such application is pending.
- (ii) Mr. Bikash Halder who was caught red-handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.

[MTP June-2018, MTP Dec-2019]

Answer:

- (i) Section 164 (1) (c) states that a person shall not be eligible for appointment as a director: of a company if he has applied to be adjudicated as an insolvent and his application is pending. Therefore, in the present case, Mr. Arvind Swamy cannot be appointed as a Director of a Company- whether public or private.
- (ii) Section 164 (1) (d) states that a person shall not be eligible for appointment as a Director of a Company if he has been convicted by a Court for any offence involving general turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months, and a period of five years has not elapsed from the date of expiry of the sentence. In the present case, although the sentence was only two years ago but the period of sentence was only eight weeks i.e., less than six months. Hence, Mr. Bikash Halder does not come under the purview of this disqualification and can be appointed as a Director of a Company.

Question 31:

In what way does the Companies Act, 2013 restrict the non-cash transactions involving Directors of Public Limited Company? Explain.

[MTP June-2018]

Answer:

Restrictions on non -cash transactions involving directors [Section 192]:

1. No company shall enter into an arrangement by which-
 - (a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company: or
 - (b) the company acquires or is to acquire assets for consideration other than cash from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval under this subsection shall also be required to be obtained by passing a resolution in general meeting of the holding company.

2. The notice for approval of the resolution by the company or holding company in general meeting under sub-section (1) shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.
3. Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless-
 - (a) the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or
 - (b) Any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

Question 32:

Mr. Deshmukh is a director of Practical Ltd. The said company is having sufficient liquid funds and Mr. Deshmukh is in dire need of funds. In order to mitigate the hardship of Mr. Deshmukh the board of directors of Practical Ltd. wants to lend Rs.5 lakhs to him and Rs.2 lakhs to his wife. State whether such loans can be given and if so under what conditions. What would be your answer if the company Practical Ltd. would have been Practical Private Ltd.?

[MTP June-2018]

Answer:

Loan to Director and his relative: According to Section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Thus, in the instant case, if Practical Ltd. wants to lend Rs.5 Lakhs to Mr. Deshmukh who is a director in Practical Ltd. and Rs.2 Lakhs to his wife, then it is in violation of Section 185 of the Companies Act, 2013.

If Practical Ltd would have been Practical Private Ltd. than vide Notification No. G.S.R. 464 (E) dated 5th June 2015, Section 185 of the Companies Act, 2013 shall not apply to a Private companies in certain conditions.

Question 33:

The Board of directors of Best Ltd. are contributing every year to a charitable organization a sum of Rs. 60,000. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

[MTP June-2018 & MTP Dec-2018]

Answer:

Under section 181 of the Companies Act, 2013 the Board of Directors of a company is authorized to contribute to bonafide charitable and other funds. However, in case the aggregate amount of such contribution in any financial year exceeds five per cent, of its average net profits for the three immediately preceding financial years, prior permission of the company in general meeting shall be required.

The section does not make it mandatory for the company to have a profit for making a charitable contribution in a financial year. As the amount of donation is restricted to the average of previous 3 years' profits, it is possible for a company suffering a loss to make a contribution provided it is to a bonafide charitable fund.

In the present case, even though the company has incurred a loss it can contribute to the charitable fund only if it is a bonafide charitable fund and the amount is up to 5% of the average of the preceding three years' profits. In case the contribution exceeds the limit, the prior approval of the members must be taken at a general meeting of the company.

Question 34:

There are four directors in Jeans & Denims Limited. Mr. Michael, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Evaluate whether he will be treated as Managing Director of the company. Also recommend the procedure of appointment of a Managing Director in a company in the light of the Companies Act, 2013.

[MTP June-2019]

Answer:

Managing Director [Section 2(54)]: Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

1. virtue of articles of a company, or
2. an agreement with the company, or
3. A resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

- (i) the power to affix the common seal of the company to any document or
- (ii) to draw and endorse any cheque on the account of the company in any bank or
- (iii) to draw and endorse any negotiable instrument or
- (iv) to sign any certificate of share or
- (v) To direct registration of transfer of any share.

In the instant case, Mr. Michael, a director in Jeans and Denims Limited has been, authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Hence, according to explanation to section 2(54), Mr. Michael will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a managing director [Section 196(4)]

1. Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.
3. In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.
4. The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
5. A return in the prescribed form (Form No. MR.1) along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

Question 35:

Discuss the provisions regarding to vacation of office of director.

[MTP DEC-2019]

Answer:

The provisions regarding to vacation of office of director are contained in section 167 of the Companies Act, 2013, which are as follows:

As per **Section 167(1)**, the office of a director shall become vacant in case -

- (i) he incurs any of the disqualifications specified in section 164;
Provided that where he incurs disqualification under the above, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section
- (ii) he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;
- (iii) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

- (iv) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;
 - (v) he becomes disqualified by an order of a court or the Tribunal;
 - (vi) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months:
- Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f) above -
- (i) for thirty days from the date of conviction or order of disqualification;
 - (ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or
 - (iii) Where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of.
- (vii) he is removed in pursuance of the provisions of this Act;
 - (viii) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

As per **Section 167(2)**, if a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

As per **Section 167(3)**, where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

As per **Section 167(4)**, a private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1).

Question 36:

M/s Daga Limited (an unlisted company) without any public deposits as per the audited financial statements of the company as at March 31st, 2018 gives you the following information:

Paid-up Share Capital	` 20 crores
Gross Turnover	` 500 crores
Bank Borrowings	` 50 crores (from a National Bank)
Other Borrowings	` 30 crores (from a Public Financial Institution)

Mr. Lodha, a Chartered Accountant employed in the finance and audit department of the company wants to form a Vigil Mechanism for directors and employees of the company. Advise whether it is mandatory for M/s Daga Limited to formulate a Vigil Mechanism for directors and employees of the company.

[June-19]

Answer:

Formation of vigil mechanism: According to Section 177(9) of the Companies Act, 2013, a Vigil mechanism shall be formed in:

- (a) Every listed Company, and
- (b) Such other prescribed classes of companies.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following class or classes of companies that shall constitute Vigil mechanism:

1. The Companies which accept deposits from the public;

2. The Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.

In the instant case, Daga Ltd. does not have any public deposits. They have borrowings from banks and public financial institutions of Rs.80 Crores which is in excess of Rs.50 crores. Since, the Company had borrowed from banks and Public Financial Institutions in excess of Rs.50 crores as prescribed in Rule 7(2), the Company is mandatorily required to form a Vigil Mechanism for directors and employees of the Company.

Question 37:

One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company, power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the directors powers to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members where upon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.

Examining the provisions of the Companies Act, 2013, answer the following:

Whether the contention of members against the non-compliance of members' decision by the directors is tenable.

Whether it is possible for the members to usurp the powers, which by the Articles are vested in the directors by passing a resolution in the general meeting.

[Dec-19]

Answer:

Powers of Board: In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things, as the Company is authorized to exercise and do:

Provided that in exercising such power of doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations made by the Company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the Company or otherwise to be exercised or done by the Company in general meeting.

Section 180 (1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a Company which can be exercised only with the consent of the Company by a special resolution. Clause (a) of Section 180 (1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the Company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a Company can be made by the Board of Directors only with the consent of members of the Company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the Company, the sale of undertaking must be approved by the shareholders in general meeting by passing a special resolution.

Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly, the contention of the members that they were, the principals and directors being their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by/resolution passed by a majority or even unanimously supersede the powers of the directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the Company in the manner they like subject to the provisions of the Companies Act, 2013.

Question 38:

What are the Prohibitions and restrictions regarding political contribution under Section 182 of the Companies Act, 2013?

[MTP June-2020 Set-1]

Answer:

Prohibitions and restrictions regarding political contribution under Section 182 of the Companies Act, 2013

- (a) Notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party. Here, political party means a political party registered under section 29A of the Representation of the People Act, 1951.
- (b) The following companies are not allowed to contribute to any political party:
 - (1) a Government company; and
 - (2) A company which has been in existence for less than three financial years.
- (c) The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years.
- (d) No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.
- (e) Without prejudice to the generality of the provisions of sub-section (1),
 - (1) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose.
 - (2) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed:
 - a) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and
 - b) Where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.
- (f) Every company shall disclose in its profit and loss account any amount or amounts contributed by it to any political party during the financial year to which that account relates. [Section 182(3)].
- (g) If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed. [Section 182(4)].

Question 39:

The central bank initiated a case against Mr. Sujoy Bishoi, Managing director of BSK Limited for causing damage to the interest of the financial industry by mismanaging the funds and referred the case to the

tribunal where the Tribunal passed an order on 20th June 2018, holding that Mr.Sujoy was not fit and proper person to hold such office.

Mr.Sujoy vacated his office as on 21st June 2018 and he demanded compensation, as per the contract with the company, for early termination. On 23rd January, 2022, Mr.Sujoy was appointed as a Non-Executive Director in one other company.

In the light of the given facts, advise in the given legal situations:

- (i) Whether Mr.Sujoy was entitled for such compensation?
- (ii) Whether Mr.Sujoy was entitled to be appointed as a Non-Executive Director in such other company?

[Dec-22]

Answer:

- (i) The Tribunal had passed an order pursuant to subsection (4A) of section 242 of the Companies Act,2013, as the case had been referred to it by the central Government to decide whether Mr. Sujay was fit and proper person or not As per section sub- sections (1A) and (1B) of the 243 of the Companies Act, 2013, the person who is not a fit and proper person pursuant to subsection (4A) of section 242, shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years. Notwithstanding anything contained in any other provisions of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation Conclusion: Here, Mr.Sujoy was not entitled for such compensation for early termination of his office, despite of the terms of the contract, as his termination was pursuant to order of Tribunal passed under subsection (4A) of section 242 of the companies Act, 2013.

- (ii) As discussed aforesaid, as per sub-section (1A) to the Companies Act, 2013, Mr.Sujoy was not entitled to hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision.

The decision was given by the Tribunal on 20th June, 2021 and so till 20th June, 2026, Mr. Sujay was not entitled to hold such office except with the permission of the Central Government accorded by the leave of Tribunal. Conclusion: If Mr. Sujay had been appointed as a non-executive director in other company without the permission of the Central Government, then he and every other director of such other company who is Knowingly a party to such contravention, shall be liable to punishment as per the provisions of sub-section (3) to Section 243, as Follows:- Any person (i.e. Mr. Sujay) who Knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1) or sub-section (1A), and every other director of the company who is Knowingly a party to such contravention, shall be punishable with fine which may extend to five lakh rupees.

Question 40:

ABC limited is a company with paid up capital of ` 50 cr. and turnover of ` 310 cr. Mr. Rajesh Kumar, who is promoter and MD of the company wants to run the company complying with all laws and regulations. The chairman is non-executive and is an eminent academician. There are two more directors, one is Director (Finance), Mr Joshi and Director (commercial) Mr. Nirmal Kumar, who is related to the promoter. Company is in the process of taking substantial loan for capital investment from SBI, where SBI will nominate a director in the Board.

The MD wants to clarify the following issues from you. Pl clarify with references, if any.

- (i) Is the present Board properly constituted? If not, what is the non-compliance?
- (ii) Can Mr. Nirmal Kumar be considered as independent director?
- (iii) Is there any need of women director?

(iv) What will be the status of the director nominated by SBI? If she is a women, would satisfy the requirement of women director.

(ICMAI Study Material)

Answer:

- (i) Company is an unlisted company with four directors which is properly constituted. However, since the Turnover is more than ` 300 cr., a women director is required.
- (ii) No, since he is related to the promoter.
- (iii) Yes. Answered in (i) above.
- (iv) He or she will be classified as nominee director. Yes, if she will be considered to fulfil the requirement. Rule 3 of companies (appointment and qualification of directors) Rule 2014 refers.

Question 41:

Kapoor and Sons Ltd is a listed company with Mr. S K Kapoor as CMD and main stakeholder. Board comprises of the following.

- (a) Mr. S K Kapoor, as CMD
- (b) Mr. K Murli, Director (Finance)
- (c) Mr. B B Singh, Director (Commercial)
- (d) Mr K Shekhar, ind. Dir. Appointed in AGM in Sept, 2020
- (e) Mr.B. Ramesh, Ind. Dir., appointed in AGM in August, 2019 (f) Mr. Mahesh Singh, nominee of IDBI
- (g) Smt. Rekha Singh, ind. Director, appointed in AGM in Sept 2019
- (h) Ms. Rukmini Mathur, non-executive, non-independent, appointed as additional director in March 22.

With the above directors, please suggest constitution of CSR committee, Audit Committee and Nomination and Remuneration committee as per the Act and Rules.

(ICMAI Study Material)

Answer:

Solution:

I have to suggest constitution of various committees with the existing Board members. I suggest the following. CSR committee:

In case of CSR committee, there will be at least three directors in the committee with at least one independent director. CSR committee shall be as follows.

- (i) Mr. B Ramesh, as chairman
- (ii) Ms. Rekha Singh, ind. Director, member
- (iii) Mr. K Murli, Director (Finance), member

Since the company has adequate number of independent directors, we can have two instead of one. Since financial issues are involved, D (F) is made member.

Audit committee

- (i) Mr K Shekhar, ind. Dir. as chairperson
- (ii) Mr. Mahesh Singh, nominee of IDBI
- (iii) Ms. Rekha Singh, ind. Director,

As per rule, there has to be three directors, all non-executive, the chairman to be independent and majority Shall be independent. This has been complied here.

Nomination and Remuneration committee

- (i) Ms. Rekha Singh, ind. Director, chairperson
- (ii) Mr. B Ramesh, member
- (iii) Ms. Rukmini Mathur, member

All members need to be non-executive and /or independent.

Chapter 6 - Board Meetings & Procedures

Question 1:

The Board of Directors of Best Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2017. They seek your advice in respect of the following matters:

- (i) Can the board meeting be held in Chennai, when all the Directors of the Company reside at Kolkata?
- (ii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

Advice with reference to the relevant provisions of the Companies Act, 2013.

[Dec-18]

Answer:

- (i) There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place. The Companies Act lays down the provisions for holding meetings by video conferencing, sending notices, procedures at the meeting etc. Therefore, there is no difficulty in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with.
- (ii) Section 173(3) of the Companies act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting. However, considering the importance of Board Meetings and the responsibilities placed on the Directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings. As a matter of good secretarial practice, the notice should include full details and particulars of the business to be transacted at the Board Meetings.

The articles of association of the company may make it mandatory to do so in almost all cases.

Question 2:

Examine the following aspect related to convening of board meeting with reference to the provisions of the Companies Act, 2013:

- (i) The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
- (ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing.

[June-18]

Answer:

- (i) According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Greenhouse Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

- (ii) According to section 173 of the Companies Act, 2013,
- (a) The directors can participate in a meeting of the Board either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.
 - (b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Hence, Purple Florence Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final, only on ratification thereof by at least one independent director, if any.

Question 3:

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

- (i) An interested Director;
- (ii) A Director who has expressed his inability to attend a particular Board Meeting;
- (iii) A Director who has gone abroad (for less than 3 months).

[June-17]

Answer:

Notice of Board meeting

- (i) Interested director: Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted.
- (ii) A Director who has expressed his inability to attend a particular Board Meeting: In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting; notice must be given to that director.
- (iii) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also. This is important because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio visual means.

Question 4:

"A casual meeting of the directors, even at the office of the company, cannot be treated as a board meeting" - analyse the legal provisions relating to board meeting under the Companies Act 2013?

[MTP Dec-23]

Answer:

Under Chapter XII, Section 173 to Section 195 of the Act deals with the Meeting of Board and its power, from Section 173 of the Act deals with the meeting of the board of directors. The Section states the number of meetings, how a meeting can be called and what the penalty is for noncompliance of the same. After the incorporation, every company shall hold a meeting of the Board of Directors within 30 days and later on in a year, a minimum of 4 meetings are held.

Number of meetings to be held [Section 173(1)]: According to Section 173(1) of the Act, as stated earlier, after the incorporation of a company, the first meeting of the Board of Directors shall take place within 30 days. After the first meeting, a minimum of 4 meetings of the Board of Directors need to be held in a year. The Section further states that the meeting is to be held in such a manner that there should not be a gap of more than 120 days between the two consecutive meetings of the Board.

However, by a notification from the Central Government, the government can direct that the provisions of this Section shall or shall not apply to a specific class or description of companies.

Mode of the meeting [Section 173(2)]: Sub-section 2 of Section 173 of the Act states the mode of meeting. According to this Section, whichever method is prescribed, the directors can participate in the meeting either in person; or through video conferencing; or by any other audio-visual means. These methods must be capable of recording and recognising the directors participating and they should also be able to record and store the meeting along with the date and time of the meeting.

Notice for meeting [Section 173(3)]

Section 173(3) of the Act states that a meeting shall be called by a notice to every director in writing and the notice shall give a minimum of 7 days to the directors at their registered addresses as provided by them to the company. The Section further states that such notice shall be seen either by the following ways:

- by hand delivery; or
- by post; or
- by electronic means.

The exception to Section 173 of the Act states that if there is an urgent business matter, at least one independent director must be present in the meeting, subject to the conditions. However, if there is an independent director and that director is absent from the board meeting, then the decision shall be circulated among all the directors and the decision shall be final once that independent director ratifies or gives consent to the same.

Failure to comply with the provision and penalty [Section 173(4)]: Section 173 (4) of the Act provides the penalty provision. The Section states that in case an officer of the company, i.e. the Company Secretary, who is responsible to give the notice fails to do so, then a penalty of Rs. . 25,000 shall be imposed on him.

In cases of a One Person Company ("OPC"), a small company and a dormant company, then every half of the calendar year, at least one board meeting must be conducted and there should be a gap of a minimum of 90 days between two meetings. However, in OPC, if there is only one director on the board then the provisions of this sub-section and Section 174 of the Act shall not be applicable.

Section 174(1) of the Act states that for a quorum for a meeting of a board of directors of a company hall, there shall be either one-third participation of directors or two, whichever is higher. In case of participation of directors via video conferencing or other audio-visual means, shall also be counted.

Section 174(2) of the Act states that in case there is a reduction in the number of directors fixed for the quorum of board meetings then the continuing directors may fill in the vacancy.

Section 174 (4) of the Act states that in case a meeting could not be held for want of quorum then such meeting shall be adjourned to the same day, place and time for the next week or in case of a national holiday, the day succeeding it.

A resolution may be passed by circulation in accordance with the provisions of section 175, unless the act requires that such a resolution shall be passed at a Board meeting only.

Question 5:

Three Board meeting of A Ltd. were held on 01.01.2022, 01.04.2022, 01.07.2022. In the fourth Board meeting scheduled for 27.10.2022, no matter could be discussed since the required quorum was not present, and so it was adjourned till 03.11.2022. In the adjourned Board meeting held on 03.11.2022, 5 matters were discussed and voted upon. Assess the situation, Has the company contravened any of the provisions of the Companies Act, 2013?

[MTP Dec-23]

Answer:

As per section 173 (1), at least four Board meetings shall be held in each calendar year and not more than 120 days shall intervene between two consecutive meetings of the Board.

In the present case, the Board meeting held on 27.10.22 was adjourned, and the adjourned Board meeting was held on 03.11.22. The Board meeting held on 27.11.22 and adjourned Board meeting held on 03.11.22 shall not be deemed to be separate Board meetings, since an adjourned meeting is a mere continuation of the original meeting. Accordingly, the Board meeting held on 27.10.22 and the adjourned Board meeting held on 03.11.22 shall be counted as one Board meeting only. Thus, the company has held 4 Board meetings during the calendar year 2022.

The gap between first and second Board meeting was not more than 120 days. Similarly, the gap between the 2nd and third Board meeting was not more than 120 days. Regarding the gap between the third and fourth Board meeting, the date of third board meeting and forth original board meeting should be considered. This is so because the Board meeting only, it shall be deemed that only one Board meeting was held on 27.10. 2022. As is evident, the gap between the third Board meeting 1.07.22 and fourth Board meeting is not more than 120 days. Since, A Ltd has held four Board meetings during the calendar year 2022, and the gap between no two consecutive Board meetings is more than 120 days, A Ltd has complied with section 173.

Question 6:

Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting.

[MTP June-2020]

Answer:

Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting [Section 179 (3)]:

- (1) to make calls on shareholders in respect of money unpaid on their shares;
- (2) to authorise buy-back of securities under section 68;
- (3) to issue securities, including debentures, whether in or outside India;
- (4) to borrow monies;
- (5) to invest the funds of the company;
- (6) to grant loans or give guarantee or provide security in respect of loans;
- (7) to approve financial statement and the Boards report;
- (8) to diversify the business of the company;
- (9) to approve amalgamation, merger or reconstruction;
- (10) to take over a company or acquire a controlling or substantial stake in another company;

any other matter which may be prescribed (e) Additionally, Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed certain more powers that shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board: (1) to make political contributions; (2) to appoint or remove KMP (3) to appoint internal auditors and secretarial auditor; Vide Notification No. G.S.R. 206(E) dated 18th March, 2015, in rule 8 item numbers(3),(5),(6),(7),(8),and (9) and the entries relating thereto have been omitted by the Companies (Meetings of Board and its Powers) Amendment Rules, 2015.

Question 7:

Examine the following aspect related to convening of board meeting with reference to the provisions of the Companies Act, 2013:

- (i) The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.
- (ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing

[MTP June-2019]

Answer:

- (i) According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Greenhouse Limited has convened the Board meeting by serving a two weeks' notice (i.e. more than 7 days). Hence, the meeting shall be valid.

- (ii) According to section 173 of the Companies Act, 2013,

- (a) The directors can participate in a meeting of the Board either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.

- (b) A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Hence, Purple Florence Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final, only on ratification thereof by at least one independent director, if any.

Question 8:

A producer company was incorporated on 1st September, 2009. At present the paid up Share Capital of the company is Rs.10 lakhs consisting of 1,00,000 Equity Shares of Rs.10 each fully paid-up held by 200 individuals and 20 producers institutions. You are required to answer the following with reference to the provisions of the Companies Act, 1956:

- (i) What is the time limit for holding the First Annual General Meeting and the subsequent Annual General Meetings?
- (ii) What is the Quorum for the Annual General Meeting?
- (iii) State the manner in which the voting rights of the members are determined.
- (iv) Is it possible to remove a member?

[MTP June & Dec-2018]

Answer:

- (i) Annual General Meeting - The first annual general meeting of a producer company shall be held within 90 days of incorporation i.e. on or before 29th November, 2009 in this case [Sec. 581 ZA(2)]. In the case of subsequent AGMs gap between two AGMs must not be more than 15 months. Registrar of Companies may

- extend the time for holding any AGM other than the first AGM by a period not exceeding 3 months for any special reason [581 ZA(i)]
- (ii) Quorum unless the articles of association of the producer company provide for a larger number, 1/4th of the total number of members of the producer company shall be the quorum for its annual general meeting. In this case the company has got 220 members.
Hence the quorum is 55 [Sec. 581ZA (8)].
- (iii) Voting rights of members: It depends on the type of membership. Where the membership consists of individuals and producer institutions, (as in this case) voting rights should be computed on the basis of a single vote for every member [Section 581 D(c)]
- (iv) Removal of member: No person, who has any business interest which is in conflict with business of the producer company, shall become a member of that company (Section 581 D(4)). A person who has become a member of the producer company acquires any business interest which is in conflict with the business of the producer company, shall cease to be a member of that company and be removed as a member in accordance with the articles [Sec. 581 D(5)].

Question 9:

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

- (i) An interested Director;
(ii) A Director who has expressed his inability to attend a particular Board Meeting;

[MTP June-2018]

Answer:

Notice of Board meeting

- (i) Interested director: Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted.
- (ii) A Director who has expressed his inability to attend a particular Board Meeting: In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting; notice must be given to that director.

Question 10:

Mr.K & Mr.L who are the directors of RR Limited informed the company about their inability to attend the Board meetings because the notice thereof was not served on them. Discuss whether there is any default on the part of RR Limited and the consequences thereof.

[Dec-22]

Answer:

Under section 173 (3) of the Company Act, 2013 a meeting of the Board shall be called by giving not less than seven days" notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Section 173 (4) further provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of Rs.25,000/- In the given case, as no notice was served on Mr. K and Mr. L who are the directors of RR Limited, every officer responsible for such default in serving notice shall be punishable with fine of Rs.25,000/- as required by Section 173 (4). Neither the Companies Act, 2013 nor the Companies (Meetings of the Board and its Powers) Rules, 2014 lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors. The Companies Act, 2013 clearly provide for the notice to be sent to every directors. The Supreme Court, in the case of Parmeshwari Prasad vs. Union of India (1974) has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing. Hence, even though the directors concerned knew about the Board meeting, the meeting shall not be valid and resolutions passed thereat also shall not be valid.

Question 11:

State the provisions and the applicability of 'resolutions and agreements to be filed' as per Section 117 of Companies Act, 2013.

[MTP Dec-2018]

Answer:

- (1) A copy of every resolution or any agreement, in respect of matters specified in subsection (3) together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, shall be filed with the Registrar within thirty days of the passing or making thereof in such manner and with such fees as may be prescribed.

Provided that the copy of every resolution which has the effect of altering the articles and the copy of every agreement referred to in sub-section (3) shall be embodied in or annexed to every copy of the articles issued after passing of the resolution or making of the agreement.

- (2) If a company fails to file the resolution or the agreement under sub-section (1) before the expiry of the period specified therein, the company shall be punishable with fine which shall **not be less than one lakh rupees** but which may extend to twenty-five lakh rupees and every officer of the company who is in default, including liquidator of the company, if any, shall be punishable with fine which shall not be less than **fifty thousand rupees** but which may extend to five lakh rupees.
- (3) The provisions of this section shall apply to—
(i) special resolutions;
(ii) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions;
(iii) any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director;
(iv) resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members;
(v) resolutions requiring a company to be wound up voluntarily passed in pursuance of Section 59 of the Insolvency and Bankruptcy Code, 2016
(vi) resolutions passed in pursuance of sub-section (3) of section 179;
Provided that no person shall be entitled under section 399 to inspect or obtain copies of such resolutions;
Provided further that nothing contained in this clause shall apply to a banking company in respect of a resolution passed to grant loans, or give guarantee or provide security in respect of loans under clause (f) of sub-section (3) of section 179 in the ordinary course of its business; and
(vii) Any other resolution or agreement as may be prescribed and placed in the public domain.

Question 12:

The last Board meeting of ABC Structural Ltd., a public limited company was held on 25th January, 2022. The MD wants that in the next Board meeting the annual financial statements to be placed and approved. The Accounts manager feels that the financial statements shall be ready latest by 15th June only. Mr Ahuja is the chairman of audit committee, who will not be in India during the whole of June. MD feels that we get the financial statements approved through video board meeting. Presently, there is no chairman in the company/ MD chairs the Board meetings.

(ICMAI Study Material)

Solution:

MD of the company need to know and understand and comply with the following.

- (i) As per section 173(1) Next board meeting shall have to be held within 120 days of the previous meeting. Therefore next Board cannot be held in June. There shall be another meeting to be held when financial statements are ready.
- (ii) Rule 4 of Companies (meeting of Board and its powers) Rules prohibits approval of annual financial statements through video meetings.

Question 13:

Jyoti industries is a public limited company. Due to some IR Problem the factory and office was closed. Two accounts officers dealing with finalization of accounts left the company in quick succession and accounts could not be prepared. It is likely that the financial statements will not be placed within the last date if AGM, i.e. 30th September .MD wants to know the consequences in following situations.

- (i) Accounts is not ready and cannot be placed in AGM.
- (ii) AGM to be deferred after 30th September
- (iii) Accounts are ready but AGM could not be held
- (iv) AGM held, accounts placed but not approved

(ICMAI Study Material)

Answer:

- (i) Company has to adjourn the meeting to a date where the accounts shall be ready but such meeting also shall be within 30th September.
- (ii) AGM cannot be deferred by the Company. Approval of extension is given by Registrar of Companies. However, the approval for extension shall have to be taken within 30th September.
- (iii) If AGM s could not be held, it would amount to violation of law and extension to be sought.
 - (iii) If the AGM is held but the accounts are not adopted, the unadopted accounts shall be filed with the Registrar. Where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such un adopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of annual general meeting.

Chapter 7 - Inspection, Inquiry & Investigation

Question 1:

Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture.

With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application will be accepted. Elaborate.

[Dec-17]

Answer:

According to the Companies Act, 2013, the Central Government under section 210 (1) may order an investigation into the affairs of the company, if it is of the opinion that it is necessary to do so:

- (a) on the receipt of a report of the Registrar or Inspector under section 208;
- (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated;
- (c) In public interest.

According to section 210 (3) of the Companies Act, 2013, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct.

The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

Question 2:

Decide the liability of the person for commission of the act during the course of inspection, inquiry or investigation under the Companies Act, 2013:

- (I) A person who is required to make statement during the course of investigation pending against its company, is a party to the manipulation of documents related to the transfer of securities and naming of holders in the register of members by the company.
- (II) An employee of the company publicized among his social networking of sound financial position of his organization in order to incite the public to purchase the shares of its company. In actuality, the company was running in loss.

[June-19]

Answer:

(i) According to section 244 of the Companies Act, 2013, in the case of a Company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

- (a) Not less than 100 members of the Company or not less than one-tenth of the total number of members, whichever is less; or
- (b) Any member or members holding not less than one-tenth of the issued share capital of the Company provided the applicant(s) have paid all the calls and other sums due on the shares.

Legal heir of the deceased shareholder with minority status is entitled to file the petition.

In the given case, there are six shareholders. As per the condition (a) above, 10% of 6 i.e. 1 (round off 0.6) satisfies the condition. Therefore, in the light of the provisions of the Act, a single member (even the legal representative of a deceased shareholder) can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the Company's share capital.

Thus, the petition made by Mr. Bala is valid and maintainable.

(ii) Section 229 of the Companies Act, 2013 states that where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,—

- (b) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;
- (c) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or
- (d) Provides an explanation which is false or which he knows to be false, he shall be punishable for fraud in the manner as provided in section 447.

As per the above provision:

- (i) With respect to this part of the question, the person shall be liable for fraud. Since, in the given case, he is a party in the manipulation of documents relating to the transfer of securities and in the register of members of the company which is under investigation.
- (ii) Employee shall not be liable here, as the said company in which he is an employee, is not undergoing investigation. Secondly, the person purchasing the shares can act with due diligence before purchasing shares rather -fully relying on the publicity made on social networking.

Question 3:

During investigations conducted on the affairs of a company in the public interest, the inspector observed that the Directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is Inspector permitted to do so under the provisions of the Companies Act, 2013?

[Dec-19]

Answer:

Investigation into affairs of related companies: Section 219 of the Companies Act, 2013, provides for power of Inspector to conduct investigation into the affairs of related companies etc., if an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of

- (a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;
- (b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;
- (c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
- (d) any person who is or has at any relevant time been the company's managing director or manager or employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed. In view of above, the Inspector is permitted to investigate the holding company.

Question 4:

What are the duties of the inspector are as enumerated in Sec 223 of the Companies Act, 2013 in relation to his report.

[June-17, MTP - Dec-2018]

Answer:

Section 223 of the Companies Act, 2013 deals with Inspector's report. The following provisions are applicable in respect of the Inspector's report on investigation:

- (i) **Submission of interim report and final report [Sub section (1)]**: An inspector appointed under this Chapter (Chapter XIV- inspection, Inquiry and Investigation) may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.
- (ii) **Report to be writing or printed [Sub section (2)]**: Every report made under sub section (1) above shall be in writing or printed as the Central Government may direct.
- (iii) **Obtaining copy or report [Sub section (3)]**: A copy of the above report may be obtained by making an application in this regard to the Central Government,
- (iv) **Authentication of report [Sub section (4)]**: The report of any inspector appointed under this Chapter shall be authenticated either—
 - (a) by the seal, if any, of the company whose affairs have been investigated; or
 - (b) By a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872, and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.
- (v) **Exceptions**: Nothing in this section shall apply to the report referred to in section 212 of the Companies Act, 2013.

Question 5:

Explain who shall bear the cost of investigation under section 225 under the Companies Act 2013?

[MTP Dec-23]

Answer:

Section 225 of the Act lays down the following provisions in respect of expenses of investigation:

- (a) the expenses of investigation shall be defrayed in the first instance by the Central Government, but shall be reimbursed by the following persons to the extent mentioned below, namely:
 - (1) any person who is convicted on a prosecution instituted, or who is ordered to pay damages or restore any property in proceedings brought, under section 224, to the extent that he may in the same proceedings be ordered to pay the said expenses as may be specified by the court convicting such person, or ordering him to pay such damages or restore such property, as the case may be.
 - (2) any company or body corporate in whose name proceedings are brought as aforesaid, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings.
 - (3) unless, as a result of the investigation, a prosecution is instituted under section 224:
 - b) any company, body corporate, managing director or manager dealt with by the report of the Inspector, and
 - c) The applicants for the investigation, where the Inspector was appointed under section 213, to such extent as the Central Government may direct.
- (b) As per sub-section (2), any amount for which a company or body corporate is liable under clause (2) above shall be a first charge on the sums or property mentioned in that clause.

Question 6:

Analyse in the light of The Companies Act, 2013, the role of SFIO in investigation into the affairs of any company.

[MTP June-23 Set-2]

Answer:

Investigation by Serious Fraud Investigation Office:

The Central Government have established an office called the Serious Fraud Investigation Office (SFIO) to investigate frauds relating to a company. Section 212 of the Act provides for Investigation into affairs of Company by the Serious Fraud Investigation Office (SFIO). According to this section:

(a) where the Central Government:

- (1) on receipt of a report of the Registrar or Inspector under section 208;
 - (2) on intimation of a special resolution passed by a company that its affairs are required to be investigated,
 - (3) in the public interest, or
 - (4) on request from any Department of the Central Government or a State Government, is of the opinion that it is necessary to investigate into the affairs of a company by the SFIO, the Central Government may, by order, assign the investigation into the affairs of the said company to the SFIO.
- (b) No other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act. In case any such investigation has already been initiated, the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to facilitate SFIO to investigate.
- (c) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation [Sub section (5)]
- (d) The SFIO shall submit an interim report and on completion, final report to the Central Government, if the Central Government.
- (e) Any person concerned by making an application in this regard to the court may get a copy of the report.
- (f) The Central Government may, after examination of the report, direct the SFIO to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company [Sub section (14)].

Question 7:

State the Powers of the Registrar or Inspector under the Companies Act, 2013.

[MTP Dec-2017]

Answer:

Powers of the Registrar or Inspector [Section 207 (2) & (3)]

- (1) The Registrar or Inspector making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be:
 - (a) make or cause to be made copies of books of account and other books and papers, or
 - (b) Place or cause to be placed any marks of identification in such books in token of the inspection having been made.
- (2) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the Registrar or Inspector making an inspection or inquiry shall have all the 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) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or Inspector making the inspection or inquiry,
 - (b) summoning and enforcing the attendance of persons and examining them on oath, and
 - (c) Inspection of any books, registers and other documents of the company at any place.

Question 8:

What are the duties of an inspector as enumerated in Sec 223 of the Companies Act, 2013 in relation to his report.

[MTP June-2018]

Answer:

Section 223 of the Companies Act, 2013 deals with Inspector's report. The following provisions are applicable in respect of the Inspector's report on investigation:

- (i) Submission of interim report and final report [Sub section (1)]: An inspector appointed under this Chapter (Chapter XIV- inspection, Inquiry and Investigation) may, and if so directed by the Central

- Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.
- (ii) Report to be writing or printed [Sub section (2)]: Every report made under sub section (1) above shall be in writing or printed as the Central Government may direct.
 - (iii) Obtaining copy or report [Sub section (3)]: A copy of the above report may be obtained by making an application in this regard to the Central Government,
 - (iv) Authentication of report [Sub section (4)]: The report of any inspector appointed under this Chapter shall be authenticated either –
 - (a) by the seal, if any, of the company whose affairs have been investigated; or
 - (b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872, and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.
 - (v) Exceptions: Nothing in this section shall apply to the report referred to in section 212 of the Companies Act, 2013.

Question 9:

State briefly the composition of SERIOUS FRAUD INVESTIGATION OFFICE (SFIO) under the Companies Act, 2013.

[June-18]

Answer:

The SFIO shall be:

- (1) Headed by a Director, and
- (2) Consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in:
 - (a) Banking;
 - (b) Corporate affairs;
 - (c) Taxation;
 - (d) Forensic audit;
 - (e) Capital market;
 - (f) Information technology;
 - (g) Law; or
 - (h) Such other fields as may be prescribed.

Chapter 8 - Compromises, Arrangements & Amalgamations

Question 1:

Does the scheme of compromise or arrangement require approval of preference shareholder?

[Dec-17]

Answer:

Preference shareholders: The term 'member' includes preference shareholders also. Further, preference shareholders are a class of members and their rights may be affected differently in the proposed scheme of arrangement. Hence their approval is also required.

If the Court/Tribunal directs separate meeting of preference shareholders and equity shareholders, then the scheme should be approved by requisite majority in both such meetings held as per directions of the Court/Tribunal.

Question 2:

Is it mandatory to obtain Regulatory approvals for scheme of compromise/ arrangements as per section 230(5) of the Companies Act, 2013? Explain.

[Dec-19]

Answer:

Notice to be sent to the regulators seeking their representations Section 230(5) states that a notice under Sub-Section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under Sub-Section (1) of Section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

Question 3:

A meeting of members of Joka Agricultural Equipments Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 500000 shares. 70 members holding 400000 shares in the aggregate voted for the scheme. 120 members holding 90000 shares in aggregate voted against the scheme. 10 members holding 10000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 1956 whether the scheme was approved by the requisite majority?

[June-17]

Answer:

Compromise or Arrangement: According to sub-section (2) of the section 391 of the Companies Act, 1956, the scheme of compromise and arrangement must be approved by a resolution passed with a majority in number representing three-fourths in value of the creditors, or members, or class of members, as the case may be, present and voting either in person or, by proxy. The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting. In this case 200 members attended the meeting, but only 190 members voted at the meeting. As 70 members voted in favour of the scheme the requirement relating to majority in number (i.e. 95) is not satisfied. 190 members who participated in the meeting held 4,90,000 shares, three-fourth of which works out to 3,67,500 while 70 members who voted for the scheme held 4,00,000 shares. The majority representing three-fourths in value is satisfied. Thus, in the instant case, the scheme of compromise and arrangement of Joka Agricultural Equipment Limited is not approved as though the value of shares voting in favour is significantly more, the number of members voting in favour do not exceed the number of members voting against.

Question 4:

Critically examine the powers of Tribunal as per the provisions under section 231 of the Companies Act 2013.

[MTP June-23 Set-1]

Answer:

The powers of Tribunal as per the provisions under section 231 of the Companies Act 2013.

As per Section 231(1) when the Tribunal makes an order under Section 230 sanctioning a compromise or an arrangement, it:

- (i) shall have power to supervise the implementation of the, and
- (ii) May, give such directions in regard to any matter or make such modifications in the scheme of compromise or arrangement as it may consider necessary for the proper implementation. If the Tribunal is satisfied that the compromise or arrangement sanctioned under Section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company.
- (iii) Tribunal may require the liquidator or the company to report on the working of the scheme.

Question 5:

Demonstrate the stepwise procedure for merger and amalgamation under the Companies Act, 2013 u/s 233.

[MTP June-23 Set-2]

Answer:

Merger and Amalgamation of certain Companies [Section 233]

It prescribes simplified procedure for Merger or amalgamation of:

- (a) two or more small companies or
- (b) between a holding company and its wholly-owned subsidiary company or
- (c) Such other class or classes of companies as may be prescribed. On 1/2/21, Central Govt. has prescribed holding company, two or more start-up companies, one or more start-up company with one or more small company.

As per Section 2 (46) 'holding company', in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Small company -defined: As per Section 2 (85) "small company"-means a company, other than a public company:

- (a) Paid-up share capital of which does not exceed Rs.50 lakhs or such higher amount as may be prescribed which shall not be more than Rs.5 crores, or
- (b) Turnover of which as per its last profit and loss account does not exceed Rs.2 crores or such higher amount as may be prescribed which shall not be more than Rs.20 crores.

Start-up company defined-amendment in Rule - start-up company means a private company, recognised under notification of Department of Promotion of Industry and International Trade.

Provided that nothing in this clause shall apply to: (1) a holding company or a subsidiary company. (2) a company registered under Section 8 or (3) a company or body corporate governed by any special Act.

Question 6:

A meeting of members of Joka Agricultural Equipment's Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 200 members holding 500000 shares. 70 members holding 400000 shares in the aggregate voted for the scheme. 120 members holding 90000 shares in aggregate voted against the scheme. 10 members holding 10000 shares abstained from voting. Examine with reference to the relevant provisions of the Companies Act, 1956 whether the scheme was approved by the requisite majority?

[MTP June-2020]

Answer:

Compromise or Arrangement: According to sub-section (2) of the section 391 of the Companies Act, 1956, the scheme of compromise and arrangement must be approved by a resolution passed with a majority in number representing three-fourths in value of the creditors, or members, or class of members, as the case may be, present and voting either in person or, by proxy.

The majority is dual, in number and in value. A simple majority of those voting is sufficient. Whereas the 'three-fourths' requirement relates to value. The three-fourths value is to be computed with reference to paid-up capital held by members present and voting at the meeting.

In this case 200 members attended the meeting, but only 190 members voted at the meeting. As 70 members voted in favour of the scheme the requirement relating to majority in number (i.e. 95) is not satisfied.

190 members who participated in the meeting held 4,90,000 shares, three-fourth of which works out to 3,67,500 while 70 members who voted for the scheme held 4,00,000 shares. The majority representing three-fourths in value is satisfied.

Thus, in the instant case, the scheme of compromise and arrangement of Joka Agricultural Equipments Limited is not approved as though the value of shares voting in favour is significantly more, the number of members voting in favour do not exceed the number of members voting against.

Question 7:

Does the scheme of compromise or arrangement require approval preference shareholder?

[MTP June-2020]

Answer:

Preference shareholders: The term member' includes preference shareholders also. Further, preference shareholders are a class of members and their rights may be affected differently in the proposed scheme of arrangement. Hence their approval is also required.

If the Court/Tribunal directs separate meeting of preference shareholders and equity shareholders, then the scheme should be approved by requisite majority in both such meetings held as per directions of the Court/Tribunal.

Question 8:

Surya Ltd., wants to reorganize the company's share capital by the consolidation of shares of different classes and passed a resolution to this effect in the Board meeting and thereafter made an application to the Tribunal. The Tribunal ordered that a meeting of the members be called. The company sent notices to all the members. In the meeting, some of the members made objections to such arrangements. However, the majority of the members were interested in the resolution proposed by the company. Tribunal after scrutinizing the minutes of the meeting, sanctioned the proposed arrangement.

Examine in the light of the given facts, that in order to give effect to the arrangement which prescribes the reorganization of company's share capital by the consolidation of shares of different classes, mention the requirements on the execution of the said arrangement under the Companies Act, 2013.

[Dec-22]

Answer:

Section 230(1) of the Companies Act, 2013 provides that where a compromise or arrangement is proposed -
(a) between a company and its creditors or any class of them; or
(b) Between a company and its members or any class of them, The Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up of the liquidator, "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs. Here the term, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. Any compromise or arrangement needs the order of sanction by the Tribunal and the Tribunal may on an application made by the company, order the company to call the meeting of the shareholders, pass such resolution in the meetings and then forward the minutes to the Tribunal for its order. The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order. The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at

least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

Question 9:

ABC Ltd. and DEF Ltd. are wholly owned by Government of West Bengal. As a policy matter, the Government issued administrative orders for merging DEF Ltd. with ABC Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act, 2013.

[Dec-18]

Answer:

Authority to whom the application for merger is to be made According to Section 237 of the Companies Act, 2013, where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette provide for the amalgamation of those companies into a single company.

Thus, in the given situation of merger between two wholly owned Government companies in public interest, there is no specific authority with whom the application for merger is required as the Central Government shall by notification in the Official Gazette, will provide for the amalgamation of the two said companies into a single company.

Question 10:

Discuss the process of Merger or Amalgamation of an Indian company with a foreign company as per Companies act, 2013.

[MTP June-2020]

Answer:

Section 234 (2) Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose. For the purposes of Sub-Section (2), the expression foreign company means any company or body corporate incorporated outside India whether having a place of business in India or not. Section 234 (1) states that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this Section.

Question 11:

ABC Ltd. Is a public limited unlisted company with Rs.50 crore equity capital of Rs.10 each. It has taken over 70% equity of a company called BCG Ltd which is a listed company with equity capital of Rs.20 crores divided into share of Rs.10 each. ABC Ltd. And BCG Ltd. Have decided to merge.

The CEO of BCG Ltd. has following queries which you have to answer.

- (i) Is the decision to merge is in order?
- (ii) Is a scheme necessary for merger?
- (iii) Is the merger to be approved by shareholders of each of the companies?
- (iv) What happens if few shareholders do not consent?
- (v) Does require order of NCLT?

(ICMAI Study Material)

Answer:

- (i) Yes. The decision to merge is in order. Companies are free to merge with consent of shareholders and by following the procedures prescribed under law. However, it will not fall under special category mergers under section 233 of the Act.
- (ii) Yes, a scheme is necessary.
- (iii) Yes, the scheme has to be approved by 3/4th majority of shareholders in value.
- (iv) The dissenting shareholders have to accept the decision of the majority.
- (v) Yes. It requires approval of NCLT. Since the transferee company is listed, SEBI regulations have to be complied with, wherever applicable

Chapter 9 - Prevention of Oppression & Mismanagement

Question 1:

ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement? Give your answer according to the provisions of the Companies Act, 2013.

[Dec-17]

Answer:

(i) Under section 244 of the Companies Act, 2013, in the case of a company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

- a) Not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less; or
- b) Any member or members holding not less than one-tenth of the issued share capital or the company provided the applicant(s) have paid all the calls and other sums due on the shares.

In the given case, since there are eight shareholders. As per the condition (a) above, 10% of 8 i.e. 1 satisfies the condition. Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.

Question 2:

A group of members of XYZ Limited has filed a petition before the Tribunal alleging various acts of oppression and mismanagement by the majority shareholders of the company. The Petitioner group holds 12% of the issued share capital of the company. During the pendency of the petition, some of the petitioner group holding about 5% of the issued share capital of the company wish to disassociate them from the petition and they along with the other majority shareholders have submitted before the Tribunal that the petition may be dismissed on the ground of non-maintainability.

Examine their contention having regard to the provisions of the Companies Act, 2013.

[Dec-18]

Answer:

The argument of the majority shareholders that the petition may be dismissed on the ground of non-maintainability is not correct. The proceedings shall continue irrespective of withdrawal of consent by some petitioners. It has been held by the Supreme Court in Rajmundhry Electric Corporation vs. V.NageswarRao, AIR (1956) SC 213 that if some of the consenting members have subsequent to the presentation of the petition withdrawn their consent, it would not affect the right of the applicant to proceed with the petition. Thus, the validity of the petition must be judged on the facts as they were at the time of presentation. Neither the right of the applicants to proceed with the petition nor the jurisdiction of Tribunal to dispose of it on its merits can be affected by events happening subsequent to the presentation of the petition.

Question 3:

A group of shareholders consisting of 25 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s Fly By Night Operators Ltd. The company has a total of 300 members and the group of 25 members holds one-tenth of the total paid-up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is that due to mismanagement by the board of directors, the company is incurring losses and the company has not declared any dividend even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act, 2013, advise the group of shareholders regarding the success of (I) getting the petition admitted and (II) obtaining relief from the Tribunal.

[June-18]

Answer:

Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mismanagement. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

- a. In the case of company having a share capital, not less than 100 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, provided that the applicant(s) have paid all calls and other dues on the shares.
- b. In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (*Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth*).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (*Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd.*)

Thus the shareholders may not succeed in getting any relief from Tribunal.

Question 4:

A petition by majority shareholders complaining oppression by minority shareholders. Give your answer according to the provisions of the Companies Act, 2013

[MTP June-2018]

Answer:

Right not confined to minority:

According to Section 244, The Right to apply for relief under section 241/242 is given to 100 members or 1/10 of the total number of members or any member or members holding not less than 1/10 of the issued share capital of the company. There is nothing in this section which suggests even indirectly that unless the application is made by minority shareholders it is not maintainable. The Right to apply is, therefore, not confined to oppressed minority of the shareholders alone. It was held by Calcutta High Court in *Re. Sindhri Iron Foundry (P) Ltd.* that the oppressed majority also might apply for relief under section 241. Therefore the petitioners are likely to succeed in getting relief provided the other conditions laid down in Section 242(i.e., that to wind up the Company would unfairly prejudice such members, but that otherwise the facts would justify the making of a winding up order on just equitable ground) is satisfied even though the Delhi High Court held a contrary view in *Suresh Kumar Sanghi versus Supreme Motors Ltd.*

Question 5:

A group of shareholders consisting of 25 members decide to file a petition before the tribunal for relief against oppression and mismanagement by the Board of Directors of KV Ltd. The company has a total of 300 members and the group of 25 members holds one-tenth of the total paid up share capital accounting for one-fifteenth of the issued share capital. The main grievance of the group is the due to mismanagement by the Board of Directors, the company is incurring losses and the company has not declared any dividends even when profits were available in the past years for declaration of dividend. In the light of the provisions of the Companies Act 2013, advise the group of shareholders regarding the success of i) getting the petition admitted and ii) obtaining relief from the tribunal.

[Dec-22]

Answer:

Section 244 of the Companies Act. 2013 provides the right to apply to the Tribunal for relief against oppression and mismanagement. This right is available only when the petitioners hold the prescribed limit of shares as indicated below.

- (i) In the case of company having a share capital, not less than 100 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 on the issued share capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares.

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

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241. As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. Vs. M.K. Chandrakanth). Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. (v) Kuttanad Rubber Co.Ltd.) Thus, the shareholders may not succeed in getting any relief from Tribunal.

Question 6:

Prepare a list of powers of Central Government to prevent Oppression and Mismanagement.

[MTP June-23 Set-2]

Answer:

Central Govt.'s power to prevent Oppression and Mismanagement

Companies Amendment Act, 2019 have inserted sub-section 3 to section 241, enabling Central Govt. to make a case of oppression and mismanagement, under following situations.

- a) Any person management guilty of fraud, iterance, persistent negligence or breach of duty and trust,
- b) Business not conducted with sound business principles or prudent commercial practices,
- c) Management conducted in many injuries to interest of the trade, industry to which the company pertains,
- d) Business carried out with an intention to defraud its creditors, members or in fraudulent or unlawful purpose.

Question 7:

ABC Private Limited is a company in which there are eight shareholders. Can a member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement? Give your answer according to the provisions of the Companies Act, 2013.

[MTP June-2020]

Answer:

Under section 244 of the Companies Act, 2013, in the case of a company having share capital, the following member(s) have the right to apply to the Tribunal under section 241:

- (a) Not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less; or
- (b) Any member or members holding not less than one-tenth of the issued share capital or the company provided the applicant(s) have paid all the calls and other sums due on the shares.

In the given case, since there are eight shareholders. As per the condition (a) above, 10% of 8 i.e. 1 satisfies the condition. Therefore, a single member can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.

Question 8:

You, an individual shareholder found that the Directors representing the majority of shareholders perform an illegal or ultra vires act for the company. What is the action you may take to restrain such an act?

[Dec-19]

Answer:

The majority of shareholders have no right to confirm an illegal or ultravires transactions of the company. In such case an individual shareholder has right to restrain the company by an order or injunction of the court from carrying out an ultravires acts.

Question 9:

State the justification and advantages of the Rule in Foss v. Harbottle

[MTP Dec-2017]

Answer:

The justification for the rule laid down in **Foss v. Harbottle** is that the will of the majority prevails. On becoming a member of a company, a shareholder agrees to submit to the will of the majority. The rule really preserves the right of the majority to decide how the company's affairs shall be conducted. If any wrong is done to the company, it is only the company itself, acting, as it must always act, through its majority, that can seek to redress and not an individual shareholder. Moreover, a company is a person at law and the action is vested in it and cannot be brought by a single shareholder. Where there is a corporate body capable of filing a suit for itself to recover property either from its directors or officers or from any other person then that corporate body is the proper plaintiff and the only proper plaintiff [Gray v. Lewis, (1873) 8 Ch. Appl. 1035].

The main advantages that flow from the Rule in Foss v. Harbottle are of a purely practical nature and are as follows:

1. **Recognition of the separate legal personality of company:** If a company has suffered some injury, and not the individual members, it is the company itself that should seek to redress.
2. **Need to preserve right of majority to decide:** The principle in Foss v. Harbottle preserves the right of majority to decide how the affairs of the company shall be conducted. It is fair that the wishes of the majority should prevail.
3. **Multiplicity of futile suits avoided:** Clearly, if every individual member were permitted to sue anyone who had injured the company through a breach of duty, there could be as many suits as there are shareholders. Legal proceedings would never cease, and there would be enormous wastage of time and money.
4. **Litigation at suit of a minority futile if majority does not wish it:** If the irregularity complained of is one which can be subsequently ratified by the majority it is futile to have litigation about it except with the consent of the majority in a general meeting.

Chapter 10 - Insolvency & Bankruptcy Code, 2016

Question 1:

The Insolvency and Bankruptcy Code, 2016 is not applicable to corporates in finance sector. Explain.

[Dec-18]

Answer:

Code not applicable to financial service providers - The Insolvency and Bankruptcy Code is not applicable to corporates in finance sector. Section 3(7) of Insolvency and Bankruptcy Code, 2016 states that "Corporate person" shall not include any financial service provider. Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

Question 2:

State the manner of initiation of corporate insolvency resolution process by financial creditor under the Insolvency and Bankruptcy Code, 2016.

[June-18]

Answer:

Initiation of corporate insolvency resolution process by financial creditor

Section 7 of Insolvency and Bankruptcy Code deals with initiation of corporate insolvency resolution process by a financial creditor. The process can be explained as under:

(1) Filing of application before the Adjudicating Authority for initiating corporate insolvency resolution process

A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

For this purpose, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) Form and manner of making application

The application shall be in such form and manner and accompanied with such fee as may be prescribed.

(3) Enclosures to application

Following documents and information shall be furnished along with the application:

- (a) Record of the default recorded with the information utility or such other record or evidence of default as may be specified.
- (b) The name of the resolution professional proposed to act as an interim resolution professional.
- (c) Any other information as may be specified by the Board.

(4) Duty of Adjudicating Authority to ascertain the existence of a default

The Adjudicating Authority shall, within 14 days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

(5) Admission of application by the Adjudicating Authority

The Adjudicating Authority may, by order, admit such application, if it is satisfied that -

- (a) a default has occurred;
- (b) the application for initiating corporate insolvency resolution process is complete; and
- (c) No disciplinary proceedings are pending against the proposed resolution professional.

(6) Rejection of application by the Adjudicating Authority

The Adjudicating Authority may, by order, reject such application, if it is satisfied that -

- (a) default has not occurred; or
- (b) the application for initiating corporate insolvency resolution process is incomplete; or
- (c) Any disciplinary proceeding is pending against the proposed resolution professional.

Before rejecting the application, the Adjudicating Authority shall give a notice to the applicant to rectify, within 7 days, the defect in his application.

(7) Commencement of corporate insolvency resolution process

The corporate insolvency resolution process shall commence from the date of admission of the application by the Adjudicating Authority.

Question 3:

Mr. Ganesh, an operational creditor filed an application for corporate insolvency resolution process. He does not propose for appointment of an interim resolution professional in the application. State the provisions given by the code in the given situation. State the term of such appointed IRP.

[June-19]

Answer:

Appointment of IRP: As per Section 16 of the Code where the application for corporate insolvency resolution process is made by an operational creditor and no proposal for an interim resolution professional is made in the said application. The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an Interim resolution professional.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

Period of appointment of IRP: The term of Interim Resolution Professional shall continue till the date of appointment of the resolution professional under section 22 of the Code.

Question 4:

Domen India Limited owes a sum of Rs.2,80,000 to S, who assigns this debt to his two creditors, Mr. R—to the extent of Rs.1,40,000 and Mr. M—to the extent of Rs.1,40,000. Mr. M makes a demand for his money from the company by giving a legal notice. The company could not meet Mr. M's demand or otherwise satisfy him till the expiry of four weeks from the date of notice. Mr. M, therefore, moves to NCLT with an application for initiation of Insolvency and Bankruptcy Code, 2016, decide whether an application filed by Mr. M can be accepted by NCLT.

[Dec-19]

Answer:

Financial creditor can initiate corporate insolvency resolution process himself or jointly with other financial creditors against corporate debtor on default of payment of debt of Rs. 1,00,000/- or more. Assignee of financial debt is also financial creditor as per section 5 (7) of the IBC, 2016. Mr. M's application can be accepted by NCLT if Company fails to pay debt within stipulated time. Application should be supported with a copy of the assignment or transfer agreement and other relevant documents as may be required to demonstrate the assignment or transfer.

Question 5:

Everlasting Ltd. went into liquidation. XYZ Bank Ltd. the secured creditor, decided to realise its security interest by informing liquidator of such security interest and identify assets subject to which such security interest has to be realised. Liquidator denied the XYZ bank Ltd. to enforce its security interest as said secured creditor is not a part of committee of creditors. Throw a light on the stated situation and examining on the validity of the stand taken by the liquidator.

[Dec-21]

Answer:

As per Provisions laid down in Section 52 of the Insolvency and Bankruptcy Code, 2016, an option is given to secured creditor to realise its security interest by informing liquidator in respect of such security interest

and identify assets subject to which such security interest has to be realised. Therefore, it is not mandatory under Code proceedings for financial creditor to be a part of CoC (Committee of Creditors) to enforce its security interest. Hence, application filed by financial creditor was to be accepted.

Therefore the stand taken by the liquidator on his denial to the XYZ Bank Ltd., to enforce its security interest on the account that secured creditor is not a part of the Committee of creditors, is not valid.

Question 6:

Who can initiate the insolvency resolution process?

[Dec-21]

Answer:

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided- Section 6 of Insolvency and Bankruptcy Code, 2016.

Question 7:

Nature India Limited filed a petition under Insolvency and Bankruptcy Code, 2016 with National Company Law Tribunal (NCLI) against Tulip Limited and the petition was admitted. After that, Nature India Limited wanted to withdraw the petition based on a settlement arrived between the parties. Examine whether it is permissible to withdraw the petition after it has been admitted? And also infer the legal provision relating to the admission and rejection of application by an adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

[MTP Dec-23]

Answer:

The given problem relates to section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 44(2) of the National Company Tribunal Rules, 2016.

As per section 9, an application for initiation of corporate insolvency resolution process may be made by an operational creditor against the corporate debtor. Such application is made to the Adjudicating Authority (NCLT).

As per section 13, where an application is made under section 9 is admitted, the Adjudicating Authority shall make an order with respect to following:

- (i) Appoint an interim resolution professional in the manner as laid down in sec 16.
- (ii) Cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims.
- (iii) Declare a moratorium for the purposes referred to in section 14.

However, section 9 does not address a situation wherein an application made to the Adjudicating Authority is admitted, but afterwards, the operational creditor wishes to withdraw its application. In other words, section 9 is silent as to whether an application, once admitted, can be withdrawn or not. But, this is dealt with Rule 44(2) of the National Company Law Tribunal Rules, 2016.

As per Rule 44(2), where at any stage prior to the hearing of the petition or application, the applicant desires to withdraw his application, he shall make an application to that effect to the Tribunal, and the Tribunal on hearing the applicant and if necessary, the other party in the application, may permit such withdrawal upon imposing such costs as it may deem fit and proper. In "Parker Hannifin India private Limited v Powers International Private Limited" an application made under section 9 was admitted by the Adjudicating Authority. As a consequence of admission of application, public announcement was made inviting claims from the creditors and moratorium was declared. Thereafter, operational creditor and corporate debtor duly agreed for amicable settlement and was arrived at between the parties. Then an application was made to the Adjudicating Authority for withdrawal of application admitted earlier.

The Authority held that after the admission of the application under section 9, the application acquires the character of a representative suit. By reason of public announcement, other creditors become entitled to file their claims and participate in the corporate insolvency resolution process. Therefore, the application cannot be dismissed on the basis of a compromise or settlement arrived at between the operational creditor and corporate debtor. Thus, operational creditor and corporate debtor alone shall have no right to decide the withdrawal of the application. In the given Nature India Limited's application against Tulip Limited has been

admitted by the Adjudicating Authority under section 9. Afterwards, Nature India Limited and Tulip Limited entered into a settlement and wanted to withdraw the application. Accordingly, the application admitted under section 9 cannot be withdrawn.

Question 8:

Critically examine the rationale behind the powers and duties of a liquidator as prescribed in the IBC, 2016.

[MTP June-23 Set-1]

Answer:

Powers and duties of liquidator

The liquidator will work under overall directions of the Adjudicating Authority and have the following powers and duties.

- (a) To verify claim of all the creditors.
- (b) To take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor.
- (c) To evaluate the assets and property of the corporate debtor.
- (d) To take such measures to protect and preserve the assets and properties.
- (e) To carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary.
- (f) To sell the immovable and movable property and actionable claims of the corporate debtor in liquidation other than to those who are not eligible to be a resolution applicant.
- (g) to draw, accept, make and endorse any negotiable instruments
- (h) to take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate.
- (i) to obtain any professional assistance from any person or appoint any professional
- (j) To invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code.
- (k) To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, on behalf of the corporate debtor.
- (l) to investigate the financial affairs of the corporate debtor to determine undervalued or preferential transactions
- (m) To take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument.
- (n) to apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process
- (o) To perform such other functions as may be specified by the Board.

The liquidator may but consult any of the stakeholders entitled to a distribution of proceeds such consultation shall not be binding on the liquidator.

Question 9:

Analyse various provisions concerning related parties in to the matter of corporate debtor as provided under the IBC Code, 2016.

[MTP Jun-23 Set-2]

Answer:

Related party, in relation to a corporate debtor, means—

- (a) a director or partner or a relative of a director or partner of the corporate debtor
- (b) a key managerial personnel or a relative of a key managerial personnel of the corporate debtor;
- (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
- (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than 2%, of its share capital;
- (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than 2%, of its paid-up share capital;

- (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;
- (h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;
- (i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary; Provided, where the interim resolution professional is not appointed in the order admitting application u/s 7, 9 & 10, the insolvency commencement date shall be the date on which such IRP is appointed by the adjudicating authority.
- (j) any person who controls more than twenty per cent, of voting rights in the corporate debtor on account of ownership or a voting agreement;
- (k) any person in whom the corporate debtor controls more than twenty per cent, of voting rights on account of ownership or a voting agreement;
- (l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;
- (m) any person who is associated with the corporate debtor on account of—
(i) participation in policy making processes of the corporate debtor; or
(ii) having more than two directors in common between the corporate debtor and such person; or
(iii) Interchange of managerial personnel between the corporate debtor and such person; [Section 5(24)].

Question 10:

Prepare a list of the functions of an Asset Reconstruction Company (ARC).

[MTP June-23 Set-2]

Answer:

List of functions of an Asset Reconstruction Company:

"Asset Reconstruction Company" means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both."

Role / Functions of an ARC:

- Acquisition of financial assets (as defined u/s 2(L) of SRFAESI Act, 2002),
- Change or takeover of Management / Sale or Lease of Business of the Borrower,
- Rescheduling of Debts,
- Enforcement of Security Interest (as per section 13(4) of SRFAESI Act, 2002)
- Settlement of dues payable by the borrower,
- Shall commence/undertake only the securitization and asset reconstruction activities,
- Shall not raise monies by way of deposit,
- The company carries business other than allowed activities would result in cancellation of registration.

Question 11:

Discuss the applicability of Insolvency and Bankruptcy Code, 2016.

[MTP June-2020] [MTP June-2019] [June-2023]

Answer:

Applicability of Insolvency and Bankruptcy Code, 2016

The provisions of Insolvency and Bankruptcy Code, 2016 applies to the following, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be (Section 2 of Insolvency and Bankruptcy Code, 2016).

- (a) Companies incorporated under Companies Act

- (b) Companies governed under special Act (so far as of Insolvency and Bankruptcy Code, 2016 is consistent with those special Acts i.e. provisions of Special Act will prevail over of Insolvency and Bankruptcy Code, 2016)
- (c) Limited Liability Partnership (LLP)
- (d) Other body corporates as may be notified by Central Government
- (e) Partnership firms and individuals.
- (f) Personal guarantors to corporate debtors:
- (g) Partnership firms and proprietorship firms; and
- (h) Individuals, other than persons referred to in clause (e).

Question 12:

Explain the role of committee of creditors under Insolvency and bankruptcy code 2016.

[MTP June-2020]

Answer:

In following cases, resolution professional can take action only with prior approval of committee of creditors, with 66% voting in favour [Section 28(1) of Insolvency and Bankruptcy Code, 2016].

- (a) Raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting.
- (b) Create any security interest over the assets of the corporate debtor.
- (c) Change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company.
- (d) Record any change in the ownership interest of the corporate debtor.
- (e) Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting.
- (f) Undertake any related party transaction
- (g) Amend any constitutional documents of the corporate debtor
- (h) Delegate its authority to any other person.
- (i) Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties.
- (j) Make any change in the management of the corporate debtor or its subsidiary.
- (k) Transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business.
- (l) Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or
- (m) Make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.

Question 13:

Draw the structure of Regulatory Mechanism and Regulatory Bodies as per Insolvency and Bankruptcy Code, 2016.

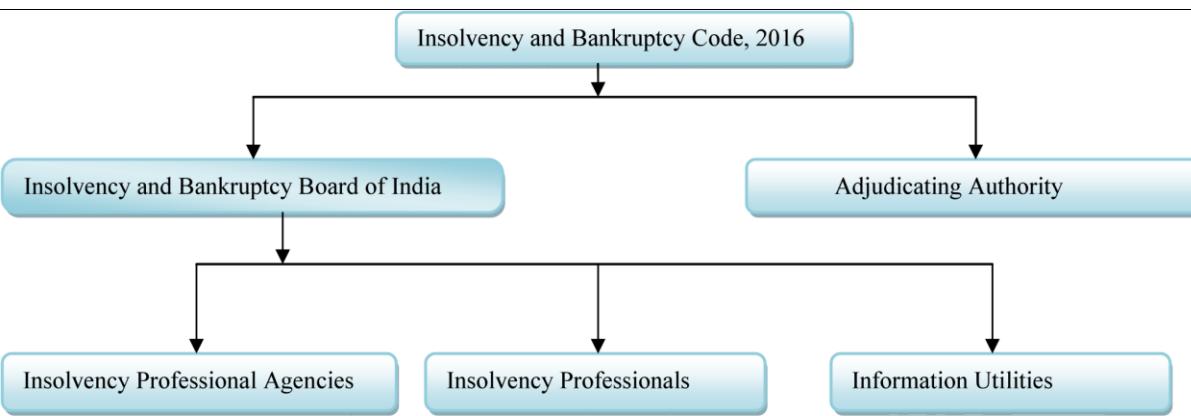
[MTP June-2019] & [MTP June-2020]

Answer:

The Regulatory Mechanism and Regulatory Bodies

The regulatory mechanism as per The Insolvency and Bankruptcy Code, 2016 would be based on the following five pillars:

- Insolvency and Bankruptcy Board of India
- Adjudicating Authority
- Insolvency Professional Agencies
- Insolvency Professionals
- Information Utilities



Question 14:

State the Salient Features of the Insolvency and Bankruptcy code, 2016.

[MTP Dec-2017]

Answer:

Salient Features of the IBC, 2016

- (i) Application on default - Any financial or operational creditor(s) can apply for insolvency on default of debt or interest payment.
- (ii) Moratorium period - Adjudication authority will declare moratorium period during which no action can be taken against the company or the assets of the company.
- (iii) Credit committee - A credit committee of financial creditors will be constituted. Operational creditors are certain to act as observer in the credit committee meeting. Resolution plan to be approved by the credit committee with at least 75 per cent of the financial creditors by value.
- (iv) Process of revival - Existing management have no say during the process of revival as well as resolution, accordingly no fetters by them.

Liquidation procedure - Fast track liquidation procedure has been introduced. Failure to approve the resolution plan within specified days will cause initiation of liquidation. Debtors can also opt for voluntary liquidation by a special resolution in a general meeting.

Question 15:

State the objectives of the Insolvency and Bankruptcy Code, 2016

[MTP Dec-2017]

Answer:

- (a) Consolidate the laws relating to insolvency, reorganisation and liquidation/ bankruptcy of all persons, including companies, individuals, partnership firms and limited liability partnerships (‘LLPs’) under one statutory umbrella and amending relevant laws.
- (b) Time bound resolution of defaults and seamless implementation of liquidation / bankruptcy and maximising asset value.
- (c) Encourage resolution as means of first resort for recovery and plugging the loopholes in the existing debt recovery procedures.
- (d) It does not make any distinction between the rights of international and domestic creditors or between classes of financial institutions. The Code has sought to balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues.
- (e) Promotion of entrepreneurship, availability of credit and ease of doing business.
- (f) Creating infrastructure which can eradicate inefficiencies involved in bankruptcy process by introducing National Company Law Tribunal (‘NCLT’), Insolvency
- (g) Resolution Professional Agencies (‘IRPAs’), Insolvency Professionals (‘IPs’) and Information Utilities (‘IUs’).
- (h) Facilitate the application of consistent and coherent provisions to different stakeholders affected by Business failure and inability to pay debt.
- (i) Address the challenges being faced for swift and effective bankruptcy resolution.
- (j) Improve the handling of conflict between creditors and debtors.
- (k) Improve ease of doing business ranking for India.

- (l) To develop a vibrant market for debt.
- (m) To increase flow of lending by banks and reduce rate of interest.

Question 16:

Discuss about the Powers and duties of Liquidator under Section 35 of Insolvency and Bankruptcy Code, 2016.
[MTP June-2018]

Answer:

Powers and duties of the liquidator - The liquidator shall have the following powers and duties

- (a) To verify claims of all the creditors.
- (b) To take into his custody or control all the assets, property, effects and actionable claims of the corporate debtor
- (c) To evaluate the assets and property of the corporate debtor in the manner as may be specified by the Board and prepare a report
- (d) To take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary
- (e) To carry on the business of the corporate debtor for its beneficial liquidation as he considers necessary
- (f) To sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified
- (g) To draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business
- (h) To take out, in his official name, letter of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due and payable from a contributory or his estate which cannot be ordinarily done in the name of the corporate debtor, and in all such cases, the money due and payable shall, for the purpose of enabling the liquidator to take out the letter of administration or recover the money, be deemed to be due to the liquidator himself
- (i) To obtain any professional assistance from any person or appoint any professional, in discharge of his duties, obligations and responsibilities
- (j) To invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of this Code
- (k) To institute or defend any suit, prosecution or other legal proceedings, civil or criminal, in the name of or behalf of the corporate debtor
- (l) To investigate the financial affairs of the corporate debtor to determine undervalued
Or preferential transactions
- (m) To take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument and for such purpose to use the common seal, if any, as may be necessary for liquidation, distribution of assets and in discharge of his duties and obligations and functions as liquidator
- (n) To apply to the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the corporate debtor and to report the progress of the liquidation process in a manner as may be specified by the Board
- (o) To perform such other functions as may be specified by the Board.

The liquidator may exercise the above powers subject to the directions of the Adjudicating Authority.

Power of the liquidator to consult the stakeholders

The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53. However, any such consultation shall not be binding on the liquidator. The records of any such consultation shall be made available to all other stakeholders not so consulted, in the manner specified by the Board.

Question 17:

State the procedure wherein a corporate insolvency resolution process can be initiated by a financial creditor?
[MTP June-2018]

Answer:

Section 7 of Insolvency and Bankruptcy Code deals with initiation of corporate insolvency resolution process by a financial creditor. The process can be explained as under:

(1) Filing of application before the Adjudicating Authority for initiating corporate insolvency resolution process

A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

For this purpose, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.

(2) Form and manner of making application

The application shall be in such form and manner and accompanied with such fee as may be prescribed.

(3) Enclosures to application

Following documents and information shall be furnished along with the application:

- (a) Record of the default recorded with the information utility or such other record or evidence of default as may be specified.
- (b) The name of the resolution professional proposed to act as an interim resolution professional.
- (c) Any other information as may be specified by the Board.

(4) Duty of Adjudicating Authority to ascertain the existence of a default

The Adjudicating Authority shall, within 14 days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

(5) Admission of application by the Adjudicating Authority

The Adjudicating Authority may, by order, admit such application, if it is satisfied that -

- (a) a default has occurred;
- (b) the application for initiating corporate insolvency resolution process is complete; and
- (c) no disciplinary proceedings are pending against the proposed resolution professional.

(6) Rejection of application by the Adjudicating Authority

The Adjudicating Authority may, by order, reject such application, if it is satisfied that -

- (a) default has not occurred; or
- (b) the application for initiating corporate insolvency resolution process is incomplete; or
- (c) Any disciplinary proceeding is pending against the proposed resolution professional.

Before rejecting the application, the Adjudicating Authority shall give a notice to the applicant to rectify, within 7 days, the defect in his application.

(7) Commencement of corporate insolvency resolution process

The corporate insolvency resolution process shall commence from the date of admission of the application by the Adjudicating Authority.

Question 18:

Diamonds International Ltd. Who is a foreign trade creditor having its office in Chicago wanted to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of the debtor in India. It moved a petition u/s 9 of the Code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it could not submit a "Certificate from a financial institution" as required under the Code. Whether the petition is permissible under the Insolvency and Bankruptcy Code, 2016? Decide.
[MTP Dec-2018]

Answer:

As per the definition of the Creditor given in Section 3(10) of the Insolvency and Bankruptcy Code, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Diamond International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Diamond International Ltd., is a foreign trade creditor. He wanted to file a petition under the under Section 9 of the Insolvency and Bankruptcy Code, 2016 for commencement of Insolvency process against the defaulter in India. Diamond International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority. Being a foreign trade creditor, Diamond International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Diamond International Ltd. Was not having any office or bank account in India, it cannot furnish certificate from financial institution. So, Petition under Section 9 of the Code is not permissible.

Question 19:

State the provisions of Initiation of corporate insolvency resolution process by a corporate debtor and the time limit for completion of insolvency resolution process as per Insolvency and Bankruptcy Code, 2016.

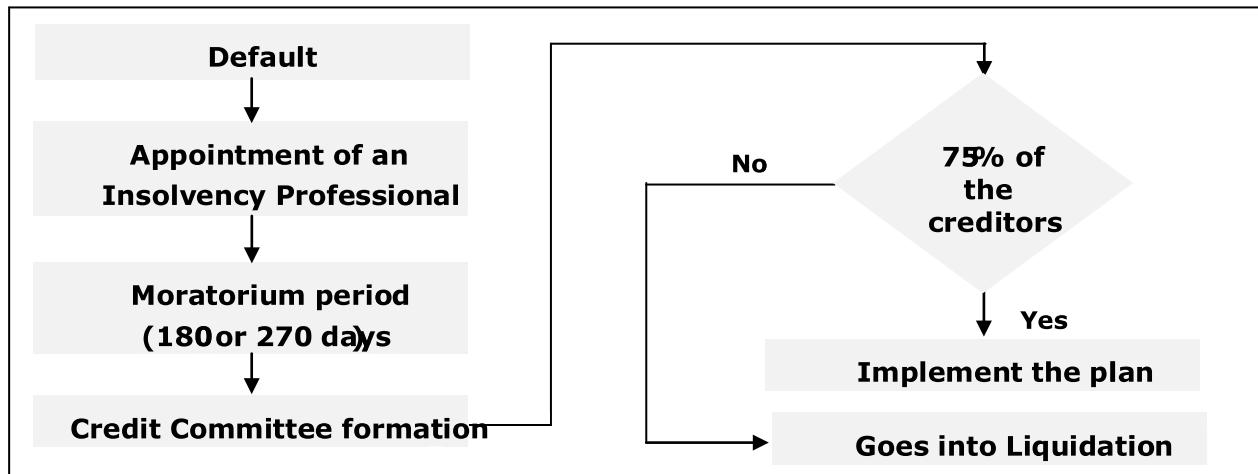
[MTP Dec-2018]

Answer:

Corporate insolvency resolution process can be commenced when a corporate debtor commits a default - Section 4(1) of Insolvency and Bankruptcy Code, 2016.

The default should be minimum Rupees one lakh. The amount can be increased by Central Government but shall not exceed Rupees one crore - proviso to Section 4(1) of Insolvency and Bankruptcy Code, 2016.

The resolution process and timeline can be diagrammatically represented as:



Meaning of Corporate Person

Corporate person means company or LLP or other body corporate with limited liability. However, the Code completely excludes financial service providers. The reason is that they are regulated by specialized agencies. Thus, the Code does not cover Bank, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

Who can initiate insolvency resolution process

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided - Section 6 of Insolvency and Bankruptcy Code, 2016.

Thus, application to initiate insolvency resolution process cannot be filed within 12 months or if there were violation of conditions or where order of liquidation has been made.

Time-limit for completion of insolvency resolution process

Subject to sub-Section 12(2), where extension of time is requested, the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process.

The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of seventy-five per cent of the voting shares.

On receipt of an application under sub-Section 12(2), if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days:

Provided that any extension of the period of corporate insolvency resolution process under this Section shall not be granted more than once.

Question 20:

Mr. MS, an operational creditor, filed an application with the Adjudicating Authority (NCLT, Delhi) to initiate the Corporate Insolvency Resolution Process (CIRP) against TR Limited, and the application was accepted. On 10th July, 2022, NCLT, Delhi appointed Mr. VS to act as an Interim Resolution Professional of TR Limited. After the appointment, Mr. VS issued the public announcement on 12th July, 2022, of the initiation of CIRP Process and called for the submission of claims. On 20th July, 2022, the Committee of Creditors was constituted by Mr. VS. Thereafter, Mr. MS wants to withdraw his application under Section 12A of the Insolvency and Bankruptcy Code, 2016. However, Mr. VS denied filing a withdrawal application stating that the Committee of Creditors has already been constituted.

Referring to the provisions of the Insolvency and Bankruptcy Code, 2016, answer the following with reference to the above facts.

- i) Is Mr. VS right to deny Mr. MS to file a withdrawal application with NCLT, Delhi? Explain in detail.
- ii) Would you answer differ in case the Committee of Creditors is not constituted?
- iii) Who is the authority to pass the final order of withdrawal application?

[Dec-22]

Ans:

- (i) According Section 12A of the Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of the IBBI (Insolvency Resolution process for Corporate persons) Regulations, 2016, the Adjudicating Authority may allow the withdrawal of application admitted under Section 7 or Section 9 or Section 10, on an application made by the applicant with the approval of ninety per cent voting share of the Committee of Creditors, in such manner as may be specified. Thus, the application can be withdrawn if approval of ninety per cent, voting share of the Committee of Creditors is obtained. Hence, Mr. VS cannot deny Mr. MS for filing of withdrawal application only on the basis that committee of creditors has been constituted.
- (ii) Before Constitution of Committee of Creditors, the applicant shall make an application for withdrawal to the Adjudicating Authority through the interim resolution professional. The resolution professional shall submit such withdrawal application to the Adjudicating Authority on behalf of the applicant, within three days of receipt of request. Further, the final approval of such withdrawal shall be by way of an order passes by the Adjudicating Authority. Thus, if Committee of Creditors is not constituted Mr. MS shall apply to the Adjudicating Authority (NCLT, Delhi) through the Interim Resolution Professional, for withdrawal. Hence, the answer will not differ and Mr. VS cannot deny Mr. MS to file a withdrawal application with NCLT, Delhi.
- (iii) The final approval of such withdrawal shall be by way of an order passed by the Adjudicating Authority i.c. NCLT, Delhi.

Chapter 11 - Corporate Governance & Social Responsibility & Sustainability

Question 1:

Explain the main provisions of clause 49 of the listing agreement with the Stock Exchanges regarding Corporate Governance.

[Dec-18]

Answer:

Clause 49, as currently in effect, includes the following key requirements:

- a) **Board:** Independence Boards of directors of listed companies must have a minimum number of independent directors. Where the chairman is an executive or a promoter or related to a promoter or a senior official, then at least one half the board should comprise independent directors; in other cases, independent directors should constitute at least one third of the board size.
- b) **Audit Committees:** Listed Companies must have audit committees of the board with a minimum of three directors, two thirds of whom must be independent; in addition, the roles and responsibilities of the audit committee are specified in detail.
- c) **Disclosure:** Listed companies must periodically make various disclosures regarding financial and other matters to ensure transparency.
- d) **CEO/CFO Certification of Internal Controls :** The CEO and CFO of listed companies must:
 - (i) Certify that the financial statements are fair, and
 - (ii) Accept responsibility for internal controls
- e) **Annual Reports:** Annual reports of listed companies must carry status reports about compliance with corporate governance norms.

Question 2:

The leadership team of a company is confused on the point whether it is wise for any company to practice good governance which comes with additional cost. Please advise the company with your comprehensive answer quoting appropriate examples and the relevant provisions of law.

[MTP June-23 Set-2]

Answer:

Governance tantamount to the process the affairs of the company is managed with regards to fairness, honesty and good practices for the benefit of all stakeholders. This is to be done with systematic, well designed policies and procedures, keeping in view the balance between the interests of various stakeholders.

Therefore, in order to qualify as good governed company, a company has to put in place the mechanics of the functioning of the company with checks and balances between the shareholders, directors, auditors etc. The process of Corporate Governance/CG is more a way of business life than a mere legal compulsion. Companies are forced to comply with conditions / practices by adopting the legal prescription as some companies may not function in the desired ethical manner. Moreover, there should be uniformity in governance, so that stakeholders can compare between the companies.

Narayan Murthy Committee (Chairman of the CG Committee) stated:

"CG is the acceptance by the, of the non-alienable rights of the shareholders as true owners of the corporation and their own role as trustees. It is about commitment of values, ethical business conduct and differentiating between personal and corporate fund".

In course of time, with the growth of trade and commerce, business and society, now, have a stronger interface. From the typical concept of profit being the essence of business, now we are into a regime where the stakeholder definition includes not only the shareholder but the employees, society, Govt., Customers, creditors, financiers etc. This is a paradigm shift in corporate management from the traditional "management" concept to "governance" concept.

Question 3:

State the National Voluntary Guidelines, 2011 on Social, Environmental and Economic Responsibilities of Business?

[MTP Dec-2017]

Answer:

National Voluntary Guidelines 2011 on Social, Environmental and Economic Responsibilities of Business:

The Guidelines emphasize that businesses have to endeavour to become responsible actors in society, so that their every action leads to sustainable growth and economic development. These Guidelines have been developed through an extensive consultative process by a Guidelines Drafting Committee (GDC) comprising competent and experienced professionals representing different stakeholder groups. The Guidelines are designed to be used by all businesses irrespective of size, sector or location and therefore touch on the fundamental aspects the 'spirit' of an enterprise. The Guidelines are applicable to all such entities, and are intended to be adopted by them comprehensively, as they raise the bar in a manner that makes their value creating operations sustainable.

The Guidelines have been articulated in the form of nine (9) Principles with the Core Elements to actualize each of the principles. A reading of each Principle, with its attendant Core Elements, should provide a very clear basis for putting that Principle into practice.

Question 4:

State the "Role of the Board of Directors" & "Role of the CEO" Corporate Governance in family business

[MTP June-2017]

Answer:

Role of the Board of Directors-Constitution of the Board place an important role in managing the Family Owned Businesses. The Board is expected to take independent/unbiased decisions and the board members are the 'trustees' of the shareholders, especially the minority group. They should be in a position to provide transparent data and take decisions in the best interest of the shareholders. When it comes to board membership, most family Controlled businesses reserve this right to members of the family and in a few cases to some well trusted non-family managers. This practice is generally used to keep family control over the direction of its business. Indeed, most decisions are usually taken by the family member directors. Family directors who are also managers in the business would naturally encourage reinvesting profits in the company so as to increase its growth potential. On the contrary, family directors who do not work in the business would rather make the decision of distributing the profits as dividends to family shareholders. These gainsay views can lead to major conflicts in the board and negatively impact its way of Functioning.

Role of the CEO-In selecting the CEO of a company, one should want the organization to be run by the 'most competent' person with professional knowledge and experience. Being employee of firm the CEO has accountability and responsibility to the organization and its shareholders. He or she should be able to be questioned by an 'independent' authority called the Board or Chairperson of the company. In a worst case situation if found unsuitable, he/she is asked to relinquish the position. Practically, it is when the CEO is a family member; this becomes quite difficult and awkward which can create further unsuitable problems for management and as a whole business. This family CEO believes that being owner of majority share owner he has full right for different experiments as well to do according to their force.

Question 5:

What is meant by the Corporate Governance as per renowned exponents in this field? How far do you agree with their views? (Agree / Strongly agree / Disagree etc.).

Answer:

Corporate Governance: Corporate Governance is.

- The process of supervision and control intended to ensure that the company's management acts in accordance with the interest of shareholders (Parkinson, 1994)- Strongly agree
- The governance role is not concerned with the running of the business of the company per se, but with giving overall directions to the enterprise, with overseeing and controlling the executive actions of management and with satisfying legitimate expectations of accountability and regulation by interests beyond the Corporate boundaries (Tricker, 1984) - Agree
- The governance of an enterprise is the sum of those activities that make up the internal regulation of the business in compliance with the obligations placed on the firm by legislation, ownership trusteeship of assets, their management and their deployment (Cannon, 1994) - Agree
- The relationship between shareholders and their companies and the way in which shareholders act to encourage best practice (e.g. by voting at AGMs and by regular meetings with companies senior management). Increasingly, this includes shareholders activism which involves a campaign by a shareholder or a group of shareholders to achieve change in companies (the Corporate Governance Handbook 1996). - Some agreement.
- The structures, process, cultures and systems that engender the successful operation of the organization (Keasey and Wright, 1993). - Some agreement
- The system by which companies are directed and controlled (The Cadbury Report 1992). - Slight Agreement

Question 6:

Business should support inclusive growth and equitable development. Explain briefly as per National Voluntary Guidelines 2011 in this regard.

[Dec-17]

Answer:

Principle 8: Businesses should support Inclusive growth and equitable development:

The principle recognizes the challenges of social and economic development faced by India and builds upon the development agenda that has been articulated in the government policies and priorities.

The principle recognizes the value of the energy and enterprise of businesses and encourages' them to innovate and contribute to the overall development of the country, especially to that of the disadvantaged, vulnerable and marginalised sections of society.

The principle also emphasizes the need for collaboration amongst businesses, government agencies and civil society in furthering this development agenda. The principle reiterates that business prosperity and inclusive growth and equitable development are interdependent.

Core Elements

- (a) Businesses should understand their impact on social and economic development, and respond through appropriate action to minimise the negative impacts.
- (b) Businesses should innovate and invest in products, technologies and processes that promote the wellbeing of society.
- (c) Businesses should make efforts to complement and support the development priorities at local and national levels, and assure appropriate resettlement and rehabilitation of communities who have been displaced owing to their business operations.
- (d) Businesses operating in regions that are underdeveloped should be especially sensitive to local concerns.

Question 7:

Discuss the National Voluntary Guidelines on "Business should respect the interests of and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized."

[Dec-18]

Answer:

The principle recognizes that businesses have a responsibility to think and act beyond the interests of its shareholders to include all their stakeholders.

The principle, while appreciating that all stakeholders are not equally influential or aware, encourages businesses to proactively engage with and respond to those that are disadvantaged, vulnerable and marginalized.

Core Elements

- (a) Businesses should systematically identify their stakeholders, understand their concerns, define purpose and scope of engagement and commit to engaging with them.
- (b) Businesses should acknowledge, assume responsibility and be transparent about the impact of their policies, decisions, product & services and associated operations on the stakeholders.
- (c) Businesses should give special attention to stakeholders in areas that are underdeveloped.
- (d) Businesses should resolve differences with stakeholders in a just, fair and equitable manner.

Question 8:

Discuss the National Voluntary Guidelines on "Business, when engaged in influencing public and regulatory policy, should do so in a responsible manner".

[June-19]

Answer:

7: Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner. The principle recognizes that businesses operate within the specified legislative and policy frameworks prescribed by the Government, which guide their growth and also provide for certain desirable restrictions and boundaries.

The principle acknowledges that in a democratic set-up, such legal frameworks are developed in a collaborative manner with participation of all the stakeholders, including businesses.

The principle, in that context, recognizes the right of businesses to engage with the Government for redressal of a grievance or for influencing public policy and public opinion.

Core Elements

- (a) Businesses, while pursuing policy advocacy; must ensure that their advocacy positions are consistent with the Principles and Core Elements contained in these Guidelines.
- (b) To the extent possible, businesses should utilize the trade and industry chambers and associations and other such collective platforms to undertake such policy advocacy. The principle emphasizes that policy advocacy must expand public good rather than diminish it or make it available to a select few.

Question 9:

Prepare a statement of the Features of Corporate Governance.

[DEC 2023 MTP]

Answer:

Features of Corporate Governance:

Let us discuss a few features or elements of corporate governance generally accepted by the industry.

1. **A proper tool for transparency:** disclosing the status of the affairs company at every step to every stakeholder is required to maintain transparency. The concept goes against the theory of suppression of material facts by the company to its stakeholders, may be or may not be, for the benefit of the shareholders only
2. **Prudent and participative management:** The management should use its full intelligence and knowledge for the benefit of the stakeholders. Hence, it may be taken that management is prudent and wise in its decision making

3. **Enhancing value of the enterprise:** Any company should grow from year to year, if it wants to satisfy its stakeholders. Value may be monetary or reputation, image, goodwill etc. Better governing companies will have better reputation, trust of the stakeholders and there will be enhancement of business, leading to more profit and better enterprise valuation.
4. **Accountability:** Success and accountability has to go together. Successful companies will make themselves accountable to the stakeholders. There are many combinations of relationships, ie. with the customer, creditors, shareholders, employees, etc. The company cannot say it is accountable to one stakeholder only It has to be accountable to all stakeholders.
5. **Innovation:** Doing something new or doing the same thing in a novel manner is the essence of growth and sustainability of an enterprise. The governance structure should encourage new things in the company to enhance the value of the company.
6. **Professionalism and specialisation:** The basics of professionalism is that the job shall not be compromised at any level and there should not be conflict of interest of the directors and senior managers between his duty and personal gain. It also takes into account the competence of the person doing job having obviously adequate domain knowledge either by academic qualification or track record of experience
7. **Stakeholder recognition:** All stakeholders should be recognized and respected. The Company should believe that all these stakeholders have a contribution in making the company work and grow.

Question 10:

Discuss the benefits of Sustainable report.

[MTP Dec-23]

Answer:

Benefits of sustainability reporting: Sustainability reporting refers to the disclosure, whether voluntary, solicited, or required, of non-financial performance information to outsiders of the organization. Generally speaking, sustainability reporting deals with information concerning environmental, social, economic and governance issues in the broadest sense. These are the criteria gathered under the acronym ESG (Environmental, social and corporate governance).

The introduction of these non-financial information in published reports is seen as a step forward in corporate communication and considered as an effective way to increase corporate engagement and transparency. Sustainability reports help companies build consumer confidence and improve corporate reputations through social responsibility programs and transparent risk management. This communication aims at giving stakeholders broader access to relevant information outside the financial sphere that also influences the company's performance.

In the EU, the mandatory practice of sustainability reporting for certain companies is regulated by the Non-Financial Reporting Directive (NFRD) recently revised and renamed Corporate Sustainability Reporting Directive (CSRD). An increasing number of organizations are providing frameworks for sustainability reporting and are issuing standards or similar initiatives to guide companies in this exercise.

There is a wide range of terminology used to qualify this same concept of sustainability reporting: non-financial reporting, extra-financial reporting, social reporting, CSR reporting or even socioenvironmental reporting.

UNO supports principles of Responsible Investment (PRI). These principles have subscribed by 3500 signatories who are investors. They have committed to integrate ESG factors into investment decision making. Most of the large companies in the world are already reporting their ESG profile in line with globally recognized parameters.

Studies have made by one rating agency on ESG ratings which shows variance in rating in different sectors. Though not mandatory ESG rating would give the message to the outsiders, stakeholders about the ESG approach of the entity. More and more companies are coming under ESG philosophy and practice.

In view of the above, it has become important to reporting of company's performance on sustainability related factors and its importance is as relevant operational performance.

SEBI had in November 2015, prescribed format in reporting ESG parameters listed entities. SEBI has raised the format in May, 2021 for reporting ESG parameters called Business Responsibility and Sustainability Report (BRSR). It seeks disclosure from listed entities on their performance against the principles of National Guidelines on Responsible Business Conduct (NGBRC). Each parameter is divided into leadership and essential indicators, whereas the former is voluntary and latter is mandatory. The corporates need to look beyond financial figures for effective ecosystem between corporate, society and environment.

With effect from financial year 2022-23, the filing shall be mandatory for top 1000 companies listed in any of the exchange, based on market capitalization.

Sustainable management takes the concepts from sustainability and synthesizes them with the concepts of management. Sustainability has three branches: the environment, the needs of present and future generations, and the economy. Sustainable management is needed because it is an important part of the ability to successfully maintain the quality of life on our planet.

Question 11:

XYZ. Ltd. is a listed company having turnover of Rs.1200 crores during the financial year 2015-16. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. Company finalised the project under its CSR initiatives which require funds @ 5% of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advice.

[Dec-17]

Answer:

In terms of Section 135(5) of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every Financial year at least 2 per cent of average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR policy. There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over 2% would be considered as voluntary higher spending.

Question 12:

Explain the concept of Corporate Social Responsibility and its meaning to different people.

[June-18]

Answer:

Corporate Social Responsibility (CSR): It is a concept that organizations, have an obligation to consider the interests of customers, employees, shareholders, communities, and ecological considerations in all aspects of their operations. This obligation is seen to extend beyond their statutory obligation to comply with legislation. CSR is closely linked with the principles of Sustainable Development, which argues that enterprises should make decisions based not only on financial factors such as profits or dividends, but also based on the immediate and long-term social and environmental consequences of their activities, especially taking into consideration the needs of future generations. It is an integrated combination of policies, programs, education, and practices which extend throughout a corporation's operations and into the communities in which they operate, about how companies voluntarily manage the business processes to produce an overall positive impact on society.

CSR can mean different things to different people:

- For an employee it can mean fair wages, no discrimination, acceptable working conditions etc.
- For a shareholder it can mean making responsible and transparent decisions regarding the use of capital.
- For suppliers it can mean receiving payment on time.
- For customers it can mean delivery on time, etc.
- For local communities and authorities it can mean taking measures to protect the environment from pollution.

- for non-governmental organisations and pressure groups it can mean disclosing business practices and performance on issues ranging from energy conservation and global warming to human rights and animal rights, from protection of the rainforests and endangered species to child and forced labour, etc.

For a company, however, it can simply be seen as responding to the needs and concerns of people who can influence the success of the company and/or whom the company can Impact through its business activities, processes and products.

Question 13:

ABC Ltd., is a company which has a net worth of INR Rs.200 crores, it manufactures rubber parts for automobiles. The sales of the company are affected due to low demand of its products.

The previous year's financial state:

(` in Crore)	March 31, 2019 (Current year)	March 31, 2018	March 31, 2017	March 31, 2016
Net Profit	3.00	8.50	4.00	3.00
Sales (Turnover)	850	950	900	800

Does the company have an obligation to form a CSR Committee since the applicability criteria is not satisfied in the current financial year?

[June-19]

Answer:

It has been clarified that 'any financial year' referred to under sub section (1) of section 135 of the act read with rule 3(2) of companies CSR Rule,2014 implies 'any of the three preceding financial years'.

A company which meets the net worth, turnover of net profits criteria in any of the preceding three financial years, but which does not meet the criteria in the relevant financial year ,will still need to constitute a CSR committee and comply with provisions of sections 135(2) to(5) read with the CSR rules.

As per the criteria to constitute CSR committee -

- Net worth greater than or equal to INR 500 Crores: This criterion is not satisfied.
- Sales greater than or equal to INR 1000 crores: This criterion is not satisfied.
- Net profit greater than or equal to INR 5 crores: This criterion is satisfied in financial year ended March 31, 2018.

Hence, the company will be required to form a CSR committee.

Question 14:

What is meant by Corporate Governance? State the major 'characteristics' of good corporate governance.

[Dec-19]

Answer:

Corporate Governance: Simply stated, 'Governance' means the process of decision making and the process by which decisions are implemented. The term corporate governance is understood and defined in various ways. Corporate governance can be defined as the formal system of accountability and control for ethical and socially responsible organisational decisions and use of resources and accountability relates to how well the content of workplace decisions is aligned with the organisations strategic direction. Control involves the process of auditing and improving organisation decisions and actions. Good corporate governance has the following major characteristics:

- Participatory
- Consensus oriented
- Accountable
- Transparent
- Responsive
- Effective and efficient
- Equitable and inclusive and
- Follows the rule of law.

Question 15:

Corporate governance is about Stakeholder's satisfaction. Comment.

[June-17]

Answer:

Corporate governance is about stakeholders' satisfaction: The term "Corporate Governance" is not easy to define. The term governance relates to a process of decision making and implementing the decision in the interest of all stakeholders, it basically relates to enhancement of corporate performance and ensure proper accountability for management in the interest of all stakeholders. It is a system through which an organization is guided and directed. On the basis of this definition, the core of objectives of Corporate Governance are focus, predictability, transparency, participation, accountability, efficiency and effectiveness and satisfaction of stakeholders.

Question 16:

What is the minimum contribution the companies are required to make towards CSR as per Companies Act, 2013?

[June-17]

Answer:

Required minimum contribution of the Companies towards CSR:

- (A) The Board of every company shall ensure that the company spends, in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.
- (B) The company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.
- (C) If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount.
- (D) Companies may build CSR capacities of their own personnel as well as those of their implementing agencies through Institutions with established track records of at least three financial years. However, such expenditure shall not exceed five percent of total CSR expenditure of the company in one financial year.

Question 17:

Explain the principles of corporate governance.

[Dec-21]

Answer:

Principles of Corporate Governance

Transparency

Transparency means the quality of something which enables one to understand the truth easily. In the context of corporate governance, it implies an accurate, adequate and timely disclosure of relevant information about the operating results etc. of the corporate enterprise to the stakeholders.

Accountability

Accountability is a liability to explain the results of one's decisions taken in the interest of others. In the context of corporate governance, accountability implies the responsibility of the Chairman, the Board of Directors and the chief executive for the use of company's resources (over which they have authority) in the best interest of company and its stakeholders.

Independence

Good corporate governance requires independence on the part of the top management of the corporation i.e., the Board of Directors must be strong non-partisan body; so that it can take all corporate decisions based on business prudence. Without the top management of the company being independent; good corporate governance is only a mere dream.

Question 18:

State briefly various factors which have persuaded businessmen to consider their social responsibilities.

[Dec-21]

Answer:

The various factors which have persuaded businessmen to consider their social responsibilities are:

- (ii) Threat of public regulation
 - (iii) Pressure of labour movement
 - (iv) Impact of consumer consciousness
 - (v) Development of social standards of business
 - (vi) Development of business education
 - (vii) Relationship between social interest and business interest
- Development of professional, managerial class

Question 19:

State the applicability of CSR Provisions and constitution and functions of CSR Committee as per the Companies Act 2013.

[MTP June-23 Set-1]

Answer:

Applicability of CSR Provisions -

Section 135 of the Act provides for the applicability of the CSR provisions on corporates. Sub-section (1) of section lays down that every company having

- net worth of ₹500 crores or more; or
- turnover of ₹1,000 crores or more;
- net profit of ₹5 crores

During immediately preceding financial year shall be required

- (a) to constitute a CSR Committee of the Board consisting
- (b) formulate CSR policy
- (c) Spend at least 2% of the average net profit of last three years, during the financial.

Constitution of CSR Committee

- (i) There will be at least three directors in the committee with at least one independent director;
- (ii) Unlisted public company or a private company, falling under the financial threshold but not required to have IDs, shall not have any ID in the committee.
- (iii) Private company having 2 directors only shall have 2 directors in the committee
- (iv) In case of foreign company, person who is authorized to receive notice on behalf of the company and any other person nominated by the company.

Every company which ceases to be a company covered under section 135 as per the limits specified thereunder for three consecutive financial years shall not be required to constitute a CSR Committee and comply with the provision of section 135, till such time that it meets the criteria specified.

Functions of CSR Committee

- (i) To institute a transparent monitoring mechanism for implementation of CSR projects;
- (ii) To recommend the CSR Policy and modification thereto, if any;
- (iii) To recommend projects for approval of Board.

Question 20:

Critically assess the reasons behind the Companies Act 2013 prescribing certain features of corporate governance in a family run business in India.

[MTP June-23 Set-1]

Answer:

Family owned companies have specific problems due to its nature, their constitution, and their managerial systems.

As the company grows, more members, children, grandchildren and so on are incorporated into the family and different types of interests and relationships are generated within the company. The larger the company, the greater the conflict of interest are. Problems arise when the sentimental value collides with the entrepreneurial values. This is why conflicts in family Companies must be handled properly with the help of a consultant or

lawyer. These conflicts may bring bad consequences to these kind companies that may end up destroying the family, the company or both.

It must be understood that the same corporate governance norms that is commonly used for other companies might not apply to these ones. The family factor brings along a different way of looking the company, its strengths and also its weaknesses. A balance between the emotional factors of family with the profitable factor of business.

In India, business was traditionally a family business. Even now 99% of the corporate houses are owned by individuals or families. Nothing wrong in that. In fact, growth of family business is quite substantial.

1. Full time directors/other directors and senior management personnel are either from the family or related to the family members.
2. Formation of coterie is common.
3. Control and ownership is diluted with shareholding being diluted on passing of generation.
4. Conflict of interest is very common where personal interest of the promoter conflicts with the company interest. However, proper procedures are followed as per the Act to avoid legal complication.
5. Emotions are attached and therefore, some decision is taken which may not be managerially correct.
6. Where the family members are united, the non-family directors/managers are defunct in decision making process. Where family is divided, there are more problems like confusion in leadership, delay in decision making, distrust of outside stakeholders etc. The stability, reputation and performance is affected.
7. Some families have clear cut roles of the family members in business with structured succession planning, allotment of each company to each member to avoid conflict.
8. Personal image of the chairman/MD? Directors is very important which determines the reputation.
9. Many hard-core professional avoid working in family business for obvious reasons.
10. Death/disability of senior member in the family results to leadership management crisis.

Question 21:

What is the minimum contribution the companies are required to make towards CSR as per Companies Act, 2013?

[MTP June-2020]

Answer:

Required minimum contribution of the Companies towards CSR:

- (A) The Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.
- (B) The company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.
- (C) If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount.
- (D) Companies may build CSR capacities of their own personnel as well as those of their implementing agencies through Institutions with established track records of at least three financial years. However, such expenditure shall not exceed five percent of total CSR expenditure of the company in one financial year.

Question 22:

Benefit of CSR programme.

[MTP June-2020]

Answer:

Benefits of CSR programme As the business environment gets increasingly complex and stakeholders become vocal about their expectations, good CSR practices can only bring in greater benefits, some of which are as follows:

- (a) Communities provide the licence to operate: Apart from internal drivers such as values and ethos, some of the key stakeholders that influence corporate behaviour include governments (through laws and

regulations), investors and customers. In India, a fourth and increasingly important stakeholder is the community and many companies have started realising that the licence to operate is no longer given by governments alone, but communities that are impacted by a company's business operations. Thus, a robust CSR programme that meets the aspirations of these communities not only provides them with the licence to operate, but also to maintain the licence, thereby precluding the trust deficit'.

- (b) Attracting and retaining employees: Several human resource studies have linked a company's ability to attract, retain and motivate employees with their CSR commitments. Interventions that encourage and enable employees to participate are shown to increase employee morale and a sense of belonging to the company.
- (c) Communities as suppliers: There are certain innovative CSR initiatives emerging, wherein companies have invested in enhancing community livelihood by incorporating them into their supply chain. This has benefitted communities and increased their income levels, while providing these companies with an additional and secure supply chain.
- (d) Enhancing corporate reputation: The traditional benefit of generating goodwill, creating a positive image and branding benefits continue to exist for companies that operate effective CSR programmes. This allows companies to position themselves as responsible corporate citizens.

Question 23:

'Corporate Social Responsibility is not Charity'. Discuss.

[MTP June-2019]

Answer:

There have been evidences that record a paradigm shift from charity to a long-term strategy, yet the concept still is believed to be strongly linked to philanthropy. There is a need to bring about an attitudinal change in people about the concept. By having more coherent and ethically driven discourses on CSR, it has to be understood that CSR is about how corporate place their business ethics and behaviours to balance business growth and commercial success with a positive change in the stakeholder community.

Several corporates today have specific departments to operationalize CSR. There are either foundations or trusts or a separate department within an organization that looks into implementation of practices.

Being treated as a separate entity, there is always a flexibility and independence to carry out the tasks.

But often these entities work in isolation without creating a synergy with the other departments of the corporate. There is a need to understand that CSR is not only a pure management directive but it is something that is central to the company and has to be embedded in the core values and principles of the corporate.

Whatever corporates do within the purview of CSR has to be related to core business. It has to utilize things at which corporates are good; it has to be something that takes advantage of the core skills and competencies of the companies. It has to be a mandate of the entire organization and its scope does not simply begin and end with one department in the organization.

While there have been success stories of short term interventions, their impact has been limited and have faded over a long period of time. It is essential for corporates to adopt a long term approach rather than sticking to short term interventions, involving the companies and employees in the long-term process of positive social transition. A clearly defined mission and a vision statement combined with a sound implementation strategy and a plan of action firmly rooted in ground realities and developed in close collaboration with implementation partners, is what it takes for a successful execution of CSR.

An area that can be looked upon is the sharing of best practices by corporates. A plausible framework for this could be bench-marking. While benchmarking will help corporates evaluate their initiatives and rank them, it will also provide an impetus to others to develop similar kind of practices. Credibility Alliance, a consortium of voluntary organizations follows a mechanism of accreditation for voluntary sector. Efforts have to be directed towards building a similar kind of mechanism for CSR as well.

Question 24:

CSR and Sustainability are closely entwined; explain.

[MTP Dec-2017]

Answer:

Sustainability (Corporate Sustainability) is derived from the concept of sustainable development which is defined by the Brundtland Commission as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". Corporate sustainability essentially refers to the role that companies can play in meeting the agenda of sustainable development and entails a balanced approach to economic progress, social progress and environmental stewardship.

CSR in India tends to focus on what is done with profits after they are made. On the other hand, sustainability is about factoring the social and environmental impacts of conducting business, that is, how profits are made. Hence, much of the Indian practice of CSR is an important component of sustainability or responsible business, which is a larger idea, a fact that is evident from various sustainability frameworks. An interesting case in point is the National Voluntary Guidelines (NVGs) for social, environmental and economic responsibilities of business issued by the Ministry of Corporate Affairs in June 2011. Principle eight relating to inclusive development encompasses most of the aspects covered by the CSR clause of the Companies Act, 2013. However, the remaining eight principles relate to other aspects of the business.

The United Nations (UN) Global Compact, a widely used sustainability framework has 10 principles covering social, environmental, human rights and governance issues, and what is described as CSR is implicit rather than explicit in these principles. Globally, the notion of CSR and sustainability seems to be converging, as is evident from the various definitions of CSR put forth by global organisations. The genesis of this convergence can be observed from the preamble to the recently released rules relating to the CSR clause within the Companies Act, 2013 which talks about stakeholders and integrating it with the social, environmental and economic objectives, all of which constitute the idea of a triple bottom line approach. It is also acknowledged in the Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises issued by the Department of Public Enterprises (DPE) in April 2013. The new guidelines, which have replaced two existing separate guidelines on CSR and sustainable development, issued in 2010 and 2011 respectively, mentions the following:

"Since CSR and sustainability are so closely entwined, it can be said that CSR and sustainability is a company's commitment to its stakeholders to conduct business in an economically, socially and environmentally sustainable manner that is transparent and ethical."

Question 25:

Rapid Real Estate Limited, a listed company has made the following profits; the profits reflect eligible profits under the relevant section of the Companies Act, 2013.

Financial year	Amount (' in crores)
2011-12	20
2012-13	40
2013-14	30
2014-15	70
2015-16	50

- (i) Calculate the amount that the company has to spend towards CSR.
- (ii) Give the composition of the CSR committee of a listed and unlisted company.
- (iii) Will the company suffer penalties if they fail to provide for or incur expenditure for CSR

[MTP June-2018]

Answer:

Section 135 read with Companies (Corporate Social Responsibility Policy) Rules, 2014 of the

Companies Act, 2013 deals with the provisions, related to the Corporate Social Responsibility.

As per the given facts, following are the answers in the given situations-

(ii) Amount that Company has to spend towards CSR: According to section 135 of the Companies Act, 2013, the Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

Accordingly, net profits of Rapid Real Estate Ltd. for three immediately preceding financial years is 150 crores (30+70+50) and 2% of the average net profits of the company made during these three immediately preceding financial years will constitute 1 crore,- can be spent towards CSR in financial year 2016-2017.

(iii) Composition of CSR Committee:

(a) In the case of listed company, the CSR Committee shall consist of three or more directors, out of which at least one director shall be an independent director.

(b) Whereas in case of an unlisted public company or a private company, Is not required to appoint an independent director and shall have its CSR Committee without such director. A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(iv) In case of failure to incur expenditure for CSR: If the company fails to provide such amount or incur expenditure for CSR, the Board shall, in its report, under section 134 of the Companies Act, 2013 specify the reasons for not spending the amount.

As no quantum of punishment is given under section 135, section 450 of the Companies Act, 2013 says that, the company and every officer of the company or any other person who is in default or contravenes in compliances with section 135 shall be punishable with fine which may extend to Rs.10,000. In case of continuation of contravention with further fine extending to Rs.1,000 for every day after the first during which the contravention continues.

Question 26:

Corporate Social Responsibility (CSR) is also called Corporate Citizenship or Corporate Responsibility? – Discuss

[MTP June-2018]

Answer:

Corporate Social Responsibility is a concept where by companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. The main function of an enterprise is to create value through producing goods and services that society demands, thereby generating profit for its owners and shareholders as well as welfare for society, particularly through an ongoing process of job creation.

Corporate Social Responsibility can be explained as:

- Corporate - means organized business
- Social - means everything dealing with the people
- Responsibility - means accountability between the two.

The term corporate citizenship implies the behaviour which would maximize company's positive impact and minimize the negative impact on its' social and physical environment.

CSR means open and transparent business practices that are based on ethical values and respect for employees, communities and the environment.

Question 27:

'The typical organizational structure of PSUs makes it difficult for the implementation of Corporate Governance practices as applicable to other publicly- listed private enterprise.' In the above context, list the difficulties encountered in Governance.

[MTP June-2018]

Answer:

While routine governance regulations become applicable for public sector companies formed under the Companies Act, 2013 and come under the purview of SEBI regulations the moment they mobilize funds from the public, the typical organizational structure of PSUs makes it difficult for the implementation of corporate

governance practices as applicable to other publicly - listed private enterprises. The typical difficulties faced are:

- (i) The board of directors will comprise essentially of bureaucrats drawn from various ministries which are interested in the PSU. In addition, there may be nominee directors from banks or financial institutions who have loan or equity exposures to the unit. The effect will be to have a board much beyond the required size, rendering decision-making a difficult process.
- (ii) The chief executive or managing director (or chairman and managing director) and other functional directors are likely to be bureaucrats and not necessarily professionals with the required expertise. This can affect the efficient running of the enterprise.
- (iii) Difficult to attract expert professionals as independent directors. The laws and regulations may necessitate a percentage of independent components on the board; but many professionals may not be enthused as there are serious limitations on the impact they can make.
- (iv) Due to their very nature, there are difficulties in implementing better governance practices. Many public sector corporations are managed and governed according to the whims and fancies of politicians and bureaucrats. Many of them view PSUs as a means to their ends. A lot of them have turned sick due to overdoses of political interference, even when their areas of operations offered enormous opportunities for advancement and growth. And when the economy was opened up, many of them lacked the competitiveness to fight it out with their counterparts from the private sector

Question 28:

Rule 8 of the CSR rules provides that the Companies, upon which the CSR Rules applicable shall be required to incorporate in its Board's Report an annual report on CSR containing the certain particulars. What are those particulars?

[Dec-22]

Answer:

Rule 8: CSR Reporting: Rule 8 of the CSR Rules provides that the companies, upon which the CSR Rules are applicable shall be required to incorporate in its Board's report an annual report on CSR containing the following particulars:

A brief outline of the company's CSR Policy, including overview of projects or programs proposed to be undertaken and a reference to the web-link to the CSR policy and projects or programs;

The composition of the CSR Committee;

Average net profit of the company for last three financial years;

Prescribed CSR Expenditure (2% of the amount of the net profit for the last 3 financial years);

Details of CSR Spent during the financial year;

In case the company has failed to spend the 2% of the average net profit of the last three financial year, reasons thereof;

A responsibility statement of the CSR Committee that the implementation and monitoring of CSR Policy, is in compliance with CSR objectives and Policy of the company.

In case of a foreign company, the balance sheet shall contain an annual report on CSR

Every company having average CSR obligation of Rs 10 Crore or more in the three immediately preceding financial years, shall undertake impact assessment, through an independent agency, of their CSR projects having outlays of Rs 1 Crore or more, and which have been completed not less than one year before undertaking the impact study.

The impact assessment reports need to be placed before the Board and shall be annexed to the annual report on CSR.

Question 29:

M/s ABC Tyres Ltd., manufactures of tyres of all types of vehicles, is a public limited company has three manufacturing units, one at Durgapur, West Bengal, Palej, Gujarat and Munnar in Kerala with corporate office at Kolkata. The company is professionally managed, the promoter being the chairman, only comes in Board

meetings and does not interfere in day to day management. The other directors are independent professionals.

The company has sales offices and dealers pan India.

The financial performance of the company is as follows: (in Crores)

Parameters	2017-2018	2018-19	2019-2020	2020-21
Turnover	700	650	920	1010
Net worth	402	423	480	530
Net profit	14.5	15.7	16.8	18

Queries:

1. Do the company comes under CSR obligation?
2. What would be minimum budget for 2021-22.
3. Is CSR committee required?
4. What are the other obligations for CSR under the Act?
5. What will happen if the stipulated amount is not spent within the year.
6. What will happen if a project is taken up but full allocated amount is not spent?

(ICMAI Study Material)

Answer:

1. Section 135 of the Act provides for the applicability of the CSR provisions on corporates. Sub-section (1) of section lays down that every company having
 - Net worth of ` 500 Crores or more; or
 - Turnover of ` 1000 Crores or more;
 - Net profit of ` 5 Crores

Therefore, ABC Tyres Ltd. Comes under CSR obligation.

2. Minimum budget will be ` 2.7 lakhs for 2021-22. This 2% of average profit of last 3 financial years.
3. Yes, CSR committee is required to be formed as it comes under the purview of section 135 of the Act.
4. Other obligations are spending the amount within the financial year. The details have to be disclosed in Board's report as annexure. Form CSR 1 needs to be filed.
5. The unspent amount will have to be transferred to a special account.
6. If a project is taken up and full amount is not spent, the amount shall be kept separately for financing which will be called as "ongoing project".

Chapter 12 – SEBI Regulations

Question 1:

State briefly the power of SEBI to levy monetary fines and penalties under SEBI Act, 1992.

[Dec-18]

Answer:

Power of SEBI to levy monetary fines and penalties under SEBI Act, 1992: SEBI Act, 1992 empowers SEBI to levy monetary fines and penalties on any person incurring a default under the Act in the following cases:

- (i) Failure to furnish any document, information, books, other documents, return or report called for by the Board;
- (ii) Failure to maintain books of account and records;
- (iii) Failure by an intermediary to enter into an agreement with his client, redress the grievances of investors;
- (iv) Failure by a person sponsoring or carrying on any collective investment scheme, including mutual funds, without obtaining certificate of registration;
- (v) Failure by a stock broker to issue contract notes in the form and manner specified by the stock exchange, failure to deliver any security or failure to make payment of the amount due to the investor, charging of excess brokerage;
- (vi) Any person dealing, communicating, counselling on the basis of some price sensitive information;
- (vii) Failure by a person to disclose the aggregate of his shareholding in a body corporate before he acquires any shares of that body corporate and failure to make a public announcement to acquire shares at a minimum price in case of takeovers.

SEBI also has the power to suspend or cancel the certificate of registration of a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee of a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market. This includes depository, depository participant, custodian of securities, foreign institutional investor and credit rating agency also.

Question 2:

The Securities and Exchange Board of India issued an order against a stock broker to redress the grievances of the investors within the stipulated time. The stock broker failed to do so, which is an offence under the provisions of the Securities Contracts (Regulation) Act, 1956.

Decide whether this offence can be compounded after institution of proceedings against the stock broker.

[Dec-18]

Answer:

The offence can be compounded after institution of proceedings against the stock broker as it is clearly stated under section 23N.

Question 3:

List out the main features of a qualified and independent audit committee to be set up under SEBI (listing obligations and disclosure Requirements) Regulations, 2015.

[June-18]

Answer:

The main features of a qualified and independent audit committee to be set up under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 are as follows:

1. The audit committee shall have minimum three directors as members. Two-thirds of the members of audit committee shall be independent directors;
2. All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise;

Explanation (I): The term "financially literate" means the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows.

Explanation (ii): A member will be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

3. The Chairperson of the Audit Committee shall be an independent director;
4. The Chairperson of the Audit Committee shall be present at Annual General Meeting to answer shareholder queries;
5. The Audit Committee at its discretion shall invite the finance director or the head of the finance function, head of internal audit and a representative of the statutory auditor and any other such executives to be present at the meetings of the committee; provided that occasionally, the Audit Committee may meet without the presence of any executives of the listed entity.;
6. The Company Secretary shall act as the secretary to the committee.

Question 4:

DEF Limited is a listed company. The Board of Directors of the company at their meeting held on 1st November, 2018 approved the proposal to issue bonus shares in the ratio of 1:1. Such bonus issue is authorized by its Articles of Association for issue of bonus shares and capitalization of reserves. The company implemented the bonus issue on 15th November, 2018. Whether the company has contravened the provisions of Securities Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulation 2009?

[June-19]

Answer:

Bonus Issue: According to the provisions of Chapter IX of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, a listed issuer may issue bonus shares to its members if it is authorised by its articles of association for issue of bonus share, Capitalisation of reserves, etc.

An issuer, announcing a bonus issue after the approval of its board of directors and not requiring shareholders' approval for Capitalisation of profits or reserves for making the bonus issue, shall implement the bonus issue within fifteen days from the date of approval of the issue by its board of directors. According to the stated facts, Board of Directors of DEF Ltd. approved the proposal to issue of bonus shares in the meeting held on 1st November 2018. This issue of bonus shares, is without requiring shareholders' approval.

Accordingly, DEF Ltd. implemented the bonus issue within fifteen days from the date of approval of the issue by its board of directors (i.e. on 15th November 2018). So, DEF Ltd. is in compliance with the SEBI (ICDR) Regulation, 2009 and thus has not contravened.

Question 5:

State the matters to be dealt with in the Management Discussion and Analysis Report as per SEBI guidelines on Corporate Governance.

[Dec-19]

Answer:

A Management Discussion and Analysis Report should form part of the annual report to the shareholders; containing discussion on the following matters:

- Opportunities and threats.
- Segment-wise or product-wise performance.
- Risks and concerns.
- Discussion on financial performance with respect to operational performance.
- Material development in human resource / industrial relations front.

Question 6:

Explain briefly the purpose of establishing SEBI.

[June-17]

Answer:

The purpose of the SEBI Act is to provide for the establishment of a Board called Securities and Exchange Board of India (SEBI). The Preamble to the Act provides for the establishment of a Board to:

- (i) Protect the interests of investors in securities,
- (ii) Promote the development of the securities market,
- (iii) To regulate the securities market, and
- (iv) For matters connected therewith or incidental thereto.

The Securities and Exchange Board of India was set up to achieve the following objectives:

- (i) To promote fair dealings by the issuers of securities and ensure a market place where they can raise funds at a relatively low cost.
- (ii) To provide, a degree of protection to the investors and safeguard their rights and interests so that there is a steady flow of savings into the market.
- (iii) To regulate and develop a code of conduct and fair practices by intermediaries like brokers, merchant bankers, etc., with a view to making them competitive and professional.

Question 7:

Discuss "connected person" in context of insider trading.

[MTP Dec 23]

Answer:

According to Regulation 2 (1) (d) of SEBI (Prohibition of Insider Trading) Regulations, 2015, "connected person" means-

any person who is or has during the 6 months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access. The following persons shall be considered to be connected persons unless the contrary is established, -

- (i) an immediate relative of connected persons specified in clause (i); or
- (ii) a holding company or associate company or subsidiary company; or
- (iii) an intermediary as specified in section 12 of the Act or an employee or director thereof; or
- (iv) an investment company, trustee company, asset management company or an employee or director thereof; or
- (v) an official of a stock exchange or of clearing house or corporation; or
- (vi) a member of board of trustees of a mutual fund or a member of the board of directors of the asset management company of a mutual fund or is an employee thereof; or
- (vii) a member of the board of directors or an employee, of a public financial institution; or
- (viii) an official or an employee of a self-regulatory organization recognised or authorized by Board; or
- (ix) A concern, firm, Hindu undivided family, company, or an association of persons wherein a director of the company or his immediate relative or banker of the company, has more than ten percent of the holding of interest.

Question 8:

Examine disclosure norms in respect of take over under SEBI Laws and Regulations.

[MTP June-23 Set-2]

Answer:

When an "Acquirer" takes over the control of the "Target Company", it is termed as Takeover.

Discloser norms under the Regulation:

Event based disclosure-

No obligation on the target company to give any disclosure; Obligation is only on acquirer, promoter & their PACs. Acquisition includes shares acquired by way of encumbrance (not applicable on Scheduled Commercial Banks or PFI acquiring shares by way of pledge). Disposal includes shares given upon release of encumbrance (not applicable on Scheduled Commercial Banks or PFI acquiring shares by way of pledge).

Continual disclosures (reg. 30):

Disclosure of shareholding as on 31st March i.e. at the end of financial year Within 7 working days from the end of each financial year to be given to Every Stock exchange where the shares of the Target Company are listed & Registered Office of the target company to be made by-

Promoters: Irrespective of the shareholding,

Non Promoters: Any person along with PAC holding more than 25% shares. Encumbrance disclosure (reg. 31) A claim against a property by another party;

Encumbrance usually impacts the transferability of the property and can restrict its free use until the encumbrance is removed. For takeover regulation, it includes a pledge, lien, or any transaction which creates a risk on the ownership of shares of the promoters. Promoter of every target company shall disclose details of shares in such target company relating to creation of encumbrance of shares of Target Company and invocation or release of the encumbrance of shares. Disclosure is to be made within 7 working days from the date of creation/invocation of pledge to-

- I. Every stock exchange where the shares of the target company are listed;
- II. Registered office of the target company.

Question 9:

Discuss types of Listing of Securities & benefit of listing

[JUNE 2019 MTP]

Answer:

Types of Listing

Listing of securities falls under 5 groups:

1. **Initial listing:** If the shares or securities are to be listed for the first time by a company on a stock exchange is called initial listing.
2. **Listing for Public Issue:** When a company whose shares are listed on a stock exchange comes out with a public issue of securities, it has to list such issue with the stock exchange.
3. **Listing for Rights Issue:** When companies whose securities are listed on the stock exchange issue further securities to existing shareholders on rights basis, it has to list such rights issues on the concerned stock exchange.
4. **Listing of Bonus Shares:** Companies issuing shares as a result of capitalization of profits through bonus issue shall list such issues also on the concerned stock exchange.
5. **Listing for merger or amalgamation:** When new shares are issued by an amalgamated company to the shareholders of the amalgamating company, such shares are also required to be listed on the concerned stock exchange.

Benefits of Listing

The following benefits are available when securities are listed by a company in the stock exchange:

- (a) Public image of the company is enhanced.
- (b) The liquidity of the security is ensured making it easy to buy and sell the securities in the stock exchange.
- (c) Tax concessions are made available both to the investors and the companies.
- (d) Listing procedure compels company management to disclose important information to the investors enabling them to make crucial decisions with regard to holding or disposing of such Securities.
- (e) Shares of listed companies command better credibility as they could be offered as security for loans from Banks and FIs.

Question 10:

State the Power of Securities and Exchange Board of India to make regulations.

[MTP Dec-2017]

Answer:

- (I) Without prejudice to the provisions contained in Section 30 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Securities and Exchange Board of India may, by notification in the Official Gazette, make regulations consistent with the provisions of this Act and the rules made there under to carry out the purposes of this Act.
- (II) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:
- (i) the manner, in which at least fifty-one per cent of equity share capital of a recognised stock exchange is held within twelve months from the date of publication of the order under Sub-Section (7) of Section 4B by the public other than the shareholders having trading rights under Sub-Section (8) of that Section.
 - (ii) The eligibility criteria and other requirements under Section 17A.
 - (iii) The terms determined by the Board for settlement of proceedings under Sub Section (2) of Section 23JA.
 - (iv) Any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.
- (III) Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.

Question 11:

What do you mean by 'Connected Person' according to SEBI (Prohibition of Insider Trading) Regulations, 2015?

[MTP Dec-2017]

Answer:

Regulation 2(d) describes "Connected Person". "Connected Person" means; any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access.

Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be connected persons unless the contrary is established;:

1. an immediate relative of connected persons specified in clause (i); or
2. a holding company or associate company or subsidiary company; or
3. an intermediary as specified in section 12 of the Act or an employee or director thereof; or
4. an investment company, trustee company, asset management company or an employee or director thereof; or
5. an official of a stock exchange or of clearing house or corporation; or
6. a member of board of trustees of a mutual fund or a member of the board of directors of the asset management company of a mutual fund or is an employee thereof; or
7. a member of the board of directors or an employee, of a public financial institution as defined in section 2 (72) of the Companies Act, 2013; or
8. an official or an employee of a self-regulatory organization recognised or authorized by the Board; or
9. a banker of the company; or

10. A concern, firm, trust, Hindu undivided family, company or association of persons wherein a director of a company or his immediate relative or banker of the company, has more than ten per cent. Of the holding or interest.

Question 12:

State the Procedure and Powers of the Securities Appellate Tribunal of The SEBI Act, 1992
[MTP June-2017]

Answer:

The powers and procedures of the Securities Appellate Tribunal have been given under Section 15U. The Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules. The Securities Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings. The Securities Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) Summoning and enforcing the attendance of any person and examining him on oath.
- (b) Requiring the discovery and production of documents.
- (c) Receiving evidence on affidavits.
- (d) Issuing commissions for the examination of witnesses or documents.
- (e) Reviewing its decisions.
- (f) Dismissing an application for default or deciding it ex parte.
- (g) Setting aside any order of dismissal of any application for default or any order passed by it ex parte.
- (h) Any other matter which may be prescribed.

Every proceeding before the Securities Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code (45 of 1860) and the Securities Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

The appellant in the Securities Appellate Tribunal may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by an court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Question 13:

Bareilly Stock Exchange wants to get itself recognize. Explain:

- (i) Who enjoys the power to recognize stock exchange?
- (ii) What information will have to be provided with the application for recognition?

[MTP June-2018]

Answer:

- (i) Power to recognize Stock Exchange vests with Central Government. However, Central Government has delegated the power to SEBI vide its notification No.F.No.1/57/SE/93 dated 13.9.94. (Section 3 of Securities Contracts (Regulation) Act, 1956).
- (ii) Application for recognition must be accompanied with Bye-Laws, Rules, Regulations which must contain specific details on:
 1. Constitution, powers of management and manner of transacting business by the Governing Body of the Stock Exchange
 2. Powers and duties of the office bearers of Stock Exchange.

3. Various classes of Members, qualification of membership and the exclusion, suspension, expulsion and re-admission of members.
4. The procedure for registration of Partnership as members to stock exchange and rules of nomination of authorized representatives.

Membership provisions, composition of Board Powers of Governing Board are defined in the Articles of the Exchange. Rules governing Listing Trading and Settlement, Penalties and Prohibitions, Disciplinary Actions and Defaults are defined in Bye-Laws of the Exchange.

Question 14:

Roy Infrastructure Limited, a listed company wishes to issue equity shares on preferential basis pursuant to a scheme approved under Corporate Debt Restructuring framework specified by Reserve Bank of India to various persons selected by the Board of directors of the company. Following information relevant to the preferential issue is available:

- (a) Total number of equity shares to be issued: 30 lakhs equity shares of Rs.10 each out of which 10 lakh equity shares will be allotted on 30th June as fully paid up and balance 20 lakh equity shares shall be allotted on the same date but paid up to Rs.5 each and balance Rs.5 shall be called upon at a later date and shall be paid up on 30th November, 2017.
- (b) Out of the proposed allottees some persons are holding their shares in physical form and not in dematerialized form and some persons had sold their entire shareholding in January 2017.
- (c) The meeting of general body of shareholders for approving the preferential issue was held on 15th December 2016.

Based on the above information you are required to answer the following queries with reference to the SEBI (ICDR) Regulations:

- (i) What would be the lock-in period for the shares allotted on preferential basis?
- (ii) Who are the persons not entitled for allotment of shares on preferential basis?

[MTP Dec-2018]

Answer:

- (i) Lock -in period for the Shares allotted on Preferential Basis: Regulation 78(4), SEBI, (ICDR) Regulations, 2009.

As per the aforesaid regulation, the equity shares issued on preferential basis pursuant to a scheme of corporate debt restructuring as per the Corporate Debt Restructuring framework specified by the Reserve Bank of India shall be locked- in for a period of one year from the date of trading approval. Provided that partly paid up equity shares, if any, shall be locked -in from the date of trading approval and the lock -in shall end on the expiry of one year from the date when such equity shares become fully paid up. Accordingly, the first lot of 10 lakhs full paid equity shares issued on 30th June, 2017 will have a lock -in period of 1 year from the date of trading approval i. e. till 30th June, 2018. In respect of the second lot, of partly paid 20 lac equity shares, the lock in period will be till 30th November, 2018 being the date on which the calls shall be paid up on 30th November, 2017.

- (i) Persons not entitled for allotment of shares on preferential basis (Regulation 72)

- (1) A listed issuer may make a preferential issue of specified securities, if:
 - (a) A special resolution has been passed by its shareholders;
 - (b) All the equity shares, if any, held by the proposed allottees in the issuer are in dematerialized form; the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognized stock exchange where the equity shares of the issuer are listed;
 - (c) The issuer has obtained the Permanent Account Number of the proposed allottees.

- (2) The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date.

As per Regulation 71, in case of preferential issue of equity shares pursuant to a scheme approved under the Corporate Debt Restructuring framework of Reserve Bank of India, the date of approval of the

Corporate Debt Restructuring Package shall be the relevant date. i.e., 15th December 2016 in the given case.

Since, in the given question the said persons had already sold their entire shareholding in ROY Ltd. In January 2017 i.e. after the date of approval of the Restructuring package (i.e. 15th December, 2016), they will not fall within the purview of time limit as provided under Regulation 72 (Persons not entitled for allotment of shares on preferential basis). Hence, only the persons who are not holding their shares in ROY Ltd. In dematerialized form, shall not be entitled for preferential allotment of shares.

Question 15:

Prepare a list of the provisions prescribed for fair disclosures by listed companies in India.

[MTP June-23 Set-1]

Answer:

Code of Fair Disclosure.

The board of directors of every listed company, shall formulate and publish on its official website, a code of practices and procedures for fair disclosure of unpublished price sensitive information that it would follow the principles set out in Schedule A and shall be promptly intimated to the stock exchanges. Schedule A to the Rules provides for Principles of Fair Disclosure for purposes of Code of Practices and Procedures for Fair Disclosure of Unpublished Price Sensitive Information, which are as follows.

1. Prompt public disclosure of unpublished price sensitive information that would impact price discovery no sooner than credible and concrete information comes into being in order to make such information generally available. Dissemination of unpublished price sensitive unpublished price sensitive information to avoid selective disclosure.
2. Designation of a senior officer as a chief investor relations officer to deal with dissemination of information.
3. Appropriate and fair response to queries on news reports and requests for verification of market rumours by regulatory authorities.
4. Ensuring that information shared with analysts and research personnel is not unpublished price sensitive information.
5. Developing best practices to make transcripts or records of proceedings of meetings with analysts and other investor relations conferences on the official website to ensure official confirmation and documentation of disclosures made.

Chapter 13 – The Competition Act, 2002

Question 1:

Whether a person purchasing goods not for personal use, but for resale can be considered as a "consumer" under the Competition Act, 2002.

[Dec-18]

Answer:

It is not necessary that a person must purchase the goods for personal use in order to be considered as a "consumer" under Competition Act 2002. Even a person purchasing goods for re-sale or for any commercial purpose will also be considered as a "consumer" within the meaning of the section 2(f) of Competition Act, 2002.

Question 2:

Upon an enquiry made by the Competition Commission of India it was found that Huge Limited is enjoying dominant position in the market and there is every possibility that the company may abuse its dominant position. In order to overcome such a possible situation, the Competition Commission of India wants to order for division of Huge Limited. Referring to the provisions of the Competition Act, 2002, describe the matters which may be provided in the said order.

[June-18]

Answer:

According to section 28 of the Competition Act, 2002, the Commission, may, notwithstanding anything contained in any other law for the time being in force, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. The order may provide for all or any of the following matters, namely:—

- (i) the transfer or vesting of property, rights, liabilities or obligations;
- (ii) the adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;
- (iii) the creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (iv) the formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (v) the extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (vi) Any other matter which may be necessary to give effect to the division of the enterprise.
- (vii) The payment of compensation to any person who suffered any loss due to dominant position of such enterprise.

Question 3:

Mr. Zupi was appointed as a Member of the Competition Commission of India by Central Government. He has a professional experience in international business for a period of 12 years, which is not a proper qualification for appointment of a person as member. Pointing out this defect in the Constitution of Commission, Mr. P. K. against whom the commission gave a decision, wants to invalidate the proceedings of the commission. Examine with reference to the provisions of the Competition Act, 2002 whether Mr. P. K. will succeed.

[June-19]

Answer:

As per section 15 of Competition Act 2002 any act or proceeding of the Commission shall not be invalidated merely on the ground of:

- (a) any vacancy in, or any defect in the constitution of the Commission; or
- (b) any defect in the appointment of a person acting as a Chairperson or as a member; or
- (c) Any irregularity in the procedure of the Commission not affecting the merits of the case.

Here in this case Mr. Zupi should have professional qualification of not less than 15 years as per section 8 of the Act but this disqualification will not invalidate the proceeding of the Commission.

Question 4:

An understanding has been reached among the manufacturers of cement to control the price of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings. Examine whether the above understanding can be considered as an 'Agreement' with the meaning of Section 2(b) of the Competition Act, 2002.

[Dec-19]

Answer:

Agreement

'Agreement' includes any arrangement or understanding or action in concert:

- (i) Whether or not, such arrangement, understanding or action is formal or in writing or
- (ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. [Section 2(b)].

In view of the above definition of 'agreement', and understanding reached by the cement manufacturers to control the price of cement will be an 'agreement' within the meaning of section 2(b) of the Competition Act, 2002 even though the understanding is not in writing and it is not intended to be enforceable by legal proceedings.

Question 5:

What do you mean by anti-competitive agreements, viz tie-in arrangement and resale price maintenance?

[June-17]

Answer:

Anti-competitive agreements - According to section 3 of the Competition Act, 2002, it shall not be lawful for any enterprise or association of enterprises or person or association of persons to 'enter' into an agreement in respect of production, Supply, storage, distribution, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. These agreements are called as anti-competitive agreements. All such agreements entered into in contravention of the aforesaid prohibition shall be void.

Tie-in arrangement - It includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

Resale price maintenance - It includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

Question 6:

Analyse the duties and power of the director general of Competition Commission of India?

[MTP Dec-23]

Answer:

The competition bill, 2001 was introduced in Lok Sabha on 6 August 2001 and passes on December 2002 to replace the MRTP act, 1969. The act is also acknowledged as competition act 2002 or antitrust law. This act extends to whole of India except the state of Jammu and Kashmir. The objective of the act to prohibits anti-competitive agreements, abuse of the dominant position by enterprises and regulates the combinations which causes or likely to cause adverse effect on competition with in India.

The Central Government appoints a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions.

The Director General is responsible for performing a number of important duties, which are outlined below:

Conducting Investigations: The primary duty of the DG is to investigate cases where there is a suspicion of anti-competitive behaviour by businesses or individuals. The DG may conduct investigations on its own initiative, or on the basis of a complaint filed by a party. In conducting investigations, the DG has the power to summon witnesses, call for the production of documents, and conduct search and seizure operations.

Gathering Evidence: In the course of investigations, the DG is responsible for gathering evidence in order to establish whether there has been a contravention of the Competition Act. This may involve interviewing witnesses, examining documents and records, and analysing economic data.

Preparing Reports: Once an investigation is complete, the DG is required to prepare a report outlining its findings. The report must contain details of the alleged anti-competitive conduct, the evidence gathered during the investigation, and the DG's conclusions as to whether there has been a contravention of the Competition Act.

Providing Expert Opinions: The DG is often called upon to provide expert opinions and advice to the Competition Commission of India (CCI) on matters related to competition law and policy. This may include providing advice on proposed mergers and acquisitions, conducting market studies, and assessing the impact of government policies on the competition.

Assisting the CCI: The DG is required to assist the CCI in the discharge of its functions under the Competition Act. This may include providing technical and administrative support, assisting in the preparation of cases, and presenting evidence before the CCI.

Prosecuting Offences: In cases where the DG concludes that there has been a contravention of the Competition Act, it is responsible for initiating prosecution proceedings before the Competition Commission of India.

Conducting Advocacy: The DG also plays an important role in promoting competition advocacy, which involves raising awareness about the benefits of competition and advocating for policies and practices that promote competition in the marketplace.

The Director General shall in the entire matters under his charge, have powers assigned to him all the way through the Governing Body. He shall exercise these powers under the direction, superintendence and control of the Society, President and Vice President and subject to these rules and bye-laws.

Section 33: -

power to issue interim orders The commission may by order, temporarily restrain any party from carrying on such act until the conclusion of any such inquiry or until further orders, without giving notice to such party where it deems necessary. Section 33 empowers to issue in term orders in case of anticompetitive agreements.

Section 34: -

The power to award competition In the section 34 of this act, the anti-competitive agreements are agreements in the midst of competitors in the direction of prevent, restrict or distort competition. Section 34 under this Act disallow agreements, decisions and practices that are anti-competitive.

Section 35: -

Person or an enterprise or the Director General may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or else any of his or its officers to there his or its case sooner than the Commission etc.

Question 7:

Critically assess the major differences between horizontal and vertical business combination agreements with examples.

[MTP June-23 Set-1]

Answer:

The difference between Horizontal and Vertical Agreements is that in Horizontal Agreements there is same level of competition whereas in Vertical Agreement there is different level of competition. Section 3(3) of the Act states that any agreement entered into between enterprises or associations of business entities or persons or associations of persons or between any person and enterprise or practice carried on, or concerted

decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods Services. There are few recognized trade associations in India. There are informal association and arrangement by which similar business entities. Mostly competitors join hands and exploit the market in concerted manner.

Vertical agreements are agreements that are entered amongst enterprise or persons at different stages of the production and distribution chain. Under the Act, such agreements are:

(b) **Tie-in arrangement:** sale of one product is tied up with taking of other product which may not be useful or commercially not viable;

(i) Anticompetitive agreements and assist the competition authorities in lieu of immunity or lenient treatment. A Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own. It is based on the principle of fair competition for greater good.

A. Anti-competitive agreement shall be presumed to have appreciable adverse effect on competition and thereby deemed to be restrictive. Some type of agreements is discussed below.

II. Any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Any such agreement shall be void.

III. Any agreement entered into between enterprises or associations of enterprises including cartels, engaged in identical or similar trade of goods or provision of services, which—

- a. directly or indirectly determines purchase or sale prices;
- b. limits or controls production, supply, markets, technical development, investment;
- c. shares the market or source of production by way of allocation of geographical area of market;
- d. directly or indirectly go for bid rigging or collusive bidding; "bid rigging" means any agreement, eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding, other than joint ventures business agreements are excepted

(ii) Any agreement amongst enterprises or persons in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including, tie-in arrangement: includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(iii) Exclusive supply agreement: includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Example: ABC Ltd. has appointed Soni Brothers as a supplier of raw materials with a restriction that they cannot do business with other parties.

(iv) exclusive distribution agreement: includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods

(v) Refusal to deal: includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought. Example: ABC Ltd. appoints a dealer for domestic fans and restricts him to take dealership of other Product

(vi) Resale price maintenance: includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged. In other words, the "maximum retail price" shall have to be disclosed and nobody can take more than that. Therefore, we find the MRP in most of the product on the package.

Above restriction shall not apply to

(a) The right to restrain any infringement of Intellectual property rights under the Copyright, Patents Act, Trade Marks, Geographical Indications, Designs and Semiconductor Integrated Circuits Layout-Design as provided in the respective Acts.

- (b) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Question 8:

Examine the provision of Anti-Competitive Agreement in light of The Competition Act, 2002.

[MTP June-23 Set-2]

Answer:

The purpose of Competition act is to encourage competition both for the benefit of consumers and regulating the industry. Therefore, law defines few types of trade, commerce or business agreements as anti-competitive.

Agreement is defined under Section 2(b) of the Competition Act. It includes any written/ oral agreement/ arrangement relating to production, supply, distribution, storage, acquisition or control of goods or services which causes or may cause an appreciable adverse effect on competition in India shall be void. Agreement widely defined and include any kind of arrangement whether express or implied, to be decided from facts and circumstantial evidence.

There can be two types of agreement under the Act-

1. Vertical
2. Horizontal

The difference between Horizontal and Vertical Agreements is that in Horizontal Agreements there is same level of competition whereas in Vertical Agreement there is different level of competition. Section 3(3) of the Act states that any agreement entered into between enterprises or associations of business entities or persons or associations of persons or between any person and enterprise or practice carried on, or concerted decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods Services. There are few recognized trade associations in India. There are informal association and arrangement by which similar business entities. Mostly competitors join hands and exploit the market in concerted manner.

Vertical agreements are agreements that are entered amongst enterprise or persons at different stages of the production and distribution chain. Under the Act, such agreements are:

- (a) Tie-in arrangement: sale of one product is tied up with taking of other product which may not be useful or commercially not viable;
- (i) Anti-competitive agreements and assist the competition authorities in lieu of immunity or lenient treatment. A Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own. It is based on the principle of fair competition for greater good.
- A. Anti-competitive agreement shall be presumed to have appreciable adverse effect on competition and thereby deemed to be restrictive. Some type of agreements is discussed below.
- (i) Any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Any such agreement shall be void.
- (ii) Any agreement entered into between enterprises or associations of enterprises including cartels, engaged in identical or similar trade of goods or provision of services, which—
- b. directly or indirectly determines purchase or sale prices;
 - c. limits or controls production, supply, markets, technical development, investment;
 - d. shares the market or source of production by way of allocation of geographical area of market;
 - e. Directly or indirectly go for bid rigging or collusive bidding; "bid rigging" means any agreement, eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding, other than joint ventures business agreements are expected.
- (iii) Any agreement amongst enterprises or persons in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including, tie-in arrangement: includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

- (iv) Exclusive supply agreement: includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. Example: ABC Ltd. has appointed Soni Brothers as a supplier of raw materials with a restriction that they cannot do business with other parties.
- (v) exclusive distribution agreement: includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods
- (vi) Refusal to deal: includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

Question 9:

What Constitutes Competition Law and Policy? Objectives of the Competition Act, 2002.

[MTP June-2020]

Answer:

Competition law and policy is defined as those Government measures that affect the behaviour of enterprises and structure of the industry with a view to promote efficiency and maximize welfare.

The two elements of such Government measures are:

Competition Policy: Set of policies, such as liberalized trade policy, relaxed FDI policy, deregulation, etc., that enhances competition in the markets.

Competition Law: To prevent anti-competitive practices with minimal intervention.

Objectives of the Competition Act, 2002

Keeping in view of the economic development of the country, the Competition Act, 2002 was laid down to provide for an establishment of a Commission seeks to achieve the following objectives:

- (a) To prevent practices having adverse effect on competition.
- (b) To promote and sustain competition in markets.
- (c) To protect the interests of consumers.
- (d) To ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (CCI) which has been established by the Central Government with effect from 14th October, 2003.

Question 10:

Explain the provisions as to Prohibition of certain agreements under Chapter II of Competition Act, 2002.

[MTP June-2020]

Answer:

Chapter II of the Competition Act, 2002 deals with Prohibition of certain Agreements along with Abuse of Dominant Position and Regulation of Combinations.

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:

- (1) Agreement to limit production and/or supply.
- (2) Agreement to allocate markets.
- (3) Agreement to fix price.
- (4) Bid rigging or collusive bidding.
- (5) Conditional purchase/sale (tie-in arrangement).
- (6) Exclusive supply/distribution arrangement.
- (7) Resale price maintenance. And
- (8) Refusal to deal.
- (b) Section 3(1) of the Competition Act provides that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. the market or any other similar way, and

(4) Directly or indirectly results in bid rigging or collusive bidding. It shall be presumed to have an appreciable adverse effect on the competition and onus to prove otherwise lies on the defendant. The explanation appended to the Section 3 defines the term bid rigging as any agreement between enterprises or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding. Efficiency enhancing joint ventures entered into by parties engaged in identical or similar goods or services, shall not be presumed to have appreciable adverse effect on competition but judged by rule of reason. The term cartel used in the Section is the most severe form of entering into anti-competitive agreements and has been defined in Section 2(c). Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre-determination is by way of intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Section 3(2) further declares that any anti-competitive agreement within the meaning of sub-Section 3(1) shall be void. Under the law, the whole agreement is construed as void if it contains anti-competitive clauses having appreciable adverse effect on competition. Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or associations of persons or person or enterprise or practice carried on, or decision taken by any association of enterprises or association of persons, including cartels, engaged in identical or similar goods or services which:

- (1) Directly or indirectly determines purchase or sale prices.
- (2) Limits or controls production, supply, markets, technical development, investment or provision of services.

Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in.

Question 11:

What Constitutes Competition Law and Policy? Objectives of the Competition Act, 2002.

[MTP June-2019]

Answer:

Competition law and policy is defined as those Government measures that affect the behaviour of enterprises and structure of the industry with a view to promote efficiency and maximize welfare.

The two elements of such Government measures are:

Competition Policy: Set of policies, such as liberalized trade policy, relaxed FDI policy, deregulation, etc., that enhances competition in the markets.

Competition Law: To prevent anti-competitive practices with minimal intervention.

Objectives of the Competition Act, 2002

Keeping in view of the economic development of the country, the Competition Act, 2002 was laid down to provide for an establishment of a Commission seeks to achieve the following objectives:

- a) To prevent practices having adverse effect on competition.
- b) To promote and sustain competition in markets.
- c) To protect the interests of consumers.
- d) To ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (CCI) which has been established by the Central Government with effect from 14th October, 2003.

Question 12:

State the Evaluation of appropriate adverse effect on competition of the Competition Act, 2002.

[MTP Dec-2017]

Answer:

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act

empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in sub Section (4) of Section 20. Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition in the relevant market:

- (a) Actual and potential level of competition through imports in the market.
- (b) Extent of barriers to entry into the market.
- (c) Level of concentration in the market.
- (d) Degree of countervailing power in the market.
- (e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins.
- (f) Extent of effective competition likely to sustain in a market.
- (g) Extent to which substitutes are available or are likely to be available in the market.
- (h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination.
- (i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market.
- (j) Nature and extent of vertical integration in the market.
- (k) Possibility of a failing business.
- (l) Nature and extent of innovation.
- (m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition.
- (n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Question 13:

What constitutes Competition Law and Policy?

[MTP June'17 & Dec-2017]

Answer:

Competition law and policy is defined as those Government measures that affect the behaviour of enterprises and structure of the industry with a view to promote efficiency and maximize welfare.

The two elements of such Government measures are:

Competition Policy: Set of policies, such as liberalized trade policy, relaxed FDI policy, de-regulation, etc., that enhances competition in the markets.

Competition Law: To prevent anti-competitive practices with minimal intervention.

Question 14:

What are the Objectives of The Competition Act, 2002?

[MTP Dec-2017]

Answer:

Objectives of the Competition Act, 2002:

Keeping in view of the economic development of the country, the Competition Act, 2002 was laid down to provide for an establishment of a Commission seeks to achieve the following objectives:

- a) To prevent practices having adverse effect on competition.
- b) To promote and sustain competition in markets.
- c) To protect the interests of consumers.
- d) To ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

The objectives of the Act are sought to be achieved through the instrumentality of the Competition Commission of India (CCI) which has been established by the Central Government with effect from 14th October, 2003.

Question 15:

Discuss the Acts taking place outside India but having an effect on competition in India.

[MTP June-2017 & MTP Dec-2018]

Answer:

Acts taking place outside India but having an effect on competition in India has been discussed u/s 32 of the Competition Act, 2002. The commission shall, notwithstanding that:

- (i) An agreement referred to in Section 3 has been entered into outside India, or
- (ii) Any party to such agreement is outside India, or
- (iii) Any enterprise abusing the dominant position is outside India, or
- (iv) A combination has taken place outside India, or
- (v) Any party to combination is outside India, or
- (vi) Any other matter or practice or action out of such agreement or dominant position or combination is outside India,

Have power to inquire in accordance with the provisions contained in Sections 19, 20, 26, 29 and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

Question 16:

Mr. Sidhartha was appointed as a Member of the Competition Commission of India by Central Government. He has a professional experience in international business for a period of 12 years, which is not a proper qualification for appointment of a person as member. Pointing out this defect in the Constitution of Commission, Mr. Goswami, against whom the commission gave a decision, wants to invalidate the proceedings of the commission. Examine with reference to the provisions of the Competition Act, 2002 whether Mr. Goswami will succeed.

[MTP June-2018]

Answer:

As per Section 15 of Competition Act 2002, any act or proceeding of the Commission shall not be invalidated merely on the ground of:

- (a) Any vacancy in, or any defect in the Constitution of the Commission; or
- (b) Any defect in the appointment of a person acting as a Chairperson or as a member; or
- (c) Any irregularity in the procedure of the Commission not affecting the merits of the case.

Here in this case Mr. Sidhartha should have professional qualification of not less than 15 years as per Section 8 of the Act but this disqualification will not invalidate the proceeding of the Commission.

Question 17:

A Ltd. and B Ltd. both dealing in chemicals and fertilizers have entered into an agreement to jointly promote the sale of their products. A complaint has been received by the Competition Commission of India (CCI) stating that the agreement between the two is anti-competitive and against the interests of others in the trade. Examine with reference to the provisions of the Competition Act, 2002, what are factors of CCI will take into account to determine whether the agreement in question will have any appreciable adverse effect on competition in the market.

[MTP June-2018]

Answer:

Factors determining appreciable adverse effect on competition: The Competition Commission of India (CCI), while determining whether an agreement is anti-competitive under section 3 of the Competition Act, 2002, will take into account the following factors:

- (b) Creation of barriers to new entrants in the market.
- (c) Driving existing competitors out of the market.
- (d) Foreclosure of competition by hindering entry into the market.
- (e) Accrual of benefits to consumers.
- (f) Improvements in production or distribution of goods or provision of services and
- (g) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Question 18:

A Ltd. And B Ltd. Both dealing in chemicals and fertilizers have entered into an agreement to jointly promote the sale of their products. A complaint has been received by the Competition Commission of India (CCI) stating that the agreement between the two is anti-competitive and against the interests of others in the trade. Examine with reference to the provisions of the Competition Act, 2002, what are factors of CCI will take into account to determine whether the agreement in question will have any appreciable adverse effect on competition in the market.

[MTP Dec-2018]

Answer:

Factors determining appreciable adverse effect on competition: The Competition Commission of India (CCI), while determining whether an agreement is anti-competitive under section 3 of the Competition Act, 2002, will take into account the following factors:

- (a) Creation of barriers to new entrants in the market.
- (b) Driving existing competitors out of the market. Foreclosure of competition by hindering entry into the market.
- (c) Accrual of benefits to consumers.
- (d) Improvements in production or distribution of goods or provision of services and

Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Question 19:

Mr.Jaydev was the Chairperson of the Competition Commission of India and he ceased to hold his office on 31st March, 2019. Recently, he has offered the post of the Executive Director with an attractive remuneration and perquisites in the following organizations:

- i) Arnab Limited, a private sector public company, which has been a party to a proceeding before the Competition Commission of India.
- ii) National Milk Products Limited, a Government Company, as defined under the provisions of the Companies Act, 2013.

Mr.Jaydev is confused and seeks your advice regarding selection of the appropriate concern, with which he should join. Examine the situation in the light of the provisions of the Competition Act, 2002 and advise him.

[Dec-22]

Answer:

As per the provisions of Section 12 of the Competition Act, 2002, the Chairman and other Member of CCI shall not, for a period of two years from the date on which he ceased to hold office, accept any employment in or connected with the management or administration of any enterprise, which has been a party to a proceeding before the Commission. However, these provisions will not apply to any appointment in a Government Company or the Central Government or any State Government or local authority or any Corporation established by or under any Central or State or Provincial Act.

- (I) In view of the aforesaid, Mr. Jaydev cannot join Arnab Limited for a period of two years starting from 1st April, 2019.
- (II) However, there is no bar for him to join National Milk Products Limited, since it is a Government Company

Question 20:

Enumerate the Penalty for offences in relation to furnishing of information under the Competition Act, 2002.

[Dec-2023]

Answer:

Penalty for offences in relation to furnishing of information

Without prejudice to the provisions of section 44 of the Competition Act 2002, if a person, who furnishes or is required to furnish under this Act any particulars, documents or any information,

- (a) makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular, or

- (b) omits to state any material fact knowing it to be material, or
- (c) Wilfully alters, suppresses or destroys any document which is required to be furnished as aforesaid, such person shall be punishable with fine which may extend to 1 crore as may be determined by the Commission.

The Commission may, if it is satisfied, impose a lesser penalty that any person has made a full and true disclosure in respect of the alleged violations, a lesser penalty. However, a lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under section 26 has been received before making of such disclosure.

Lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission. The Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,

- (a) not complied with the condition on which the lesser penalty was imposed by the Commission, or
- (b) had given false evidence, or
- (c) The disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed.

Question 21:

You are CFO of ABC India Limited, a large steel parts manufacturing company in India with turnover of more than 1 billion and turnover of more than 2 billion. Negotiation for takeover of a foreign company is going on, whose turnover for last financial year was US\$ 3.5 billion and assets of 1.5 billion US\$. Company wants to know the steps to be taken in case the negotiation succeeds. Please advise your company.

(ICMAI Study Material)

Answer:

In the given case, ABC India Ltd is to acquire a foreign company whose turnover for last financial year was US\$3.5 billion and assets of 1.5 billion US\$. The combined assets of both the companies, shall exceed the threshold limit of combination which require CCI nod and therefore, will come under the purview of Competition Act. The threshold limit is asset of US\$ 1 billion and turnover of US\$ 3 billion for the combined entity.

Here, the procedure is as follows:

1. The binding documents are to be signed, which will be done with the approval of Board or shareholders, whatever may be the case. Here binding documents means agreement to invest or any other undertakings.
2. Within 30 days of signing the binding documents, the company shall give a notice to CCI in a prescribed format.
3. CCI may go for primary inquiry and form an opinion on the notice.

Chapter 14 - Foreign Exchange Management Act, 1999

Question 1:

Ms. Ashima, daughter of Mr. Mittal (an exporter), is residing in Australia since long. She wants to buy a flat in Australia. Since she is unmarried, she wants to make her father Mr. Mittal a joint holder in that flat, for which entire proceeds are to be paid by her.

- State the provisions of FEMA governing such type of transaction.
- On applying the relevant provisions, can Mr. Mittal join his daughter in acquiring such a flat in Australia

[June-18]

Answer:

- (i) The provisions governing the acquisition and transfer of immovable property outside India.
 - (1) A person resident in India may acquire immovable property outside India:
 - (a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the FEMA or referred to in clause (b) of regulation 4 acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of Reserve Bank.
 - (b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the foreign exchange management (Foreign Currency accounts by a person resident in India) Regulations 2015,
 - (c) Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.
 - (2) A person resident in India may acquire immovable property outside India, by way of Inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provision in force at the time of such acquisition.
 - (3) A Company incorporated in India having overseas offices, may acquire Immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve bank of India from time to time.
- (ii) In the light of above discussions in 1(c), it is quite clear that Mr. Mittal, a resident in India, can join his daughter who is a resident outside India, in acquiring a flat in Australia.

Question 2:

Mr. Daksh, an Indian National desires to obtain foreign exchange for the following purposes:

- (i) Payment to be made for securing health insurance from a company abroad.
- (ii) Payment of commission on exports under Rupee State Credit Route. Advise whether he can get foreign exchange and if so, under what condition?

[Dec-19]

Answer:

Any person may sell or draw foreign exchange to or from an authorized person if such sale 'or drawal is a current account transaction. However, the Central Government may in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000.

The Rules stipulate some prohibitions and restrictions on drawal of foreign exchange for certain purposes. In the light of provisions of these rules, the answer to the given problem is as follows:

- i. Drawl of foreign exchange for securing health insurance from a company abroad does not fall under any of the Schedules I, II or III. Therefore, such a transaction is permitted without any restriction or condition.
- ii. Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits payment of commission on exports under Rupees State Credit Route (except commission upto 10% of invoice value of exports of tea and tobacco). Therefore, payment of commission on exports under Rupee State Credit Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.

Question 3:

State the kind of approval required for the following transactions under the Foreign Exchange Management Act, 1999:

- ii. L, a famous playback singer of India wants to perform a musical night in Paris for Indians residing there. Foreign exchange to the extent of USD 20,000 is required for this purpose.
- iii. M requires USD 5,000 to make payment related to 'call back services' of telephone.

[June-17]

Answer:

- (i) Foreign exchange drawals for cultural tours require prior permission/approval of the Government of India irrespective of amount of foreign exchange required. Therefore, in the given case L, the singer is required to seek permission of the Government of India.
- (ii) Drawal of foreign exchange for payment related to 'call back services' of telephones is prohibited. Therefore 'M' cannot draw foreign exchange.

Question 4:

List the items which are prohibited as per Liberalised Remittance Scheme, with brief justifications for each.

[MTP June-23 Set-1]

Answer:

Under the Liberalised Remittance Scheme (LRS), all resident individuals, including minors, are allowed to freely remit up to USD 2,50,000 per financial year (April - March) for any permissible current or capital account transaction or a combination of both. The Scheme was introduced on February 4, 2004, with a limit of USD 25,000. The LRS limit has been revised in stages consistent with prevailing macro and micro economic conditions. The Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

Prohibited items under the Scheme

- (i) Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000.
- (ii) Remittance from India for margins or margin calls to overseas exchanges / overseas counterparty.
- (iii) Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market.
- (iv) Remittance for trading in foreign exchange abroad.
- (v) Capital account remittances, directly or indirectly, to countries identified by the Financial Action Task Force (FATF) as "non-cooperative countries and territories", from time to time.
- (vi) Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

Question 5:

What are the prohibited sectors for FDI in India?

[MTP June-2020]

Answer:

FDI is prohibited in:

- (1) Lottery Business including Government / private lottery, online lotteries, etc.
- (2) Gambling and betting including casinos etc.
- (3) Chit funds.
- (4) Nidhi company.
- (5) Trading in Transferable Development Rights (TD'Rs').
- (6) Housing and Real Estate Business or Construction of Farm Houses Real estate business shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.
- (7) Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.
- (8) Activities/ sectors not open to private sector investment e.g.,
 - a) Atomic Energy and
 - b) Railway operations (other than permitted activities).

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business and Gambling and Betting activities. Investments in India have to be in accordance with any one of the schedules to the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. There are nine schedules to the Regulations.

Investments can be made by non-residents in the equity shares/fully, compulsorily and mandatorily convertible debentures/fully, compulsorily and mandatorily convertible preference shares of an Indian company, through the Automatic Route or the Government Route which is also alternatively referred to as the approval route. Under the Automatic Route, the non-resident investor or the Indian company does not require any approval from Government of India for the investment. Under the Government Route, prior approval of the Government of India is required. Proposals for foreign investment under Government route, are considered by respective administrative ministry of central government. Various filing are required to be made to RBI in automatic route.

Question 6:

State the modes of payment allowed for receiving Foreign Direct Investment in an Indian Company under the Foreign Exchange Management Act, 1999.

[MTP Dec-2017]

Answer:

An Indian company issuing shares / convertible debentures under FDI Scheme to a person resident outside India shall receive the amount of consideration required to be paid for such shares / convertible debentures by:

- (a) Inward remittance through normal banking channels.
- (b) Debit to NRE / FCNR account of a person concerned maintained with an AD Category-I bank.
- (c) Conversion of royalty/lump sum/technical know-how fee due for payment or conversion of ECB, shall be treated as consideration for issue of shares.
- (d) Conversion of import payables / pre incorporation expenses / share swap can be treated as consideration for issue of shares with the approval of FIPB.
- (e) debit to non-interest bearing Escrow account in Indian Rupees in India which is opened with the approval from AD Category-I bank and is maintained with the AD Category-I bank on behalf of residents and non-residents towards payment of share purchase consideration. If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE/FCNR (B)/Escrow account, the amount shall be refunded. Further, Reserve Bank may on an application made to it and for sufficient reasons permit an Indian Company to refund/allot shares for the amount of consideration received towards issue of security if such amount is outstanding beyond the period of 180 days from the date of receipt.

Question 7:

State the difference between the title, FERA and FEMA of legislations.

[MTP June-2017]

Answer:

The difference between the title, FERA and FEMA of legislations is that, in view of the stated change, the title of the legislation has rightly been changed from „Foreign Exchange Regulation Act’ to „Foreign Exchange Management Act’. The main change that has been brought is that FEMA is a civil law, whereas the FERA was a criminal law. In simple word, for contravention of provisions under the FEMA arrest and imprisonment would not be resorted whereas it was the norm under the previous act. Drastic tenor of FERA can be gauged from the fact that it provided for imprisonment for violation of even very minor offenses. In FERA, the presumption was upon the accused to defend himself as he was deemed guilty, whereas in FEMA, the onus is upon the Enforcement Directorate to prove the guilt of the accused.

Question 8:

State the Benefits of the Foreign Exchange Management Act 1999.

[MTP June-2017]

Answer:

In the FERA regime accent was to regulate everything that was specified, relating to foreign exchange whereas FEMA lay down that 'everything other than what is expressly covered is not controlled'. The overriding objective of FERA was to regulate and minimize dealings in foreign exchange and foreign securities while FEMA on the other hand aims to aid in creation of a liberal foreign exchange market in India. It is also to be understood that the foreign exchange reserves started increasing after the liberalization regime and foreign exchange was started to be allowed more freely in contrast to the earlier FERA regime.

This difference in terminology reflects seriousness of government towards deregulation of foreign exchange and promotion of free flow of international trade. To facilitate external trade, section 5 of the Act removes restrictions on withdrawal of foreign exchange for the purpose of current account transactions. As external trade i.e., imports/export of goods & services involve transactions on current account, there is no need for seeking RBI permissions in connection with remittances involving external trade. All transactions which fall within the category current account transactions are deemed permitted unless expressly specified and in respect of capital account transactions, they need to be expressly permitted to be transacted.

Question 9:

Mr. Sandeep, an Indian National desires to obtain foreign exchange for the following purposes:

- (i) Payment of commission on exports under Rupee State Credit Route.
- (ii) Gift remittance exceeding US\$ 10,000.

Advise him whether he can get foreign exchange and if so, under what condition?

[MTP June-2018]

Answer:

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign 'Exchange Management (Current Account Transactions) (Rules, 2000. The Rules stipulate some prohibitions and restrictions on drawal of foreign exchange for certain purposes. In the light of provisions of these rules, the answer to the given problem is as follows:

- (i) (Rule 3 read with Schedule I of Foreign 'Exchange Management (Current Account Transactions) (Rules, 2000 prohibits payment of commission on exports under (Rupees State Credit (Route (except commission upto 10% of invoice value of exports of tea and tobacco). Therefore, payment of commission on exports under (Rupee State Credit (Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.
- (ii) As per (Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, individuals can draw foreign exchange upto US Dollar 2,50,000 for gift or donation referred to as 'the Liberalised (Remittance Scheme). Drawal of foreign exchange in excess of US Dollar 2,50,000 shall require prior approval of the Reserve Bank of India. Therefore, Mr. Sunny can obtain more than US Dollar 10,000 for gift without any approval of the Reserve Bank of India provided the total amount drawn by him during the entire financial year does not exceed US Dollar 2,50,000.

Question 10:

Mr. Sandeep, an Indian National desires to obtain foreign exchange for the following purposes:

- (i) Payment of commission on exports under Rupee State Credit Route.
- (ii) Gift remittance exceeding US\$ 10,000.

Advise him whether he can get foreign exchange and if so, under what condition?

[MTP Dec-2018]

Answer:

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawals is a current account transaction. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign 'Exchange Management (Current Account Transactions)

(Rules, 2000. The Rules stipulate some prohibitions and restrictions on drawal of foreign exchange for certain purposes. In the light of provisions of these rules, the answer to the given problem is as follows:

- (i) (Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) (Rules, 2000 prohibits payment of commission on exports under (Rupees State Credit (Route (except commission up to 10% of invoice value of exports of tea and tobacco). Therefore, payment of commission on exports under (Rupee State Credit (Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.
- (ii) As per (Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, individuals can draw foreign exchange up to US Dollar 2,50,000 for gift or donation referred to as 'the Liberalised (Remittance Scheme). Drawal of foreign exchange in excess of US Dollar 2,50,000 shall require prior approval of the Reserve Bank of India. Therefore, Mr. Sunny can obtain more than US Dollar 10,000 for gift without any approval of the Reserve Bank of India provided the total amount drawn by him during the entire financial year does not exceed US Dollar 2,50,000.

Question 11:

Sunita Garments Limited is engaged in the business of exporting leather garments. The company is neither located in a Special Economic Zone, nor has availed any special status like Status Holder Exporter, Export Oriented or a unit under Bio-Technology Park.

[Dec-22]

Answer:

Period within which amount representing the export value shall be realized & repatriated as per Section 7 of the FEMA, 1999 read with Foreign Exchange Management (Export of Goods and Services) Regulations, 2015: The amount representing the full export value of goods/software/ services exported shall be realized and repatriated to India within nine months from the date of export, provided:

- (a) that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within fifteen months from the date of shipment of goods;
- (b) Extension of Period: Further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be. Sunita Garments Limited may be advised as above.

Question 12:

Discuss Permitted Investments by person's resident outside India.

[Dec-2023]

Answer:

Permitted Investments by persons resident outside India

Any investment made by a person resident outside India shall be subject to the entry routes, sectoral caps or the investment limits, may make investment as stated hereinafter For details, one has to see the relevant annexure, out of various annexures which relate to each kind of investment.

- (i) Subscribe/ purchase/ sale of capital instruments of an Indian company is permitted as per the directions laid down in Annex 1
- (ii) Purchase/ sale of capital instruments of a listed Indian company on a recognised stock exchange in India by Foreign Portfolio Investors is permitted as per the directions laid down in Annex 2
- (iii) Purchase/ sale of Capital Instruments of a listed Indian company on a recognised stock exchange in India by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on repatriation basis is permitted as per the directions laid down in Annex 3
- (iv) Purchase/ sale of Capital Instruments of an Indian company or Units or contribution to capital of a LLP or a firm or a proprietary concern by Non-Resident Indian (NRI) or Overseas Citizen of India (OCI) on a Non-Repatriation basis is permitted as per the directions laid down in Annex 4
- (v) Purchase/ sale of securities other than capital instruments by a person resident outside India is permitted as per the directions laid down in Annex 5

- (vi) Investment in a Limited Liability Partnership (LLP) is permitted as per the directions laid down in Annex 6.
- (vii) Investment by a Foreign Venture Capital Investor (FVCI) is permitted as per the directions laid down in Annex 7.
- (viii) Investment in an Investment Vehicle is permitted as per the directions laid down in Annex 8.
- (ix) Issue/ transfer of eligible instruments to a foreign depository for the purpose of issuance of Depository receipts by eligible person(s) is permitted as per the directions laid down in Annex 9.
- (x) Purchase/ sale of Indian Depository Receipts (IDRs) issued by Companies Resident outside India is permitted as per directions laid down in Annex 10.

Question 13:

Demonstrate the prohibited items of LRS and briefly explain what the rationale for such regulation is.

[MTP June-23 Set-2]

Answer:

Prohibited items of LRS:

- i. Remittance for any purpose specifically prohibited under Schedule-I (like purchase of lottery tickets/sweep stakes, proscribed magazines, etc.) or any item restricted under Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000.
- ii. Remittance from India for margins or margin calls to overseas exchanges / overseas counterparty.
- iii. Remittances for purchase of FCCBs issued by Indian companies in the overseas secondary market.
- iv. Remittance for trading in foreign exchange abroad.
- v. Capital account remittances, directly or indirectly, to countries identified by the Financial Action Task Force (FATF) as "non-cooperative countries and territories", from time to time.
- vi. Remittances directly or indirectly to those individuals and entities identified as posing significant risk of committing acts of terrorism as advised separately by the Reserve Bank to the banks.

Under the Liberalised Remittance Scheme, all resident individuals, including minors, are allowed to freely remit up to a certain amount as specified for any permissible current or capital account transaction or a combination of both. The LRS limit has been revised in stages consistent with prevailing macro and micro economic conditions from time to time and the Scheme is not available to corporates, partnership firms, HUF, Trusts etc.

Question 14:

What is an overseas direct investment? Differentiate between automatic route and approval route to direct investment.

[Dec-21]

Answer:

Direct investment outside India /overseas direct investment means investments, either under the Automatic Route or the Approval Route by way of

- I. contribution to the capital or subscription to the Memorandum of a foreign entity or
- II. Purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity. (JV or WOS).

Difference between Automatic Route and Approval Route for direct investment Automatic route for direct investment or financial commitment outside India:

An Indian Party has been permitted to make investment/undertake financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (for its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Approval route for direct investment or financial commitment outside India:

- (i) Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.

- (ii) Reserve Bank would, inter alia, take into account the following factors while considering such applications:
- (a) Prima facie viability of the JV/WOS outside India,
 - (b) Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment),
 - (c) Financial position and business track record of the Indian Party and the foreign entity, and
 - (d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV/WOS outside India.

Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorised Dealer Category- 1 Banks.

Question 15:

What is external commercial borrowings? Discuss the purpose for which it is taken.

[MTP June-2020]

Answer:

External Commercial Borrowings (ECB): ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB (herein after referred to as the ECB Framework) comprises the following three tracks:

- (3) Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.
- (4) Long term foreign currency denominated ECB with minimum average maturity of 10 years.
- (5) Indian Rupee (^) denominated ECB with minimum average maturity of 3/5 years.

Forms of ECB: The ECB Framework enables permitted resident entities to borrow from recognized non-resident entities in the following forms:

- (a) Loans including bank loans.
- (b) Securitized instruments (e.g., floating rate notes and fixed rate bonds, non-convertible, optionally convertible or partially convertible preference shares/debentures).
- (c) Buyers' credit.
- (d) Suppliers' credit.
- (e) Foreign Currency Convertible Bonds (FCCBs).
- (f) Financial Lease, and
- (g) Foreign Currency Exchangeable Bonds (FCEBs),

Question 16:

Ramesh, Rohit and Madan, all graduate in pharmacy, decide to form a start-up business of manufacturing rare medicine for cancer. Rohit plans big and wants to go to public for finance in course of time. Madan has requested his uncle, an NRI based at USA to invest in the company which he has agreed. Ramesh feels that they should go for section 8 company as the target is not to make money. Madan's uncle wants to know the advantages and disadvantages of public and private company in India.

You are advised to clarify the following issues.

- (i) In order to fulfil Rohit's plan, what kind of entity should be preferred and why?
- (ii) Can Madan's uncle invest in the company as an NRI?
- (iii) Ramesh's idea of section 8 company is ok?
- (iv) Prepare small note for Madan's uncle.

(ICMAI Study Material)

Answer:

(i) Private company cannot call for finance from the public. However, a private company can be converted into public company. It is preferred that a public limited company be incorporated so that finance can be taken from the market.

(ii) Yes, Madan's uncle can invest in the company, subject to FDI restrictions.

(iii) Ramesh's idea of section 8 company is not ok as this is a business, where they are investing as entrepreneur and it is not a NGO or social enterprise.

(iv) Note for Madan's uncle.

Advantages of private company

(a) Many provisions of the companies Act do not apply

(b) Shareholders are limited are normally known.

Disadvantages of private company

(a) Cannot invite fund from public

(b) Cannot increase number of shareholders over 200

Question 17:

Modern Technologies, an unlisted Indian company, having a capital of Rs.23 crores are negotiating with foreign investor for 20 % stake in the company by issue of fresh shares at a price to be negotiated. The Company is in high tech area where there no limit on foreign investment. You are the CFO of the company. Please prepare a note for directors, whether the issue is possible and if so, the steps to be taken.

(ICMAI Study Material)

Answer:

Note for Directors.

Our Company, Modern Technologies, is an unlisted company and SEBI regulations do not apply. However, Company has to comply with FEMA regulations.

1. As per present FDI regulation, no Govt. approval is required. Neither one requires prior approval of RBI.
2. The investment is within limit. Once the remittance is received, RBI has to be given intimation.
3. The shares certificates have to be issued in dematerialised mode. There is no restriction on repatriation of dividend, subject to tax, as per Indian laws.
4. The shares shall have same voting and other rights.

Chapter 15 - Laws related to Banking Sector

Question 1:

Various complaints have been made against the activities of a Co-operative Banking company to the effect that, if unchecked, the shareholders, depositors and others will suffer heavily and the complainants requested for the appointment of directors by Reserve Bank of India. Discuss whether the Reserve Bank has any powers to inspect the records of the Co-operative Bank to ascertain the truth or otherwise in the complaints and to appoint directors in the Co-operative Bank under the Banking Regulation Act, 1949.

[Dec-17]

Answer:

Power of Reserve Bank of India to inspect banks (Section 35 of the Banking Regulation Act, 1949): RBI is empowered to conduct inspection of any bank and to give them direction as it deems fit. All banks are bound to comply with such directions. Every directors or other officer of the bank shall produce all such books, documents as required by the inspector. The inspector may examine on oath any director or other officers. RBI shall supply the bank a copy of such report of the inspection. RBI submits report to Central Government and the latter, on scrutiny, if is of the opinion that the affairs of the bank are being conducted detrimental to the interest of its depositors, it may, after giving an opportunity of being heard, to the bank, may order in writing prohibiting the bank from receiving fresh deposits, direct the RBI to apply section 38 for winding up of the bank.

Power of RBI to appoint Directors (Section 36AB of the Banking Regulation Act, 1949): RSI is empowered to appoint additional Directors for the banking company with effect from the date to be specified in the order, in the interest of the bank or that of depositors. Such additional directors shall hold office for a period not exceeding three years or such further period not exceeding three years at a time.

Question 2:

The Board of Directors of M/s. S.K. Limited, a banking company incorporated in India, for the accounting year ended 31st March, 2018 has transferred 10% of its net profit during the year to the Reserve Fund Account. A few shareholders of the company have objected the above act of the Board on the ground that it is violative of the provisions of the Banking Regulation Act, 1949. The Board of Directors of the Company in their defence have stated that the company has received an order dated 30th April, 2018 from the Central Government exempting the company from the provisions of sub section (1) of section 17 of the Act. It is further informed that on the date of the Central Government order i.e. 30.04.2018 the paid up capital of the company was Rs.200 crores and the amount standing in the Reserve Fund Account and Share Premium Account was Rs.100 crores and Rs.75 crores respectively.

Decide whether the order of the Central Government exempting the company is justified as per the provisions of the Banking Regulation Act, 1949.

[Dec-18]

Answer:

Reserve Fund: According to Section 17 of the Banking Regulation Act, 1949, every Banking Company incorporated in India must create a Reserve Fund and transfer a sum equal to not less than 20% of its net profits. However, the Central Government is empowered to exempt from this requirement on the recommendation of the RBI. Such exemption will be allowed only:-

- When the amounts in the reserve fund and the share premium account are not less than the paid-up capital of the banking company.
- When the Central Govt. feel that its paid-up capital and reserves are adequate to safe guard the interest of the depositors.

If a banking company appropriates any sum from the Reserve fund or the share premium account, it must be reported to RBI within 21 days explaining the circumstances leading to such appropriation.

In the instant case, the total amount in the reserve fund and the share premium account is Rs. 175 crores which is less than the paid-up capital of the banking company i.e. Rs. 200 crore.

In view of the above the transfer of 10% of its net profits to reserve fund is violative of the provisions of the Banking Regulation Act, 1949. Moreover, the Order of the Central Government exempting the company is not justified as per the provisions of the Banking Regulation Act, 1949.

Question 3:

M/s. Toy Metal Limited had availed credit facilities from Bapi Bank Ltd. The company made repayment of loan to some extent and not entirely and accordingly, the bank took recourse under the provisions of section 13(2) of the SARFAESI Act, 2002. Consequently, possession of the mortgaged property was taken up and was duly advertised by the Bank. The company also filed an application under section 17(1) of SARFAESI Act, 2002 before the debts recovery tribunal which was dismissed by the impugned order. Being aggrieved the company approached the Court.

Examine in the light of the SARFAESI Act, 2002 whether the company will succeed in the petition filed before the Court.

[Dec-18]

Answer:

According to section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any person aggrieved, by any order made by the Debts Recovery Tribunal under sec. 17, may prefer an appeal along with prescribed fees to the Appellate Tribunal within 30 days from the date of receipt of the order of Debts Recovery Tribunal.

Further, no appeal shall be entertained unless the Borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the Secured Creditors, or determined by the Debts Recovery Tribunal, whichever is less. However, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount of not less than 25% of debt.

Thus, in the given situation, Toy Metal Limited can appeal to the Appellate Tribunal (Now to NCLT) by following the above provisions.

Question 4:

Popular Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The Bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the Company to discharge its liabilities within a period of 60 days from the date of the notice. The company failed to discharge its liabilities within the time limit specified. Identify and explain the measures to be taken by the Bank to enforce its security interest under the said Act.

[June-18]

Answer:

Sub-section (4) of section 13 of SARFAESI Act, 2002, provides that if the borrower fails to discharge his liability in full within the 60 days, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

- (i) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (ii) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;
Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;
- (iii) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- (iv) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

In the instant case, the Bank may take the above mentioned procedure to enforce its security interest in case Popular Limited has failed to discharge its liabilities within the time limit specified.

Question 5:

Referring to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 state the circumstances under which the Reserve Bank of India may cancel the certificate of registration granted to a Securitisation Company.

[Dec-17]

Answer:

Cancellation of Certificate of Registration (Section 4 of the securitization and reconstruction of financial assets and enforcement of Security Interest Act, 2002).

As per the section 4 of the Securitisation & Reconstruction of Financial Assets and Enforcement of security Interest Act, 2002, the Reserve Bank may cancel a certificate of registration granted to a securitization company or a reconstruction company, if such company-

- (i) ceases to carry on the business of securitisation or asset reconstruction; or
- (ii) ceases to receive or hold any investment from a qualified institutional buyer; or
- (iii) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
- (iv) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or
- (v) fails to-
 - (a) Comply with any direction issued by the Reserve Bank under the provisions of this Act; or
 - (b) Maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or
 - (c) Submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
 - (d) Obtain prior approval of the Reserve Bank required under sub-section (6) of section 3.

Question 6:

Referring to the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 state the circumstances under which the Reserve Bank of India may cancel the certificate of registration granted to a Securitisation Company.

[June-19]

Answer:

Cancellation of Certificate of Registration (Section 4 of the securitisation & reconstruction of financial assets & enforcement of Security interest Act, 2002).

As per the section 4 of the Securitisation & Reconstruction of Financial Assets & Enforcement of security Interest Act, 2002, the Reserve Bank may cancel a certificate of registration granted to a securitization company or a reconstruction company, if such company-

- (i) ceases to carry on the business of securitisation or asset reconstruction; or
- (ii) ceases to receive or hold any investment from a qualified institutional buyer; or
- (iii) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
- (iv) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or
- (v) fails to-
 - (a) comply with any direction Issued by the Reserve Bank under the provisions of this Act; or
 - (b) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or
 - (c) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
 - (d) Obtain prior approval of the Reserve Bank required under sub-section (6) of section 3.

Question 7:

The Management of Gangotri Ltd. was taken by LBV Bank Ltd. (secured creditor) complying the provisions of SARFAESI Act, 2002 who appointed two Directors. The Board of Directors of Gangotri Ltd., duly authorized

by its Articles, appointed two Alternate Directors and the majority of the Directors made a declaration required for voluntary liquidation proceedings. A special resolution requiring the Company to be liquidated voluntarily by appointing an insolvency professional to act as the Liquidator was passed at the general meeting of the Company. The Board of Directors and the Shareholders passed the resolutions without the approval/consent of Directors appointed by LBV Bank Ltd. Discuss the validity of the above resolutions under SARFAESI Act, 2002. Does an unsecured Creditor have recourse to this Act?

[Dec-19]

Answer:

Management of borrower taken by the secured creditor (Section 15 of the SARFAESI Act, 2002): Where the management of the business of a borrower, being a company is taken over by (the secured creditor then, notwithstanding anything contained in the said Act or in the memorandum or articles of association of such borrower -

- (a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
- (b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;

Accordingly, in the given situation in the question, appointment of alternate directors by the BoD of Gangotri Ltd. though authorised by its Articles, is not valid, and the special resolution so passed by majority for voluntary liquidation passed at general meeting shall not be given effect due to lack of consent of LBV Bank Ltd.

An unsecured creditor doesn't have recourse to this Act.

Question 8:

Perpetual Limited is an asset reconstruction company (ARC) under the SARFAESI Act, 2002. During the financial year 2020-2021. Mr.Param, one of the directors of the company in urgent need of money transferred 10% of his shareholding to Mr.Shariff (Another director of the company), which increased Mr Shariff's shareholding to 20%. Perpetual Ltd also appointed Mr.Vikram as CEO for managing the overall operations and resources of the company. However, for the said purposes, Perpetual limited did not take approval of the Reserve Bank of India. RBI cancelled the certificate of Registration granted to Perpetual Limited. Perpetual Ltd. contended that the decision of the RBI is inappropriate as transfer of shareholding and appointment of CEO is not a substantial change in management. Discuss the validity of decisions of the RBI in the light of the applicable law.

[Dec-21]

Answer:

As per Section 3(6) of the SARFAESI ACT 2002. Every asset reconstruction company, shall obtain prior approval of the Reserve Bank for any substantial change in its management including appointment of any director on the board of directors of the asset Reconstruction Company or managing director or chief executive officer thereof or change of location of its registered office or change in its name.

Provided that the decision of the Reserve Bank whether the change in management of a securitisation company or a reconstruction company is a substantial change in its management or not shall be final.

Explanation—For the purposes of this section, the expression "substantial change in management" means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer or shares or amalgamation or transfer of the business of the company.

In the above question, there has been change in shareholding of directors which falls under the "substantial change in management" including appointment of CEO and the decision of the Reserve Bank as to whether the change in management of the asset reconstruction company is a substantial change in management or not, shall be final.

Therefore, the decision of the Reserve Bank shall be final and will be held valid.

Question 9:

Describe the role of Reserve Bank of India in management of foreign exchange.

[MTP Dec-23]

Answer:

Since its inception Reserve Bank has been playing key role in the formulation of monetary, banking and financial policies.

(i) Inspection of banks

Reserve Bank of India has been empowered under Banking Regulation Act, 1949 to conduct the inspection of banks and regulate them in the interest of banking system, banking policy and depositors/public.

(ii) Regulatory role of commercial banks

Department of Banking Operations and Development exercises regulatory powers in respect of commercial banks and Local Area Banks (LABs).

(iii) Anti - money laundering under PMLA

RBI has a role in PMLA by creating an anti-money laundering Cell (AML Cell) for combating Financing of Terrorism (CFT) and tracking domestic and global developments in AML and CFT.

(iv) Approval/ monitoring of Board level appointments of commercial banks.

The key activity of the section, appropriately named as Appointments Section, relate

- Approval of proposals from the domestic private sector banks for appointment/ removal of part-time Chairman/Managing Director/ whole-time Chairman and Chief Executive Officers.
- Making recommendations to Government regarding appointment of Executive Directors/Chairmen & Managing Directors of public sector banks, fixation of their salaries, payment of superannuation benefits and other allied matters.
- Making recommendations to Government regarding appointment of non-official directors, non-workmen directors and RBI Nominee Directors on the Boards of Nationalised banks.

(v) licensing of branches

- Issue of authorisations to Indian commercial banks including Local Area Banks for opening of branches in pursuance to regulatory powers vested with Reserve Bank under the provisions of Banking Regulation Act, 1949.
- To consider representations/complaints from institutions/VIPs and members of public for opening /shifting/closure of bank offices.
- Review of branch licensing policy periodically
- Maintenance and updating of database on opening/substitution/closure/shifting of branches, Extension Counters, ATMs, etc.

(vi) Banking policy

It undertakes various new policy initiatives and reviews existing guidelines for progressive upgradation of prudential norms to move towards best practices. The major activities of the Section are as follows:

- Formulation of policy and issue of prudential guidelines pertaining to Capital adequacy; Income recognition; asset classification and provisioning pertaining to advances portfolio; Classification, valuation and operation of investment portfolio; and Credit exposure limits.
- Formulation of policy and issues regarding capital structure of public sector banks, including raising of fresh equity, return of capital, recapitalisation.
- Formulation of policy and issuance of regulatory guidelines for implementation of the Basel II framework.
- Policy guidelines / clarifications on integrated risk management systems including Asset Liability Management and issue of guidance notes on various aspects.
- Policy issues/ guidelines pertaining to compromise settlement of NPAs of banks.
- Matters regarding Foreign Contributions Regulations Act - donations received by organizations from abroad.

(vii) Issue of directives to banks

Various directions are issued by RBI from time to time, on payment of Interest rates on various types of deposit accounts (including NRI deposit), maintenance of deposit accounts, prohibitions in respect of S.B. Accounts, matters relating to payment of additional interest and brokerage on deposits, appointment of agents for soliciting deposits, giving gifts/incentives to depositor's/staff members, freezing of

accounts, Resurgent India Bonds, Development Bonds, etc. RBI may also direct Capital Market Exposure of banks.

(viii) Collection and dissemination of information

Collection and dissemination of information from/to banks and notified All-India financial institutions (FIs) regarding defaulting borrowers with outstanding aggregating Rs. 1 crore and above, which have been classified by them as 'doubtful' or 'loss' (non-suit filed accounts) on half-yearly basis viz., as on March 31 and September 30.

(ix) Overseeing/ monitoring Indian banks operations abroad

- Policy formulation and issue of guidelines regarding overseas operations of Indian banks, examination of proposals and grant of approvals for opening their Joint Ventures / Representative Offices / branches and review of their overseas operations including closure of branches / joint ventures / representative offices.
- Approval of Indian banks' proposals for entering into Management Agreements and correspondent banking arrangements with foreign entities.
- Preparation of proposals for submission before IDC of GOI regarding opening of branches / representatives offices of Indian banks abroad.

(x) Authorisation for dealing in precious metals

Policy matters relating to Gold Deposit and Gold Import Schemes and dealing with references received from banks in this regard, issue and renewal of authorization for banks for import of gold / silver / platinum and acceptance of gold under Gold Deposit Scheme and collection of data relating to import of gold and Gold Deposit Scheme and collection of data relating to import of gold and gold deposits by banks in India.

(xi) Overseeing and monitoring offshore banking units

- Approvals for setting up of Offshore Banking Units (OBUs) and issue of policy guidelines for the operation of OBUs in Special Economic Zones (SEZs).
- Correspondence with Government and other agencies relating to setting up of Special Economic Zones, International Financial Services Centres.

(xii) Monitoring and policy making industrial and export credit

The industrial credit segment has been considerably liberalized / deregulated over the period. At present, various items of work currently undertaken by IECS are distributed amongst three desks viz. (i) Policy Desk (ii) Export Credit Desk and (iii) Industrial Rehabilitation Desk.

(xiii) Interpretation of regulations

(xiv) Granting exemptions

(xv) Role in management of foreign exchange:

- a) Controlling dealings in foreign exchange by giving general or special permission for dealing in foreign exchange, excluding those cases where specific provisions have been made in Act, Rules or Regulations.
- b) RBI cannot impose any restrictions on current account transactions. These can be imposed only by Central Government in consultation with RB. In certain cases, prior approval of RBI is required for current account transactions as provided in Foreign Exchange Management (Current Account Transactions) Rules, 2000.
- c) Specifying conditions for payment in respect of capital account transaction - Section 6(2).
- d) Regulate/prohibit/restrict the following, by issuing Regulations:
 - Transfer or issue of foreign security to resident and Indian security to nonresident;
 - Borrowing and lending in foreign exchange or to a foreign person;
 - Export/import of currency or currency notes;

- Transfer of immovable property outside India;
 - Giving guarantee or surety where foreign exchange transaction is involved - Section 6(3)
- e) Specify (by regulation) period and manner in which foreign exchange due from export of goods and services should be received - Section 8.
- f) To grant exemption from realisation and repatriation in cases specified under Section 9.
- g) Granting authorisation to 'Authorised Person' to deal in foreign exchange, to give directions to them and to inspect the authorised person - Sections 10, 11 & 12. This post was last modified on June 25, 2021 12:38 pm.

(xvi) Bankers bank:

It extends loans and advances to commercial banks.

(xvii) Bankers to Central Govt/State Govt.

RBI is the banker to Central/ State Govt. where it also extends loan and keeps account. It also issues bonds on behalf of the Govt.

(xviii) Oversee payment and settlement system

RBI oversees payment and settlement system of commercial banks.

Question 10:

List the measures for asset reconstruction by an Asset Reconstruction Company as per the SARFESI Act, 2002, with brief narratives.

[MTP June-23 Set-1]

Answer:

An asset reconstruction company may for the purposes of asset reconstruction, provide for any one or more of the following measures, namely:

- (i) the proper management of the business of the borrower, by change in or takeover of, the management of the business of the borrower;
- (ii) the sale or lease of a part or whole of the business of the borrower;
- (iii) rescheduling of payment of debts payable by the borrower;
- (iv) Enforcement of security interest in accordance with the provisions of this Act.
- (v) settlement of dues payable by the borrower;
- (vi) taking possession of secured assets in accordance with the provisions of this Act;
- (vii) Conversion of any portion of debt into shares of a borrower company.

Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

The Reserve bank for this purpose shall determine the policy and issue necessary directions including the directions for regulation of management of the business of the borrower and fees to be charged. The asset reconstruction company shall take measures as per the directions of RBI.

Question 11:

What is the meaning of security interest as per SARFAESI Act? Can SARFAESI proceedings be initiated against the guarantor to the credit facility? Can proceedings against the guarantor be initiated first and then against the borrower?

[MTP June-2020]

Answer:

The term "security interest" has been defined in section 2(zf) of the SARFAESI Act, 2002, as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (Amendment Act).

Broadly, it includes the following: a. where the property is tangible in nature:

- (i) Right title or interest those created for security;

- (ii) Mortgage created under section 58 of the Transfer of Property Act, 1881 conferring the right to the lender to sell the property on default;
- (iii) Charge created on immovable property under section 100 of the Transfer of Property Act, 1881;
- (iv) Hypothecation created on movable property - defined in section 2(1)(n) of the SARFAESI Act, 2002 and includes all forms of security interest created on movable properties except by virtue of which the possession is taken by the creditor, i.e., pledge;
- (v) Assignment of rights created for the purpose of creating a security and not for the purpose of transferring.
- (vi) Right or interest created by way of financial lease, hire purchase or conditional sale - Though from legal point of view, these are ownership interests, however, for the purpose of SARFAESI Act, these have been recognised as security interests.

SARFAESI Act defines the term borrower in section 2(f) in the following manner - "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;

As stated in the law quoted above, the term borrower includes anyone who has extended guarantee for a financial assistance. Therefore, enforcement proceedings under the SARFAESI Act can be initiated against the guarantors as well. Note, however, that SARFAESI is available only for enforcement of security interest. That is, if the guarantor has granted a security interest, the same may be enforced under SARFAESI. Yes. There is no specific provision in the Act which requires the secured lender to proceed first against the principal borrower and then against the guarantor.

Question 12:

What do you mean by Non-performing asset?

Answer:

"Non-performing asset" is discussed under Section 2(O) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,

- (i) In case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body.
- (ii) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

Question 13:

State the winding up procedure of Banking Companies.

[MTP June-2017]

Answer:

Sections 38 to 44 of the Act lay down the provisions for winding up of a banking company. The RBI may apply for the winding up of a banking company if.

- (i) It fails to comply with the requirements as to minimum Paid-up capital and reserves as laid down in Section 11, or
- (ii) Is disentitled to carry on the banking business for want of license under Section 22, or
- (iii) It has been prohibited from receiving fresh deposits by the Central Government or the Reserve Bank, or
- (iv) It has failed to comply with any requirement of the Act, and continues to do so even after the Reserve Bank calls upon it to do so, or
- (v) The Reserve Bank thinks that a compromise or arrangement sanctioned by the court cannot be worked satisfactorily, or

- (vi) The Reserve Bank thinks that according to the returns furnished by the company it is unable to pay its debts or its continuance is prejudicial to the interests of the depositors.
The banking company cannot be voluntarily wound up unless the Reserve Bank certifies that it is able to pay its debts in full.

Question 14:

As per the provisions of the Banking Regulation Act, 1949, a Banking Company in addition to the business of Banking, may carry on some general utility services as listed in Section 6. List out any five of the general utility services that a bank may carry on.

[MTP June-2018]

Answer:

Section 6 of the Banking Regulation Act, 1949 provides a list of activities which a banking company may engage in addition to the business of banking. From among them, General Utility Services, which can be provided by a bank are as follows:

- (1) Providing safe-custody facility to its customers for keeping their valuables;
- (2) Providing the facility of Safe Deposit Vault (Locker) under lease agreement to its customers for keeping their valuables;
- (3) Technology based general utility services like Tele-banking, Phone-banking, On-line banking, Home banking, Single window banking, Demat services for security trading, ATM services, Credit Card services etc.,
- (4) Consultancy services;
- (5) ECS services for payment of different dues of the people;
- (6) Payment of pension;
- (7) Payment of salaries of employees of schools etc.;

Question 15:

Successful Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The Bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the Company to discharge its liabilities within a period of 60 days from the date of the notice. The company failed to discharge its liabilities within the time limit specified. Identify and explain the measures to be taken by the Bank to enforce its security interest under the said Act.

[MTP Dec-2018]

Answer:

Sub-section (4) of section 13 of SARFAESI Act, 2002, provides that if the borrower fails to discharge his liability in full within the 60 days, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

- (i) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (ii) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;
Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;
- (iii) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- (iv) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

In the instant case, the Bank may take the above mentioned procedure to enforce its security interest in case Popular Limited has failed to discharge its liabilities within the time limit specified.

Question 16:

An asset reconstruction company may, for the purposes of asset reconstruction, provide for any one or more of the measures. Elucidate that measures to be taken for assets reconstruction.

[Dec-2023]

Answer:

Measures for assets reconstruction (Section 9 of SARFAESI Act, 2002)

An asset reconstruction company may for the purposes of asset reconstruction, provide for any one or more of the following measures, namely

- (a) the proper management of the business of the borrower, by change in or takeover of, the management of the business of the borrower,
- (b) the sale or lease of a part or whole of the business of the borrower,
- (c) rescheduling of payment of debts payable by the borrower,
- (d) Enforcement of security interest in accordance with the provisions of this Act.
- (e) settlement of dues payable by the borrower,
- (f) taking possession of secured assets in accordance with the provisions of this Act,
- (g) Conversion of any portion of debt into shares of a borrower company Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.

The Reserve bank for this purpose shall determine the policy and issue necessary directions including the directions for regulation of management of the business of the borrower and fees to be charged. The asset reconstruction company shall take measures as per the directions of RBI.

Question 17:

Mr. Krishnamurthy, a CA is now the CFO of large bank which is also a listed company. Mr. Aditya Kapoor, who was in the bank as MD since inception is retiring and the bank has to look for a M. The chairman of the bank is a retired IAS officer. The nomination and remuneration committee has considered few persons and feel that Mr. Krishnamurthy is the right candidate to take over as MD.

Discuss the steps to be taken to appoint him, under the provisions of Companies Act and Banking Regulation Act.

(ICMAI Study Material)

Answer:

Appointment managerial person has to be done n the basis of recommendation of the Nomination and Remuneration Committee of the Board of directors. Based on the recommendation, The Board should appoint the Manning Director, subject to approval in ensuing General meeting of the shareholders.

However, in case of banking company, apart from Companies Act, the provisions of Banking Regulation Act would also apply. Section 10B of the Act requires that the MD of Bank shall be appointed with prior approval of RBI. Therefore, RBI approval has to be taken.

Chapter 16 - Laws related to Insurance Sector

Question 1:

With reference to the provisions of Insurance Act, 1938 as amended by Insurance Regulatory and Development Authority Act, 1999, state the norms in respect of paid up equity capital for carrying out the business of an insurer. Also state the items that are excluded in determining the amount of paid up equity capital of an insurer under the said Acts.

[Dec-17]

Answer:

Requirement of Paid Up equity capital for insurance business: No insurer carrying on the business of life insurance, general insurance, health insurance or re-insurance in India on or after the commencement of the Insurance Regulatory and Development Authority of India Act, 1999, shall be registered unless he has, —

- (i) a paid-up equity capital of rupees one hundred crores, in case of a person carrying on the business of life insurance or general insurance; or
- (ii) a paid-up equity capital of rupees one hundred crore, in case of a person carrying on exclusively the business of health insurance; or
- (iii) A paid-up equity capital of rupees two hundred crore, in case of a person carrying on exclusively the business as a re-insurer.

Items to be excluded in determining the amount of paid up equity share capital: In determining the paid-up equity capital specified above, any preliminary expenses incurred in the formation and registration of any insurer as may be specified by the regulations made under this Act, shall be excluded.

Question 2:

M/s Samrat is a company engaged in providing services of supplying goods all over the world through aircrafts. The aircrafts of the said company is registered and insured in India with the reputed insurance company. Company found that the insurance policy of one of aircraft which is in Europe had expired. Company said to his officer to get new insurance policy of that aircraft in Europe. State the validity of such an act of registration of aircraft in Europe.

[June-19]

Answer:

Given problem is based on the section 2CB of the Insurance Act, 1938. Said section deals with the Indian properties not to be insured with foreign insurers. According to the section, no person shall take out or renew any policy of insurance in respect of any property in India or any ship or other vessel or aircraft registered in India with an insurer whose principal place of business is outside India, without the permission of the IRDAI.

In the given case, act of registration of aircraft of M/s Samrat which is an Indian property, with an insurer in Europe, is an invalid act.

Question 3:

State the "Insurable Interest"— based on the Insurance Act, 1938.

[June-17, MTP June-17, MTP June-18, MTP Dec-18, MTP June-20]

Answer:

Insurable Interest

To constitute insurable interest, it must be an interest such "that the risk would by its proximate effect cause damage to the assured, that is to say, cause him to lose a benefit or incur a liability. The validity of an insurance contract in India is dependent on the existence of an insurable interest in the subject matter. The person seeking an insurance policy must establish some kind of interest in the life or property to be insured, in the absence of which, the insurance policy would amount to a wager and consequently void in nature.

The test for determining if there is an insurable interest is whether the insured will in case of damage to the life or property being insured, suffer pecuniary loss [New India Insurance Company Ltd. v. G.N. Sainani (1997) 6 SCC 383]. A person having a limited interest can also insure such interest.

Insurable interest varies depending on the nature of the insurance. The controversy as to the existence of an insurable interest between spouses was settled by the court, which held that such an interest could exist as neither was likely to indulge in any1 mischievous game'. The same analogy may be extended to parents and children. Further, the courts have also held that such an insurable interest would exist for a creditor (in a debtor) and for an employee (in an employer) to the extent of the debt incurred and the remuneration due, respectively.

Question 4:

A claim for loss by fire must satisfy the certain conditions. What are those conditions?

[Dec-21]

Answer:

A claim for loss by fire must satisfy the following two conditions,

- (i) There must be actual loss, and
- (ii) Fire must be accidental and non-intentional. The property must be damaged or burnt by fire. If the property is damaged by heat or smoke without ignition, it will not be covered under the word 'fire', and the loss will not be recoverable from the insurer.

Question 5:

State the Functions of the Insurance Regulatory and Development Authority.

[MTP Dec-2017]

Answer:

The Functions of Insurance Regulatory and Development Authority under the said Act of 1999 are as follows:

- (i) Nomination by Policyholders.
- (ii) Settlement of insurance claim.
- (iii) Practical training for Insurance agents and other intermediaries.
- (iv) Insurable Interest.
- (v) Surrender value of Policyholders
- (vi) Code of conduct of Insurance intermediaries.
- (vii) Assistance in gaining correct information about policies.
- (viii) Creation of management information system.
- (ix) Promotion of Self-regulation within the insurance sector.

Question 6:

Write short notes on Actuarial Valuation/Report

[MTP June-2017]

Answer:

Actuarial Valuation/Report - Under Section 13 of The Insurance Act, 1938 it has been stated that at least once a year, every insurer carrying on life insurance business shall cause an investigation of the life insurance business carried on by him including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations. The Authority may, having regard to the circumstances of any particular insurer, allow him to have the investigation made as at a date not later than two years from the date as at which the previous investigation was made. If the investigation is made annually by any insurer, the statement need not be appended every year but shall be appended at least once in every three years.

Question 7:

M/s Samrat is a company engaged in providing services of supplying goods all over the world through aircrafts. The aircrafts of the said company are registered and insured in India with the reputed insurance company. Company found that the insurance policy of one of aircraft which is in Europe had expired. Company said to its officer to get new Insurance policy of that aircraft in Europe. State the validity of such an act of registration of aircraft in Europe.

[MTP June-2018]

Answer:

Given problem is based on the Section 2CB of the Insurance Act, 1938. The said Section deals with the Indian properties not to be insured with foreign insurers. According to the Section No person shall take out or renew any policy of Insurance in respect of any property in India or any ship or other vessel or aircraft registered in India with an insurer whose principal place of business is outside India, without the permission of the IRDAI. In the given case Act of registration of aircraft M/s Samrat which is an Indian property, with an insurer in Europe, is an invalid Act.

Question 8:

Ajit Kumar works as an accountant in a private company. He wants make argument with 3 or 4 insurance companies, both life and non-life to get business for them at fixed monthly retaining fees. He has a room in his house where he can have an office. He wants to know where this possible and if so, where and how to get such agency contracts. Advise Ajit Kumar.

(ICMAI Study Material)

Answer:

The Act provides that no person shall, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or an intermediary or insurance intermediary in such manner as may be specified by the regulations. No insurance agent or intermediary or insurance intermediary shall receive or contract to receive commission or remuneration in any form in respect of policies issued in India, by an insurer in any form in respect of policies issued in India, by an insurer except in accordance with the regulations specified in this regard. Therefore, Ajit Kumar has to first become an insurance agent. If he is employed full time, he cannot be an agent.

No person shall act as an insurance agent for more than one life insurer, one general insurer, one health insurer and one of each of the other mono-line insurers: ensure that no conflict of interest is allowed to arise for any agent in representing two or more insurers for whom he may be an agent. Ajit Muar has to chose from these options.

Ajit Kumar has to comply with various other restrictions of an agent as per regulation of IRDA and the Act.

Chapter 17 - Specific Legal Provisions related to MSME Sector

Question 1:

Prepare a list of the members of the National Board for Micro, Small and Medium enterprises as per the MSME Act.

[MTP June-23 Set-1]

Answer:

National Board for Micro, Small and Medium Enterprises

The Central Government has established, a Board known as the National Board for Micro, Small and Medium Enterprises with head office at Delhi. The Board shall consist of the following members, namely: -

- (i) the Minister in charge of the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises who shall be the ex-officio Chairperson of the Board;
- (ii) the Minister of State or a Deputy Minister, if any, in the Ministry having administrative control of the micro, small and medium enterprises who shall be ex officio Vice-Chairperson of the Board;
- (iii) six Ministers of the State Governments having administrative control of the departments of small scale industries or, as the case may be, micro, small and medium enterprises, to be appointed by the Central Government to represent such regions of the country as may be notified by the Central Government in this behalf, ex officio;
- (iv) three Members of Parliament of whom two shall be elected by the House of the People and one by the Council of States;
- (v) the Administrator of a Union territory to be appointed by the Central Government, ex officio;
- (vi) the Secretary to the Government of India in charge of the Ministry or Department of The Central Government having administrative control of the micro, small and medium enterprises, ex officio;
- (vii) four Secretaries to the Government of India, to represent the Ministries of the Central Government dealing with commerce and industry, finance, food processing industries, labour and planning to be appointed by the Central Government, ex officio;
- (viii) the Chairman of the Board of Directors of the National Bank, ex-officio;
- (ix) the Chairman and managing director of the Board of Directors of the Small Industries Bank, ex-officio;
- (x) the Chairman, Indian Banks Association, ex officio;
- (xi) one officer of the Reserve Bank, not below the rank of an Executive Director, to be appointed by the Central Government to represent the Reserve Bank;
- (xii) twenty persons to represent the associations of micro, small and medium enterprises, including not less than 3 persons representing associations of women's enterprises and not less than three persons representing associations of micro enterprises, to be appointed by the Central Government;
- (xiii) three persons of eminence, one each from the fields of economics, industry and science and technology, not less than one of whom shall be a woman, to be appointed by the Central Government;
- (xiv) two representatives of Central Trade Union Organisations, to be appointed by the Central Government; and
- (xv) one officer not below the rank of Joint Secretary to the Government of India in the Ministry or Department of the Central Government having administrative control of the micro, small and medium enterprises to be appointed by the Central Government, who shall be the Member-Secretary of the Board, ex officio. The term of office of the members of the Board, other than ex officio members of the Board, the manner of filling vacancies, and the procedure to be followed in the discharge of their functions by the members of the Board, shall be such as may be prescribed: Provided that the term of office of an ex officio member of the Board shall continue so long as he holds the office by virtue of which he is such a member. The Board shall meet at least once in every three months in a year. The Board may associate with itself, any person or persons whose assistance or advice.

Question 2:

Demonstrate with examples the major measures taken to promote MSME sector units. Do you think those would help to achieve the objective?

[MTP June-23 Set-2]

Answer:

The schemes/ programmes undertaken by the Ministry of Micro Small and Medium Enterprises and its organizations seek to facilitate/provide:

- (i) flow of credit from financial institutions/banks;
- (ii) technology upgradation and modernization;
- (iii) infrastructural facilities;
- (iv) modern testing facilities and quality certification;
- (v) access to modern management practices;
- (vi) entrepreneurship development and skill upgradation;
- (vii) support for product development, design intervention and packaging;
- (viii) welfare of artisans and workers;
- (ix) Assistance for better access to domestic and export markets etc.

Subsequent announcement by Govt. as relief to MSME sector:

The Finance ministry of the Govt. has announced few financial relief package in the last budget, some important issues are mentioned below.

- (i) Three lakh crore Emergency Working Capital Facility for Businesses, including MSMEs;
- (ii) With an objective to provide relief to the business, additional working capital finance of 20% of the outstanding credit (as on February 29, 2020), in the form of a Term Loan at a concessional rate of interest.
- (iii) 20,000 crores Subordinate Debt for Stressed MSMEs: Provision made for Rs. 20,000 crores subordinated debt for 2,00,000 MSMEs which are NPA or are stressed. The government will support them with Rs.4,000 crores to Credit Guarantee Trust for Micro and Small Enterprises (CGTMSE).
- (iv) Banks are expected to provide the subordinate-debt to promoters of such MSMEs equal to 15% of his existing stake in the unit subject to a maximum of Rs.75 lakhs; Rs.50,000 crores equity infusion through MSME Fund of Funds (FoF): Govt will set up an FoF with a corpus of Rs.10,000 crores that will provide equity funding support for MSMEs. The FoF shall be operated through a Mother and a few Daughter funds. It is expected that with leverage of 1:4 at the level of daughter funds, the FoF will be able to mobilize equity of about Rs.50,000 crores.

The Government of India introduces several schemes for the benefit of these MSMEs. However, often the MSME business owners are not aware of these schemes and thus lose out on benefiting from them. These Government schemes for MSMEs have several advantages that business owners can benefit from.

Question 3:

Balaram is school dropout but took over his father's business after his sudden death. The business, a proprietorship firm, is manufacturing and selling rubber spares and is located at remote place in the District of West Bengal. Turnover of business was ` 342 crore. Though not audited or evaluated, the investment in plant and machinery is around ` 93 lakhs. The business is not registered with DIC but with GST. He pays income tax. He wants to expand his business and wants to know:

- (i) What category of industry the business is falling?
- (ii) Is registration compulsory?
- (iii) Where to register?
- (iv) What are the benefits of registration?

Answer:

- (i) The business falls under micro enterprise as defined under MSME Act and Rules. Since the investment in Plant and Machinery or Equipment:
Not more than `1 crore and Annual Turnover; not more than `5 crore.
- (ii) Registration is not compulsory but lot of benefits are not available to unregistered parties.
- (iii) Registration has to be taken in the office District Industries Centre (DIC)
- (iv) Registered units shall get the benefit of loan, loan repayment moratorium, tax holiday, price preference by Govt. organizations etc.

Chapter 18 - Laws & Regulations related to Cyber Security & Data Privacy

Question 1:

Classify the major categories of cyber-crimes and summarize them with examples.

[MTP Dec-23]

Answer:

Cyber-crimes can be basically divided into three major categories:

A. Cyber-crimes against persons are:

- Cyber-Stalking: It means to create physical threat that creates fear to use the computer technology such as internet, e-mail, phones, text messages, webcam, websites or videos.
- Defamation: It is an act of imputing any person to lower down the dignity of the person by hacking his mail account and sending some mails with using vulgar language to unknown persons.
- Hacking: unauthorized control/access over computer system and act of hacking completely destroys the whole data as well as computer programmes.
- Cracking: Cracking means that a stranger has broken into your computer systems without your knowledge and consent and has tampered with precious confidential data and information.
- Spoofing: A spoofed e-mail may be said to be one, which misrepresents its origin. It shows its origin to be different from which actually it originates. Spoofing is a blocking through spam which means the unwanted uninvited messages. Wrongdoer steals mobile phone number of any person and sending SMS via internet and receiver gets the SMS from the mobile phone number of the victim.
- Carding: It means false ATM cards i.e. Debit and Credit cards used by criminals for their monetary benefits through withdrawing money from the bank account mala fide.
- Fraud: It means the person who is doing the act of cyber-crime i.e. stealing password and data storage has done it with having guilty mind which leads to fraud and cheating.
- Threat: refers to threatening a person with fear for their lives or lives of their families through the use of a computer network i.e. E-mail, videos or phones.

B. Cyber-crimes against property

There are certain offences which affects person or properties which are as follows:

- Squatting: It means where two persons claim for the same Domain Name either by claiming that they had registered the name first on by right of using it before the other or using something similar to that previously.
- Vandalism: Vandalism means deliberately destroying or damaging property of another. Thus cyber vandalism means destroying or damaging the data when a network service is stopped or disrupted. It may include within its purview any kind of physical harm done to the computer of any person.
- Hacking: Hacktivism attacks those included Famous Twitter, blogging platform by unauthorized access/ control over the computer. Due to the hacking activity there will be loss of data as well as computer.
- Virus: Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worm attacks plays major role in affecting the computerize system of the individuals.
- Trespass: It means to access someone's computer without the right authorization of the owner and does not disturb, alter, misuse, or damage data or system by using wireless internet connection.

C. Cyber-crimes against Government

There are certain offences done by group of persons intending to threaten the international governments by using internet facilities. It includes:

- **Terrorism:** Cyber terrorism is a major burning issue in the domestic as well as global concern. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyber terrorism activities endanger the sovereignty and integrity of the nation.
- **Warfare:** It refers to politically motivated hacking to damage and spying. It is a form of information warfare sometimes seen as analogous to conventional warfare although this analogy is controversial for both its accuracy and its political motivation.
- **Piracy:** It means distributing pirated software from one computer to another intending to destroy the data and official records of the government.
- **Unauthorized Information:** It is very easy to access any information by the terrorists with the aid of internet and to possess that information for political, religious, social, ideological objectives.
 - (i) Tampering with Computer source documents - Sec.65
 - (ii) Hacking with Computer systems, Data alteration - Sec.66
 - (iii) Publishing obscene information - Sec.67
 - (iv) Un-authorised access to protected system Sec.70
 - (v) Breach of Confidentiality and Privacy - Sec.72
 - (vi) Publishing false digital signature certificates - Sec.73

Question 2:

Examine the major types of cybercrimes and the gravity of cybercrime against the Government in the context of contemporary business ecosystem.

[MTP June-23 Set-1]

Answer:

Major types of Cybercrimes are:

Cybercrimes can be basically divided into three major categories:

- A. Cybercrimes against persons like harassment occur in cyberspace or through the use of cyberspace. Harassment can be sexual, racial, religious, or other.
- B. Cybercrimes against property like computer wreckage (destruction of others' property), transmission of harmful programs, unauthorized trespassing, unauthorized possession of computer information.
- C. Cybercrimes against Government like Cyber terrorism

Cybercrimes against Government in the context of contemporary business ecosystem:

There are certain offences done by group of persons intending to threaten the international governments by using internet facilities. It includes:

- **Terrorism:** Cyber terrorism is a major burning issue in the domestic as well as global concern. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyber terrorism activities endanger the sovereignty and integrity of the nation.
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 - (i) Tampering with Computer source documents - Sec.65
 - (ii) Hacking with Computer systems, Data alteration - Sec.66
 - (iii) Publishing obscene information - Sec.67
 - (iv) Un-authorised access to protected system Sec.70
 - (v) Breach of Confidentiality and Privacy - Sec.72
 - (vi) Publishing false digital signature certificates - Sec.73

Question 3:

Examine with reference to the legal provisions and related rationale for the purpose of Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) rules, 2011.

[MTP June-23 Set-2]

Answer:

Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011

The Department of Information Technology notified Information Technology the 2011 Rules on April 11, 2011 vide notification no. G.S.R. 313(E). The main highlights of the 2011 Rules are as follows-

- (i) The Rules 2011 only apply to bodies corporate and persons located in India.
- (ii) Rule 3 of the 2011 Rules provides a list of items that are to be treated as "sensitive personal data", and includes inter alia information relating to passwords, credit/debit cards information, biometric information (such as DNA, fingerprints, voice patterns, etc. that are used for authentication purposes), physical, physiological and mental health condition, etc. It is further clarified that any information is freely available or accessible in the public domain is not considered to be sensitive personal data.
- (iii) Rule 4 imposes a duty on Body Corporates seeking sensitive personal data to draft a privacy policy and make it easily accessible for people who are providing the information. This should be clearly published on the website of the body corporate and should contain details on the type of information that is being collected, the purpose for which it has been collected and the reasonable security practices that have been undertaken to maintain the confidentiality of such information.
- (iv) Rule 5 provides the guidelines that need to be followed by a Body Corporate while collecting information and imposes the following duties on the Body Corporate:
 - Obtain consent from the person(s) providing information,
 - a. Information shall not be collected unless it is for lawful purpose, and is considered necessary for the purpose. The information collected shall be used only for the purpose for which it is collected and shall not be retained for a period longer than which is required;
 - b. Ensure that the person(s) providing information are aware about the fact that the information is being collected, its purposes & recipients, name and addresses of the agencies retaining and collecting the information;
 - c. Offer the person(s) providing information an opportunity to review the information provided and make corrections, if required;
 - d. Maintain the security of the information provided; and
 - e. Designate a Grievance Officer, whose name and contact details should be on the website who shall be responsible to address grievances of information providers expeditiously.
- (v) Prior permission of the information provider before disclosing such information to a third party unless.
- (vi) Rule 8 provides the reasonable security processes and procedures that may be implemented by Body Corporates. International Standards (IS/ISO/IEC 27001) is one such standard which can be implemented by a body corporate to maintain data security. It is pertinent to note that an audit of reasonable security practices and procedures shall be carried out by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant upgradation of its process and computer resource.

Question 4:

The business intelligence has some process of works. Elucidate that process of works.

[Dec-2023]

Answer:

The process works of the business intelligence:

A business intelligence architecture includes more than just BI software. Business intelligence data is typically stored in a data warehouse built for an entire organisation or in smaller data marts that hold subsets of business information for individual departments and business units, often with ties to an enterprise data warehouse. BI data can include historical information and real-time data gathered from source systems as

it's generated, enabling BI tools to support both strategic and tactical decision-making processes. Before it's used in BI applications, raw data from different source systems generally must be integrated, consolidated and cleansed using data integration and data quality management tools to ensure that BI teams and business users are analysing accurate and consistent information. Steps in BI can be:

- (a) data preparation, in which data sets are organised and modelled for analysis,
- (b) analytical querying of the prepared data,
- (c) distribution of key performance indicators (KPIs) and other findings to business users, and
- (d) Use of the information to help influence and drive business decisions. Initially, BI tools were primarily used by BI and IT professionals. However, now, business analysts, executives and workers are using business intelligence platforms themselves, thanks to the development of self-service BI and data discovery tools. Self-service business intelligence environments enable business users to query BI data, create data visualisations and design dashboards on their own.

BI programs often incorporate forms of advanced analytics, such as data mining, predictive analytics, text mining, statistical analysis and big data analytics. A common example is predictive modelling that enables what-if analysis of different business scenarios. In most cases, though, advanced analytics projects are conducted by separate teams of data scientists, statisticians, predictive modellers and other skilled analytics professionals, while BI teams oversee more straightforward querying and analysis of business data.

Chapter 19 - Laws & Regulations related to Anti-Money Laundering

Question 1:

"Money Laundering does not mean just siphoning of fund." Comment.

[Dec-18]

Answer:

Money laundering is a moving of illegally acquired cash through financial systems so that it appears to be legally acquired. Thus, Money laundering is not just the siphoning of fund but it is the conversion of money which is illegally obtained.

Question 2:

Sohan Lal, a farmer, was found involved in embezzlement of opium cultivated by him. State the punishment that can be awarded to him under the Prevention of Money Laundering Act, 2002.

[June-18]

Answer:

Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering. Whoever commits the offence of money laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of, Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years.

Paragraph 2 of Part a of Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs And Psychotropic Substances Act, 1985 Whereby, embezzlement of opium by cultivator (section 19) is covered under paragraph 2 of Part A.

In the present case, Sohan Lai, a farmer, who was involved in embezzlement of opium cultivated by him shall be liable for the rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine.

Question 3:

State the causes and methods adopted for generation of Black Money.

[June-18]

Answer:

Causes and Methods Adopted for Generation of Black Money

- (i) Suppression of receipts, inflation of expenditure, etc.
- (ii) Land and real estate transactions
- (iii) Corruption
- (iv) Financial market transactions
- (v) Bullion and jewellery transactions
- (vi) Cash economy and use of counterfeit currency
- (vii) NPO Sector
- (viii) Participatory Notes
- (ix) Trade Based Money Laundering

Question 4:

Explain the responsibilities of banking companies under the Prevention of Money Laundering Act, 2002.

[June-19]

Answer:

Section 12 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries or a person carrying on a designated business or profession. According to subsection (1), every banking company, financial institution and intermediary or a person carrying on a designated business or profession shall -

- (a) maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;
- (b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;
- (c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;
- (d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;
- (e) Maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.

The records referred to in clause (a) of sub-section (I) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

The records referred to in clause (e) of sub-section (I) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter.

Question 5:

State some of the devices by which trade based money laundering is done.

[Dec-19]

Answer:

- (1) **'Over-Invoicing' and 'Under-Invoicing' of Goods and Services:** Money laundering through the over-invoicing and under-invoicing of goods and services, which is one of the oldest methods of fraudulently transferring value across borders, remains a common practice today. The key element of this technique is the misrepresentation of the price of the good or service in order to transfer additional value between the importer and exporter. Over-invoicing of exports is one of the most common trade-based money laundering techniques used to move money. This reflects the fact that the primary focus of most customs agencies is to stop the importation of contraband and ensure that appropriate import duties are collected.
- (2) **Multiple-Invoicing of Goods and Services:** Another technique used to 'launder' funds involves issuing more than one invoice for the same trade transaction. By invoicing the same good or service more than once, a money launderer or terrorist financier is able to justify multiple payments for the same shipment of goods or delivery of services. Unlike over-invoicing and under-invoicing, it should be noted that there is no need for the exporter or importer to misrepresent the price of the good or service on the commercial invoice.
- (3) **Over-Shipment and Under-Shipment of Goods and Services:** In addition to manipulating export and import prices, a money launderer can overstate or underestimate the quantity of goods being shipped or services being provided. In the extreme, an exporter may not ship any goods at all, but simply collude with an importer to ensure that all shipping and customs documents associated with this so called "phantom shipment" are routinely processed. Banks and other financial institutions may unknowingly be involved in the provision of trade financing for these phantom shipments.
- (4) **Falsely Described Goods and Services:** In addition to manipulating export and import prices, a money launderer can misrepresent the quality or type of a good or service. For example, an exporter may ship a relatively inexpensive good and falsely invoice it as a more expensive item or an entirely different item. This creates a discrepancy between what appears on the shipping and customs documents and what is

actually shipped. The use of false descriptions can also be used in the trade in services, such as financial advice, consulting services and market research.

Question 6:

State on the nature of liability caused on an offence committed under the prevention of Money Laundering Act, 2002.

[Dec-21]

Answer:

Money Laundering basically is knowingly dealing with proceeds of crime directly or indirectly. The Act provides both for civil and criminal liability. Criminal liability under the Prevention of Money Laundering Act Crime which results in tainted money is a separate offence under various laws as specified in Schedule to Prevention of Money Laundering Act. These offences are punishable under those Acts. The punishment is to the person/s who is/are involved in actually committing that offence.

The offence as specified in Section 4 of the Prevention of Money Laundering Act is a separate offence. The punishment under section 4 of Prevention of Money Laundering Act is not only to those who are actually involved in dealing with tainted money but also on those who are knowingly involved, directly or indirectly, in dealing with proceeds of crime.

This is a criminal offence, which will be tried by special courts designated for this purpose under Section 2 (Z) of the Prevention of Money Laundering Act. The trial will be both for charges under the specific Act which is a crime and also offence of money laundering under Prevention of Money Laundering Act. However it is not "joint trial".

Civil Liability i.e. confiscation of tainted property

In addition to criminal liability, the property involved in money laundering can be attached and frozen by Central Government and later confiscated.

Question 7:

"Money Laundering is the process of conversion of such proceeds of crime, the 'dirty money', to make it appear as 'legitimate' money"- examine the validity of statement by the rules and regulations of the act "The Prevention of Money Laundering Act, 2002"

[MTP Dec-23]

(Or)

How does Money Laundering actually take place?

[MTP June-2019, MTP Dec-2017]

Answer:

The goal of a large number of criminal activities is to generate profit for an individual or a group. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. The money so generated is tainted and is in the nature of 'dirty money'. Money Laundering is the process of conversion of such proceeds of crime, the 'dirty money', to make it appear as 'legitimate' money.

The Prevention of Money Laundering Act, 2002 consists of ten chapters containing 75 sections and one Schedule divided into five parts.

The objects sought to be achieved under the Act are:

- (a) To prevent and control money laundering.
- (b) To confiscate and seize the property obtained from the laundered money. And
- (c) To deal with any other issue connected with money laundering in India.

The Directorate of Enforcement in the Department of Revenue, Ministry of Finance is responsible for investigating the cases of offence of money laundering under Prevention of Money Laundering Act, 2002. Financial Intelligence Unit - India (FIU-IND) under the Department of Revenue, Ministry of Finance is the central national agency responsible for receiving, processing, analysing and disseminating information relating

to suspect financial transactions to enforcement agencies and foreign FIUs. Central Govt. (CG) shall appoint adjudicating authority to exercise jurisdiction and powers conferred under the Act.

The process of Money Laundering:

- (b) **Placement:** The Money Launderer introduces the illegal funds into the financial systems. This might be done by breaking up large amount of cash into less conspicuous smaller sums which are deposited directly into a Bank Account or by purchasing a series of instruments such as Cheques, Bank Drafts etc., which are then collected and deposited into one or more accounts at another location.
- (c) **Layering:** In this stage, the Money Launderer typically engages in a series of continuous conversions or movements of funds, within the financial or banking system by way of numerous accounts, so as to hide their true origin and to distance them from their criminal source. The Money Launderer may use various channels for movement of funds, like a series of Bank Accounts, sometimes spread across the globe, especially in those jurisdictions which do not co-operate in anti-Money Laundering investigations.
- (d) **Integration:** The Launderer moves to this third stage in which the funds reach the legitimate economy, after getting inseparably mixed with the legitimate money earned through legal sources of income. The Money Launderer may invest the funds into real estate, business ventures & luxury assets, etc. so that he can enjoy the laundered money, without any fear of law enforcement agencies.

The offences listed in the Schedule the Act, are scheduled offences and are divided into three parts - Part A, B and C.

In Part A, offences to the Schedule have been listed in 28 paragraphs.

Part 'B' of the Schedule are offences with total value involved is Rs.1 crore or more.

Part 'C' deals with trans-border crimes, and is a vital step in tackling Money Laundering across International boundaries. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years. Property made out of proceeds of crime, directly or indirectly attached and/or confiscated by the authority.

Question 8:

Explain the responsibilities of banking companies under the Prevention of Money Laundering Act, 2002.

[MTP June-2018]

Answer:

Section 12 provides for the obligation of Banking Companies. Financial Institution and Intermediaries or a Person carrying on a designated business or profession. According to Subsection (1), every Banking Company, Financial Institution and intermediary or a person carrying on a designated business or a profession shall-

- (a) Maintain a record of all transaction, including information relating to transactions covered under Clause (b), in such manner as to enable it to reconstruct individual transaction;
- (b) Furnish to Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;
- (c) Verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;
- (d) Identify the beneficial owner, if any, of such of its clients, as may be prescribed
- (e) Maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.

The records referred to in clause (a) of subsection (1) shall be maintained for a period of 5 years from the date of transaction between a client and the reporting entity. The records referred to in clause (e) of sub section (1) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later. The Central Government

may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter.

Question 9:

Referring to the obligations of banking companies under the Prevention of Money Laundering Act, 2002, specify the period up to which a bank has to maintain records relating to the current account of a charitable organization.

[MTP Dec-18]

Answer:

(2) Every banking company, financial institution and intermediary shall—

- (a) Maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month;
- (b) Furnish information of transactions referred to in clause (a) to the Director within such time as may be prescribed;
- (c) verify and maintain the records of the identity of all its clients, in such manner as may be prescribed:

Provided that where the principal officer of a banking company or financial institution or intermediary, as the case may be, has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value so as to defeat the provisions of this section, such officer shall furnish information in respect of such transactions to the Director within the prescribed time.

(3)

- (a) The records referred to in clause (a) of sub-section (1) shall be maintained for a period of ten years from the date of transactions between the clients and the banking company or financial institution or intermediary, as the case may be.
- (b) The records referred to in clause © of sub-section (1) shall be maintained for a period of ten years from the date of cessation of transactions between the clients and the banking company or financial institution or intermediary, as the case may be.