GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

JUNE 2022

MODULE 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be updated with the applicable amendments which are as follows:

CS Examinations	**Applicability of Amendments to Laws**
December Session	upto 31 May of that Calender year
June Session	upto 30 November of previous Calender Year

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PROFESSIONAL PROGRAMME EXAMINATION

JUNE 2022

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

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

PART I

Question 1

(a) *You are the Company Secretary of the newly formed company Star Infrastructure Ltd. Your chairman has asked you to prepare a compliance chart. What are the various points you would mention in the compliance chart ?*

(b) *Differentiate Physical Data Room and Virtual Data Room.*

(c) *Murthy, an Indian resident and citizen of India, has incorporated one person company under the Companies Act, 2013 at Mumbai with a paid up share capital of ₹40 lakh. During the financial year 2021-22, turnover of the company was ₹1.35 crore. The director of this company has asked the Company Secretary about holding of board meetings, notice and quorum of board meetings and appointment of auditor. Explain the applicable section, rule and compliances for these matters.*

(d) *Ashok, the Managing Director (MD) of XYZ Ltd., has observed that some confidential information has leaked in the company. MD has called the Company Secretary and asked him to prepare Standard Operating Procedure (SOP) for protecting the confidential information. Suggest the matters for inclusion in the SOP.*

(5 marks each)

Answer 1(a)

The Compliance Chart is an important part of the compliance framework and every organization shall give more focus on the preparation of the compliance chart based on the operations and the structure of the company as the compliance requirements depends on the type of organization, type of industry, activity, sector in which the company operates and laws which are specifically applicable to the company, etc.

Broadly, the Compliance Chart should include the following details:

1. Reference to the key compliance related laws, regulations, industry standards and compliance related policies and standards of the company;
2. Concise statements that capture the relevant internal and external compliance obligations and the risks arising from those obligations;
3. Inherent and managed risk level (critical, high, medium, low) of the identified obligations;

4. The business processes or people to which the compliance obligations are linked or on which they have an impact;
5. Specific compliance risk mitigation activities and compliance risk tracking and monitoring for managing the compliance obligations;
6. To whom and how frequently compliance related results and findings are reported; and
7. Clear ownership of the processes, activities and obligations outlined in the chart.

The compliance chart must be practical and concise on the role and responsibilities of the management and of the compliance officer.

Answer 1(b)

Difference between the physical data room and virtual data room are as below:

Sl. No.	*Particulars*	*Physical Data Room*	*Virtual Data Room*
1	Form of documents	Papers, files, boxes or other tangible thing	Electronic / Digital / soft copies of documents including video / audio documents
2	Security of documents	Lies with the integrity of person who is in-charge of the data room	More secured through specific log-in ID and pass word. In addition facilities like internet fire walls are there.
3	Time required for creation of data room	Longer time required.	Can be created within 48 hours once demands of prospective bidders are identified.
4	Cost	Cost is high because of reasons like- Requirement of one person to take care of data room. Requires bidders to travel from their place to the place of location of data room, etc.	Cost is Low as the documents can be viewed from any location with internet security
5	Convenience	Searching the documents is time consuming	More convenient as it enables multiple bidders to review documents at the same time with search facility also.
6	Accessibility to data room	Timings to access data may be restricted	Data may be accessed nearly any time.

7	Facility to restrict access of specific document	Difficult to implement any restriction	Access can be restricted.
8	Facility to check who has reviewed what documents and how many times	Available with high cost	Available with negotiable cost
9	Facility to highlight new information	To be conveyed manually to all bidders	A highlight can be made in the website created as data room
10	Ability to copy documents	Possible	Not possible always
11	One to one communication with the seller or his representatives	Available	Not available

Answer 1(c)

The below mentioned provisions apply for board meetings, notice of Board Meetings, quorum and appointment of auditor and its return filing with ROC in case of One Person Company (OPC):

Sl. No.	*Event*	*Provisions/Compliances*	*Particulars*
1	Board Meeting	Section 173 (5) & SS-1	Every One Person Company shall hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings shall not be less than 90 days.
2	Quorum	Section 174	Section 174 relating to quorum shall not apply to One Person Company in which there is only one director on its Board of Directors.
3	Notice of Board Meeting	Section 173 (3) & SS-1	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. However, meeting of the Board may be called at shorter notice to transact urgent business.
4	Appointment of Auditor	Section 139(1) read with Rule 4(2) of the Companies (Audit and Auditors) Rules, 2014	Auditor shall be appointed for 5 years. The company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar within fifteen days of the meeting in which the auditor is appointed in E-Form ADT-1.

Answer 1(d)

For every business/organization it is important to have a written confidentiality procedure describing both the type of information considered confidential and the procedures employees must follow for protecting confidential information and dealing with the confidential information. However, the company may adopt the following standard operating procedure for protecting confidential information:

- All confidential documents should be stored in locked file cabinets or rooms accessible only to those who are authorized.
- All electronic confidential information should be protected via firewalls, encryption and passwords.
- Employees should clear their desks of any confidential information before going home at the end of the day.
- Employees should refrain from leaving confidential information visible on their computer monitors when they leave their work stations.
- All confidential information, whether contained on written documents or electronically, should be marked as “confidential.”
- All confidential information should be disposed of properly (e.g., employees should not print out a confidential document and then throw it away without shredding it first.)
- Employees should refrain from discussing confidential information in public places.
- Employees should avoid using e-mail to transmit certain sensitive or controversial information.
- Limit the acquisition of confidential client data (e.g., social security numbers, bank accounts, or driver’s license numbers) unless it is integral to the business transaction and restrict access on a ‘need-to- know’ basis.
- Before disposing of an old computer, use software programs to wipe out the data contained on the computer or have the hard drive destroyed.

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

Question 2

(a) Who is a registered owner of shares of a company ? Is registered owner different from beneficial owner ? What are the declarations to be filed by the registered owner/beneficial owner to the company ? Is the company required to take any action, if such a declaration is received ?

(b) What is a cyber fraud ? What is the difference between Phishing and Vishing ?

(c) Who is a Customer under Know Your Customer (KYC) ?

(d) Den Ltd. had a paid up share capital of ₹275 crore in the previous year 2021-22. Explain how a Practicing Company Secretary can prepare himself for such a big assignment before undertaking the work relating to pre-certification so that the chances of incorrect certification will not be there.

(5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) Your client wants to set up a Bio-technology unit in Bengaluru. Describe the details of specific laws applicable to a Bio-technology industry.

(ii) What are the various risks a company may face for non-compliance of law ?

(iii) Why are the following registers maintained in a company and under what rules ? CHG-7, MGT-2, MBP-3, SH-3, PAS-5.

(iv) Illustrate the list of KYC documents to be submitted in respect of a Hindu Undivided Family (HUF). *(5 marks each)*

Answer 2(a)

Registered owner of a company is a person whose name is entered in the register of members of a company as holder of shares of the company but may not hold the entire benefit of interest in such shares. Whereas, beneficial owner is a person having beneficial interest in the share but his name is not entered in the register of members. Therefore, registered owner may be different from beneficial owner.

Section 89 (1) of the Companies Act, 2013 read with rule 9 of the Companies (Management and Administration) Rules, 2014 provides that, the person or the company (as the case may be), whose name is to be entered into the register of members of the company but who does not hold the beneficial interest in such shares shall submit the declaration in Form MGT-4 within thirty days from the date on which his name is entered in the register of members of such company.

Similarly, as per section 89(2) read with rule 9(2) of the Companies (Management and Administration) Rules, 2014, the beneficial owner shall also file declaration with the company in from MGT-5 disclosing the interest within 30 days after acquiring such beneficial interest in the shares of the company (including changes that may occur at any time in future).

Section 89(6) provides that where any declaration as mentioned above (MGT-4 or MGT-5) is received by the company, the company shall make a note of such declaration in the register of members and shall file within 30 days from receiving of such declaration, a return to Registrar of Companies (ROC) in form MGT-6 in respect of such declaration with fee. The basic intent behind the above section is to reveal the identity of the beneficial owner who is unknown to the company.

Answer 2(b)

Computer fraud or cyber fraud is a crime committed through a computer via internet in order to unethically fetch another individual's personal and financial information which is stored online. In the present technological era, cyber fraud is most common type of fraud. Individuals and organisations are need to be more vigilant and protect their information from fraudsters.

Phishing : Is a type of social engineering attack often used to steal user data, including login credential and credit card information. It occurs when an attacker purporting as a trusted entity and dupes a victim into opening email, instant message or text message. It is a technique used to obtain card and personal details of a person through a fake email. For eg. X send an email with a data collecting form which promises to pay after the details are submitted.

Vishing : Is a fraudulent practice of making phone calls, or leaving voice message purporting to be from reputed companies in order to introduce individual to reveal their personal information such as bank debit/credit card details. In case of vishing, fraudsters also use the phone to solicit your personal information. For eg. X makes a call to obtain the data and intends to use it for illicit purpose.

Answer 2(c)

For the purpose of KYC, a 'Customer' includes:-

i. A person who is engaged in a financial transaction or activity with a reporting entity and includes a person on whose behalf the person who is engaged in the transaction or activity, is acting;

ii. A director who has been allotted DIN issued by the Ministry of Corporate Affairs;

iii. A person or entity that maintains an account and/or has a business relationship with the bank;

iv. Beneficiaries of transactions conducted by professional intermediaries such as stockbrokers, Chartered Accountants, Company Secretaries or solicitors, as permitted under the law; or

v. Any person or entity connected with a financial transaction which can pose significant reputational or other risks to the bank, for example, a wire transfer or issue of a high-value demand draft as a single transaction;

vi. One on whose behalf the account is maintained (i.e. the beneficial owner).

Answer 2(d)

Professionals like Company Secretary in Practice (PCS) before undertaking the work relating to pre-certification should thoroughly read the requirements of the provisions

of the Companies Act, 2013 and Rules made thereunder and be familiar with the actual practices that are being followed in this regard. He should particularly ensure the following:

- Ensure that Letter of Engagement/Board Resolution authorizing the professional for the assignment by the company to be obtained (where the statutory requirement is there for the board resolution or general meeting resolution then a copy of the extract of such resolution shall be obtained by PCS. Wherever the instance is possible it is recommended to record such appointment in the Minutes of the Board Meetings);
- Maintain a physical/scanned copy of all documents verified (subject to confidentiality requirement) and also have the draft forms approved by the Company's personnel before the forms are filed, as part of documentation;
- Obtain the signature(s) of the authorised signatories on the e-forms in presence of the professional;
- Ensure that all relevant documents and attachments are legible and visible;
- Verify the documents from the original records of the company and then seek the soft copies for form filing;
- Correctness of the records and the material departure from the facts;
- The form to be digitally signed by the Director or person authorized by the company;
- Before certification of any form, the person should be aware about the relevant provisions under the Act and Rules made thereunder, due process to be followed by the company, approval if any required etc.

Answer 2A(i)

The Biotechnology industry in India is divided into the segments namely- Biopharmaceuticals, Bio-services, Bioagriculture, Bio-Industrials and Bio-IT. India is one of the top biotech destinations in the world. India is working to boost the biotechnology sector under the flagship programmes such as 'Make in India' and 'Startup India'.

Specific Laws applicable to the Biotechnology sector includes:

- Rules for the manufacture, Use/Import/Export and storage of hazardous micro organisms/ Genetically engineered organisms or cell, 1989
- Revised recombinant DNA safety guidelines
- Guidelines for research in transgenic plants and guidelines for toxity and allergencity evaluation of transgenic seeds, plants and plant parts, 1998
- The plants, Fruits and Seeds (Regulation of import in India) Order 1989 issued under the destructive Insects and Pests Act, 1914
- Guidelines for generating Preclinical and Clinical data for DNA Therapeutics,1999
- National Seed policy 2002
- Seeds Act, 1966

- EXIM Policy Pertaining to Biotechnology
- Environment Protection Act, 1986 pertaining to Biotechnology
- Foreign Exchange Management Act, 1999 pertaining to Biotechnology
- Protection of Plant Varieties and Farmers' Rights Act, 2001.

Answer 2A(ii)

Compliances of laws and regulations must be managed as an integral part of any corporate strategy. In case of non-compliance of law, the following risks are likely to be faced:

1. Cessation of business activities;
2. Civil action by the authorities;
3. Punitive action resulting in fines against the company/officials
4. Imprisonment of the errant officials.
5. Public embarrassment & loss of reputation of the company and its employees.
6. Attachment of bank accounts etc.
7. Initiation of action by the regulators like MCA, SEBI, RBI or others authorities, which may jeopardize the very stability of the financial and manufacturing operations

Answer 2A(iii)

The requirements and legal provisions of following registers maintained by the company are as mentioned below:

1. **Form CHG-7** - It is register of charges mentioned under section 85 read with rule 10(1) of Companies (Registration of Charges) Rules, 2014.
2. **Form MGT-2** - Register of debenture holders/ other securities holders with index of names. It is maintained as per section 88 read with rule 4 and 15 of the Companies (Management and Administration) Rules, 2014.
3. **Form MBP-3** - Register of Investment not held in the name of the company maintained under section 187 (3) read with rule 14(1) of the Companies (Meetings of Board and its Powers) Rules, 2014.
4. **Form SH-3** - Register of sweat equity shares. Entry shall be made forthwith on issue of sweat equity shares under section 54. Authentication of the entries are to be made by company secretary or by any other person authorized by the Board. It is maintained under section 54 and rule 8(14)(a) of the Companies (Share Capital and Debentures) Rules, 2014.
5. **Form PAS-5** - Complete record of private placement offers. Maintenance under section 42(7) read with rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

Answer 2A(iv)

List of the KYC documents to be submitted for a Hindu Undivided Family (HUF), are as mentioned under:

1. Copy of PAN of HUF and Karta
2. Latest colour photograph of Karta and Authorised signatory (if any)
3. Copy of identify proof of Karta and authorised signatory(if any)
4. Copy of address proof of HUF, if different from that of Karta
5. Foreign Account Tax Compliance (FATCA) declaration
6. Deed of declaration of HUF/ List of coparceners
7. Bank pass-book/bank statement in the name of HUF.

PART II

Question 3

(a) What do you understand by Social Audit ? State the implications of Social Audit.

(b) Beeta Ltd., where you are the Company Secretary, has got listed in BSE and NSE recently. The company has not constituted an audit committee of the board yet. Advise the company about requirement and constitution of audit committee as per the Companies Act, 2013.

(c) TQP Ltd. wants to amalgamate with the company RZP Ltd. As a Practising Company Secretary, explain about preparing the scheme of amalgamation and its contents. (5 marks each)

Answer 3(a)

Social Audit Means

A Social Audit is a way of measuring, understanding, reporting and ultimately improving an organization's social and ethical performance. A social audit helps to narrow gaps between vision/goal and reality, between efficiency and effectiveness. It is a technique to understand, measure, verify, report on and to improve the social performance of the organization. Social auditing creates an impact upon governance. It values the voice of stakeholders, including marginalized/ poor groups whose voices are rarely heard. Social auditing is taken up for the purpose of enhancing local governance, particularly for strengthening accountability and transparency in local bodies.

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

A social audit is an official evaluation of an organization's involvement in social responsibility projects or endeavors. For example, a local family store makes a clothing donation to a NGO that has a homeless shelter for women and children. The store makes a similar donation three times a year. This is something that a social audit might

uncover. Factors examined by a social audit include records of charitable contributions, volunteer events, and efficient utilization of energy, transparency, work environment, and employees' wages.

Implications of Social Audit

- Social auditing creates an impact upon governance. It values the voice of stakeholders, including marginalized/poor groups whose voices are rarely heard.
- Social auditing is taken up for the purpose of enhancing local governance, particularly for strengthening accountability and transparency in local bodies.
- Social Audit makes it sure that in democracy, the powers of decision makers should be used as far as possible with the consent and understanding of all concerned.

Answer 3(b)

As per section 177 of the Companies Act, 2013 read with rule 6 and 7 of the Companies (Meetings of Board and its Powers) Rules, 2014, the audit committee is required to be constituted for the following class of companies:

(i) Every listed public company; or

(ii) the Public Companies having paid up share capital of ten crore rupees or more; or

(iii) the Public Companies having turnover of one hundred crore rupees or more; or

(iv) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees or above .

Composition of Audit Committee

The Audit Committee shall be constituted with a minimum number of three directors with independent directors forming a majority. Majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand, the financial statement.

The above mentioned advise may be given to the company management.

Answer 3(c)

Preparation of scheme of Amalgamation

An application for merger & amalgamation shall be filed with National Company Law Tribunal (NCLT) by both the transferor(s) and the transferee company in the form of petition under section 230-232 of the Companies Act, 2013 for the purpose of sanctioning the scheme of amalgamation. Standard guidelines for presenting an application or petition before NCLT are prescribed in National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

The Scheme of Amalgamation to be prepared by the company should contain the following information:

Introductory Part

1. Basic Details of the Transferor & Transferee Company like date of incorporation, CIN and registered office and address for service of notice

2. Main objects in Memorandum of Association of Transferor and Transferee Company
3. Jurisdiction of the Bench and limitation
4. Facts of the case - reason in brief for going into merger or amalgamation
5. Nature of business and definition clause
6. Share Capital of the companies involved and shareholding relationship between the companies involved

Operating Part - The scheme

7. Appointed Date - The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.
8. Transfer of assets and transfer of debts/liabilities
9. Transfer of licenses, approvals / permissions, Company's staff, workmen and employees
10. Enforcement of contracts, deeds, bonds and other instruments and Legal Proceedings
11. Issue and Allotment of Shares under the Scheme and Increase in Authorized Share Capital
12. Accounting Treatment and Dissolution of Transferor Company
13. Effect of Scheme and Conduct of business by the transferor Company till effective date
14. Expenses relating to the Scheme and General terms and conditions applicable for the scheme

Prayer / Relief Part

15. Approval of scheme
16. Particulars of Bank draft evidencing payment of fee for the Application.

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

Question 4

(a) Explain the concepts of Integrity and Conflict of interest.

(b) "The Peer reviewer is expected to examine the office systems and procedures with regard to compliance of attestation services provided by a practice unit." Comment.

(c) Distinguish between Audit Plan and Audit Programme.

(d) State key differences between Ethics and Values.

(e) Explain reporting of specific event under Secretarial Audit Report.

(3 marks each)

Answer 4(a)

Integrity

Integrity is the quality of being honest and having strong moral principles and character dealing with others. The term has been described judicially as connoting "moral soundness, rectitude, and steady adherence to an ethical code". It requires that members are impartial, independent and informed.

For example:

Displaying integrity includes:

- acting professionally in your business dealings;
- displaying a proper understanding and appreciation of your role and responsibilities;
- being respectful of others at all times;
- not accepting or offering improper gifts, hospitality or other inducements;
- avoiding conflicts of interest, or, where a conflict arises, making sure that everyone involved is aware of the interest;
- recognising and considering the ethical issues arising from, and the interests of the groups or;
- stakeholders who may be affected by, your choices, decisions and actions;
- avoiding involvement in any unethical, misleading, illegal or covert behaviour;
- not knowingly ignoring (or turning a blind eye to) unethical, misleading, illegal or obscure behaviour; and
- avoiding bringing the profession into disrepute.

Conflict of Interest:

A 'conflict of interest' exists where the interests or benefits of one person or entity conflict with the interests or benefits of the client. The professional must avoid situations involving actual or potential conflict of interest. Any situation that involves or may involve a conflict of interest must be promptly disclosed. No transaction, which involves an actual or potential conflict of interest, should be undertaken by professional.

(Or)Alternative Answer to "Conflict of Interest":

Conflict of Interest CSAS-1 (Auditing Standard on Audit Engagement) effective from 1st April, 2021, defines: "Conflict of Interest" The Auditor shall not have any substantial

conflict of interest with the Auditee. Any conflict of interest, other than substantial conflict of interest, must be disclosed by the Auditor before accepting the Audit Engagement or as soon as the Auditor becomes aware of the same, as the case may be.

Answer 4(b)

Peer review of compliance of attestation services by Practicing Company Secretaries

The peer reviewer is expected to examine the office systems and procedures with regard to compliance of attestation services. The reviewer shall verify whether the practice unit has adequate office systems and procedures in place. However, the extent and scale of these systems may vary from one practice unit to another, depending upon the size and scale of the practice unit.

The reviewer shall particularly examine the following aspects, besides forming his own judgment during the review:

1. Whether the practice unit has a document management system which should ideally include the filing system, record storage and retrieval system (whether in hard copy or soft copy),

2. Whether allocation of attestation assignments among the trainees are commensurate with the capability of the staff, whether the assignments are properly carried out and the attestation services are verified by the proprietor or partner of the practice unit or a qualified assistant in the office of the practice unit before authentication. Proper training and capacity development of the apprentice trainee(s) and other staff in the office of the practice unit is very essential to maintain the quality of attestation services.

As it may become difficult for the practice unit to attend to every attestation service, most practice units generally rely on the trainees for execution of the attestation services. In this context, the peer reviewer may examine whether:-

- The apprentice trainees are maintaining a training diary to record the work done every day the dairy is being examined by the proprietor/partner/qualified assistant of the practice unit periodically;

- Whether any staff induction process is in place;

- Whether the staff are periodically encouraged to attend any training program or any other capacity building programme, including any in-house mechanism for their professional development;

- Whether the office of the practice unit is equipped with a library or reference material relating to professional services;

- Whether the overall décor/appearance of the office of the practice unit is satisfactory.

Answer 4(c)

Differences between Audit Plan and Audit Programme are as below:

Audit Plan	*Audit Programme*
Audit Plan lays down the audit strategies to be followed for conducting an audit such as identifying the areas where special audit consideration and skills may be necessary, obtain the knowledge of business etc.	Audit programme is an outline of how audit is to be done, who is to do what work and within what time.
Audit Plan should be made to cover the following among other things: • Acquiring knowledge of accounting systems, policies and internal control procedures. • Establishing the expected degree of reliance to be paced on the internal control. • Determining the nature, timing and extent of the audit procedures to be performed. • Co-ordinating the work to be done.	Audit Programme lays down the following audit procedure to be followed : • Evaluation process • Ascertaining accuracy • Verification of Document • Scrutiny of supporting Documents • Checking of overall disclosure and presentation of all items in the audit completion • Preparation and submission of be performed audit report.

Answer 4(d)

Differences between Ethics and Values are as below:

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

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

3. Values strongly influence the emotional state of mind. Therefore, it acts as a motivator. On the other hand, ethics compels to follow a particular course of action.

4. Ethics are consistent, whereas values are different for different persons, i.e. what is important for one person, may not be important for another person.

5. Values tell us what we want to do or achieve in our life, whereas ethics helps us in deciding what is morally correct or incorrect, in the given situation.

6. Ethics determines to what extent our options are right or wrong. As opposed to values, which defines our priorities for life.

Answer 4(e)

Circumstances under which reporting of Specific Event under Secretarial Audit Report is considered are as mentioned below:

The Secretarial Auditor should report all events/actions having major bearing on the Company's affairs/ governance in pursuance of the applicable laws, rules, regulations, guidelines, standards, etc. An event/action may be considered as having major bearing on Company's affairs includes the following situations:

- Events/actions altering the charter documents of the Company
- Changes in the Capital structure of the company
- Change in the affairs/management of the company
- Change in the licensing or permission for the business operation of the company
- Capacity expansion and utilization of the company
- Sale/ Disposing of the substantial assets of the company
- Entering in to joint ventures agreements etc.

Question 5

(a) S Ltd. appointed M & Co., Chartered Accountants, as statutory auditors for the financial year 2021-22. During the audit, the statutory auditors have noticed fake and duplicate expenses reimbursement of ₹1.10 crore to the directors of the company. In this situation, explain the procedure to be adopted by the auditors for reporting of fraud. (5 marks)

(b) Indicate the scope of secretarial audit, which should be taken into consideration by a Practicing Company Secretary, to examine and report the compliance of various laws/regulations as specified in the form MR-3, for submission in Secretarial Audit Report. (5 marks)

(c) DEF Ltd. has to appoint the internal auditor for the financial year 2022-23. The company called a board meeting on 28th April, 2022 to appoint the internal auditor, but due to non-finalisation of audit firm, the Board of directors deferred the matter of appointment of internal auditor for next board meeting. Subsequently, the company has finalized the proposal of a practising Chartered Accountants firm for appointment as internal auditor. Now, in view of urgency, the directors of the company want to appoint the internal auditor by passing a resolution by circulation. Examine whether the appointment of internal auditor in this manner is permissible under the Companies Act, 2013. (5 marks)

Answer 5(a)

Reporting of frauds by auditor involving amount more than Rs. 1 crore

As per section 143 (12) read with rule 13 to the Companies (Audit and Auditors) Amendment Rules, 2014, if an auditor of a company, in the course of the performance of his duties as statutory 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 officers or employees, the auditor shall report the matter to the Central Government. Auditor should report such frauds as soon as possible but not later than 60 days of his knowledge about the frauds:

STEP-I - Report to Board & Audit Committee

Auditor shall forward his report to the board of directors or the audit committee, as the case maybe, within 2 days of his knowledge of the fraud, seeking their reply or observations within 45 days.

STEP-II - Report to Central Government after reply of board

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 15 fifteen days of receipt of such reply or observations.

STEP-III - Report to Central Government if no reply received

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 failed to receive any reply or observations within the stipulated time.

Other Points to be kept in mind : The report shall be on the letter-head of the auditor containing Postal address; e-mail address; contact number (telephone/ mobile); signed by the auditor with his seal; indicate his membership number. Report shall be in the form of a statement as specified in Form ADT-4.

Answer 5(b)

In terms of Form MR-3 (Secretarial Audit Report), the Secretarial auditor needs to examine and report the compliance of the following:

- The Companies Act, 2013 and the rules made thereunder;
- The Securities Contracts (Regulation) Act, 1956 and the rules made thereunder;
- The Depositories Act, 1996 and the Regulations and Bye-laws framed thereunder;
- Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;
- The following Regulations and Guidelines prescribed under the Securities and Exchange Board of India Act, 1992:-
    1. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011;
    2. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015;

3. The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009/2018;

4. The Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999/ SEBI (Share Based Employee Benefits) Regulations, 2014/The Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021;

5. The Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008;

6. The Securities and Exchange Board of India (Registrars to an Issue and Share Transfer Agents) Regulations, 1993 regarding the Companies Act and dealing with client;

7. The Securities and Exchange Board of India (Delisting of Equity Shares) Regulations,2009/2021;

8. The Securities and Exchange Board of India (Buy back of Securities) Regulations, 2018;

9. The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Other laws as may be applicable specifically to the company.

Further, the Secretarial Auditor also needs to examine and report on the compliance with the applicable clauses of the following:

(i) Secretarial Standards issued by The Institute of Company Secretaries of India.

(ii) The Listing Agreements entered into by the Company with ..Stock Exchange(s), if Applicable.

Answer 5(c)

Section 179(3)(k) of the Companies Act, 2013 read with Rule 8(4) of the Companies (Meeting of Board and its Powers) Rules, 2014 requires that the Internal Auditor of the Company shall be appointed by passing a resolution at a duly convened meeting of the Board. Therefore, the appointment of Internal Auditor cannot be made by passing a resolution by circulation.

Also, the resolution for appointment of the Internal Auditor shall be filed with the Registrar of Companies within 30 days from the passing of the said resolution pursuant to the provisions of Section 117 & 179 of the Companies Act, 2013.

Hence, DEF Ltd. should call a Board Meeting and appoint the Internal Auditor.

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

Question 6

(a) Claton Ltd., a Mumbai based company, started a make shift hospital in Mumbai suburbs to provide temporary Covid care facilities, which include creating health

infrastructure for Covid care, establishment of medical oxygen plants etc. Can these expenditures qualify for Corporate Social Responsibility (CSR) spending ? What are the government guidelines in this regard ? (5 marks)

(b) 'The audit process can be broadly grouped in three phases'. Prepare a note to substantiate the statement. (5 marks)

(c) Under what circumstances, the auditor should express modified opinion ? Explain. (5 marks)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) Elucidate the term 'Emphasis of matter' giving suitable examples.

(ii) SJ has started working in a practicing company secretary firm as a trainee. Explain to him about Current Audit File and its contents.

(iii) How the evaluation of internal audit function can be helpful to the secretarial auditor in performance of his duties ? Describe. (5 marks each)

Answer 6(a)

The General Circular No. 10/2020 dated March 23, 2020 issued by the Ministry of Corporate Affairs (MCA), clarified that spending of CSR funds for various activities related to COVID-19 is an eligible CSR activity. Further, setting up of make shift hospitals and temporary COVID care facilities are legible CSR activity under item no. (i) and (xii) of the schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care/sanitisation and disaster management.

The MCA has clarified that board based items as mentioned under schedule VII may be interpreted liberally, therefore spending of CSR funds for creating health infrastructure for COVID care, establishment of medical oxygen generation and storage, manufacturing and supply of oxygen concentrators, ventilators, cylinders and other medical equipment's for countering COVID-19 or similar such activities are eligible CSR activities under schedule VII of the Companies Act, 2013.

Hence, Claton Ltd. can undertake the aforesaid activities in consultation with State Government subject to fulfillment of the Companies (Corporate Social Responsibility Policy) Rules, 2014 and the circulars issued by MCA from time to time.

Answer 6(b)

The audit process can be broadly grouped in three phases: Audit Planning, Execution of Audit and Reporting.

Audit Planning : The audit plan, describes the processes and activities that are to be carried out in connection with a particular audit and for the improving the quality of audit. Accordingly, an auditor should plan an audit so that it is performed in an effective manner within the defined scope. The audit planning should also include overall audit strategy for the audit.

The audit planning consist following actions:

Understanding the company; Establishing audit objectives and scope; Determining materiality; Assessment of Risk; Preparation of Audit Plan and Preparation of detailed audit Programme.

Execution of Audit : The effective Audit Execution is based on the Audit plan and the efficiency of the Audit team. However the Execution of the Audit covers the following actions:

1. Sampling of various transactions or items
2. Sampling for testing of controls
3. Identification of events
4. Performing controls testing procedures
5. Performing analytical procedures
6. Sampling for substantive test of details
7. Performing substantive test of details
8. Review of working papers
9. Management discussion on draft report

Reporting : In the reporting phase, the auditor covers evaluation of audit results, deriving conclusion, forming of opinion and prepare the audit report.

Answer 6(c)

The Auditor should express modified opinion when the Auditor concludes that:

a. based on the Audit Evidence obtained, there is non-compliance with the applicable laws in terms of timelines or process; or

b. based on the Audit Evidence obtained, the records as a whole are not free from misstatement; or are not maintained in accordance with applicable laws; or

c. he is unable to obtain sufficient and appropriate Audit Evidence to conclude that there is due compliance with the applicable laws in terms of timelines and process; or

d. he is unable to obtain sufficient and appropriate Audit Evidence to conclude that the records as a whole are free from misstatement; or are maintained in accordance with applicable laws.

If the information prepared in accordance with the requirements of a fair presentation framework is not sufficient and relevant enough so as to allow achieving of a fair presentation, the auditor should discuss the matter with management and, depending on the requirements of the applicable reporting framework and how the matter is resolved, should determine whether it is necessary to modify the opinion in the auditor's report. In case the auditor expresses a modified opinion or disclaims an opinion, the text of the opinion shall be either in italics or bold letters.

The modification on Opinion can be in any one of the following three categories depending upon the nature and severity/ extremity of the matter under consideration:

- The qualified Opinion
- The adverse Opinion
- The disclaimer of Opinion

Answer 6A(i)

Emphasis of matter (EOM) is included in the audit report to seek the attention of the reader, to make the reader aware about the specific instances which are notin the general course of business. Such matters can have the positive as well as negative impact on the affairs of the company in future. The purpose of an EOM paragraph is to draw the users' attention to a matter already disclosed but the auditor believes that, it is fundamental to their understanding and should be a part of the report.

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

- An uncertainty relating to the future outcome of exceptional litigation or regulatory action;
- When there is uncertainty about exceptional future events, pending litigations certainty;
- Early adoption of new accounting standards;
- Adoption of new technology;
- Recent changes in the regulatory environment;
- When a major catastrophe has had a major effect on the financial position;
- Early application (where permitted) of a new accounting standard (for example, a new International Financial Reporting Standard) that has a pervasive effect on the financial statements in advance of its effective date; and
- A major catastrophe that has had, or continues to have, a significant effect on the entity's financial position.

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

Answer 6A(ii)

Current Audit File

This file contains information relating to the audit of the current period. Information included in the current file should be information for the period under audit. The indicative list of documents in the current file can be as follows:

i. Appointment letter for the Current Year, along with the defined scope of Audit;

ii. Extracts of important board/management meetings;

iii. List of responsible persons with their designation and contact details;

iv. Secretarial Audit Report/Financial Audit Report for current year as well as previous year;

v. Actions initiated by company towards Secretarial Auditor's observations and suggestions in previous years reports;

vi. Audit Plan/Audit Program;

vii. Current year's Secretarial Records ;

viii. Communications with the company/management team;

ix. Letters of representations, confirmations received from company;

x. Audit review points and highlights of analysis

Answer 6A(iii)

Evaluation of internal audit function by a secretarial auditor

During the performance of the Secretarial Audit, the secretarial auditor also needs to report on the adequacy of systems and process in the company. The internal audit function greatly assist the Secretarial auditor in determining the extent to which he can place reliance upon the work of the internal auditor. The Secretarial auditor should document his evaluation and conclusions in this respect. The important aspects to be considered in this context are:

1. *Organisational Status* - Whether internal audit is undertaken by an outside agency or by an internal audit department within the entity itself. The internal auditor reports to the management, in an ideal situation he reports to the highest level of management and is free of any other operating responsibility.

2. *Scope of Audit Function* - The external auditor should ascertain the nature and depth of coverage of the assignment which the internal auditor discharges for management. He should also ascertain to what extent the management considers, and where appropriate acts upon internal audit recommendations.

3. *Technical Competence* - The external auditor should ascertain that internal audit work is performed by persons having adequate technical training and proficiency.

4. *Due Professional Care* - The external auditor should ascertain whether internal audit work appears to be properly planned, supervised, reviewed and documented. An example of the exercise of due professional care by the internal auditor is the existence of adequate audit manuals, audit programmes and working papers.

5. *Monitoring of internal control* - The internal audit function may be assigned specific responsibility for reviewing controls, monitoring their operation and recommending improvements thereto.

6. *Examination of financial and operating information* - The internal audit function may be assigned to review the means used to identify, measure, classify and

report financial and operating information, and to make specific inquiry into individual items, including detailed testing of transactions, balances and procedures.

7. *Review of operating activities* : The internal audit function may be assigned to review the economy, efficiency and effectiveness of operating activities, including non- financial activities of an entity.

8. *Review of compliance with laws and regulations* : The internal audit function may be assigned to review compliance with laws, regulations and other external requirements, and with management policies and directives and other internal requirements.

9. *Risk management* : The internal audit function may assist the organization by identifying and evaluating significant exposures to risk and contributing to the improvement of risk management and control systems.

10. *Governance* : The internal audit function may assess the governance process in its accomplishment of objectives on ethics and values, performance management and accountability, communicating risk and control information to appropriate areas of the organization and effectiveness of communication among those charged with governance, external and internal auditors, and management.

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CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING-UP

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer ALL Questions.*

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

PART I

Question 1

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

(b) "A company may merge with a Foreign Company, only if it is incorporated in any of the Jurisdictions specified under Rule 25A, of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016." Specify these jurisdictions.

(c) "Profit on slump sale is a Capital Receipt." Explain and support the statement through decided Case Laws.

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

Answer 1(a)

Corporate restructuring is an action taken by the corporate entity to modify its capital structure or its operations significantly. To improve the operations of a corporate entity, market restructuring is indispensable. Market restructuring involves decisions with respect to the product market segments where company plans to operate on its core-competencies. This type of restructuring usually affects employees, and tends to lead to new training initiatives along with some layoffs as the company improves efficiency. This type of restructuring also involves alliances with third parties that have technical knowledge and resources,

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

Similarly, Tata Steel Ltd. acquired overseas Corus Group Plc. that drastically improved the production synergies for Tata Steel Ltd. Through the acquisition, Tata

Steel Ltd. could combine its low-cost production with the high quality of Corus. It resulted utilization of wide retail and distribution network, technology transfer and enhanced R&D capabilities.

Answer 1(b)

A company may merge with a foreign company incorporated in any of the jurisdiction specified in Rule 25A(2)(a) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 after obtaining prior approval of the Reserve Bank of India and after complying with provisions of Sections 230 to 232 of the Companies Act, 2013 and these rules.

The Transferee Company shall ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation.

A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under Rule 25A (2) (a).

The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining specified approvals.

Jurisdictions specified are as under:

(i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or

(ii) whose central bank is a member of Bank for International Settlements (BIS), and

(iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:

  (a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or

  (b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

Answer 1(c)

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

The Supreme Court in the case of *CIT* vs. *West Cast Chemicals and Industries Ltd.* held that a slump sale price paid is an appreciation of capital but not arising out of trading. In the case of *CIT* vs. *Mungeeram Bangar & others* it was held that mere fact

that in the schedule price of land was stated does not lead to conclusion that part of the slump price is attributable to the land sold.

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

Answer 1(d)

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

— Section 7(7) : Incorporation

— Section 55(3) : Issue and redemption of preference shares

— Section 58 and 59, remedy for refusal to transfer or transmission of securities.

— Section 61 (1) : Approval for consolidation and division of shares which results in changes in the voting percentage of shareholders of the limited company

— Section 62(4) to (6) : further issue of share capital

— Sections 71(9) to (11) : Debentures issues

— Section. 75 : Damages for fraud

— Sections 97, 98, & 99 : To call meetings of members

— Sections 119(4) : Inspection of minutes' books

— Sections 130, 131 : Reopening of accounts, revision of financial statements

— Sections 140 (4) & (5) : Removal of auditors

— Sections 169(4) : Removal of directors

— Sections 213, 216(2), 214, 221, 222, 224(5) : Investigations into company's affairs

— Section 230, 231 : Compromise or Arrangement

— Section 231, 232 : Merger or Amalgamation

— Sections 241, 242 except (1) (b), (2) (c) and (g) : Relief in cases of oppressions, etc. and powers of Tribunal.

— Sections 243, 244, 245 : Oppression and mismanagement and Class Action suits

— Section 252 : Revival of strike -off companies

— Sections 399 (2) : Production of documents

— Sections 419, 425 : Powers of NCLT

— Section 441 : Compounding.

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

Question 2

(a) Critically examine the criteria considered by Competition Commission of India, before sanctioning or approving a Combination.

(b) What are the types of valuation for a start-up unit ? Give any five methods.

(c) X Ltd. is considering the proposal to acquire Y Ltd. and their financial information is given below :

Particulars	***X Ltd.***	***Y Ltd.***
No. of Equity Shares	*1000000*	*600000*
Market price per share (Rs)	*30*	*18*
Market Capitalization (Rs)	*30000000*	*10800000*

X Ltd. intend to pay ₹1,40,00,000 in cash for Y Ltd., if Y Ltd.'s market price reflects only its value as a separate entity, calculate the cost of merger :

(i) When merger is financed by cash.

(ii) When merger is financed by stock. (Assume that X Ltd. agrees to exchange 5,00,000 shares in exchange of shares in Y Ltd. instead of payment of cash of ₹1,40,00,000). (5 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) "The valuation of shares is not only a question of facts, but also arises out of technical & complex issues." Comment and analyse with the help of decided case laws.

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

(iii) Often reputed companies appoint joint valuers for fair valuation of the company. Explain the procedure and purpose of joint valuation. (5 marks each)

Answer 2(a)

The Mergers, amalgamations and acquisition in India are regulated by the Competition Commission of India (CCI). The CCI has to follow a set of procedures which have been laid down in the Competition Act, 2002 and with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011(Combination Regulation).

The CCI will consider a few criteria before sanctioning or approving a combination. These criteria are:

- Actual and potential level of competition through imports in the market;
- Extent of barriers to entry into the market;

- Level of combination in the market;
- Degree of countervailing power in the market;
- Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- Extent of effective competition likely to sustain in a market;
- Extent to which substitutes are available or likely to be available in the market;
- Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- Likelihood that the combination would result in the removal of a vigorous and effective competition or competitors in the market;
- Nature and extent of vertical integration in the market;
- Possibility of a failing business;
- Nature and extent of innovation;
- Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Answer 2(b)

Start-up Valuation Methods are as under:

1. *Venture Capital Method* : is used to arrive, at the preliminary valuations for starts up which are yet to generate revenues.

   Formulas:

   - Return of Investment = Terminal Value / Post Money Valuation
   - Post Money Valuation = Terminal Value / Anticipated ROI.

2. *Berkus Method* assigns a range of value to the valuation of the start-up based on the progress that the start-up owners have achieved in getting the start-up off to a start.
3. *Scorecard Valuation Method* : The average pre money valuation of other starts up on the same vertical arrived at and this valuation is then used to value the start-up that is looking for investment.
4. *Risk Factor Summation Method* : The value is to be adjusted for 12 risk factors inherent to the startup.
5. *Cost to Duplicate Method* : Start up value is based on the cost that it would take to duplicate the starts up assets elsewhere. It does not consider future earnings.

   It is conservative valuation method.

6. *Valuation by stages* : When start-up is in the advanced stage, lesser risk that

an investor in taking. This method is used by venture capitalist and angel investors.

7. *Comparable Method* : Valuation is based on precedent transactions, and key ratios within a particular sector.

8. *The Book Value Method* : Net worth is considered.

9. *First Chicago Method* : This method recognizes the fact that start up is a high-risk investment and there is a high probability that they may grow beyond expectation and equal chances that they may fail badly. Under this method, three valuations are provided

   I. Worst-cause scenario

   II. Normal cause scenario

   III. Best cause scenario.

Answer 2(c)

(i) Cost of Merger, when Merger is financed by cash = (Cash - MVY) + (MVY - PVY)

Where, MVY = Market Value of Y Ltd

PVY = True/Intrinsic Value of Y Ltd.

Then, = (1,40,00,000 - 1,08,00,000) + (1,08,00,000 - 1,08,00,000) = Rs. 32,00,000

If cost of merger becomes negative, then shareholders of X Ltd. will get benefited by acquiring Y Ltd. in terms of market value.

(ii) Cost of Merger when Merger is financed by Exchange of Shares in X Ltd. to the shareholders of Y Ltd.

Cost of merger = PVXY – PVY

Where,

PVXY = Value in X Ltd. that Y Ltd.'s shareholders get.

PVY = True/intrinsic value of Y Ltd.

Here X Ltd. agrees to exchange 5,00,000 shares in exchange of shares in Y Ltd.

Then the cost of merger is calculated as below:

= (5,00,000 * Rs. 30) – Rs. 1,08,00,000 = Rs. 42,00,000

PVXY = PVX + PVY = 3,00,00,000 + 1,08,00,000 = Rs. 4,08,00,000

Proportion that Y Ltd.'s shareholders get in X Ltd.'s Capital structure will be:

$$= \frac{5,00,000}{10,00,000 + 5,00,000} = 0.3333$$

True Cost of Merger = PVXY - PVY

= (0.3333 x 4, 08, 00,000) - 1, 08, 00,000 = Rs. 27, 98,640 or Rs. 28, 00,000

The cost of merger i.e., Rs. 42,00,000 as calculated above is much higher than the true cost of merger Rs. 27,98,640 or Rs. 28,00,000 with this proposal, the shareholders of Y Ltd. will get benefited.

Answer 2A(i)

The Supreme Court followed the principle laid down in the case of *Dr. Renuka Dutta* vs. *B.V. Solvay Pharmaceuticals* and held that the valuation of shares is not only a question of fact, but also raised technical and complex issues which may be appropriately left to the wisdom of the experts, having regard to the many imponderables which enter the process of valuation of shares. If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter. Where a method of valuation is prescribed the valuation must be made by adopting scrupulously the method prescribed, taking into account all relevant factors which may be enumerated as relevant for arriving at the valuation.

In *Duncans Industries Ltd.* vs. *State of U.P. and others*, the Hon'ble Court held that the question of valuation is basically a question of fact and this Court is normally reluctant to interfere with the finding on such a question of fact if it is based on relevant material on record. Similarly in *Miheer H. Mafatlal* vs. *Mafatlal Industries Ltd.* the Hon'ble Court sounded a note of caution observing that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy.

Answer 2A(ii)

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

The member's liability is unlimited. The unlimited company can reduce the share capital of the Company in a manner specified in the Articles of Association of the Company without confirmation of NCLT.

The following are cases which amount to reduction of share capital but where no confirmation of the Tribunal is necessary:

(a) Surrender of shares.

(b) Forfeiture of shares.

(c) Diminution of capital.

(d) Redemption of redeemable preference shares.

(e) Buy-back of its own shares.

Answer 2A(iii)

A practice of joint valuation report is more prevalent in Merger and Amalgamation transaction involving one or more listed company. The following efficient processes would reduce complexities in delivery the final report:

(a) Issue independent appointment letters to the valuer from the company on whose behalf the valuation work is to be carried out.

(b) Joint introductory meeting or call of all the parties and to provide understanding of the business of the companies to be valued, purpose of valuation and timelines.

(c) Subsequently valuer can independently meet respective company's management for further understanding and clarifications.

(d) Understand the business rational for the purpose of transaction.

(e) Obtain financial information from management of the entities.

(f) Discussion among the Joint valuers on valuation methods

(g) Arrive at consensus on the valuation methods to be used for valuation of each of the companies formally part of the transaction. Board valuation assumptions, reconciliation of input date for the valuation exercise, value derived by using selected approach.

(h) Convergence on value/share swap independently arrived by the valuers.

(i) Draft of joint valuation report to be prepared, reviewed and confirmed by the joint valuers.

(j) Final joint valuation report, to be signed by joint valuers and issued to the clients.

Question 3

(a) "An acquirer made an open offer to acquire shares. He subsequently withdrew the offer." Can he do so ? If yes, what are the circumstances under which he can do so ? What is the procedure to be followed ? (3 marks)

(b) Constitution of National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) has provided various new opportunities for Practicing Company Secretaries (PCS) which were not available earlier. Briefly enumerate the scope of services for PCS under NCLT and NCLAT regime. (3 marks)

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

(d) Briefly state the effect of non-receipt of approvals or conditions enumerated in the scheme of amalgamation. (3 marks)

(e) Does any tax concessions accrue to a foreign company in case of demerger ? (3 marks)

Answer 3(a)

An open offer for acquiring shares once made shall not be withdrawn except under any of the following circumstances: -

(a) Statutory approvals required for the open offer or for affecting the acquisitions

attracting the obligation to make an open offer under these regulations having been finally refused, subject to such requirements having been specifically disclosed in the detailed public statement and the letter of offer;

(b) The acquirer, being a natural person, has died;

(c) Any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded, subject to such conditions having been specifically disclosed in the detailed public statement and the letter of offer; or

(d) Such circumstances as in the opinion of the board, merit withdrawal. In this case SEBI shall pass a reasoned order permitting withdrawal and such order shall be hosted by the board on its official website.

In the event of withdrawal of any open offer, the acquirer shall through the manager to the open offer, within two working days, make an announcement in the same newspaper in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal. The acquirer shall inform in writing to SEBI, and all the stock exchanges on which the shares of the target company are listed. The stock exchange shall disseminate such information to the public and the target company.

Answer 3(b)

With establishment of National Company Law Tribunal (NCLT) and National Company Law Tribunal (NCLAT) opportunities for Company Secretaries has increased. Under section 432 of the Companies Act, 2013, Company Secretaries have been authorized to appear before the Tribunal/ Appellate Tribunal. Before setting - up of the Tribunal, the matters dealt by the Tribunal what dealt by the High Court and so the appearances were taken by only advocates.

Areas of increased scope are as under:

1. Merger/ Amalgamation/Compromise
2. Revival of Companies
3. Winding up
4. Reduction of Capital
5. Oppression and Mismanagement
6. Insolvency and Bankruptcy cases.

Answer 3(c)

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

1. India's largest engineering and Construction Company Larsen and Tourbo (L&T) adopted "asset-lights strategy" by separating business units into independent

subsidiaries by selling a stake in business. The Company, which is considered a corporate proxy for the broader economy, divested its assets as a way to generate capital for investing in fresh projects.

2. In 2017, the Government of India divested 10 per cent stake in Coal India Limited through the Offer-For-Sale (OFS) route at Rs.358 per share and brought its holding to 79.65 per cent.

Answer 3(d)

In the event of any approvals or conditions enumerated in the Scheme not being obtained or complied with, or for any other reason, the Scheme cannot be implemented, the Board of Directors of the Transferee Company and the Transferor company shall mutually waive such conditions as they consider appropriate to give effect, as far as possible, to this Scheme and failing such mutual agreement or in case the Scheme not being sanctioned by the Hon'ble NCLT, the Scheme shall become null and void and each party shall bear and pay their respective costs, charges and expenses in connection with the Scheme.

Answer 3(e)

Where a foreign company holds any shares in an Indian company and transfers the same in case of a demerger, to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under the Income Tax Act, 1961 if the following conditions are satisfied:

(a) The shareholders holding not less than three-fourth in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company, and

(b) Such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated.

PART II

Question 4

(a) State the eligibility requirement for a debtor for the purpose of making an application for a fresh start process under the Insolvency and Bankruptcy Code, 2016.

(b) "Home buyers can initiate corporate insolvency process." Comment.

(c) During the course of liquidation the liquidator noticed that some preferential transactions were made with some persons. What do you understand by preferential transactions ? State the orders that may be passed by the Adjudicating Authority in relation to the avoidance of preferential transactions.

(d) Distinguish between winding up under the Companies Act, 2013 and liquidation in terms of the Insolvency and Bankruptcy Code, 2016.

(5 marks each)

Answer 4(a)

Section 80 of the Insolvency & Bankruptcy Code, 2016, lays down the eligibility

criteria for the debtor for the purposes of making an application for a fresh start process. Section 80(1) lays down that a debtor, who is unable to pay his debt and fulfils the conditions specified in section 80(2), shall be entitled to make an application for a fresh start for discharge of his qualifying debt under Chapter II part III of the Code.

Conditions for filing application for fresh start process :

Section 80(2) provides that a debtor may apply, either personally or through a resolution professional, for a fresh start under Chapter II of Part III of the Code in respect of his qualifying debts to the Adjudicating Authority if -

(a) The gross annual income of the debtor does not exceed Rs. 60,000:

(b) The aggregate value of the assets of the debtor does not exceed Rs. 20,000;

(c) The aggregate value of the qualifying debts does not exceed Rs. 35,000;

(d) He is not an undischarged bankrupt;

(e) He does not own a dwelling unit, irrespective of whether it is encumbered or not;

(f) A fresh start process, insolvency resolution process or bankruptcy process is not subsisting against him; and

(g) No previous fresh start order under this chapter has been made in relation to him in the preceding twelve months of the date of the application for fresh start.

Answer 4(b)

The home buyer can initiate corporate insolvency process against the builders or developers as they have been included in the definition of Financial debt as per explanation to Section 5(8)(f) of Insolvency & Bankruptcy Code, 2016.

As per Section 7 of the Insolvency & Bankruptcy Code, 2016, financial creditors who are allottees under a real estate project, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by not less than one hundred of such allottees under the same real estate project or not less than ten per cent. of the total number of such allottees under the same real estate project, whichever is less.

Answer 4(c)

Preferential transaction in reference to corporate insolvency resolution process or the liquidation process means preferential transaction made with any person within the period of one year preceding the insolvency commencement date or transaction made with a related party within a period of two years preceding the insolvency commencement date.

An application may be made to the Adjudicating Authority by the Liquidator or Resolution Professional for avoidance of such preferential transaction.

Section 44 of Insolvency & Bankruptcy Code, 2016 specifies the orders that may be passed by the Adjudicating Authority in relation to the avoidance of a preferential

transaction. These orders are passed to reverse the effects of the preferential transaction and require the person to whom the preference is granted to pay back any gains he may have made as a result of such preference.

Section 44 lays down that the Adjudicating Authority, may on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(c) release or discharge (in whole or in part) of any security interest created by the corporate director;

(d) require any person to pay such sum in respect of benefits received by him from the corporate debtor, such sum to the liquidator or the resolution professional, as the Adjudicating Authority may direct;

(e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;

(f) direct for providing security or charge of any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and

(g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

Answer 4(d)

Winding up is a means by which the dissolution of a company is brought about. The main purpose of winding up of a company is to realize the assets and pay the company's debts expeditiously and fairly in accordance with the law. If any surplus is left, it is distributed among the members in accordance with their rights. The Companies Act, 2013 shall continue to govern winding up of companies on various grounds excluding inability to pay debts.

On promulgation of the Insolvency and Bankruptcy Code, 2016 the clause relating to ground of inability to pay their debts and provision relating to voluntary winding up of Companies have been deleted. Liquidation is defined as a process by which the life of a company is brought to an end in legal terms, after which it will be properly administered by a liquidator for the benefit of its creditors, members, and other stakeholders. The Insolvency and Bankruptcy Code also exclusively govern the insolvency resolution and liquidation of corporates.

Part II- Chapter III & Chapter V of the Insolvency and Bankruptcy Code, 2016 deals with Liquidation Process and Voluntary Liquidation of Corporate Persons respectively.

Question 5

(a) "The word 'Insolvency' and 'Bankruptcy' are generally used interchangeably in common parlance, but there is marked difference between the two." Explain. (3 marks)

(b) "The Insolvency and Bankruptcy Code, 2016 will prevail over the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002)." Examine the statement with the help of decided Case laws. (3 marks)

(c) What does the 'Insolvency Resolution Process Costs' mean under the Insolvency and Bankruptcy Code, 2016 ? Elaborate. (3 marks)

(d) "Insolvency codes are not applicable to financial services." Examine this statement. (3 marks)

(e) 'E-auction i.e. Auction on an online portal is fool proof method.' Discuss and describe the steps taken for auction under the Insolvency and Bankruptcy Code, 2016. (3 marks)

Answer 5(a)

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but here is a marked distinction between the two. Insolvency and Bankruptcy are not synonymous.

The term "insolvency" notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word "bankruptcy" is the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's assets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion.

Answer 5(b)

In the case of *Canara Bank* v. *Sri Chandramoulishvar Spg. Mills (P) Ltd.*, the NCLAT while referring to Supreme Court's verdict in Innoventive case has ruled that when two proceedings are initiated, one under the Insolvency and Bankruptcy Code, 2016 (the

Code) and the other under the SARFAESI Act, 2002, then the proceeding under the Code shall prevail.

Answer 5(c)

According to section 5(13) of the Insolvency and Bankruptcy Code, the "insolvency resolution process costs" means: -

(a) the amount of any interim finance and the costs incurred in raising such finance;

(b) the fees payable to any person acting as a resolution professional;

(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

(d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

(e) any other costs as may be specified by the Board.

Answer 5(d)

Section 227 of the Insolvency and Bankruptcy Code (IBC) empowers the Central Government, in consultation with the appropriate financial sector regulators, to notify financial service providers or categories of financial service providers about their insolvency and liquidation proceedings, which may be conducted under the IBC with such modifications and in such manner as may be prescribed.

Pursuant to its powers, Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019.

The Financial Service Provider Rules empower the government to commence the CIRP in terms of the IBC against financial service providers, in consultation with the appropriate financial sector regulator as prescribed by the law. In terms of the notification dated November 18, 2019, issued by the MCA, the Financial Service Provider Rules would apply to non-banking finance companies with a prescribed asset size with the RBI as the appropriate financial service regulator.

Answer 5(e)

According to Schedule I read with Regulation 33 of Insolvency & Bankruptcy Board of India (Liquidation Process) Regulations, 2016 -

1. Where assets are to be sold through auction, the Liquidator shall do so in the manner specified herein
2. Prepare strategy with the help of professional. The strategy may include -
    a. Release of Advertisement
    b. Information & Description of Assets
    c. Preparing a Notice of Sale and
    d. Liasoning with Agents

e. Terms and Conditions of Sale

f. Reserve Price, Earnest Money Deposit

g. Reserve Price shall be the value arrived in accordance with Regulation

h. It auction fails, the reserve price can be reduced upto 25% in subsequent auction

i. Public announcement

j. Liquidator shall provide all assistance for conduct of due diligence by interested buyers

k. Sale through an electronic auction as an online portal

l. For physical auction, the Liquidator shall obtain approval of NCLT

m. Highest bid at any time shall be visible to other bidders

n. The highest bidder shall be directed to provide balance amount within the time prescribed in Sale Notice

o. On receipt of payment, Liquidator shall execute certificate of sale or sale deed to transfer the assets and deliver the assets as per the terms of sale.

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

Question 6

(a) "The Insolvency Profession offers a challenging opportunity to the professional members as an Insolvency Professional plays a central role in the effective implementation of the Insolvency Law." Discuss this statement from the view that the success of an Insolvency/Bankruptcy case depends primarily on the quality of the professional attending it.

(b) "A person convicted of any offence punishable with imprisonment for five years under any Act specified in the Twelfth Schedule of the Insolvency and Bankruptcy Code, 2016 is not eligible to be a resolution applicant under the Insolvency and Bankruptcy Code, 2016 (the Code)." Do you agree ? Give at least five grounds which make a person not eligible to become a resolution applicant under the Code.

(c) Explain the measures provided to the secured creditor for taking possession and selling the secured asset in terms of Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002). (5 marks each)

OR (Alternate question to Q. No. 6)

Question 6A

(i) "UNCITRAL Model Law is not a law in its own right and has no force." Comment.

(ii) What are the provisions governing corporate debtor's eligibility to Pre-packaged Insolvency Resolution Process.

(iii) An application filed before National Company Law Tribunal (NCLT) under the Insolvency and Bankruptcy Code, 2016 can be withdrawn before admission but not after admission. Discuss. (5 marks each)

Answer 6(a)

The insolvency professional occupies a pivotal position and acts as an intermediary between the corporate debtor & creditor on one hand and the Adjudicating Authority on the other and functions under the watchful eyes of the Agency and the Insolvency Bankruptcy Board of India. This is a position of trust and confidence.

In terms of work, the insolvency professional has to carry a heavy work workload - secretarial, legal, finance, management of business of debtor, valuation and sale of assets etc., fall under the care of the insolvency professional. This calls for the insolvency professional to be more than adequate knowledge in the field of human relations, finance, taxation etc.

It goes without saying that the more endowed and equipped is the better are the chances of the resolution of the insolvency. An insolvency process cannot be imagined without the active involvement of an insolvency professional who is in many respects, the lynch pin of the same. He does play a central role and assumes many diverse functions like stakeholder management, business dynamics, strategic foresight, business resolution etc. It is therefore rightly said that the success of the insolvency/bankruptcy case primarily depends on the professional attending it.

Answer 6(b)

A person convicted of any offence punishable with imprisonment for five years under any Act specified in the Twelfth schedule of the Insolvency and Bankruptcy Code, 2016 is not eligible to be resolution applicant. The statement is true /correct.

Section 29A of the Insolvency and Bankruptcy Code, 2016 specified the persons not eligible to be resolution applicant. They are as under:

A person shall not be eligible to submit a resolution plan if he:

a. is an undischarged insolvent.

b. is a wilful defaulter in accordance with the guidelines of Reserve Bank of India.

c. at the time of submission of the resolution plan has an account, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949.

d. has been convicted of an offence punishable with imprisonment

   i. for two or more years under any Act Specified under the Twelfth schedule of the I & B Code

   ii. for seven years or more under any other law for the time being in force.

e. disqualified to act as director under the Companies Act, 2013.

f. is prohibited by SEBI from trading in securities.

g. has been a promoter or in the management or control of a corporate debtor in

which preferential transactions, undervalued transaction or fraudulent transaction has taken place.

h. has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution has been admitted.

i. is subject to any disability corresponding to stated above, under any law in a jurisdiction outside India.

j. has a connected person not eligible under clause (a) to (f) stated above.

Answer 6(c)

Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereto and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

(a) Take possession of such asset and documents relating thereto; and

(b) Forward such asset and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly formed by the authorized officer of the secured creditor, declaring that -

i. the aggregate amount of financial assistance granted and the total claim of the bank as on the date of filing the application;

ii. the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

iii. the borrower has created security interest over various properties giving the details of properties refer to in sub-clause (ii) above;

iv. the borrower has committed default in repayment of the financial assistance granted aggregating the specific amount;

v. consequent upon such default in repayment of the financial assistance in the account of the borrower has been classified as a nonperforming asset;

vi. affirming that the period of sixty days' notice as at the period of sixty days' notice as required by the provisions of sub-section (2) section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

vii. The objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

viii. The borrower has not made any repayment of the financial assistance in spite of the above notice and the authorized officer is, therefore, entitled to take

possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

ix. That the provisions of the Act and the rules made there under had been compiled with.

Answer 6A(i)

The UNCITRAL Model Law on Cross-Border Insolvency adopted in 1997 is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross border insolvency. Although the number of cross border insolvency cases has increased significantly, the adoption of national or international legal regimes equipped to address the issues raised by those cases have not kept pace.

The following circumstances necessitated the harmonization of legislations across nations with reference to cross border insolvency:

1. Continuing global expansion of trade and investment
2. Increasing evidence of cross border insolvency due to integration of trade across countries
3. National Insolvency Laws of different countries have by and large not kept pace with the trend.

Inadequate and inharmonious legal approach due to difference in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of assets of the insolvent debtors against dissipation. The UNCITRAL Model law has been adopted in as many as 44 countries and therefore forms part of international best practices of cross border insolvency.

Answer 6A(ii)

Corporate Debtors eligible for Prepacked Insolvency Resolution Professional (PPIRP) provided under Section 54-A of Insolvency & Bankruptcy Code, 2016. It states that:

(1) Application for initiation of PPIRP may be made by corporate debtors classified as micro, small and medium enterprises under sub section (1) of Section 7 of the MSME Development Act 2006.

(2) Without prejudice to sub section (1) above , an application for initiation of PPIRP may be made by Corporate Debtors who commits a default subject to the following conditions -

(a) It has not undergone PPIRP resolution or completed insolvency resolution process during period of three years preceding the initiation date

(b) It is not undergoing a corporate insolvency resolution process

(c) No order requirements related to liquidation is passed under section 33

(d) Eligible to submit resolution plan under section 29A

(e) The financial creditors of the Corporate Debtors not being its related parties

(f) Majority of the directors/partners of the Corporate Debtor shall file declaration that

— they will file application for PPIRP within 90 days

— that the process is not being initiated to defraud any person

— the name of Insolvency Professional to be appointed as a resolution professional.

(h) The members of corporate debtors have passed a special resolution approving the filing of an application for initiating PPIRP.

(3) Approval from creditors not less than 66% of value of financial debt.

(4) Prior to seeking approval from financial creditors, declaration by the majority of the directors or partners of the corporate debtor.

(5) Base resolution plan under Section 54K.

(6) Such other information and documents as may be specified.

Answer 6A(iii)

The statement is not correct. Application can be withdrawn before or after admission. It is possible that the compromise formula may be evolved either before or after application is filed before National Company Law Tribunal (NCLT).

Application can be withdrawn with the permission of adjudicating authority under Rule 8 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

According to Section 12A of Insolvency & Bankruptcy Code, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.

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RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

Time allowed : 3 hours *Maximum marks : 100*

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

Question 1

(a) *"Section 300 of Criminal Procedure Code (CrPC) contains adequate provisions to protect a person from being prosecuted for the same offence again". Comment with reference to a suitable case law.* *(5 marks)*

(b) *During the income-tax assessment of PR Ltd., the Assessing Officer suspected that the Company concealed incentive income received from its related parties. The Assessing Officer wanted to pursue this further and seized certain documents and records of the Company without obtaining permission from the Competent Authorities. It has been more than two months since the documents have been seized. Is the Assessing Officer empowered to do so ? Evaluate whether the act of the Assessing Officer is justified.* *(5 marks)*

(c) *Gaj, Managing Director of MGR Ltd. retired on March 31, 2021 upon attaining superannuation. The Company had allotted residential premises during his tenure, for his stay as part of his remuneration. At the time of full and final settlement of the amounts like gratuity, leave pay and other amounts payable to him, it was noticed that Gaj had let out the Company's leased premises to Val, his distant relative. The management decided to hold back the full and final settlement amount and was considering to file a complaint against Gaj for breach of trust and misuse of Company's property. Is the management's contention tenable ?* *(5 marks)*

(d) *The Board of Directors of All India Tyre Manufacturers Association Ltd., passed a resolution to the effect that no member who is indulging in activities detrimental to the interests of the Company be permitted to examine the records or obtain certified copies thereof. A member of the Company who is also a member of the rival association demands inspection of the register of members, minutes of general meetings and certified copies thereof. The Company refuses the inspection, on the basis of resolution passed by its Board of Directors. Examine the validity of refusal by the Company in the light of the provisions of the Companies Act, 2013 and the remedial action, if any, available to the aggrieved member.* *(5 marks)*

Answer 1(a)

Section 300 of Criminal Procedure Code, 1973(CrPC) contains adequate provisions to protect a person from being prosecuted for the same offence again. Section 300 of CrPC cannot be definitely interpreted to mean that if a person steals a property and gets

convicted of the offence of theft, he should not be prosecuted for the same offence if it arises out of another theft. Section 300 of CrPC is unique in the sense that it requires either a conviction or acquittal as a pre-requisite for the protection to be available. In simple words, the marginal note that "Person once convicted or acquitted not to be tried for same offence" conveys everything about the intention of the legislature.

Analysing the law laid down in section 300 of CrPC, the Kerala High Court in *Bharat Plywood and Timber Products Private Limited and Anor*. v. *Registrar of Companies and Anor*. It was held as follows:

"Section 300 of the CrPC provides that so long as an order of acquittal or conviction handed down by a Court of competent jurisdiction stands in respect of a person charged with committing an offence, that person cannot again be tried on the same facts for the offence for which he was earlier tried or for any other offence arising there from. Section 300 of CrPC becomes applicable when a Court of competent jurisdiction had already tried the accused and that he is either acquitted or convicted. It is also necessary to note that for the first part of sub- section (1) of Section 300 to apply, the prior prosecution and subsequent prosecution should be for the same offence".

The High Court held that the principle embodied in Section 300 of CrPC is as follows: "A person cannot be tried again for the offence for which he had already been tried or on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 221 (1) of CrPC or for which he might have been convicted under sub-section (2) of that section".

Answer 1(b)

According to Section 131(1) of the Income-tax Act, 1961(the said Act), the Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals), Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner and the Dispute Resolution Panel referred to in clause (a) of sub-section (15) of section 144C, for the purposes of the said Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely :

a) discovery and inspection;

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

c) compelling the production of books of account and other documents, and

d) issuing commissions.

Further, according to Section 131(3) of the said Act, subject to any rules made in this behalf, any authority referred to in section 131(1) or section 131(1A) or section 131(2) may impound and retain in its custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under the said Act.

According to Proviso to Section 131(3), an Assessing Officer or an Assistant Director or Deputy Director shall not :

a) impound any books of account or other documents without recording his reasons for so doing, or

b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner or Principal Director or Director therefor, as the case may be.

The Assessing Officer can impound the documents as per the provisions stated above but in the circumstances given in the question the assessing officer seized the documents and records of the Company without obtaining permission from competent authority for more two months.

Therefore, the act of assessing officer is not justified as the documents of PR Ltd., have been kept for more than 15 days without approval of the competent authorities.

Answer 1(c)

As per the provisions of Section 452(1) of the Companies Act, 2013(the Act), if any officer or employee of a company,

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

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs.5 Lakh.

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

Further, as per the proviso to section 452(2), which provides that the imprisonment of such officer or employee, as the case may be, shall not be ordered for wrongful possession or withholding of a dwelling unit, if the court is satisfied that the company has not paid to that officer or employee, as the case may be, any amount relating to:

a) provident fund, pension fund, gratuity fund or any other fund for the welfare of its officers or employees, maintained by the company;

b) compensation or liability for compensation under the Workmen's Compensation Act, 1923 in respect of death or disablement.

Accordingly, the company may file a complaint against Gaj under section 452(1) of the Act and he may be punished in accordance with section 452(2) along with proviso thereto.

Answer 1(d)

According to rule 14(1) of the Companies (Management and Administration) Rules, 2014 read with section 94(2) of the Companies Act, 2013, the registers and indices

maintained pursuant to section 88 of the Companies Act, 2013 and copies of returns prepared pursuant to section 92 of the Companies Act, 2013, shall be open for inspection during business hours, at such reasonable time on every working day as the board may decide, by any member, debenture holder, other security holder or beneficial owner without payment of fee and by any other person on payment of such fee as may be specified in the articles of association of the company but not exceeding fifty rupees for each inspection.

According to section 119(1) of the Companies Act, 2013, the books containing the minutes of the proceedings of any general meeting of a company or of a resolution passed by postal ballot, shall:

(a) be kept at the registered office of the company; and

(b) be open, during business hours, to the inspection by any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting, impose, so, however, that not less than two hours in each business day are allowed for inspection.

According to section 119(3) of the Act, if any inspection under section 119(1) is refused, or if any copy required under section 119(2) is not furnished within the time specified therein, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each such refusal or default, as the case may be.

According to section 119(4) of the Companies Act, 2013, in the case of any such refusal or default, NCLT may, without prejudice to any action being taken under section 119(3) of the Act, by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it.

In the circumstances given in the questions, the Board of Directors of All India Tyre Manufacturers Association (the company) passed a resolution which is not in line with the requirements of the above referred provisions of the Companies Act, 2013 as Section 94 does not allows placing any restrictions (except a fee) on inspection of Registers & Returns etc., and Section 119 clearly provides that reasonable restrictions on inspection of minutes can be placed only through the Articles or the resolution of the general meeting with a condition that not less than two hours in each business day are allowed for inspection. The company has also refused the inspection on the basis of above said Board Resolution.

Accordingly, the refusal of the company is not valid. The company is liable under section 119(3) of the Act and NCLT may by order, direct an immediate inspection of the minute-books or direct that the copy required shall forthwith be sent to the person requiring it. The aggrieved member may approach NCLT against the refusal.

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

Question 2

(a) SWR is a director of MI Real Estate Ltd. whose wife Van, also works in the Company as part of the management. Van has applied for housing loan of ₹35 lakhs for construction of a house. Can the Company grant such loan ? Evaluate

with reference to the provisions of the Companies Act, 2013 and also explain the penal provisions, if any.

(b) Singleton OP & Co., a One Person Company, passed certain resolutions on September 15, 2021 which were supposed to be filed with ROC in Form MGT-14, within the stipulated time. However, Singleton OP & Co., filed it with ROC on October 30, 2021. Comment if there has been any violation. If so, what are the penalties ?

(c) ''For conducting a Class Action Suit, publication of notice is a sine qua non.'' Explain the procedure of 'publication of notice' provided under the National Company Law Tribunal Rules, 2016.

(d) ''Though the concept of 'Whistle Blower' is a landmark for the Corporate Governance and Section 177 of the Companies Act, 2013 has specific mention about vigil mechanism, its implementation is not upto the mark in the Indian corporate context.'' Comment. (4 marks each)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Aru, the Director of Power Corporation Ltd., a Public Sector Undertaking has been accused of misappropriation and other offences. Further, criminal prosecution was also initiated against him. Aru contends that this prosecution is not legal as necessary approval of the authorities has not been obtained. In background of a decided case law, examine whether prosecution of Aru under CrPC, 1973 is appropriate.

(ii) Excellent & Co., Company Secretaries were the Secretarial Auditors of Opoco Ltd. During the secretarial audit, the Secretarial Auditor was verifying the board approvals and other documentation for the loan taken by the Company and they found that a fraud of ₹ 3.5 crores was committed against the Company, by its officers which was not observed by the Statutory Auditors of the Company. In this background, explain the duties and responsibilities of Secretarial Auditors under the Companies Act, 2013.

(iii) Explain the effect of Settlement Order on third party rights or other proceedings. Also, state the circumstances under which the Settlement Order is revoked.

(iv) Hoso Transport Company (HTC), is a transport corporation which is exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. During the current year, the corporation deducted the employees contribution from the wages payable to the employees. The amount deducted by the corporation was not remitted to the EPF Trust, maintained by the corporation, due to acute financial crunch. Evaluate whether this amounts to Criminal Breach of trust. (4 marks each)

Answer 2(a)

According to section 185(1) of the Companies Act, 2013(the Act), no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,-

(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(b) any firm in which any such director or relative is a partner.

According to section 2(77)(ii) of the Act, a wife is covered as a relative with respect to her husband.

According to section 185(4) of the Act, if any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of section 185 of the Act. The following are the penal provisions:

For Company

The company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.

For officer of the company who is in default

Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees

Other person to whom any loan is advanced or guarantee or security is given or provided

The director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

Accordingly, in the given circumstances the company should not grant Loan to Van. If the company grants the loan, the company, officer in default and other persons will be liable in accordance with the above mentioned penal provisions.

Answer 2(b)

Requirement of filling resolutions and agreements

According to section 117(1) of the Companies Act, 2013(the Act), a copy of every resolution or any agreement, in respect of matters specified in section 117(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.

Penal provisions

Section 117(2) of the Act provides the penal provisions in case of failure to file such resolution or agreements. The penal provisions is as under:

If any company fails to file the resolution or the agreement under section 117(1) of the Act before the expiry of the period specified therein, such company shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of two lakh rupees and every officer of the company who is in default including liquidator of the company, if any, shall be liable to a penalty of ten

thousand rupees and in case of continuing failure, with a further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of fifty thousand rupees.

Lesser penalties in case of One Person Companies and Small Companies

However, according to section 446B of the Companies Act, 2013, if penalty is payable for non-compliance by a One Person Company, small company, start-up company or Producer Company, or by any of its officer in default, or any other person in respect of such company, then such company, its officer in default or any other person, shall be liable to a penalty which shall not be more than one-half of the penalty subject to a maximum of two lakh rupees in case of a company and one lakh rupees in case of an officer who is in default or any other person.

According to given circumstances, Singleton OP & Co. (One Person Company) has made a delay of 15 Days in filling form MGT-14.

Hence, the penalty for Singleton OP & Co. is Rs. 5750/- and the penalty for every officer in default is Rs. 5750/-.

Answer 2(c)

The procedure of 'publication of notice' under Rule 87 of National Company Law Tribunal Rules, 2016 is as under:

(1) For the purposes of section 245(5)(a) of the Companies Act, 2013 (the Act), on the admission of an application filed under section 245(1), a public notice shall be issued by the National Company Law Tribunal(NCLT) as per Form No NCLT-13 to all the members of the class by-

   (a) publishing the same within seven days of admission of the Application by NCLT at least once in a vernacular newspaper in the principal vernacular language of the State in which the registered office of the company is situated and at least once in English in an English newspaper that is in circulation in that State;

   (b) requiring the company to place the public notice on the website of such company, if any, in addition to publication of such public notice in newspaper under sub-clause (a) mentioned above:

   Provided that such notice shall also be placed on the websites of NCLT and the Ministry of Corporate Affairs, the concerned Registrar of Companies and in respect of a listed company on the website of the concerned stock exchange where the company has any of its securities listed, until the application is disposed of by NCLT.

(2) The date of issue of the newspaper in which such notice appears shall be considered as the date of serving the public notice to all the members of the class.

(3) The public notice shall, *inter alia*, contain the following-

   (a) name of the lead applicant;

   (b) brief particulars of the grounds of application;

(c) relief sought by such application;

(d) statement to the effect that application has been made by the requisite number of members/ depositors;

(e) statement to the effect that the application has been admitted by NCLT after considering the matters stated under section 245(4) and these rules and it is satisfied that the application may be admitted;

(f) date and time of the hearing of the said application;

(g) time within which any representation may be filed with NCLT on the application;

(h) the details of the admission of the application and the date by which the form of opt out has to be completed and sent as per Form NCLT-1 and shall be accompanied with such documents as are mentioned in Annexure 'B', and such other particulars as NCLT thinks fit.

(4) The cost or expenses connected with the publication of the public notice under this rule shall be borne by the applicant and shall be defrayed by the company or any other person responsible for any oppressive act in case order is passed in favour of the applicant.

Answer 2(d)

Section 177(9) of the Companies Act, 2013(the Act) required that every listed company or prescribed class of companies, shall establish a vigil mechanism for directors and employees to report genuine concerns. Further, rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 prescribes the following class of companies:

(a) the Companies which accept deposits from the public;

(b) the Companies which have borrowed money from banks and public financial institutions in excess of fifty crore rupees.

Regulation 4(2)(d) of the SEBI(Listing Obligations and Disclosure Requirements) Regulations, 2015(LODR Regulations) requires that the listed entity shall devise an effective vigil mechanism/whistle blower policy enabling stakeholders, including individual employees and their representative bodies, to freely communicate their concerns about illegal or unethical practices.

Further, regulation 22 of LODR Regulations requires as under:

(1) The listed entity shall formulate a vigil mechanism/whistle blower policy for directors and employees to report genuine concerns.

(2) The vigil mechanism shall provide for adequate safeguards against victimization of director(s) or employee(s) or any other person who avail the mechanism and also provide for direct access to the chairperson of the audit committee in appropriate or exceptional cases.

The fact that the Act expressly requires that whistle-blowers be provided direct access to the Chairman of the Audit Committee and for adequate safeguards to avoid victimisation of the whistle-blowers, further indicates the importance of the whistle blowers mechanism.

The ineffective protection mechanisms for whistle-blowers might result in creating an atmosphere of fear for whistle-blowers. But, it still does not stop some crusaders from going ahead and blowing off the lid of corruption. However, in some organisations the whistle Blower Mechanisms is followed just for compliance and not in spirit.

The main reason is that there is the general fear among the employees, i.e., they may get adverse consequences if they become the root cause.

Therefore, it can be said that protection to the whistle-blowers, is essential from a corporate governance perspective and effective implementation of whistle blower mechanism will create high chances of early fraud detections.

Answer 2A(i)

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

The Supreme Court in *Mohd. Hadi Raja and Ors.* v. *State of Bihar and Anr. [1998] 93 Comp Cas362 (SC)* observed that the common question of law that arises in all these matters is whether sanction under section 197 of CrPC is required for prosecuting officers of public sector undertakings or Government companies. The Supreme Court held that in order to invite the requirement for sanction as contemplated under section 197 of CrPC, the accused should be such a public servant who cannot be removed from his office except by or with the sanction of the Government and the offence must have been committed while such public servant had been acting or purporting to act in the discharge of his official duties.

The Supreme Court also referred to its own decision in *S.S. Dhanoa* v. *Municipal Corporation of Delhi (1981) 3 SCC +38; AIR 1981 SC 1395* that-

"it has been contended that sanction contemplated under Section 197 of CrPC must be restricted only in respect of a judge or a Magistrate or a public servant who is directly employed by the Government and not by any instrumentality or agency of the Government."

Public sector undertakings, being juristic persons with a distinct legal entity stand on a different footing than the Government departments. It will not be just and proper to bring such persons within the ambit of section 197 by liberally construing the provisions of section 197. Such exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a court of law but will amount to legislation by the court.

Therefore, the Supreme Court held that the protection by way of sanction under section 197 of CrPC is not applicable to officers of Government companies or public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the Government.

The Supreme Court of India has further reiterated the above position in a recent case, *B.S.N.L.* vs. *Pramod V. Sawant (2019)*

In view of the above, it can be concluded that prosecution of Aru is appropriate as the Supreme Court held that the protection by way of sanction under section 197 of CrPC is

not applicable to officers of Government companies or public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution.

Answer 2A(ii)

Section 143 of the Companies Act, 2013 (the Act) confers certain powers on the auditors including Secretarial Auditors as well as the Cost Auditors of the company and it casts certain duties as well on them. Section 143 (12) of the Act carries a non-obstanate clause casting a duty on the auditors of the company including Secretarial Auditor to report to the central government an offence of fraud committed by the company or by its officers or employees.

Rule 13 of the Companies (Audit and Auditors) Rules, 2014 contains the operational procedures for reporting of fraud as mandated in Section 143(12) of the Act. Similar obligations are cast upon the company secretary in practice (secretarial auditor) and the cost accountant in practice (cost auditor) also.

Accordingly, the following are the obligations and duties of the Secretarial Auditors in the given case under Companies Act, 2013 as provided under 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 officers or employees, the auditor shall report the matter to the Central Government as under:

- the auditor shall report the matter to the Board of Directors 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.
- on receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board of Directors 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;
- 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;
- 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 e-mail in confirmation of the same;
- the report shall be in the form of a statement as specified in Form ADT-4;
- as per Sec 143(15), any non-compliance of this duty by any auditor, cost accountant, or company secretary in practice, attracts penalty, which shall be

  (a) in case of a listed company five lakh rupees; and

(b) in case of any other company one lakh rupees.

Answer 2A(iii)

Regulation 27 of the SEBI (Settlement Proceedings) Regulations, 2018 (the said regulations) provides for Effect of settlement order on third party rights or other proceedings. According to regulation 27:

(1) A settlement order under the said regulations shall not be admissible as evidence in any other proceeding relating to an alleged default not covered under the settlement order nor affect the right of third parties arising out of the alleged default.

(2) Where any applicant who obtains a settlement order is also noticee along with any other person in any civil and administrative proceeding, the Adjudicating Officer or the Securities Exchange Board of India (SEBI) while disposing proceedings against such other person may make necessary observations in respect of the applicant in so far as is necessary to prove the act of another:

Provided that, unless the settlement order is revoked, such observations shall qua the applicant be subject to the settlement order obtained by the applicant.

(3) Where any person has obtained a settlement order, which contains observations in respect of any other person for the commission of an alleged default, such an order shall not in itself be admissible as evidence against such other person.

Further, regulation 28 of SEBI (Settlement Proceedings) Regulations, 2018(the said regulations) provides the provisions related to Revocation of the settlement order. According to regulation 28:

(1) If the applicant fails to comply with the settlement order or at any time after the settlement order is passed, it comes to the notice of the SEBI that the applicant has not made full and true disclosure or has violated the undertakings or waivers, settlement order shall stand revoked and withdrawn and SEBI shall restore or initiate the proceedings, with respect to which the settlement order was passed.

(2) Whenever any settlement order is revoked, no amount paid under these regulations shall be refunded.

Answer 2A(iv)

Section 405 of the Indian Penal Code, 1860(IPC) provides the definition of Criminal Breach of Trust. Explanation 1 to section 405 of IPC provides that a person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 or not who deducts the employee's contribution from the wages payable to the employee for the credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Moreover, acute financial crunch is not made a valid reason for non-remittance of the employees' contribution.

In view of the above, it can be concluded that there is a Criminal Breach of Trust on the part of Haso Transport Company.

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

Question 3

(a) Explain whether the following offences are compoundable, if yes, by whom ?

(i) Failure to disclose director's interest and participation by interested director.

(ii) Intentionally giving false evidence under Section 449 of the Companies Act, 2013.

(iii) Failure to maintain proper books of accounts before winding up.

(iv) Not publishing the order of confirmation of reduction in share capital by the Tribunal.

(b) The Joint Commissioner of CGST authorised the Assistant Commissioner for search and seizure of certain goods and relevant documents available at the premises of SNL Ltd., where the goods were stored. Due to COVID-19 pandemic situation, the Assistant Commissioner could not inspect the premises on the scheduled date. Explain the further course of action available to the Officer under the CGST Act, 2017.

(c) Sun, is the Company Secretary of S Ltd., a Company listed on Bombay Stock Exchange. During one of the Stakeholder Committees meetings, SKR, one of the Committee members raised a query on whether the Company can allow the transfer of partly paid up shares. There were quite some deliberations in the meeting around the transfer of shares. One such question which arose was whether Ek Private Ltd, one of the group companies, refuse the registration of any transfer or transmission of its securities, considering the fact that it is a private limited company. Explain briefly the provisions relating to transfer of partly paid up shares and the 'refusal notice' in connection with registration of transfer/transmission of Securities in a private limited company under the Companies Act, 2013.

(d) Explain 'Execution of detention orders' and 'Revocation of detention orders' under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA,1974). (4 marks each)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on :

(i) Offences triable by Special Courts.

(ii) Rejection of Application under Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018.

(iii) Rule of Opt-out.

(iv) Economic Offences Wing (EOW) under DSPE Act, 1946 (4 marks each)

Answer 3(a)

(i) Failure to disclose director's interest and participation by interested director

According to section 184(4) of the Companies Act, 2013(the Act), if a director of the company contravenes the provisions of section 184(1) and 184(2) of the Act i.e. related to Failure to disclose director's interest, such director shall be liable to a penalty of one lakh rupees. The offence mentioned above is punishable under section 184(4) of the Act.

In view of Sec 441(1)(b) of the Act the above offence is compoundable by Regional Director or any officer authorised by the Central Government, as the punishment does not involve imprisonment.

(ii) Intentionally giving false evidence under section 449 of the Companies Act, 2013

If any person intentionally gives false evidence within the purview of section 449 of the Companies Act, 2013(the Act), he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and with fine which may extend to ten lakh rupees. The offence given above is punishable under section 449 of the Act.

In view of Sec 441 of the Act, the offence is non-compoundable as the offence is punishable with imprisonment as well.

(iii) Failure to maintain proper books of accounts before winding up

According to section 338 of the Companies Act, 2013, where a company is being wound up, if it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up, or the period between the incorporation of the company and the commencement of the winding up, whichever is shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable, be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

In view of Sec 441 the above, the offence is non-compoundable as the punishment involves imprisonment as well.

(iv) Not publishing the order of confirmation of reduction in share capital by the tribunal

According to section 66(4) of the Companies Act, 2013 (the Act) the order of confirmation of the reduction of share capital by the Tribunal under section 66(3) of the Act shall be published by the company in such manner as the Tribunal may direct.

The punishment for above mentioned offence which was earlier mentioned in Sec 66(11) is now omitted by Companies (Amendment) Act, 2020 w.e.f. 21st December, 2020.

According to section 450 of the Act, where no penalty or punishment is provided elsewhere in the Act, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.

In view of section 441 of the Act, the offence is compoundable by Regional Director or any officer authorised by the Central Government as the punishment doesn't involves imprisonment.

Answer 3(b)

According to Section 67(2) of the Central Goods and Services Tax Act, 2017(the Act), where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under section 67(1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under the Act, are secreted in any place, he may authorize in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things.

According to first proviso to Section 67(2) of the Act, it has been provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

Accordingly, under the given circumstances, the Assistant Commissioner may serve an order on the owner or the custodian of the goods that he shall not remove, part with, or otherwise deal with the goods except with his prior permission.

Answer 3(c)

Transfer in case of partly paid shares

Section 56(3) of the Companies Act, 2013 provides that where an application is made by the transferor alone and relates to partly paid shares, the transfer shall not be registered, unless the company gives the notice of the application in prescribed manner to the transferee and the transferee gives no objection to the transfer within two weeks from the receipt of notice.

Rule 11 of the Companies (Share Capital and Debenture) Rules, 2014 provides that a company shall not register a transfer of partly paid shares, unless the company has given a notice in Form No. SH.5 to the transferee and the transferee has given no objection to the transfer within two weeks from the date of receipt of notice.

Refusal notice in connection with registration of transfer/transmission of securities in a private limited company

Section 58(1) of Companies Act, 2013 provides that if a private limited company refuses, whether in pursuance of any power of the company under its articles or otherwise,

to register the transfer of, or the transmission by operation of law of the right to, any securities or interest of a member in the company, it shall within a period of thirty days from the date on which the instrument of transfer, or the intimation of such transmission, was delivered to the company, send notice of the refusal to the transferor and the transferee or to the person giving intimation of such transmission, giving reasons for such refusal.

According to section 58(3) the transferee may appeal to NCLT against the refusal within a period of thirty days from the date of receipt of the notice or in case no notice has been sent by the company, within a period of sixty days from the date on which the instrument of transfer or the intimation of transmission, was delivered to the company.

Answer 3(d)

Section 4 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974(COFEPOSA, 1974) stipulates that a detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1973.

Section 11(1) of COFEPOSA, 1974 states that without prejudice to the provisions of section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified-

(a) notwithstanding that the order has been made by an officer of a State Government, by that State Government or by the Central Government;

(b) notwithstanding that the order has been made by an officer of the Central Government or by a State Government, by the Central Government.

Further, section 11(2) of COFEPOSA, 1974 provides that the revocation of a detention order shall not bar the making of another detention order under section 3 against the same person.

Answer 3A(i)

Offences triable by Special Courts under the Companies Act, 2013

Section 436 of the Companies Act, 2013(the Companies Act) provides the provisions related to Offences Triable by Special Courts. The relevant provision provides as under:

According to section 436(1) of the Companies Act, 2013, notwithstanding anything contained in the Code of Criminal Procedure, 1973(CrPC)

(a) all offences specified section 435(1) of the Companies Act shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

(b) where a person accused of, or suspected of the commission of, an offence under the Act is forwarded to a Magistrate under section 167(2) or 167(2A) of CrPC such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such

Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

It is further provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of CrpC in relation to an accused person who has been forwarded to him under that section; and

(d) a Special Court may, upon perusal of the police report of the facts constituting an offence under the Companies Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

According to section 436(2) of the Companies Act, when trying an offence under the Companies Act, a Special Court may also try an offence other than an offence under the Companies Act with which the accused may, under the CrPC be charged at the same trial.

According to section 436(3) of the Companies Act, notwithstanding anything contained CrPC, the Special Court may, if it thinks fit, try in a summary way any offence under the Companies which is punishable with imprisonment for a term not exceeding three years.

Offences triable by Prevention of Money-laundering Act, 2002

Section 44 of the Prevention of Money-laundering Act, 2002(PMLA) provides the provisions related to Offences Triable by Special Courts.The relevant provision provides as under.

According to section 44(1) of PMLA, notwithstanding anything contained in the Code of Criminal Procedure, 1973(CrPC) –

(a) an offence punishable under section 4 of PMLA and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

It has been provided that the Special Court, trying a scheduled offence before the commencement of PMLA, shall continue to try such scheduled offence; or

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under PMLA take cognizance of offence under section 3, without the accused being committed to it for trial.

It has been provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under PMLA, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of CrPC as it applies to a trial before a Court of Session.

According to section 44(2) of PMLA, nothing contained in section 44 of PMLA shall be deemed to affect the special powers of the High Court regarding bail under section 439 of CrPC and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under section 43 of PMLA.

Answer 3A(ii)

The provisions related to rejection of application under Securities Exchange Board of India (Settlement Proceedings) Regulations, 2018 (the said regulations) is provided under Regulation 6 of the said regulations. The provisions of the regulation 6 are as under:

Regulation 6(1) of the said regulations provides that an application may at any time be rejected on the following grounds:

a. Where the applicant refuses to receive or respond to the communications sent by the Securities Exchange Board of India (SEBI);

b. Where the applicant does not submit or delays the submission of information, document, etc., as called for by the SEBI;

c. Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;

d. Where the applicant violates in any manner the undertaking and waivers as provided in Part-C of the Schedule-I;

e. Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers.

Regulations 6(2) of the said regulations provides that the rejection under regulation 6(1) shall be communicated to the applicant:

Provided that the applicant shall continue to be bound by the waivers given in respect of limitation or laches in respect of the initiation or continuation or restoration of any legal proceeding and the waivers given under sub-paras (d), (e), (f) and (g) of para 12 of the undertaking and waivers as provided in Part-C of the Schedule-I.

Alternate Answer 3A(ii)

The regulation related to rejection of application under Securities Exchange Board of India (Settlement Proceedings) Regulations, 2018 (the said regulations) is provided under regulation 6 of the said regulations. The provisions of the regulation 6 are as under:

Regulation 6(1) of the said regulations provides that an application may also at any time be rejected on the following grounds:

a. Where the applicant refuses to receive or respond to the communications sent by the Securities Exchange Board of India (SEBI);

b. Where the applicant does not submit or delays the submission of information, document, Revised Settlement Terms etc., as called for by the SEBI;

c. Where the applicant who is required to appear, does not appear before the Internal Committee on more than one occasion;

d. Where the applicant violates in any manner the undertaking and waivers as provided in Part-C of the Schedule-I;

e. Where the applicant does not remit the settlement amount within the period specified in clause (a) of sub-regulation (2) of regulation 15 and/or does not abide by the undertaking and waivers.

f. Where the applicant fails to comply with the condition precedent(s) for settlement within the time as required by the Internal Committee.

Regulations 6(2) of the said regulations provides that the rejection under regulation 6(1) shall be communicated to the applicant:

Provided that the applicant shall continue to be bound by the waivers given in respect of limitation or laches in respect of the initiation or continuation or restoration of any legal proceeding and the waivers given under sub-paras (d), (e), (f) and (g) of para 12 of the undertaking and waivers as provided in Part-C of the Schedule-I.

Answer 3A(iii)

Rule 86 of the National Company Law Tribunal Rules, 2016 (NCLT Rules, 2016) provides for Opt-Out as under:

(1) A member of a class action under section 245 of the Companies Act, 2013(the Act) is entitled to opt-out of the proceedings at any time after the institution of the class action, with the permission of the NCLT, as per Form No. NCLT - 1.

(2) For the purposes of this rule, a class member who receives a notice under section 245(5)(a) of the Act shall be deemed to be the member of a class, unless he expressly opts out of the proceedings, as per the requirements of the notice issued by the NCLT in accordance with rule 38 of NCLT Rules, 2016.

(3) A class member opting out shall not be precluded from pursuing a claim against the company on an individual basis under any other law, where a remedy may be available, subject to any conditions imposed by the NCLT.

Answer 3A(iv)

Economic Offence Wings are specialized wings of state police to handle investigation of economic offences. In many state police department, the Economic Offence Wing is part of its Criminal Investigation Department (CID). Cyber Cell usually part of economic offence wing in many states.

The purpose of the Economic Offences Wing (EOW) is to prevent, detect and investigate cases of economic, cyber and Intellectual Property related crimes to ensure prompt justice and desired relief to the victims.

Economic and financial offences cover fraud, forgery and counterfeiting, offences against the legislation governing cheques (in particular forgery or use of stolen cheques),

forgery or use of credit cards, undeclared employment, and offences against companies (such as misuse of company assets).

Being a specialized wing of the state Police to deal with important cases concerning multi-level-marketing frauds, share market frauds, multi-victim frauds, foreign trade related frauds, land and building rackets, offences of forgery, cheating by individuals and Non-Banking Financial Companies, cyber-crimes, offences related to Intellectual Property Rights and such like cases

Question 4

(a) Explain the factors which Competition Commission of India (CCI) will take into account to determine whether an agreement has any appreciable adverse effect on competition in the market. (4 marks)

(b) The Articles of Association of Vraj Ltd. inter alia includes a provision "For obtaining a loan of more than rupees five crore from any bank, special resolution is necessary". Due to business emergencies, on one occasion the Company obtained a bank loan of ₹5.5 crore from a Scheduled Bank by passing an ordinary resolution and completing the necessary documentation. Examine the validity of the act. (4 marks)

(c) "D & O policies can take different forms, depending on the nature of the organization and the risks it faces, so it's best to seek out an insurance company with deep experience in this specialized field. The policies are generally purchased by the organization to cover a group of individuals rather than by the individuals themselves. Even the non-profit organizations may also purchase D & O insurance policy for a better protection". Comment. (4 marks)

(d) "The Company's management is taken care of by the Board of Directors and the directors are expected to perform in the best interests of the company as they are in a fiduciary position. Even a single director's intentions to gain an undue advantage out of stakeholders' money can result in fraud." Will fraud by just one director make the other directors liable ? (4 marks)

Answer 4(a)

Section 19(3) of the Competition Act, 2002(the Act) enumerates the factors which the Competition Commission of India (Commission) will take into account to determine whether an agreement has any appreciable adverse effect on competition.

According to Section 19(3) of the Act, the Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3 of the Act, have due regard to all or any of the following factors, namely:

a. creation of barriers to new entrants in the market;

b. driving existing competitors out of the market;

c. foreclosure of competition by hindering entry into the market;

d. accrual of benefits to consumers;

e. improvements in production or distribution of goods or provision of services; or

f. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Accordingly, CCI will consider the above factors to determine the existence of appreciable adverse effect on competition in the market.

Answer 4(b)

As per section 114 (2) of the Companies Act, 2013(the Companies Act), a resolution shall be a special resolution when—

(a) the intention to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(b) the notice required under the Act has been duly given; and

(c) the votes cast in favour of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, by members who, being entitled so to do, vote in person or by proxy or by postal ballot, are required to be not less than three times the number of the votes, if any, cast against the resolution by members so entitled and voting.

Assuming that the company was not required to pass any special resolution under section 180(1)(c) of the Act, for availing the said loan, we can say that the Articles of Association(AoA) of the Company is entrenched to the effect of providing a condition (stricter than what the Act stipulates)for availing the loan and accordingly, any action taken by the Company outside the stipulated requirements of the AoA shall be considered to be ultra vires the AoA. Such a stipulation even not being in contradiction of the Companies Act, 2013 will also prevail and be applicable pursuant to Sec 6 of the Act.

Therefore, the act of the Company is not valid.

Answer 4(c)

It is a misnomer to believe that only large non-profit organizations need Directors' & Officers (D&O) insurance. Directors and officers of every-sized non-profit organization have meaningful exposure to personal liability. The liability for directors and officers of small corporations is at least as high as that of for-profit corporations.

Large numbers of directors and officers for non-profit organizations lack experience. Often times, they may also lack sufficient knowledge of their legal duties and responsibilities regarding the non-profit they serve. Directors and officers of non-profit organizations who do have knowledge or experience sometimes take advantage of the less formal approach of non-profits and fail to take the same business approaches to decision-making as they would when working for a for-profit corporation. Non-profit boards that fail to protect their organizations with a D&O insurance policy may find that the cost of just one claim is far larger than the cost of any insurance premiums they would have paid, if they had purchased a D&O insurance policy.

In the context of various shareholder disputes, the liabilities under the Companies Act, 2013 (the Act) could also increase pressure on defaulting directors, nominating shareholders, or promoters. In addition, while resignation may protect a director from

subsequent defaults, an erstwhile director may still continue to be liable for any defaults that took place during his or her tenure. The penal provisions of the Act may be cause of concern about the role, accountability, and responsibility of non-executive, nominee, and independent directors, who could be caught on the wrong side of the company's disputes.

D&O liability insurance applies to anyone who serves as a director or an officer of a for-profit business or non-profit organization. A directors and officers liability policy insures against personal losses, and it can also help reimburse a business or non-profit for the legal fees or other costs incurred in defending such individuals against a lawsuit.

D&O insurance will not prevent claims from occurring; however, it does mitigate the high costs associated with defending claims. Lawsuits and potential claims may originate with vendors, donors, competitors, employees, government, regulators or others.

Hence, regardless of the organization's size and board experience, all non-profit organizations need to purchase D&O insurance protection.

Answer 4(d)

Section 2(60) of the Companies Act, 2013 implicates 'every director' in respect of a contravention of the provisions of the Act (including Section 447) who consented to the fraud or is aware of the contravention can become covered within the term 'officer who is in default'.

According to section 2(60)(iv) of the Act, "Officer who is in default include" any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default.

The method of awareness is also provided for - this must be either by participating in board proceedings without objecting to the same or even by virtue of receipt of proceedings of the board.

Secretarial Standard on Meetings of the Board of Directors requires that the draft minutes need to be circulated to all the members of the board of directors, not only those who attended the meeting. Thus the proceedings of the Board can be available even to those who did not attend the meeting and they can therefore be considered to be aware of a contravention.

Board papers circulated over a period of time, if efficiently compiled, might be instrumental in throwing up a red flag for a director, and might result in an independent either recording his dissent or in extreme cases, resignation.

Hence in view of above, it can be said that fraud by one director may make the other directors liable, if such acts of omission or commission by a company had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Question 5

(a) ''Crisis management amounts to controlling of an unruly horse which, if not be properly bridled, it carries its rider where he knows not. Even if it is an apology,

it has to be carefully crafted.'' Explain the statement with the help of any two suitable cases.

(b) HGV, is a Senior Partner in Supreme & Co. LLP, Practising Company Secretaries. The firm has good repute in handling corporate related matters including investigations and other representations. PRO, Company Secretary of Mano Lifesciences Ltd. is a professional acquaintance of HGV and has reached out to him for advice on investigation initiated on the Company. PRO has requested HGV to meet the Board of Directors of Mano Lifesciences Ltd. and make a presentation on various statutory aspects involved in investigation. Prepare a detailed note, explaining the provisions of investigation into affairs of a Company under Section 212 of the Companies Act, 2013. (8 marks each)

Answer 5(a)

Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization or its stakeholders.

Any business, large or small, may run into problems that may negatively impact its normal course of operations. Crises such as fire, death of a key managerial personnel, terrorist attack, data breach, natural disasters, management disputes, litigations, and/or regulatory actions can lead to tangible and intangible costs to a company in terms of lost sales, customers, and a decrease in the firm's net income.

Crisis can either be self-inflicted or caused by external forces. Examples of external forces that could affect an organization's operations include natural disasters, security breaches, or false information about a company that hurts its reputation. Therefore, crisis management is tantamount to controlling of an unruly horse which, if not be properly bridled, it carries its rider where he knows not.

The statement can be explained with the help of examples mentioned below:

1. The United Airlines PR Crisis

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

When United realized that they could not get out of the scandal, the CEO Oscar Munoz commented on the situation. He apologized for "having to re-accommodate the customer.

The statement of CEO Oscar Munoz is as under:

"This is an upsetting event to all of us here at United. I apologize for having to re-

accommodate these customers. Our team is moving with a sense of urgency to work with the authorities and conduct our own detailed review of what happened.

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

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

What's more, United lost more than $800 Million in revenue. United was not able to manage the crisis by themselves, and they had to hire a professional crisis management team. The CEO apologized, but his words caused even more indignation than before. The instance that occurred on the plane was quite traumatic to those that witnessed it personally and those that saw it on video. It deserved a heartfelt response, but the tweet showed a lack of understanding and accountability. In United's case, the CEO's apology sounded as if he did not actually care, and their audience immediately felt it.

Therefore, it is clear that online apologies have to be carefully crafted. Think of the emotions that need to be addressed and consider your words carefully. An apology should not sound like a press-release. When a brand makes a mistake they need to own up to it and let the public know they are going to address it and ensure it never happens again.

2. Facebook's silence about its data breach

The social media giant reportedly chose to stay silent even though it had known for three years that Cambridge Analytica - the consulting firm hired by President Donald Trump's 2016 campaign – improperly accessed information on millions of people. Since then, the company has racked up misstep after misstep. From the failure to issue an immediate statement from Chief Executive Officer Mark Zuckerberg when Facebook finally admitted what happened to hiring a shady opposition research firm to investigate its critics. Facebook was the subject of more trouble, when the New York Times reported that it shared even more user data with outside companies than previously acknowledged.

Moral of the story: When the news broke, disclosure is the most effective strategy in a crisis because the truth always emerges. Companies and even the government need to explain what happened on their own terms and regain confidence by demonstrating that they have learned a lesson and are taking immediate steps to change course.

3. Lockheed Martin asks people to share photos of its products

In August, the world's largest weapons maker tweeted: “Do you have an amazing photo of one of our products? Tag us in your pic and we may feature it during our upcoming #WorldPhotoDay celebration on Aug. 19!" People quickly responded with pictures showing the impact of its weapons, including an image of UNICEF backpacks belonging to children killed in Yemen with a bomb made by the company. Lockheed Martin later deleted the tweet.

Moral of the story: Although it's important to engage in conversations on social media, first be aware of how people generally feel about your company, products and policies. Carefully consider possible responses before asking for content.

4. Chipotle

In July 2015, the E coli outbreaks started for Chipotle and lasted through January 2016. It began in the Northwest and spread across dozens of states. The result was an 82% decrease in profits over the course of a year and Chipotle stock down 15%. 2016 also saw an executive arrested for cocaine possession and 10,000 workers suing the company for unpaid compensation.

Chipotle's Crisis Management

The burrito company's crisis management strategy has been a long and often criticized one. In the midst of the 2015 outbreaks, co-CEO Monty Moran spoke at an industry conference for investors saying:

It's been fueled by the sort of unusual and "even unorthodox way the CDC has chosen to announce cases related to the original outbreak in the Northwest," he said. And: "Because the media likes to write sensational headlines, you'll probably see, you know, when somebody sneezes … 'Ah, it's E. coli from Chipotle' for a little bit of time.

While truthful, as journalists at Fortune pointed out, "this is not how you win back the world's confidence." A few days later, Chipotle founder Steve Ellis appeared on the today show apologizing to consumers and promising that "The procedures we're putting in place today are so above industry norms that we are going to be the safest place to eat." It was a bold promise, and one that made some PR professionals nervous for the already queasy company, but Chipotle's stock made a 5% climb after Ellis' speech.

In 2017, Moran stepped down as co-CEO, a move that was heralded by many. However, finger pointing, wishywashy answers and apologies, and a lack of company representation at the 125 food safety cases that were settled in 2016 has some feeling that the brand could have done a better, more authentic job of recovering its image.

Answer 5(b)

The provision of investigation under section 212 of the Companies Act, 2013 (the Act) is in addition of the provision of investigation under Section 210 of the Act. Accordingly, the Central Government may by order assign investigation into the affairs of a company-

(a) on receipt of a report of the Registrar or inspector under section 208:

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office (SFIO) and its Director,

may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

According to section 212(2) of the Act, where any case has been assigned by the Central Government to the SFIO for investigation under the Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under the Act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under the Act to SFIO.

According to section 212(3) of the Act, where the investigation into the affairs of a company has been assigned by the Central Government to SFIO, it shall conduct the investigation in the manner and follow the procedure provided chapter XIV of the Act relating to Inspection, Inquiry and Investigation; and submit its report to the Central Government within such period as may be specified in the order.

According to section 212(4) of the Act, the Director, SFIO shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217 of the Act.

According to section 212(5) of the Act, 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.

According to section 212(6) of the Act, notwithstanding anything in the Code of Criminal Procedure, 1973 (CrPC) the provisions of offence covered under section 447 of the Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

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

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

It has been provided that a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs:

It has further been provided further that the Special Court shall not take cognizance of any offence referred to this sub-section except upon a complaint in writing made by—

(i) the Director, SFIO; or

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

According to section 212(7) of the Act, the limitation on granting of bail specified in section 212 (6) of the Act is in addition to the limitations under CrPC or any other law for the time being in force on granting of bail.

According to section 212(8) of the Act, if any officer not below the rank of Assistant

Director of SFIO authorised by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under section 447, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

According to section 212(9) of the Act, the officer authorised under section 212(8) of the Act shall, immediately after arrest of such person, forward a copy of the order, along with the material in his possession, to SFIO in a sealed envelope, in prescribed manner and SFIO shall keep such order and material for such period as may be prescribed.

According to section 212(10) of the Act, every person arrested under section 212(8) of the Act shall within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, having jurisdiction:

It has been Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court or Magistrate's court.

According to section 212(11) of the Act the Central Government if so directs, SFIO shall submit an interim report to the Central Government.

According to section 212(12) of Act on completion of the investigation, SFIO shall submit the investigation report to the Central Government.

According to section 212(13) of the Act, notwithstanding anything contained the Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

According to section 212(14) of the Act, on receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct 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.

According to section 212(14A) of the Act, where the report under section 212(11) or 212(12) of the Act, states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before National Company Law Tribunal(NCLT) for appropriate orders with regard to disgorgement of such asset, property or cash and also for holding such director, key managerial personnel, other officer or any other person liable personally without any limitation of liability.

According to section 212(15) of the Act, notwithstanding anything contained the Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of CrPC.

According to section 212(16) of the Act, notwithstanding anything contained in the Act, any investigation or other action taken or initiated by SFIO under the provisions of

the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed.

According to section 212 (17),

(a) In case Serious Fraud Investigation Office has been investigating any offence under the Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to SFIO;

(b) SFIO shall share any information or documents available with it, with any investigating agency, State Government, police authority or Income Tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.

Question 6

(a) "Mediator or conciliator facilitates in arriving a decision to resolve the dispute and that he shall not and cannot impose any settlement." In background of this statement, explain who is responsible to take a decision under Companies (Mediation and Conciliation) Rules, 2016 and what is the time limit for completion of mediation or conciliation. (4 marks)

(b) There have been internal family issues between the directors of Sak Ltd., who also hold the majority shares in the Company. Due to these internal issues, the Annual General Meetings were not held for more than two years now. The advisor informed the management that it would result in continuing offence being committed by the Company and it could face penal actions. Explain briefly, what are continuing offences and the factors constituting such offences. (4 marks)

(c) The independent directors of Suga Ltd., suggested the management that the Company should take "independent director insurance" policy. However, the executive directors contended that the Company already had a 'Side A Insurance' and so no other insurance policy was required. Is the contention of executive directors justified ? (4 marks)

(d) SOS the Company Secretary of Stup Ltd., was providing orientation to directors who were appoined recently. In one such sessions, where SOS was explaining the overview of penal provisions under the Companies Act, 2013 one of the Directors asked if the penal liability can be escaped in case no specific penalty or punishment is provided for such contravention of the provisions of Act or rules made thereunder. Can a director or officer in default escape from liability if no specific penalty or punishment is provided for contravention of provisions of the Act ? Comment. (4 marks)

Answer 6(a)

Rule 18 of the Companies (Mediation and Conciliation) Rules, 2016 provides that the parties shall be made to understand that the mediator or conciliator facilitates in arriving a decision to resolve the dispute and that he shall not and cannot impose any settlement nor the mediator or conciliator give any assurance that the mediation or conciliation shall result in a settlement and the mediator or conciliator shall not impose any decision on the parties.

In accordance with the abovementioned rule, parties alone shall be responsible for making decision.

Time limit for completion of mediation or conciliation is provided vide Rule 19 of Companies (Mediation and Conciliation) Rules, 2016 which is as under:

- The process for any mediation or conciliation under these rules shall be completed within a period of three months from the date of appointment of expert or experts from the Panel.
- On the expiry of three months from the date of appointment of expert from the Panel, the mediation or conciliation process shall stand terminated.
- In case of mediation or conciliation in relation to any proceeding before National Company Law Tribunal (NCLT) or National Company Law Appellate Tribunal (NCLAT) which could not be completed within three months, the NCLT or as the case may be NCLAT, may on the application of mediator or conciliator or any of the party to the proceedings, extend the period for mediation or conciliation by such period not exceeding three months.

Answer 6(b)

Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arise out of a failure to obey or comply with a rule or its requirement and which involves penalty, the liability for which continues until the rule or its requirement is obeyed or complied with.

Non-filling of Annual return, Financial Statements, Special Resolution etc. are few examples of continuing offences.

An analysis of the above meaning and decisions show that the following are the basic factors for constituting a continuing offence:

- The effect of commission of an offence should continue to prevail for any number of days after the date on which it is first committed.
- The effect should be understood from the point of view of intention of the legislation. The statute should have made the compliance requirement a compulsory one.
- The language used in the statute should be given due weight.
- The penal clause should provide for a penalty, which is liable to be levied during the period of continuance of the offence.

Answer 6(c)

Director & Officer (D&O) insurance often covers all directors, officers and employees, as well as the company. This means that significant claims against the company and employees may deplete the limits available for individual officers and directors. The Company should determine if there are certain limits available only to directors and officers (often referred to as “Side A” or “Side A DIC” coverage) and whether your coverage contains a “priority of payments” clause that provides that in the event of claims against both the directors/ officers and the companies, losses attributable to the directors/officers are entitled to payment before losses of the company.

Side A Insurance coverage is effectively the last line of defence against a director or officer having to pay their own costs related to a claim. It kicks in when the company is unable to provide indemnification (usually due to bankruptcy or a statutory prohibition on indemnification). Therefore, it is one of the most important coverages for individual directors and officers, as it directly protects against loss of personal assets as a result of claims.

On the other hand, Independent Director Insurance provides a separate set of coverage limits dedicated solely to independent/outside directors of a company. Generally, if adequate Side A coverage is already in place, this coverage should not be necessary.

In view of the above, a separate insurance policy for independent directors is preferable and therefore, the contention of the executive directors is not justified.

Answer 6(d)

Section 450 of the Companies Act, 2013 ("the Act") provides the provisions for the punishment where no specific penalty or punishment is provided for non-compliance of any specific provision of the Act.

According to section 450 of the Act , if a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made thereunder, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be liable to a penalty of ten thousand rupees, and in case of continuing contravention, with a further penalty of one thousand rupees for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.

Therefore, it can be said that if a company or any officer of a company or any other person contravenes any of the provisions of the Companies Act, 2013 or the Rules made thereunder, they cannot escape from liability even no specific penalty or punishment is provided for such contravention.

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