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GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

Syllabus 2022

DECEMBER 2024

GROUP 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
tel 011-4534 1000 **email** info@icsi.edu **website** www.icsi.edu

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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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Group 2

STRATEGIC MANAGEMENT AND CORPORATE FINANCE

GROUP 2 PAPER 5

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

1. Case Study :

(a) Go-Fast is a very small company in Amravati, operating its business of repairing electric-two-wheeler. It has a reputation for its fair charges and speedy delivery. For the next five years, a market study offers the following information :

Many college students are being given e-bike by the college authorities themselves and this trend is likely to continue for another five years. Coaching centers provide new e-bikes to all the students during the admission. The fees are inclusive of these costs.

LiFePO4 batteries are fast replacing lead acid batteries in certain market segments and models change every six months. In case of major repairs, affluent people discard the old lead acid batteries e-bike and go in for new LiFePO4 batteries e-bike. However, there are rural markets and certain parts of urban markets which will still be interested in the low-cost lead acid batteries e-bike repaired and re-sold the e-bikes.

Considering the gravity of the above situation Go-Fast plans to limit its operations to only one city.

You are required to give :

(i) A vision statement;

(ii) A mission statement;

(iii) SWOT analysis;

(iv) Some parameters that could be used in above situation relating to the financial and growth perspectives in a Balance Score Card (BSC).

(*1+2+4+3=10 marks*)

(b) Dr. D. N. Dutta inherited his father's Dutta's Laboratory in Delhi in 1953. Till 2001, he owned 3 labs in the National Capital Region (NCR). His ambition was to turn it into a national chain. The numbers increased to 5 in 2003 across the country including the acquisition of Platinum Lab in Mumbai. The number is likely to go to 40 within 2-3 years from 18 at present. Infusion of ₹ 26 crore for 26% stake by Pharma Capital in this company has its growth strategy.

The Lab with a revenue of ₹ 70 crore is among top three pathological labs in India with Atlantic (₹ 76 crores) and Pacific (₹ 56 crores). Yet its market share is only 2% of ₹ 3,600 crores market. The top 3 firms command only 6% as against 40-45% by their counterparts in the USA.

There are about 25,000 to 1,00,000 standalone labs engaged in routine pathological business in India, with no system of mandatory licensing and registration. That is why Dr. D. N. Dutta has not gone for acquisition or joint ventures. He does not find many existing laboratories meeting quality standards. His six labs have been accredited nationally whereon many large hospitals have not thought of accreditation. The College of American pathologists' accreditation of Dutta's Lab would help it to reach clients outside India.

In Dutta's Lab the bio-chemistry and blood testing equipments are sanitized every day. The bar coding and automated registration of patients do not allow any identity mix-ups. Even routine tests are conducted with highly sophisticated systems. Technical expertise enables them to carry out 1660 variety of tests. Same day reports are available for samples reaching by 4 PM and by 8 AM next day for samples from 550 collection centers located across the country. Their technicians work round the clock, unlike competitors. Home service for collection and reporting is also available.

There is a huge unutilized capacity. Now, it is trying to stop other segments. 20% of its total business comes through its main laboratory which acts as a reference lab for many leading hospitals. New mega labs are being built to encash pre-clinical and multi-centre clinical trials within India and provide post graduate training to the pathologists.

Considering the above situation answer the following :

(i) What was the vision of Dr. D. N. Dutta at the time of inheritance of Dutta's Lab ? Has it been achieved

(ii) What was the business strategy adopted by Dr. D. N. Dutta ?

(iii) What is the marketing strategy of Dr. D. N. Dutta to overtake his competitors ?

(iv) In your opinion what could be the biggest weakness in Dr. D. N. Dutta's business strategy ?

(*2+2+4+2=10 marks*)

Answer 1(a)

(i) Go-Fast's Vision Statement: To deliver the fastest and highest quality repair of lead-acid e-electric two-wheeler at the most reasonable prices, anywhere in the city.

(ii) Go-Fast's Mission Statement: Go-Fast is committed to deliver fully functional lead-acid e-bikes to our customers' doorsteps with minimal downtime. We ensure timely delivery as promised, reasonable charges, and high-quality services. Our focus is on replacing genuine spare parts based on actual needs, offering convenient pick-up of faulty e-bikes, and providing standby e-bikes upon request, all while maintaining the highest standards of customer satisfaction.

(iii) SWOT Analysis:

a) *Strengths:* Access to standard spare parts that normally required in lead acid e-bikes, network of trained employees who have requisite job knowledge, available loyal customers, less time in delivery and perfect commitment.

b) *Weakness:* Going beyond the scope of faults recognized by the customers, often leading to cost overruns while preventing future repairs calls.

c) *Opportunities:* Branches may be opened in universities/colleges and big coaching centers. Business can be extended to the sale of repaired e-bikes in ready mode and going markets, preventing maintenance services, annual maintenance contracts, upgrades and compatibility addition with new peripherals, etc.

d) *Threats:* Unless lead acid e-bike markets are also created to, there is a threat to long term survival. Threats from shops which are providing one stop solution for repairing all types of e-bikes including lead acid, LIFePO4 batteries etc. Threats of obsolescence resulting in non-availability of spares and change in Government policy in future on pollution control as regard to disposal of old batteries scrap.

(iv) Balance Score Card (BSC):

(a) ***Financial perspective:*** Revenue from repairs, average job order cost, total spares, purchases, delivery costs, percentage of revenue per job, debtors management (target nil), etc.

(b) ***Growth perspective***: Number of employees trained, number of new products repaired, number of new spares used, machinery used for cleaning/servicing, new logistics management, service call tracking, repair status on-line tracking etc.

Answer 1(b)

(i) Dr. D. N. Dutta's vision at the time of inheritance of Dutta's Laboratory was to turn it into a national chain of pathological laboratories.

The same has broadly been achieved, though it could have been more. He is in the process of achieving the vision as 18 laboratories have been opened at present and targeted to increase to 40 within 2-3 years. However, the market share is low while comparing with external benchmarks from US markets at the same time.

(ii) To a large extent Dr. Dutta's Lab has opted the business strategy of internal growth rather than going in for acquisitions or joint ventures. The reason for such a strategy is that Dr. D. N. Dutta found many existing laboratories are not meeting the quality standards and his six labs have been accredited nationally. To fund its growth and raise funds, it has also given a 26% stake to Pharma Capital against the infusion of ₹ 26 crores.

(iii) The marketing strategy of Dr. D. N. Dutta to overtake his competitors is to evolve his main laboratory as reference lab for many leading hospitals. This is a testimony of the level of confidence he enjoys among the medical professionals. It provides a high level of customer services because of the following:-

a) ***Product mix:*** It possesses technical expertise to conduct 1660 variety of tests.

b) ***Quality:*** The laboratories use modern methods to conduct tests. Even routine tests are conducted with highly sophisticated systems. Technology such as bar coding and automated registration of patients is also used. Thus, there are no mistakes in the identity of samples. The bio-chemistry and blood testing equipments are sanitized every day.

c) ***Speed:*** The technicians in the laboratories are working round the clock. Further, the company is able to deliver the test reports faster using modern systems.

d) ***Convenience:*** Dutta's Lab has 550 collection centers for the laboratories, thereby the reach is more. Additionally, system of collection of samples from home also provides convenience to the patients and others.

(iv) In the given case, Dr. D. N. Dutta has not gone for acquisition or joint ventures as he does not find many existing laboratories meeting the quality standards. Thus, it is the biggest weakness in capitalizing the opportunities through acquisition or joint ventures which could help in leveraging the existing goodwill. Expansions could have been faster and more.

Many of these labs must be enjoying a lot of goodwill in their region. In fact, trust and faith is prime element in every business especially in medical field such as a pathological laboratory.

On account of its size and available resources, Dutta's Lab could have easily acquired some of these labs and to make them compatible with the business ideology and quality systems of the Dutta's Lab. However, it appears that the company lacks the capability to modernize an existing laboratory.

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

Question 2

(a) Elite Kitchenware Co., a multinational company, is undergoing a feasibility study to introduce a new line of high-end kitchen appliances aimed at a specific group of customers. These appliances are designed for individuals with distinctive preferences and special requirements. The product is not standard, and the target market is narrow. The company understands that the demand for this product is large enough to be profitable but small enough to be overlooked by other major industry players. Elite Kitchenware Co. aims to position itself in this niche market by offering unique features tailored to the target market.

In this scenario, identify the generic strategy suggested by Michael Porter. Also, state the pros and cons of such a strategy.

(*5 marks*)

(b) How can the strategic planning process, though unique to each organization, be standardized with common steps ? What are the critical ways in which strategic planning can benefit your organization, and what are the potential limitations associated with it ?

(*5 marks*)

(c) "PERT and CPM are two complementing statistical techniques utilized in project management. They exhibit the flow and sequence of activities and events". In this context mention the types of projects where these techniques are used. What are the steps involved in PERT/ CPM?

(*5 marks*)

(d) "Sunny Ville Bistro," a cozy neighborhood café, has been struggling to attract a steady stream of customers despite offering high-quality food and excellent service. Recognizing the importance of an online presence, the owners decide to focus on enhancing their digital reputation. Through consistent effort, Sunny Ville Bistro's online reputation improves, attracting more customers and establishing the café as a beloved local spot.

What were the key aspects of Sunny Ville Bistro's marketing strategy, and how did they contribute to the café's improved reputation and increased customer base ?

(*5 marks*)

Answer 2(a)

Elite Kitchenware Co. has adopted Focused Differentiation Strategy which is one of Michael Porter's Generic strategies. It is a form of strategy approach that, as its name suggests, focuses on developing a product that is unique for a certain client market group. When a business adopts the differentiation strategy approach, it concentrates on reducing the size of the targeted client segment by providing unique and personalized features in the product.

For example, Coca-Cola introduced diet coke and coke zero to appeal to consumers who are health-conscious.

Pros of using Focus Strategy

a) **Availability of Resources**: It is crucial to have the necessary financial and other resources

available when organization plan to adopt the targeted strategic approach. The price of manufacturing the correct product for the particular customer market segment is higher. Yet, if a business is using scarce resources to create a rare product, it needs to ensure that those resources are available.

b) **Competitive Edge:** Gaining a competitive edge is the crucial component of putting the concentrated strategic approach into practise. When a business makes a distinctive offer to a certain client market segment, it will be easy to stand out from the competition. When organization provides its clients something worthwhile, it will be tough for your rivals to quickly imitate it.

c) **High Growth:** Companies and corporations should never forget that there is always potential for expansion. Businesses and firms who are not evolving with the times and the market find it challenging to thrive. The organization should assess the segment's growth prospects before focusing on it as a target market segment.

d) **Increased Profitability:** The smaller client market niche is simple to locate and cater to. Yet, it is important to consider whether the market niche you are aiming for is profitable. It's because creating wealth and consequently making profit is always a company or business's primary goal. Such market groupings need to be sizable enough to bring in money.

Cons of using Focus Strategy

a) **Changing Preferences:** Customers' preferences and choices are always shifting. and they strive to reflect the consensus opinion. When a business provides a unique offering that matters to the customer, they will choose it and it will last longer.

b) **High Competition:** A focused strategic strategy seeks to gain a competitive edge by providing something special and worthwhile. Being ahead of the competition is challenging since they are constantly trying to get better. The organization must monitor its development and take the offering seriously. The market's increased competition reduces the company's profitability.

Answer 2(b)

Although, strategic planning process may be unique as per the specific requirements of any organization, it does contain the steps most commonly followed by most of the organizations:

- Deliberating and assessing the mission of the Organisation;
- Developing goals based on chosen mission;
- Examining internal environment (strengths and weaknesses);
- Examine external environment (opportunities and threats);
- Summarizing findings of SWOT analysis;
- Formulating final strategy based on SWOT.

Benefits of Strategic Planning for an Organisation

Strategic planning can help any organization in a number of critical ways:

- *Improved results and confidence:* A proper plan may positively influence organizational performance and can contribute to a greater sense of purpose, progress and accountability among its team.
- *Focus*: Good strategic planning forces future thinking and can refocus and re-energize a disorientated organization.

- *Problem solving:* Strategic planning focuses on an organization's most critical problems, choices and opportunities.
- *Teamwork:* Strategic planning provides an excellent opportunity to build a sense of teamwork, to promote learning, and to build commitment across the organization.
- *Communication:* All stakeholders have an interest in knowing the direction in which organization is heading and also how their contribution will fit in overall plan.
- *Greater control:* Strategic planning can provide an organization greater control the environment in which it operates.

Limitations of Strategic Planning

- *Costs can outweigh benefits:* Strategic planning can consume a lot of time and money. This can be wasteful if the strategic planning is not successful, more so when some of these plans have long gestation periods.
- *Development of Poor plans:* Faulty assumptions about the future, poor assessment of an organization's capabilities, poor group dynamics and information overload can lead to the development of poor plans.
- *Implementation:* If not implemented properly, whole planning exercise will go futile. Disillusionment, cynicism and feelings of powerlessness often result if people have contributed energy for development of a plan which is not implemented.

Answer 2(c)

PERT and CPM are two complementary statistical techniques utilized in project management, which are network based scheduling methods that exhibit the flow and sequence of activities and events. They are used in variety of projects like construction of new plants, R&D of a new product, Space exploration projects, movie productions, ship building, road construction, relocation of a facility, MIS installation, advertisement campaigns etc.

The following steps are involved in PERT/CPM

1. Identify and distinguish the various activities required for completing the project and list them separately.
2. Clearly lay down the jobs that are to be carried simultaneously, in sequence etc. All such relationships between jobs be clearly laid down.
3. Picture/graph portraying each of these jobs should be drawn showing predecessor and successor relations among them. The graph shows the time required for completion of each job. This is known as the project graph or the arrow diagram.

Answer 2(d)

Key aspects of Sunny Ville Bristo Café 's marketing strategy included the following:

i) **Building Out their Content Marketing**

It was through content marketing that the Sunny Ville Bistro was able to initially build an audience. Engagement campaigns cannot work without followers already available. Posting interesting content, sharing curated content, and interacting with similar brands were the first step towards building Sunny Ville Bistro's social media campaigns.

ii) **Connecting Directly with Followers**

When followers connected with Sunny Ville Bistro, the marketing team began to interact with

them immediately asking them questions about their interests and their goals. This type of personal interaction is extraordinarily rare on social media today and served the purpose of not only establishing relationships with customers, but also showing them that this company was different.

iii) **Getting the Followers to Come In**

Ultimately, to get leads the marketing team needed to get people in the door, which was done through an online outreach. Once relationships were sufficiently established, the marketing team of Sunny Ville Bistro encouraged potential customers to come in to find out more about the cafe and what it could offer to them. By bringing in leads in this fashion, nearly all of the nurturing was done through the online platform.

Despite the time commitment, these strategies are scalable. Many large brands, like Wendy's for example, have extremely active social media accounts, through which they interact with customers and respond to customers regularly. Unique to Sunny Ville Bistro, however, is the type of ongoing interactions, relationship building, and lead generation that the marketing team is engaged in. By establishing an individual rapport with each follower, the centre was able to send a message that it valued them.

OR (Alternative question to Q. No. 2)

Question 2A

(*i*) "TOWS strategies are a product of the trade-off between internal and external factors." Do you agree with this statement ? How can this approach help a strategist in decision-making?

(*5 marks*)

(ii) You are a senior analyst at a large investment firm that is considering diversifying its portfolio by investing in cryptocurrencies like Bitcoin. The firm's leadership team is intrigued by the underlying blockchain technology and wants to understand how it contributes to the success and reliability of cryptocurrencies.

You are asked to prepare a presentation for the leadership team explaining what blockchain technology is and how its three main properties have helped Bitcoin and other cryptocurrencies gain widespread acclaim.

(*5 marks*)

(iii) (*a*) A company proposed a list of activities to be carried out as part of its CSR policy :

(i) The CSR projects for the benefit of employees of the company and their families only.

(ii) A contribution of ₹ 50,000 to a political party under the provisions of section 182 of the Companies Act, 2013.

(iii) A contribution to the PM CARES Fund during covid pandemic.

(iv) Local activities like promotion of child and women education.

(v) The company plans to organize a Film Festival ceremony in Switzerland.

(vi) The company sponsors activities to gain marketing benefits for its products or services.

Whether activities proposed by company were in accordance with provisions of the Act and Companies (Corporate Social Responsibility Policy) Rules, 2014 ?

(*b*) Rivalry among existing competitors is one of Porter's Five Forces. Under what specific conditions does this rivalry become intense ?

(*3+2=5 marks*)

(iv) "BrightFuture Tech," a rapidly growing technology firm, is preparing to expand its operations into new markets and introduce innovative product lines. As the company gears up for this expansion, it faces the challenge of ensuring that its human resources are adequately aligned with its strategic goals. The management team recognizes the need for a comprehensive human resource strategy to support this growth.

How should BrightFuture Tech implement its human resource strategy to effectively support its expansion and achieve its strategic goals ?

(*5 marks*)

Answer 2A(i)

Yes, SWOT Analysis starts with an internal analysis, the TOWS Matrix takes the other route, with an external environment analysis; the threats and opportunities are examined first. Then, in TOWS makes a trade-off between internal and external factors. As we know, Strengths and weaknesses are internal factors and opportunities and throats are external factors. This trade-off is the point where four potential strategies derive their importance, these are Strength/Opportunity (SO) Weakness/ Opportunity (WO), Strength/Threat (ST) and Weakness/Threat (WT) as shown in matrix given below.

TOWS ANALYSIS

		Internal Factors	
		Strengths (S)	**Weaknesses (W)**
External Factors	**Opportunities (O)**	Strengths/Opportunities(SO)	Weaknesses/ Opportunities (WO)
	Threats (T)	Strength/ Threats(ST)	Weaknesses/Threats (WT)

a) **Strength/Opportunity (SO):** Strengths of the companies are utilized to exploit the opportunities.

b) **Weakness/Opportunity (WO):** The organization finds options that overcome weaknesses, and then take advantage of opportunities. Therefore, it mitigates weaknesses, to exploit opportunities,

c) **Strength/Threat (ST):** Exploiting strengths to overcome any potential threats.

d) **Weakness/Threat (WT):** With Weakness/Threat (WT) strategies, one is attempting to minimize any weakness to avoid possible threat.

A strategist may understand the strength, weakness, opportunities and threats of the Organisation and analyse the following strategies of TOWS which are helpful in decision making:

- Aggressive strategy (maxi-maxi)
- Conservative strategy (maxi-mini)
- Competitive strategy (mini-maxi)
- Defensive strategy (mini-mini)

	External Opportunities (O)	**External Threats (T)**
Internal Strengths (S)	SO "Maxi-Maxi Strategy Strategies that use strengths to maximise opportunities	ST Maxi-Mini Strategy Strategies that use strengths to minimise threats.

Internal Weaknesses (W)	WO 'Mini-Maxi' Strategy Strategies that minimise weaknesses by taking advantage of opportunities	WT Mini-Mini Strategy Strategies that minimise weaknesses and avoid threats.

Answer 2A(ii)

Blockchain technology and its impact on cryptocurrencies, particularly Bitcoin

The goal is to provide with a clear understanding of blockchain technology and how its core properties contribute to the success and reliability of cryptocurrencies.

a) **Blockchain Technology-Meaning**

Blockchain is a series of data linked together. Every single transaction is linked to the chain using cryptographic principles in batches, making blocks. The blocks are connected to each other and have unique identifier codes (called hashes) that connect them to the previous and the subsequent blocks. This forms a blockchain, usually in the form of a continuous ledger of transactions. It isn't owned by any one individual. The series is managed and stored across several computer systems. Each ledger is shared, copied and stored on every computer connected in the system.

b) **Three pillars of Blockchain Technology**

The three main properties of Blockchain Technology which have helped it gain widespread acclaim are as follows:

- Decentralization
- Transparency
- Immutability

Pillar 1: Decentralization

Before Bitcoin and BitTorrent came along, we were more used to centralized data services. The idea is very simple. You have a centralized entity that stored all the data and you'd have to interact solely with this entity to get whatever information you required. Another example of a centralized system is the banks. They store all our money, and the only way that we can pay someone is through the bank.

In a decentralized system, the information is not stored by one single entity. In fact, everyone in the network owns the information. In a decentralized network, if you wanted to interact with your friend then you can do so directly without going through a third party. That was the main ideology behind Bitcoins. You and only you alone are in charge of your money. You can send your money to anyone you want without having to go through a bank.

Pillar 2: Transparency

One of the most interesting and misunderstood concepts in blockchain technology is "transparency." Some people say that blockchain gives you privacy while some say that it is transparent.

A person's identity is hidden vis complex cryptography and represented only by their public address. So, if you were to look up a person's transaction history, you will not see "Bob sent 1 BTC instead you will see "IMF1bhsFLkBzzz9vpFYEmvwT2TbyCt7NZJ sent 1 BTC". So, while the person's real identity is secure, you will still see all the transactions that were done by their public address.

Pillar 3: Immutability

Immutability, in the context of the blockchain, means that once something has been entered into the blockchain, it cannot be tampered with. The reason why the blockchain gets this property is that of the cryptographic hash function. In simple terms, hashing means taking an input string of any length and giving out an output of a fixed length.

In the context of cryptocurrencies like bitcoin, the transactions are taken as input and run through a hashing algorithm (Bitcoin uses SHA-256) which gives an output of a fixed length. So basically, instead of remembering the input data which could be huge, you can just remember the hash and keep track.

Answer 2A(iii)(a)

List of activities		Whether the activities are in accordance with the provisions of the Companies Act, 2013 and Companies (CSR Policy) Rules, 2014
i.	The CSR projects for the benefit of employees of the company and their families only.	No
ii.	A contribution of ₹ 50,000 to a political party under the provisions of section 182 of the Companies Act, 2013.	No
iii.	A contribution to PM CARES Fund during Covid Pandemic.	Yes
iv.	Local activities like promotion of child and women education.	Yes
v.	The company plans to organize a Film Festival ceremony in Switzerland.	No
vi.	The company sponsors activities to gain marketing benefits for its products or services.	No

Answer 2A(iii)(b)

In competitive industry, firms have to compete aggressively for a market share, which results in low profits. Rivalry among competitors is intense when:

- There are several competitors;
- Exit barriers are high;
- Industry of growth is slow or negative;
- Products are not differentiated
- Products can be easily substituted;
- Low customer loyalty.

Answer 2A(iv)

Implementing Human Resource (HR) Strategy

a) **Assessing the current HR capacity**

This includes taking stock of the skills of the existing human resources of the organisation to

have a clear understanding of the current skill set of the company. This will help in forecasting future HR requirements.

b) **Forecasting HR requirements**

This step includes projecting what the HR needs for the future and will be based on the strategic goals of the organization and assessment of total skillset of existing human resources. Some questions to be asked during this stage include:

- The positions to be filled in the future period.
- The number of staff will be required to meet the strategic goals of the organization.
- Effect of external environmental forces in getting new human resources.

c) **Gap analysis**

In this stage, one will make a comparison between existing and desired position of the organisation from strategic point of view. During this phase you should also review your current HR practices and if these require any amendments.

d) **Developing HR strategies to support the strategies of the organization**

The following HR strategies may be adopted to attain the organizational goals:

- Restructuring strategies
- Training and development strategies
- Recruitment strategies
- Outsourcing strategies
- Collaboration strategies
- Retention strategy
- Onboarding and orientation
- Mentorship programs
- Employee compensation
- Recognition and rewards systems
- Work-life balance
- Training and development
- Communication and Feedback
- Dealing with change
- Fostering teamwork
- Team celebration

PART–II

Question 3

Growth Engine Ltd., a listed company which was incorporated in 2015. The company is booming and favouring the younger generation to work. The Capital Structure of the company as on March 31, 2024 is as follows :

Particulars	₹ (Crore)
Authorised Share Capital 200,00,000 Equity Shares of ₹ 10 each	20.00
Issued, Subscribed and Paid-up Share Capital 100,00,000 Equity Shares of ₹ 10 each	10.00
Share Premium	2.00
General Reserve	7.04
Profit & Loss Account	3.16

In the Board Meeting, an agenda for formulation of policy for Sweat Equity Shares has been discussed. As an Independent director of the company, Ratan objected on a clause, which made him ineligible for availing Sweat Equity Shares. He also suggested that either the company should go for Employee Stock Option Scheme or sweat equity shares can be issued in the form of preferential Issue.

The company decided to issue 30% sweat equity shares to eligible employees to keep them motivated and partners in growth. Lock-in period for sweat equity will be five years. For this purpose, a resolution in General meeting of company was passed in this manner.

"The Resolution specifies 30 lakh sweat equity shares, Current Market price ₹ 50 per share with a consideration of ₹ 10 per share to be issued to eligible employee".

The company seeks your advice with reference to the provision of issue of sweat equity shares under the Companies Act, 2013 and SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 on the following points :

1. Is the issuance of sweat equity shares at a discount appropriate ?
2. Is the size of the sweat equity share issue appropriate, and is the lock-in period justifiable ?
3. Is Ratan eligible to receive sweat equity shares ?
4. Is Ratan eligible for the Employee Stock Option Scheme ?
5. Can sweat equity shares be issued through a preferential issue, as suggested by Ratan ?

(*3+3+3+3+3=15 marks*)

Answer 3

1) Regulation 30 of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 provides that a company whose equity shares are listed on a recognised stock exchange may issue sweat equity shares in accordance with section 54 of the Companies Act, 2013 and SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 to its employees for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called. Also, SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, defines the term sweat equity shares which means sweat equity shares as defined in sub-section (88) of section 2 of the Companies Act, 2013. In accordance with section 2(88) of the Companies Act, 2013, sweat equity shares means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing

their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

Further section 54(1)(d) of the Companies Act, 2013 provides that where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed. In this regard, Rule 8 of the Companies (Share Capital and Debentures) Rules, 2014, stipulates that a company other than a listed company, which is not required to comply with SEBI Regulations on sweat equity, shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called, unless the issue is authorised by a special resolution passed by the company in general meeting.

Since Growth Engine Ltd. is a listed company and is required to comply with SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, issuing sweat equity shares at a discount is appropriate.

2) In terms of Regulation 31 of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, a company shall not issue sweat equity shares for more than 15% of the existing paid-up equity share capital in a year. However, the issuance of sweat equity shares in the company shall not exceed 25% percent of the paid up equity share capital of the company at any time.

Further, Rule 8 (4) of the Companies (Share Capital and Debenture) Rules, 2014 states that a company shall not issue sweat equity shares for more than 15% of the existing paid up equity share capital in a year or shares of the issue value of Rs.5 crores, whichever is higher. However, the issuance of sweat equity shares in the company shall not exceed 25% of the paid up equity share capital of the company at any time.

In the given situation, size of issue of sweat equity shares i.e., 30% to be issued by a public company to a class of directors and employees was not within the prescribed limit. Hence, the size of issue of sweat equity shares of the company was not appropriate.

Lock-in Period: Regulation 38(1) of the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 provides that the sweat equity shares shall be locked in for such period of time as specified in relation to a preferential issue under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, as amended from time to time.

Further, SEBI (ICDR) Regulations, 2018 states that the specified securities, allotted on a preferential basis to the promoters or promoter group and the equity shares allotted pursuant to exercise of options attached to warrants issued on a preferential basis to the promoters or the promoter group, shall be locked-in for a period of 18 months from the date of trading approval granted for the specified securities or equity shares allotted pursuant to exercise of the option attached to warrant, as the case may be. The specified securities allotted on a preferential basis to persons other than the promoters and promoter group and the equity shares allotted pursuant to exercise of options attached to warrants issued on preferential basis to such persons shall be locked-in for a period of six months from the date of trading approval.

Accordingly, in the given situation, the lock-in period of sweat equity is 5 years which is not in the compliance of the above conditions.

3) In accordance with the explanation to the Rule 8(1) of the Companies (Share Capital and Debentures) Rules, 2014, the expressions 'Employee' means -

a) a permanent employee of the company who has been working in India or outside India, or

b) a director of the company, whether a whole-time director or not; or

c) an employee or a director as defined in sub-clauses (a) or (b) above of a subsidiary, in India or outside India, or of a holding company of the company;

According to the provisions pertaining to Sweat Equity Shares under the SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021, term 'employee' means,

(i) An employee of the company working in India or abroad; or

(ii) A director of the company whether a whole time director or not.

In the given question, Ratan is an independent director on the Board, he is eligible under the scheme for Sweat Equity shares.

4) As per SEBI (Share Based Employee Benefits and Sweat Equity) Regulations 2021, "Employee", except in relation to issue of sweat equity shares, means-

(i) an employee as designated by the company, who is exclusively working in India or outside India; or

(ii) a director of the company, whether a whole time director or not, including a non-executive director who is not a promoter or member of the promoter group, but excluding an independent director.

Since, Ratan is an independent director, will not be eligible under scheme for Employee Stock Option Scheme.

5) An issue of Sweat Equity Shares is not a 'preferential issue. As per Regulation 2(1)(nn) of SEBI (ICDR) Regulations, 2018 provides the meaning of a preferential issue excludes an issue of sweat equity shares there from, which means issue of sweat equity shares is not a preferential issue. Further, Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, clearly excludes issue of sweat equity shares from the definition of preferential offer.

Accordingly, the sweat equity shares cannot be issued through a preferential issue as suggested by Ratan.

Question 4

(*a*) What are the guidelines issued by SEBI for the return and resubmission of draft offer documents to ensure completeness for investors, provide greater clarity and consistency in disclosures, and ensure timely processing under Schedule VI of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations) ?

(*5 marks*)

(b) X Ltd. is a listed company with a market capitalization of ₹ 1500 crores. The company has been consistently profitable for the past five years and has a strong track record of dividend payments. Due to expansion plans, X Ltd. decides to raise funds through a Follow-on Public Offer (FPO).

X Ltd. wishes to avail the fast-track route for its FPO. Discuss the conditions that the company must fulfill to be eligible for the same.

(*5 marks*)

(c) Distinguish between pre and post shipment credit in export financing. Explain with examples.

(*3+2=5 marks*)

Answer 4(a)

The draft offer document/draft letter of offer filed with the SEBI for public issue/rights issue (hereinafter "draft offer document") of securities shall be scrutinized based on the broad SEBI guidelines and such documents which are not compliant with the instructions provided under Schedule VI of SEBI (ICDR) Regulations, 2018 and guidelines provided, shall be returned to the Issuer. The broad guidelines for returning of draft offer document and its re-submission are provided below:

Return of Draft Offer Document

The following shall be ensured while preparing offer documents failing which it could be returned:

- The Draft offer document is drafted in simple language with visual representation of data, so as to ensure ease of understanding of its contents.
- The information in the draft offer document is presented in a clear, concise, and intelligible manner.
- The draft offer document avoids complex presentations, vague, ambiguous and imprecise explanations, complex information, repetition of disclosures and inconsistency.
- The risk factors are appropriately worded in simple, clear and unambiguous language to bring out clearly the risk to the investor, without undermining the same.

Resubmission of Draft Offer Document

- While there shall be no requirement for payment of any fees on account of resubmission of draft offer document, the requirement for paying applicable fees for the changes, if any, in terms of changes specified in Schedule XVI of the SEBI (ICDR) Regulations, 2018 for the updated offer document shall continue to apply as is applicable to issuer for updation in offer document.
- There shall be no refund of the filing fees on account of non-submission of draft offer document by the issuer after return.
- The issuer, within two days of resubmission of draft offer document with the Board, shall make a public announcement in the mode and manner as prescribed under SEBI (ICDR) Regulations, 2018, as applicable, and the issuer shall also include a disclosure that it is a resubmitted document.
- The Issuer shall make written intimation to its sectoral regulator, if any, informing about the return and resubmission of the draft offer document, as applicable.

Answer 4(b)

Fast Track Follow-on Public Offer

An Issuer Company whose shares are already listed, need not file the draft offer document with SEBI and obtain observations from SEBI, or make a security Deposit with the Stock Exchanges for its follow-on public offer (FPO) if it satisfies the following conditions:

Listing	The equity shares of the issuer have been listed on any stock exchange for a period of at least three years immediately preceding the reference date.
Demat Form	Entire shareholding of the promoter group of the issuer is held in dematerialised form on the reference date.

Market Capitalisaton	The average market capitalisation of public shareholding of the issuer is at least one thousand crore rupees in case of public issue and two hundred and fifty crore rupees in case of rights issue.
Trading Turnover	The annualised trading turnover of the equity shares of the issuer during six calendar months immediately preceding the month of the reference date has been at least 2% of the weighted average number of equity shares listed during such six months' period. However if the public shareholding is less than 15% of its issued equity capital, the annualised trading turnover of its equity shares has been at least 2% of the weighted average number of equity shares available as free float during such six months' period.
Delivery based Trading	Annualized delivery-based trading turnover of the equity shares during six calendar months immediately preceding the month of the reference date has been at least 10% of the annualised trading turnover of the equity shares during such six months' period
Compliance with LODR	The issuer has been in compliance with the equity listing agreement or SEBI Listing Regulations, 2015, as applicable, for a period of at least three years immediately preceding the reference date. However, if the issuer has not complied with the provisions of the listing agreement or SEBI Listing Regulations, 2015, as applicable, relating to composition of board of directors, for any quarter during the last three years immediately preceding the reference date, but is compliant with such provisions at the time of filing of the red herring prospectus with the Registrar of Companies, and adequate disclosures are made in the red herring prospectus about such non-compliances during the three years immediately preceding the reference date, it shall be deemed as compliance with the condition. Further, imposition of monetary fines by stock exchange on the issuer shall not be a ground for ineligibility for undertaking issuances under these regulations.
Investor Complaints	The issuer has redressed at least 95% of the complaints received from the investors till the end of the quarter immediately preceding the month of the reference date.
No show cause Notices	That no show-cause notices, excluding proceedings for imposition of penalty, have been issued by the Board and pending against the issuer or its promoters or whole time directors as on the reference date.
No alleged Violations	If the issuer or the promoter or the promoter group or the director of the issuer has settled any alleged violations of securities laws through the settlement mechanism of the Board in the past three years immediately preceding the reference date, then the disclosure of such compliance of the settlement order, shall be made in the offer document.
Disciplinary Measures	Equity shares of the issuer have not been suspended from trading as a disciplinary measure during last three years immediately preceding the reference date.
Conflict of Interest	There shall be no conflict of interest between the lead merchant banker(s) and the issuer or its group or associate company in accordance with applicable regulations.

Audit Qualification	For audit qualifications, if any, in respect of any of the financial years for which accounts are disclosed in the offer document, the issuer shall provide the restated financial statements adjusting for the impact of the audit qualifications. Further, for the qualifications wherein impact on the financials cannot be ascertained, the same shall be disclosed appropriately in the offer document.

Answer 4(c)

Finance facilities available to exporters in Indian currency are in two forms- pre shipment credit and post shipment credit.

A short-term advance/loan given to an exporter for procuring, processing, manufacturing/packing goods prior to shipping such goods. Such export credit can be given for working capital purposes also. Banks are at liberty to decide the tenor of such loans (which are usually up to three/six months or in exceptional cases nine months) depending upon individual cases. These loans are given at concessional interest rates. If these loans are not adjusted by submission of export documents within 360 days, banks will charge normal rate of interest on such loans/ advances instead of concessional rates. Pre-shipment advances are to be repaid out of finance made available at post-shipment stage or from eligible resources of the exporting customer as per RBI directions.

This is again a short-term advance/loan given to an exporter after shipment of goods to the date of realization of proceeds of exported goods. Such credit facility granted to an exporter has to be repaid out of the proceeds of goods exported or from eligible resources of the exporter as permitted by RBI directions. The period of such advance/loan will be as specified by Foreign Exchange Dealers Association of India (FEDAI).

Example

ABC Ltd is an exporter of hosiery goods who secured an export order from USA For executing this order he needs to buy raw cloth, get them stitched, coloured, remove defective pieces, labelled, packed etc. The finance needed for these processes is pre shipment or packing credit.

After the manufacturing/ processing when the goods are ready for export and subsequent realisation, the manufacturer needs fuds to run his activity to tide over the temporary working capital need. The banker comes to his help with post shipment credit in the form of fund based limits or bill discounting facility which are repayable after realisation of export proceeds.

Question 5

(a) ABC Ltd has an outstanding bank guarantee of ₹ 425 lakh as per the Audited Balance Sheet of March 31, 2023. During the year 2023-24, the Company availed an additional bank guarantee of ₹ 150 lakh. The Company needs an additional bank guarantee of ₹ 850 lakh in December 2023 to meet its one-time requirement. The bank guarantees maturing and cancelled by December 2023 are worth ₹ 300 lakh and ₹ 180 lakh respectively. The Bank guarantees cancelled during the year are worth ₹ 200 lakh. The Company has ₹ 950 lakh as its sanctioned Bank Guarantee Limit.

Given these circumstances, you are required to assess whether the company should enhance its bank guarantee or if the existing bank guarantee will suffice to cover the additional requirement of ₹ 850 lakh.

(*5 marks*)

(b) An established company maintaining power projects in India, raised ₹ 5,600 crores from

Indian Stock Market with an issue price of ₹ 872 (FV of ₹ 10 per share) on 15th February, 2022. Anticipating a huge returns on the share price, the issue was subscribed 22 times and a huge response received to the company's IPO. The company at the time of listing only owned a land for its six power projects which were to be developed for generation of electricity, and there was no revenue income at the time of listing. On 15th March, 2022 the company listed its shares but due to the stock market meltdown, the stock fell to ₹ 654 per share, i.e. a discount of ₹ 218 from its issue price of ₹ 872. Facing huge criticism from its investors, the company decided to issue bonus shares in the ratio of 7 shares for 10 shares held. A Public Interest Litigation was filed challenging the issuance of bonus shares without any revenue income. The case was rejected and dismissed.

Discuss the merits of the case and also the conditions for issue of bonus shares.

(*5 marks*)

(c) What is working capital cycle ? Calculate the working capital cycle of the manufacturing company Classic Ltd as on 31.3.24 with the data given below. (₹ in lakh)

Particulars	Position as on 31.03.23	Position as on 3l.03.24
Inventory	6	4
Bookdebts	20	24
Sales (mark up 33.33% on cost)	150	200
Cash sales	10	24

Note :

1. All purchases on cash terms.
2. Year may be taken as 360 days for the purpose of calculation.

(*2+3=5 marks*)

Answer 5(a)

Assessment of Limit of Bank Guarantee: -

(in ₹ Lakh)

Outstanding Bank Guarantee as per Audited Balance Sheet of March 31, 2023 (a)	425
Add: Bank Guarantee availed during the year 2023-24 (b)	150
Add: Additional Bank Guarantee required for December 2023 (c)	850
Total (a+b+c)	**1425**
Less: Bank Guarantee Matured by December 2023	300
Less: Bank Guarantee cancelled by December 2023	180
Requirement of Bank Guarantee by December 2023	**945**

Hence, in the given circumstances the requirement of Bank Guarantee by ABC Ltd. is ₹ 945 Lakh which is within the sanctioned Bank Guarantee ₹ 950 lakh. As a result, there is no necessity to increase the Bank Guarantee limit.

Answer 5(b)

Conditions for issue of Bonus Shares as per Companies Act, 2013

In terms of section 63(2) of the Companies Act, 2013, company shall not capitalize its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless-

(a) It is authorised by its articles;

(b) It has been authorized in the general meeting of the company, on the recommendation of the Board of Directors;

(c) It has not defaulted in the payment of interest or principal in respect of fixed deposits or debt securities, issued by it;

(d) It has not defaulted in respect of the payment of statutory dues of the employees, such as contribution to provident fund, gratuity and bonus;

(e) The partly paid up shares, if any outstanding on the date of allotment are made fully paid up.

Section 63(3) of the Companies Act, 2013 provides that the bonus shares shall not be issued in lieu of dividend.

According to Rule 14 of the Companies (Share Capital and Debentures) Rules, 2014, the company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

Conditions for issue of Bonus Shares as per SEBI (ICDR) Regulations, 2018

Subject to the provisions of the Companies Act, 2013 or any other applicable law, a listed issuer shall be eligible to announce its bonus issue and issue bonus shares to its members if:

a) It is authorised by its articles of association for issue of bonus shares, capitalisation of reserves, etc.

b) It has received approval from the stock exchanges for listing and trading of all the securities, excluding options granted to employees pursuant to an employee stock option scheme and convertibles securities, issued by the issuer prior to the issuance of bonus shares.

c) It has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it.

d) It has not defaulted in respect of the payment of statutory dues of the employees such as contribution to provident fund, gratuity and bonus.

e) Any outstanding partly paid shares on the date of the allotment of the bonus shares, are made fully paid-up.

f) Any of its promoters or directors is not a fugitive economic offender.

If the company has complied with all the conditions required to be satisfied as mentioned above, the court was correct in awarding the judgment in favour of the company.

Answer 5(c)

(i) Working capital cycle of a company is the time taken to convert its current asset and current liabilities into cash. It is the key matric for measuring the company's financial health and efficiency. A shorter working capital cycle indicates generally good health of the company because it frees up cash for other uses. A longer working cycle indicates that capital is tied up without earning return. The working capital cycle indicates the Procuring materials, production, sales and collection. Shorter the cycle means better inventory management, collection and better payment conditions.

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(ii) **Calculation of working capital cycle of Classic Ltd. as on 31-03-24**

₹ in Lakh

Working capital cycle =	Inventory period + Accounts receivable period.	
Average Inventory =	(Opening Inventory + Closing Inventory)/2 (6+4)/2 = 5	
Cost of Goods Sold =	Sales - Profit	Profit is 33.33% on cost. Hence, cost of goods sold is (200/133.33%) x100 = 150 *[Rounded Off to two decimal places]*
Inventory Period (A) =	$\frac{\text{Average Inventory}}{\text{Cost of Goods Sold}}$ x 360	
	(5/150) x 360 = 12 days	
Credit sales =	Total Sales – Cash Sales	
	200 - 24 = 176	
Accounts Receivable Period	$\frac{\text{Average Book Debt}}{\text{Total Credit Sale}}$ x 360	
Average Book Debts =	(Opening Book Debts + Closing Book Debts)/2	
	(20+24)/2 = 22	
Account Receivable Period (B) =	**(22/176) x 360 = 45 days.**	
Hence, working capital cycle (A+B) =	**12+ 45 = 57 days**	

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

Question 6

(*a*) (*i*) Rainbow Finance Limited is a newly incorporated Non-Banking Financial Company (NBFC) in the category of Infrastructure and Finance Company. Its assets size is more than 100 billion. You are appointed as the company secretary of Rainbow finance limited. The chairman of board requires you to apprise him about the "'fit and proper criteria" for appointment of director in the company.

Write a note for the chairman of the board regarding "fit and proper criteria" as contained in the RBI Guidelines on Corporate Governance for NBFCS.

(*3 marks*)

(*ii*) What are the principles of the Stewardship Code as per the Securities and Exchange Board of India (Real Estate Investment Trusts) (Second Amendment) Regulations, 2023 ?

(*3 marks*)

(b) ABC Securitization Ltd. (ABC) is a company engaged in the securitization of debt. To achieve this, it has set up a Special Purpose Distinct Entity (SPDE) named XYZ Trust. The trustees of XYZ Trust are Mr. X and Ms. Y. They are exploring the possibility of appointing one more trustee

who can act without obtaining registration from SEBI. ABC plans to issue securitized debt instruments backed by a pool of auto loans and seeks to list these instruments on a recognized stock exchange.

As the Company Secretary, you are required to answer the following questions in compliance with all the provisions of the SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008.

(1) ABC intends to list securitized debt instruments on a stock exchange. What are the mandatory conditions that must be fulfilled for such listing as per the given information?

(2) Assuming Mr. X and Ms. Y are not registered with SEBI as trustees, what are the minimum criteria they must meet to obtain registration ?

(3) Who may act as the trustee of Special Purpose Distinct Entity (SPDE) without obtaining registration with the SEBI ?

(*2+1+3=6 marks*)

(c) An Alternative Investment Fund (AIF) proposes to appoint a custodian which is an associate of its sponsor. What are the terms and conditions imposed by the Securities and Exchange Board of India (Alternative Investment Funds) (Amendment) Regulations, 2024, on such appointments ?

(*3 marks*)

Answer (a)(i)

Fit and Proper Criteria

(1) All applicable NBFCs shall-

- ensure that a policy is put in place with the approval of the Board of Directors for ascertaining the fit and proper criteria of the directors at the time of appointment, and on a continuing basis.
- obtain a declaration and undertaking from the directors giving additional information on the directors. The declaration and undertaking shall be on the lines specified by RBI.
- obtain a Deed of Covenant signed by the directors.
- furnish to the Reserve Bank a quarterly statement on change of directors, and a certificate from the Managing Director of the NBFC that fit and proper criteria in selection of the directors has been followed.

The statement must reach the Regional Office of the Reserve Bank within 15 days of the close of the respective quarter. The statement submitted by NBFCs for the quarter ending March 31, should be certified by the auditors.

However, the Bank, if it deems fit and in public interest, reserves the right to examine the fit and proper criteria of directors of any non-banking financial company irrespective of the asset size of such non-banking financial company.

Answer 6(a)(ii)

Schedule IX on Stewardship Code has been inserted vide SEBI (REITs) (Second Amendment) Regulations, 2023 which states that the following principles of stewardship code shall be complied with by any unitholder holding not less than 10% of the total outstanding units of the REIT:

1. They must act in the best interests of the REIT and its unit holders as a whole;

2. They should formulate a comprehensive policy on the discharge of their stewardship responsibilities, review and update the same periodically;
3. They should have a policy to manage issues of conflict of interest while fulfilling their stewardship responsibilities;
4. They should periodically monitor the REIT and its investee entities viz. Holding Company(s) and SPV(s);
5. They should have a policy on intervention in the REIT and its Holding Company(s) and SPV(s);
6. They should have a policy on voting.

Answer 6(b)

Mandatory Conditions for listing Securitized Debt Instruments on a Stock Exchange

1. A person cannot make a public offer of securitized debt instruments or seek listing for such securitized debt instruments unless -
   (a) it is constituted as a special purpose distinct entity;
   (b) all its trustees are registered with the SEBI under the SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008; and
   (c) it complies with all the applicable provisions of these regulations and the SEBI Act.
2. Mr. X and Ms. Y seeking registration to act as a trustee shall:-
   (a) have a net worth of not less than ₹ 2 crore.
   (b) have in its employment, a minimum of two persons who, between them, have at least five years' experience in activities related to securitization and at least one among them shall have a professional qualification in law from any university or institution recognized by the Central Government or any State Government or a foreign university.
3. The requirement of obtaining registration is not applicable for the following persons, who may act as trustees of Special Purpose Distinct Entities (SPDE) under SEBI (Issue and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008.
   a. any person registered as a debenture trustee with SEBI,
   b. any person registered as a securitization company or a reconstruction company with the RBI under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
   c. the National Housing Bank established by the National Housing Bank Act, 1987;
   d. the National Bank for Agriculture and Rural Development established by the National Bank for Agriculture and Rural Development Act, 1981;
   e. any scheduled commercial bank other than a regional rural bank;
   f. any public financial Institution as defined under clause (72) of section 2 of the Companies Act, 2013; and
   g. any other person as may be specified by SEBI.

   However, these persons and special purpose distinct entities of which they are trustees are required to comply with all the other provisions of the SEBI (Public Offer and Listing of Securitized Debt Instruments and Security Receipts) Regulations, 2008.

Answer 6(c)

SEBI vide its SEBI (Alternative Investment Fund) (Amendment) Regulations, 2024 inserted Regulation 20 (11A) which provides that a Custodian which is an associate of the Sponsor or Manager of an Alternative Investment Fund may act as a custodian for that Alternative Investment Fund only when all the following conditions are met:

(i) The Sponsor or Manager has a net worth of at least twenty thousand crore rupees at all points of time;

(ii) 50% or more of the directors of the Custodian do not represent the interest of the Sponsor or Manager or their associates;

(iii) The Custodian and the Sponsor or Manager of the Alternative Investment Fund are not subsidiaries of each other,

(iv) The Custodian and the Sponsor or Manager of the Alternative Investment Fund do not have common directors; and

(v) The Custodian and the Manager of the Alternative Investment Fund sign an undertaking that they shall act independently of each other in their dealings of the schemes of the Alternative Investment Fund.

OR (Alternative question to Q. No. 6)

Question 6A

(*i*) Imagine you are an economic advisor to a developing country experiencing a financial crisis. To stabilize the economy, you suggest seeking assistance from the International Monetary Fund (IMF). What fundamental mission and objectives of the IMF would you highlight to justify this recommendation ?

(*5 marks*)

(ii) As the Company Secretary of EcoRenewables Energy Ltd., identify and justify the five essential feasibility studies necessary for a proposed hydroelectric power project in a remote region in Odisha. Subsequently, outline the key due diligence areas to assess the project's financial viability.

(*5 marks*)

(iii) A multinational technology company is planning to raise funds through the issuance of Global Depository Receipts to expand its operations in the European market. The company's legal team is in the process of drafting the "Offering Circular".

What specific contents and information must be included in the "Offering Circular" to ensure that prospective investors have all the necessary details to form their investment strategies ?

(*5 marks*)

Answer 6A(i)

The fundamental mission of International Monetary Fund (IMF) is to ensure the stability of the international monetary system. It does so in three ways:

(i) keeping track of the global economy and the economies of member countries;

(ii) lending to countries with balance of payments difficulties; and

(iii) giving practical help to members.

Objectives of IMF

IMF was developed as an initiative to promote international monetary cooperation, enable international trade, achieve financial stability, stimulate high employment, diminish poverty in the world and sustain economic growth. Initially, there were 29 countries with a goal of redoing the global payment system. Today, the organization has 190 members.

- To improve and promote global monetary cooperation of the world.
- To secure financial stability by eliminating or minimizing the exchange rate stability.
- To facilitate a balanced international trade.
- To promote high employment through economic assistance and sustainable economic growth.
- To reduce poverty around the world.

Answer 6A(ii)

There are five types of feasibility studies mentioned as under:

S. No.	Type of feasibility	Reason for conducting study
1.	Legal Feasibility	Performed to understand if the proposed plan conforms to the legal and ethical requirements.
2.	Economic Feasibility	Involves a cost benefits analysis to identify how well, or how poorly, a project will be concluded.
3.	Technical Feasibility	Process of validating the technical resources and capabilities to convert the ideas into working systems.
4.	Operational Feasibility	Performed to understand well a proposed system solves the problems
5.	Scheduling Feasibility	Measure of how reasonable the project duration is.

Due diligence in project finance is a process that consists of multiple steps to ensure the most comprehensive analysis:

1. Assessment of promoter history and background;
2. Evaluation of the company and project business model;
3. Legal due diligence;
4. Detailed Analysis of financial statements of the project and its and capital structure;
5. Determine major risks associated with the project;
6. Analysis of tax effects;
7. Credit analysis and evaluation of loan terms;
8. Project valuation.

Answer 6A(iii)

"Offering Circular" is a mirror through which the prospective investors can access vital information regarding the company in order to form their investment strategies. It is to be prepared very carefully giving true and complete information regarding the financial strength of the company,

its past performance, past and envisaged research and business promotion activities, track record of promoters and the company, ability to trade the securities in the European capital market. The Offering Circular should be very comprehensive to take care of overall interests of the prospective investor.

The Offering Circular for Euro-issue offering should typically cover the following contents:

- Background of the company and its promoters including date of incorporation and objects, past performance, production, sales and distribution network, future plans, etc.
- Capital structure of the company-existing, proposed and consolidated.
- Deployment of issue proceeds.
- Financial data indicating track record of consistent profitability of the company.
- Group investments and their performance including subsidiaries, joint venture in India and abroad.
- Investment considerations.
- Description of shares.
- Terms and conditions of global depository receipt and any other instrument issued.
- Economic and regulatory policies of the Government of India.
- Details of Indian securities market indicating stock exchange, listing requirements, foreign investments in Indian securities.
- Market price of securities.
- Dividend and capitalisation.
- Securities regulations and exchange control.
- Tax aspects indicating analysis of tax consequences under Indian law of acquisition, membership and sale of shares, treatment of capital gains tax, etc.
- Status of approvals required to be obtained from Government of India.
- Summary of significant differences in Indian GAAP, UK GAAP and US GAAP and expert's opinion.
- Report of statutory auditor.
- Subscription and sale.
- Transfer restrictions in respect of instruments.
- Legal matters etc.
- Other general information not forming part of any of the above.

If listed, a copy of the Offering Circular is required to be sent to the Registrar of Companies, SEBI and the Indian Stock Exchanges for record purposes.

***

CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

GROUP 2 PAPER 6

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

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

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

(M&A) team was assigned the task to do the investigating effort and to gather all relevant facts and information about the targets that can influence a decision to enter into a transaction or not. M&A team after their detailed due diligence recommended an unlisted company, Daisy

Commercial Vehicle Company Ltd. (DCVL) in South India as a potential target to give ETA Motors Ltd. a major breakthrough on the expansion front. The acquisition offer seemed to open up possibilities for strong synergies like expansion of the product line, good R&D capabilities and new markets.

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

Both the companies deliberated and discussed together at the Board level and came out with a scheme. The scheme received approval of 96% of the shareholders of DCVL but rest 4% dissented from the scheme.

K&G Associates advised that Section 235 and 236 of the Companies Act, 2013 lays down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. Where the scheme has been approved by the holders of not less than nine

tenth (90%) in value of the shares of the DCVL whose transfer is involved, ETA Motors Ltd., may give notice to the dissenting shareholders that transferee company desires to acquire their shares. The scheme shall be binding on all the shareholders of the DCVL (including dissenting shareholders), unless the Tribunal orders otherwise (i.e., that the scheme shall not be binding on all shareholders). Accordingly, the ETA Motors Ltd. shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

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

Based on the above facts, answer the following questions :

(a) Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. Explain the various types of Due diligence which could be conducted by M&A team while finalising a potential company for takeover.

(b) Whether the company has done sufficient compliance for giving Notice to dissenting shareholders in accordance with Rule 26 A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 which deals with purchase of minority shareholding held in DEMAT form ?

(c) As the legal advisor of the company, guide the company regarding determination of the price to be paid by acquirer for purchase of equity shares of the minority shareholders of DCVL under the provisions of Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

(d) Will the takeover achieved in the above process fall within the meaning of amalgamation under the Income Tax Act, 1961 and will benefits of amalgamation provided under the said Act be available to the acquisition under consideration ?

(*5 marks each*)

Answer 1(a)

The different types of Due Diligence to be conducted by M & A team may be as follows:

Legal Due Diligence: Legal Due Diligence is used to ensure that there are no legal issues in buying a business or investing in it. In this, the potential purchaser will review the important legal documents of the target firm such as employment contracts, board meeting minutes, Articles and Memorandum of Association and Patents and Copyrights or any other property related documents compliance status of the applicable laws etc.

Tax Due Diligence: This is aimed at ensuring that there are no past tax liabilities in the seller firm that might have materialized due to mistakes or deception and could hold the acquirer liable for it.

IP Due Diligence: IP due diligence is focused on establishing what rights the company may have in various intellectual property and where it might rely on the intellectual property of another entity. Typical areas of interest are Patent, Copyright and Trademark filings; descriptions of the company's IP protection processes; licensing agreements, [P Assignment document, etc.

Operational Due Diligence: Operational due diligence (ODD) is the process by which a potential purchaser reviews the operational aspects of a target company during mergers and acquisitions. The ODD review looks at the main operations of the target company and attempts to confirm (or not) that the business plan that has been provided is achievable with the existing operational facilities plus the capital expenditure that is outlined in the business plan.

Commercial Due Diligence: This aims at understanding the market the target business is operating in. This looks the current market status and the forecast of the market growth in future and the target's position in the market with relation to its competitors. This also involves interaction with the significant customers of the business to understand their opinion about the business.

Information Technology (IT) Due Diligence: This aims at identifying if there are any IT issues in the target business. This involves into matters such as scalability of systems, robustness of the processes, availability of ERP, IT base and infrastructure, capacity of server, the level of documentation of processes, compliance with the legislation and ability to integrate various systems.

HR Due Diligence: This aims at understanding the impact of human capital on the proposed deal. This involves review of number and type of manpower, skills, employment records, compensation schemes, HR processes, ongoing HR litigations, effectiveness of the sales force and cultural factors.

Answer 1(b)

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

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

(2) After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.

(3) A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.

In the particular case, compliance is not sufficient as notice in newspaper and on website of the company is also required. Further, some of the shareholders are not holding their shares in dematerialised form.

Answer 1(c)

Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that for the purposes of sub-section (2) of section 236 of the Companies Act,2013 the registered valuer shall determine the price (hereinafter called as offer price) to be paid by acquirer, person or group of persons referred to in sub-section (1) of section 236 of the Companies Act, 2013 for purchase of equity shares of the minority shareholders of the company, in accordance with the following rules:

(1) In case of a listed company;

(i) The offer price shall be determined in the manner as may be specified by the Securities and Exchange Board of India under the relevant regulations framed by it, as may be applicable; and

(ii) The registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

(2) In the case of an unlisted company and a private company,

(i) the offer price shall be determined after taking into account the following factors: -

(a) the highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;

(b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-a-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and

(ii) the registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

Answer 1(d)

According to section 2 (1B) of the Income Tax, 1961, "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that –

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise, than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

The given case deals with acquisition which does not result in does not result in the transferor Company losing its identity. Therefore, the takeover achieved in the above process through Section 235 of the Companies Act, 2013 Act will not fall within the meaning of amalgamation under the Income Tax Act, 1961 and as such benefits of amalgamation provided under the said Act will not be available to the acquisition under consideration. The takeover in the above process will not enable carrying forward of unabsorbed depreciation and accumulated losses of the transferor Company in the transferee

Company for the reason that the takeover does not result in the transferor Company losing its identity as it is stated in the question that this is takeover of an unlisted company through transfer of undertaking.

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

Question 2

(*a*) ABC Ltd. is having a share capital of ₹ 35 Crore and XYZ Ltd. is having a share capital of ₹ 45

Crore. DNF Ltd. was formed to take over the business of ABC Ltd. and XYZ Ltd. at a purchase consideration of ₹ 45 Crore and ₹ 38 Crore respectively, payable in shares of DNF Ltd.

The assets and liabilities were taken over at their carrying amounts. Compute the Goodwill or Capital Reserve.

(*5 marks*)

(b) Company ABC purchased 51% equity interest in Company XYZ. The consideration is paid in cash. The relevant dates are as under :

Date of agreement with shareholders –1st June, 2022 Appointed date as per agreement – 1st April, 2022 Date of obtaining TRAI Permission –1st July, 2022 Date of payment of consideration – 15th July, 2022

What will be the acquisition date ?

Whether the 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control. Discuss.

(*5 marks*)

(c) A Ltd. is incurring losses for past 8 years as several of its business units are running under losses. The balance sheet does not reflect the true position of the business, as higher net worth is depicted, than that of the real one. The assets are overvalued and it has many intangible and fictitious assets, which does not depict a true picture of the financial statements. The management of the company approaches Mr. X, a practising Company Secretary to suggest the way out in such a situation. Prepare suggestive measures for Mr. X for resolution of the current status with respect to corporate restructuring.

(*5 marks*)

(d) Flora Ltd. and Fauna Ltd. submitted joint application to National Company Law Tribunal (NCLT) Kolkata which has approved merger into Happy Ltd. and passed an order. Happy Ltd. management is of opinion that West Bengal govt has no authority to levy stamp duty. Here, value of shares allotted by Happy Ltd. is ₹ 500 crore and cash ₹ 57 crore. Citing relevant decided cases, as Company Secretary of Happy Ltd. give advice about legal status for levy of West Bengal state stamp duty and value over which stamp duty will be levied.

(*5 marks*)

Answer 2(a)

Since the purchase consideration is payable in shares of the transferee company and all the assets and liabilities are taken over at their carrying amounts, the amalgamation is in the nature of merger, i.e., pooling of interests' method.

To compute the "Goodwill" or "Capital Reserve" for DNF Ltd., we need to compare the purchase consideration (the amount paid for acquiring the business) with the net assets (share capital) of the companies acquired, which in this case are ABC Ltd. and XYZ Ltd.

1. **For ABC Ltd. Acquisition:**

   Purchase consideration =₹ 45 crores

   Share capital of ABC Ltd = ₹35 crores

   Net Assets of ABC Ltd.= ₹ 35 crore (since assets and liabilities are taken over at their carrying amounts)

Goodwill or Capital Reserves for ABC Ltd. acquisition= Purchase consideration less Net Assets i.e. ₹45 cr - ₹ 35 cr = 10 cr

Since the purchase consideration is higher than Net Assets, Goodwill of ₹10 cr is created for ABC Limited.

2. **XYZ Ltd Acquisition**

Purchase consideration for XYZ Ltd.= ₹ 38 cr

Share capital of XYZ Ltd. = ₹ 45 cr

Net Assets of AXYZ Ltd. = ₹ 45 cr (again, assets and liabilities are taken over at their carrying amounts)

Goodwill of Capital Reserves for XYZ Ltd

= ₹38cr- ₹45 cr= -₹7 cr

Since the purchase consideration is lower than the net assets, a Capital Reseve of ₹ 7 cr is to be created for XYZ Ltd.

3. **Total Goodwill or Capital Reserves for DNF Ltd.**

Goodwill from ABC Ltd.= ₹ 10 cr

Capital Reserve from XYZ Ltd.= ₹ 7 cr

Thus, the net Goodwill or Capital Reserve for DNF Ltd. = ₹10 cr- ₹7 cr= ₹ 3 cr (Goodwill)

Conclusion:

Goodwill of ₹3 cr will be created for DNF Ltd. after taking over the businesses of ABC Ltd. and XYZ Ltd.

Answer 2(b)

In this case the control over financial and operating policies are acquired through obtaining TRAI permission. This was obtained on 1st July, 2022. Since, TRAI approval is a substantive issue 1st July 2022 is considered as the acquisition date. It may be noted that the appointed date as per the agreement is not considered as the acquisition date, because the Company ABC did not have control over Company XYZ as at that date due to non-approval by TRAI.

Section 232(6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

In view of the above, it was clarified vide MCA Circular in 2019 that:

(a) The provision of section 232(6) of the Companies Act, 2013 enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme.

(b) The 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control for the purpose of conforming to accounting standards including IndAS 103 Business Combinations.

(c) where the "appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/amalgamation in NCLT. However, if the 'appointed date' is significantly ante-dated beyond a year from the date of filing, the

justification for the same would have to be specifically brought out in the scheme and it should not be against public interest.

(d) The scheme may identify the 'appointed date' based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective.

However, in case of such event-based date being a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force.

Answer 2(c)

The problem in the question is a clear case requiring Internal Reconstruction of the organisation. The following methodology may be suggested by Mr. X as a practising company secretary to the management of A Ltd.

Internal Reconstruction

When a company incurs loss for number of years, the balance sheet does not reflect the true position of the business, as a higher net worth is depicted, than that of the real one. In such a company the assets are overvalued and it has many intangible assets and fictitious assets. Such a situation does not depict a true picture of financial statements. Such a situation requires reconstruction. Such a reconstruction may be carried out internally. In an internal reconstruction, the assets are revalued, liabilities are negotiated, and losses suffered are written off by reducing the paid-up value of shares and/or varying the rights attached to different classes of shares. Existing company is not liquidated.

Internal Reconstruction may be done by ways of:

(a) Cost Reduction through Closure of Units:

Assessment of Underperforming Units: The company evaluates its business units or operations to identify those that are underperforming or no longer aligned with its strategic objectives.

Closure or Rationalization: Underperforming units or operations may be closed down entirely or rationalized to reduce costs. This could involve shutting down unprofitable facilities, discontinuing unproductive product lines, or exiting unprofitable markets.

Impact Analysis: The company assesses the financial and operational impact of closure or rationalization, considering factors such as employee layoffs, asset write-offs, lease terminations, and potential restructuring costs.

Communication and Stakeholder Management: Transparent communication with employees, suppliers, customers, and other stakeholders is essential to manage the impact of closures effectively. The company may provide support to affected employees and establish a transition plan for suppliers and customers.

Optimization of Resources: By closing underperforming units, the company can reallocate resources, including capital, personnel, and management attention, to focus on core businesses or areas with higher growth potential.

(b) Redundancy Programs:

Identification of Redundancies: The company identifies areas of duplication, inefficiency, or overlap in its operations, such as redundant processes, roles, functions, or departments.

Voluntary or Involuntary Redundancy Programs: Redundancy programs may involve offering voluntary retirement packages, early retirement incentives, or severance packages

to employees. In some cases, involuntary layoffs or job eliminations may be necessary to streamline operations.

Skills Assessment and Retention: The company assesses the skills and capabilities of its workforce to retain critical talent and ensure that the right people are in the right roles post-restructuring.

Legal and Regulatory Compliance: Redundancy programs must comply with applicable labor laws, regulations, and collective bargaining agreements. The company may need to consult with employee representatives or unions and provide adequate notice and compensation to affected employees.

Reorganization and Workforce Planning: Following redundancy programs, the company may reorganize its workforce and realign roles and responsibilities to optimize efficiency and productivity. Workforce planning ensures that the company has the necessary talent and skills to support its strategic objectives.

(c) Management or Organizational Restructuring involving Decentralization:

Evaluation of Organizational Structure: The company assesses its existing organizational structure to determine whether it is conducive to agility, innovation, and effective decision making.

Decentralization: Management restructuring may involve decentralizing decision making authority and empowering lower-level managers or teams to make more autonomous decisions. This could lead to faster responses to market changes, improved customer service, and increased accountability.

Clarification of Roles and Responsibilities: Clear delineation of roles, responsibilities, and accountability is essential in decentralized structures to avoid confusion and ensure alignment with organizational goals.

Communication and Training: Effective communication is critical to ensure that employees understand the rationale behind decentralization and their roles in the new structure. Training programs may be provided to equip managers and employees with the necessary skills to thrive in a decentralized environment.

Performance Monitoring and Feedback: The company establishes performance metrics and feedback mechanisms to evaluate the effectiveness of decentralization and make adjustments as needed. Regular monitoring helps identify bottlenecks, address challenges, and capitalize on opportunities for improvement.

Answer 2(d)

In exercise of power conferred by Entry 63, List II, the State Legislature can make amendment in the Indian Stamp Act, 1899 under article 372, in regard to the rates of stamp duty in respect of documents other than those specified in provisions of List I related to Union Government list.

Stamp duty is levied in India on almost all, except a few documents, by the States and hence the rate and incidence of stamp in different states vary. The State Legislature has jurisdiction to levy stamp duty under entry 44, List III of the Seventh Schedule of the Constitution of India and prescribe rates of stamp duty under entry 63, List II.

The landmark decision of Bombay High Court in ***[Li Taka Pharmaceuticals v. State of Maharashtra (1996) 8 SC 102 (Bom.)]*** has serious implications for mergers covered not just by the Bombay Stamp Act, 1958 but also mergers covered by Acts of other States.

The following are the major conclusions of the Court:

1. An amalgamation under an order of Court under Section 394 of the Companies Act,1956 is an instrument under the Bombay Stamp Act, 1958.
2. States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.
3. Stamp duty would be levied not on the gross assets transferred but on the "undertaking", when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

The Calcutta High Court in the case of *Emami Biotech Ltd. (2012*) held that a Court order sanctioning a scheme of amalgamation or demerger under section 391 to 394 of the Companies Act, 1956 [section 230 and 232 of Companies Act 2013] is an instrument and conveyance within the meaning of the Stamp Act applicable to the State of West Bengal and is accordingly, subject to stamp duty.

Therefore, it cannot be said that the State Legislature has no jurisdiction to levy such duty on an order of the High Court sanctioning a scheme of compromise or arrangement under section 394 of the Companies Act, 1956

As per point 3, Stamp duty will be leviable on value of shares allotted i.e. 500 cr plus other consideration paid i.e. ₹ 57 cr resulting into a total of ₹ 557 cr.

OR (Alternate Question to Q. No. 2)

Question 2A

(*i*) Outline a list of conditions which companies proposing to enter into fast-track mergers are required to follow under Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

(*5 marks*)

(ii) Two insurance companies Goyenka General Insurance and Binani Alliance General Insurance decide to amalgamate.

Since the amalgamation or merger involved companies being regulated by a sectoral regulator like Insurance Regulatory and Development Authority (IRDA), the approval of the Regulators was also taken in addition to compliance with the Companies Act, 2013.

In addition, where an amalgamation takes place between any two or more insurers, the insurer carrying on the amalgamated business has to submit some statements to the IRDA.

Make a list of documents to be submitted under the provisions of Section 37 of the Insurance Act, 1938 in this context.

(*5 marks*)

(iii) The Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India. Comment and explain the extra territorial jurisdiction of Competition Commission of India.

(*5 marks*)

(iv) Dneers Infotech Ltd., an Indian company, is contemplating to take over Divine Infotech Pvt. Ltd. of Indonesia in accordance with procedures under the provisions of the Companies Act, 2013. Advice top management on key regulations which need to be followed during an

inbound merger with respect to the following transactions :

(i) Transfer of Securities

(ii) Branch/Office outside India

(iii) Borrowings

(iv) Transfer of Assets

(v) Opening of overseas bank accounts for resultant company

(*5 marks*)

Answer 2A(i)

Section 233 of the Companies Act,2013 states that scheme of fast track merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed

Further Rule 25 (1A) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 prescribes that a scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely:-

(i) two or more start-up companies; or

(ii) one or more start-up company with one or more small company

Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies Act, 2013 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow:

(a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;

(b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;

(c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(2) The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

(3) On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

(4) If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days:

It may be noted that if no such communication is made, it shall be presumed that he has no objection to the scheme.

Answer 2A(ii)

Section 37 of the Insurance Act, 1938 deals with the statements required after amalgamation and transfer. It states that:

Where an amalgamation takes place between any two or more insurers, or where any business of an insurer is transferred, whether in accordance with a scheme confirmed by the Authority or otherwise, the insurer carrying on the amalgamated business or the person to whom the business is transferred, as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, furnish in duplicate to the Authority-

(a) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and

(b) a declaration signed by every party concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

(c) where the amalgamation or transfer has not been made in accordance with a scheme approved by the Authority under Section 36:

(i) balance-sheet in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(ii) certified copies of any other reports on which the scheme of amalgamation or transfer was founded.

Answer 2A(iii)

Section 32 of the Competition Act, 2002 extends the extra territorial jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse

effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

The above clearly demonstrate that the Competition Commission of India will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

Answer 2A(iv)

The concept of inbound mergers was introduced in the Companies Act, 2013 as part of Section 234 of the Companies Act, 2013. Following are the key regulations which need to be followed during an inbound merger:

(i) Transfer of Securities

Typically, the resultant company of the cross-border merger can transfer any security including a foreign security to a person resident outside India in accordance with the provisions of Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instrument) Regulations, 2019. However, where the foreign company is a joint venture/ wholly owned subsidiary of an Indian company, such foreign company is required to comply with the provisions of Foreign Exchange Management (Overseas Investment) Rules, 2022.

(ii) Branch/Office outside India

An office/branch outside India of the foreign company shall be deemed to be the resultant company's office outside India for in accordance with the Foreign Exchange Management. In case of transfer of securities both Buyer as well as Target can use the service of a Tripartite whose job is to have Securities in the Books and doing all back-office operations (including valuation of the Securities).

(iii) Borrowings

The borrowings of the transferor company would become the borrowings of the resulting company. The Merger Regulations has provided a period of 2 years to comply with the requirements under the External Commercial Borrowings (ECB) regime. The end use restrictions are not applicable here. Cross Border Mergers require hedging of External Commercial Borrowings (ECB) as well. An External Commercial Borrowings (ECB) is an arrangement between Indian Buyer and Foreign Bank whereby Foreign Bank is funding to Indian Corporate via Foreign Currency Loan having specific amount, tenor. Foreign Exchange Management Act, 1999 does permit hedging of loan taken from outside Bank in Indian Books.

(iv) Transfer of Assets

Assets acquired by the resulting company can be transferred in accordance with the Companies Act, 2013 or any regulations framed thereunder for this purpose. If any asset is not permitted to be acquired, the same shall be sold within two years from the date when the National Company Law Tribunal (NCLT) had given sanction. The proceeds of such sale shall be repatriated to India.

(v) Opening of overseas bank accounts for resultant company

The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction for a maximum period of 2 years in order to carry out transactions pertinent to the cross-border merger.

PART-II

Question 3

(*a*) Company X, the parent company, is demerging its subsidiary, Company Y, into a separate entity called Y New.

The following information is available for company X and company Y :

1. Company X :

   Number of outstanding shares : 10 crores Market price per share : ₹ 60

2. Company Y :

   Number of outstanding shares : 6 crores Market price per share : ₹ 30

You are required to determine :

- The swap ratio and
- Based on the swap ratio, calculate the number of shares a shareholder would receive in the company Y New if he owns 20,000 shares in Company X.

(*5 marks*)

(*b*) In the process of valuing a business, a detailed, comprehensive analysis and the ability to develop accurate projections and assumptions are necessities. Moreover, application of finance theory and professional judgment in the appropriate places is also required. Hence, every valuer faces a lot of hindrances in the process. Discuss some of the most common hindrances faced by valuers during business valuation process.

(*5 marks*)

Answer 3(a)

To determine the swap ratio, we need to calculate the relative value of Sub Co Y compared to Company X.

Market capitalization of Company X = Number of shares * Market price per share

= 10 crore * 60 = 600 crores

Market capitalization of Sub Co Y =Number of shares * Market price per share

= 6 crore * 30 = 180 crores

Calculation of the swap ratio:

Swap ratio = Market capitalization of Sub Co Y/ Market capitalization of Company X

= 180 crore / 600 crores = 0.3

This means that for every 0.3 shares of Sub Co Y, shareholders of Company X will receive one share of Y New.

If the shareholder of Company X owns 20,000 shares.

Based on the swap ratio, he would receive:

Number of Y New shares = Number of Company X shares * Swap ratio

=20,000 * 0.3 = 6000 shares of Y New

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Answer 3(b)

For valuing a business, a detailed, comprehensive analysis and the ability to develop accurate projections and assumptions are necessities. Business valuation also requires the application of finance theory in the appropriate places and using professional judgment. Some of the most common hindrances include:

1. Value, as a concept, is ambiguous. An asset has different values depending on the purpose or context. Thus an asset has several values: market value (amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing); fair value (amount that will fairly compensate an owner who was involuntarily deprived of the economic enjoyment of a property where there is neither a willing buyer nor a willing seller); liquidation or forced sale value (amount which may reasonably be expected to be obtained from the sale of a property within a time-frame too short to obtain a value under open market conditions); going concern value (amount ascribed to an established business, not to its constituent parts); investment value (value of a property to a particular investor, or a class of investors for specified investment objectives).
2. Everyone has an opinion of value about a business, a tangible asset, or an intangible asset but actually, the term 'value' means different things to different people. The problems faced by the valuers are enormous. They have to bring forward an appropriate definition of value for a specific valuation. The Webster's dictionary puts value as:

   "A fair return or equivalent in goods, services, or money for something exchanged: the monetary worth of something: marketable price; relative worth, utility, or importance: something intrinsically valuable or desirable."
3. Mathematical certainty or certainty of one output based on specific set of inputs is neither demanded, nor possible in valuation discipline. Being context specific, the value keeps on fluctuating. It is for the valuers to express the value attributed by them to the asset, which is estimated on the basis of the facts drawn from the evidence before them. Valuation is an art more than a science and is an interdisciplinary study drawing upon law, economics, finance, accounting, and investment. It is a procedure, essentially, a bringing together of the economic concept of value and the legal concept of property. Valuation discipline is neither science nor an art; it is a craft, i.e., a skill that one learns by doing. The more one does it, the better one gets at it.
4. Valuation may be considered a science but, to a large extent, valuation variables require inherent subjectivity. In other words, valuation is not a precise science as there is always imperfection in the market. Even in rare instances, where the valuer has perfect knowledge of the market, the market does not have the perfect knowledge of value as well as the valuation methodology and process. On every occasion, there may not be a definitive valuation method or a definitive value conclusion, but every valuation is based only on its circumstances. Right valuation requires logical and methodical approach and careful application of the basic principles. This means that there may not be a prescribed format or a preferred methodology, which is to be adopted always.
5. Any business valuation activity is based on the hypothetical consideration that there is an arm's length sale of a business between a willing buyer and a willing seller, usually for cash. Any valuation theory attempts to search for truth and relates to the practice in order to understand valuation theory.
6. One of the frequent sources of legal confusion between cost and value is the tendency of courts, in common with other persons, to think of value as something inherent in the thing

being valued, rather than an attitude of persons toward that thing in view of its estimated capacity to perform a service. Whether or not, as a matter of abstract philosophy, a thing has value except to people to when it has value, is a question that need not be answered for the sake of appraisal theory. Certainly, for the purpose of a monetary valuation, property has no value unless there is a prospect that it can be exploited by human beings.

7. In a business valuation, the value of an interest in business is typically considered to be equal to the future benefits that are to be received from the business, discounted to the present value, at an appropriate discount rate. However, this simple definition of value raises the following issues to be addressed:
   (i) How to define 'benefits?
   (ii) Future projections may be extremely difficult to make and also very difficult to get interested parties to agree to.
   (iii) What is an appropriate discount rate that reflects the risk inherent in the subject entity
8. Developing reasonable assumptions for projections based on historical trends and expected future occurrences and documenting the reasoning behind those assumption choices.
9. Gathering the appropriate market comparable (both public and private) and documenting the reasoning behind the market comparable choices.
10. Choice of Valuation Standards to be followed.
11. Drafting a comprehensive valuation report.
12. Remaining compliant with International Valuation Standards (IVS) or ICAI Valuation

Standards IRS guidelines and other industry standards.

Question 4

(a) PQR Ltd. has decided to issue Sweat equity shares, to compensate its employees for their contributions to the company by way of time, effort, expertise, increasing revenue, improving operational efficiency, or developing innovative products or services etc.

In the light of the provisions under the sub rules of rule 8 of Companies (Share Capital and Debentures) Rules, 2014 w.r.t. issue of sweat equity shares, advise the Board of directors of PQR Ltd. regarding :

(i) Valuation of sweat equity shares

(ii) Treatment of the transaction in the books of PQR Ltd.

(b) G-tech solutions is a fast-growing company and is exploring the options for fund raising.

The Management of Company has approached you to determine the valuation of their business using Discounted Cash Flow Market Approach.

Explain the steps involved in this method of valuation of business.

(*5 marks each*)

Answer 4(a)

Section 54 of the Companies Act, 2013 read with Rule 8 of the Companies (Share Capital and Debentures) Rules, 2014 states that the:

(i) Valuation of Sweat Equity Shares:

The sweat equity shares to be issued shall be valued at a price determined by a registered

valuer as the fair price giving justification for such valuation. The valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued, shall be carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with Justification for such valuation. A copy of gist along with critical elements of the valuation report obtained under clause (6) and clause (7) shall be sent to the shareholders with the notice of the general meeting.

(ii) Treatment of transaction in the books of PQR Limited: Where sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect there of obtained from the registered valuer, such noncash consideration shall be treated in the following manner in the books of account of the company-

(a) where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the accounting standards; or

(b) where clause (a) is not applicable, it shall be expensed as provide in the accounting standards.

The amount of sweat equity shares issued shall be treated as part of managerial remuneration for the purposes of sections 197 and 198 of the Act, if the following conditions are fulfilled, namely.-

(a) the sweat equity shares are issued to any director or manager; and

(b) they are issued for consideration other than cash, which does not take the form of an asset which can be carried to the balance sheet of the company in accordance with the applicable accounting standards.

In respect of sweat equity shares issued during an accounting period, the accounting value of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company, if the sweat equity shares are not issued pursuant to acquisition of an asset.

If the shares are issued pursuant to acquisition of an asset, the value of the asset, as determined by the valuation report, shall be carried in the balance sheet as per the Accounting Standards and such amount of the accounting value of the sweat equity shares that is in excess of the value of the asset acquired, as per the valuation report, shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

Explanation.- For the purposes of this sub-rule, it is hereby clarified that the Accounting value shall be the fair value of the sweat equity shares as determined by a registered valuer under sub-rule (6)

Answer 4(b)

The Discounted Cash Flow (DCF) technique is a widely used method for business valuation. It estimates the present value of a company's projected future cash flows, taking into account the time value of money. The DCF technique involves the following steps:

1. Project Future Cash Flows: Forecast the future cash flows of the business over a specific period. Cash flows typically include operating cash flows, capital expenditures, working capital changes, and any other significant cash flow components.
2. Determine the Discount Rate: Select an appropriate discount rate, often the company's Weighted Average Cost of Capital (WACC). The discount rate represents the required rate of return expected by an investor considering the risk associated with the investment. It reflects the opportunity cost of investing in the company rather than alternative investments.
3. Discount Cash Flows: Apply the discount rate to each projected period's cash flow to

calculate the present value of the cash flows. This involves dividing each projected cash flow by (1 +discount rate) raised to the power of the respective period.

4. Calculate Terminal Value: Estimate the value of the company beyond the projected period, usually based on a perpetuity or exit multiple. The terminal value represents the value of the business's cash flows beyond the projection period.
5. Sum the Present Values: Sum up the present values of the projected cash flows and the terminal value to obtain the total present value of the future cash flows. This represents the estimated value of the business.
6. Sensitivity Analysis: Perform sensitivity analysis by varying key assumptions such as cash flow projections, discount rate, and terminal value to assess the impact on the estimated value.
7. Compare to Market and Comparable Companies: Consider market conditions, industry trends, and comparable company valuations to evaluate the reasonableness of the estimated value.

It's important to note that the accuracy of the valuation heavily depends on the quality of cash flow projections, appropriate selection of the discount rate, and other assumptions made during the process. The DCF technique requires careful consideration and professional expertise in financial analysis to ensure a comprehensive and accurate valuation of the business.

PART-III

Question 5

(*a*) An application under section 9 of the Insolvency and Bankruptcy Code (IBC), 2016 was filed by N, operational creditor of Delta Pvt. Ltd. and was admitted by the NCLT on 30th July, 2024. Later on, the parties amicably settled the dispute and executed a Memorandum of Understanding on 06th August, 2024. In light of the settlement, Form-FA was received by the IRP on 08th August, 2024 for withdrawal of the Application in terms of Section 12A of the IBC read with Regulation 30A. Accordingly, an Application for withdrawal was filed by the IRP on 09th August, 2024 before NCLT.

During pendency of said Application, a Committee of Creditors (CoC) was constituted consisting of two financial creditors and the 1st meeting of CoC was also held. One financial creditor having 20% of voting shares dissented to allow withdrawal. NCLT refused to entertain the withdrawal application on the ground that it is not supported by 90% vote of CoC. As a Company Secretary of the corporate debtor, advise whether the withdrawal application is tenable citing relevant case laws ?

(*5 marks*)

(*b*) Upon commencement of the Corporate Insolvency Resolution Process (CIRP) in ABC Ltd. under IBC, a complaint was found to be pending under section 138 of the Negotiable Instruments Act, 1881 against Mr. X, Chairman and Managing Director of ABC Ltd. In the matter, NCLT also approves the resolution plan with a change in management and control in the company. Thereupon, Mr. X sought to quash the prosecution under section 138 of the Negotiable Instruments Act, 1938 in terms of the protection available to him under Section 14 of the IBC. Discuss the possibility of getting the abovesaid prosecution quashed, citing relevant case laws under IBC.

(*5 marks*)

(c) TERO Ltd. entered into supply contract with Telecom Regulatory Authority of India (TRAI)

for supply of fibre optic cables. TRAI has defaulted in paying invoice value as per demand notice issued to them. TERO Ltd. filed CIRP application in NCLT filed against TRAI. The said CIRP application was rejected. Discuss the legal status of NCLT order and advise TERO Ltd.

(*5 marks*)

(d) Mr. X, who is a Practising Company Secretary is approached by an Association of Small Enterprises. The members of Association want to understand Pre-Packaged Insolvency Resolution Process. As an Assistant to Mr. X, you are required to prepare a brief on Pre-Packaged Insolvency Resolution Process, indicating features of Pre- pack insolvency resolution process under IBC and its benefits to make the members of Association understand the features.

(*5 marks*)

Answer 5(a)

Yes, the appeal is tenable.

The facts of the case are similar to the facts in *M/s. Ashish Ispat Pvt. Ltd. v. Primuss Pipes and Tubes Ltd.*

In case of *M/s. Ashish Ispat Pvt. Ltd. v. Primuss Pipes and Tubes Ltd*., an application under section 9 of the Insolvency & Bankruptcy Code was admitted by the NCLT and after issuance of Form-A, the parties amicably settled the dispute and executed a Memorandum of Understanding. In light of settlement, Form-FA was received by the IRP for withdrawal of the Application in terms of Section 12A of the Code read with Regulation 30A. Accordingly, an Application for withdrawal was filed by the IRP before NCLT. During pendency of said Application, a CoC was constituted and the one meeting of CoC was also held. Thereafter, the NCLT observing that there being two Financial Creditors out of which one having 17% of voting shares has dissented to allow withdrawal, the Application for withdrawal cannot be considered unless the consent from CoC as required under the statute, is obtained. Hence, the Appellants and the Suspended Director of Corporate Debtor both aggrieved by the said order filed two Appeals.

The Hon'ble NCLAT held that when the Application under Section 12A was filed for withdrawal, the CoC was not constituted and hence there was no requirement of approval of 90% of voting share of CoC. Further Regulation 30A also makes it clear that when an application is filed prior to constitution of CoC, the requirement of 90% vote of CoC is not applicable and the NCLT has to consider the Application without requiring approval by 90% vote of the CoC. Thus, the Hon'ble NCLAT relying on the judgment of the Hon'ble Supreme Court in the matter of *Kamal K. Singh vs. Dinesh Gupta & Anr.* and its previous judgments in the matters of *Anuj Tejpal vs. Rakesh Yadav & Anr.* and *Sunil Tandon v Manoj Kumar Anand, IRP & Ors.* held that the NCLT without considering the facts and sequence of the events had refused to entertain the Application on the ground that it is not supported by 90% vote of CoC. Thus, the present Appeals were allowed permitting withdrawal of CIRP.

Answer 5(b)

Section 14 of the Insolvency & Bankruptcy Code details the moratorium protection given to the corporate debtor. The entire period of corporate insolvency resolution professional is covered under this moratorium, during which all suits, legal proceedings, and recovery actions against the corporate debtor are held in abeyance to give time to the corporate debtor to resolve its status.

However, the proceeding in moratorium do not include criminal prosecution. *In Mr. Ajay Kumar Bishnoi Vs. M/s Tap Engineering and Other [Criminal Original Petition No. 34996 of 2019),* the corporate debtor underwent insolvency resolution while a complaint was pending under section 138 of the Negotiable Instruments Act, 1881. Further, during this time, a resolution plan for the corporate

debtor was approved with a change in management and control. The Managing Director (MD) of the erstwhile corporate debtor sought to quash the prosecution under section 138 in view of the approval of the resolution plan. The High Court confirmed that the moratorium under section 14 of the IBC prohibits proceedings, but such proceedings do not include criminal prosecution.

In *Alchemist Asset Reconstruction Company Limited Vs. Hotel Gaudavan Private Limited [(2018) 16 SCC 94],* the Supreme Court affirmed that once a moratorium is imposed under the IBC, any proceeding initiated against the corporate debtor is non-est (does not exist) in law.

The Hon'ble Supreme Court in the case of ***P. Mohanraj & Ors vs Shah Brothers Ispat Pvt. Ltd. [AIR 2021 SC 1308]*** was concerned with the question whether the institution or continuation of a proceeding under Section 138 of Negotiable Instruments Act, 1881 for dishonor of cheque can be said to be covered by the moratorium provision under Section 14 of the IBC.

- The Supreme Court after exhaustively dealing with various provisions of the IBC and the judicial precedents, authoritatively held that the proceedings under Section 138 of NI Act against the corporate debtor were covered by Section 14(1)(a) of the IBC.
- In essence, the Supreme Court held that during the subsistence of the moratorium period as envisaged under Section 14 of the IBC, the proceedings for cheque dishonor, which are quasi-criminal in nature, would be liable to be stayed. One of the reasons for such a finding was that in a proceeding for dishonor of cheques, the corporate debtor, if convicted, may be directed to pay compensation which can amount to twice the amount of the cheque which has bounced.
- Accordingly, payment of such compensation would in fact lead to depletion of the assets of the corporate debtor thereby directly impacting the corporate insolvency resolution process.
- One clarification provided by the Supreme Court in the above case was that though the moratorium would be applicable to the corporate debtor but that would not absolve the directors/persons in charge of and responsible for the conduct of the business of the corporate debtor from being prosecuted for the offence of dishonor of cheque.

  The Hon'ble Supreme Court in the matter of ***Ajay Kumar Radheyshyam Goenka vs tourism Finance Corporation of India [MANU/SC/0244/2023]*** was concerned with a case where the managing director of a company (for which the resolution plan was approved by the NCLT) sought to seek his discharge from the proceedings under section 138 of the Negotiable Instruments Act.
- The seminal question of law framed by the Supreme Court was whether after the approval of the resolution plan of the corporate debtor, the managing director who signed the cheque, would stand discharged from the penal liability under Section 138 of the NI Act.
- The Supreme Court answered the question in the negative and held that the person who signed the cheque would continue to remain liable for the offence.

Another pertinent observation made by the Court was as under-

"*...16.. In fact, a bare reading of Section 14 of IBC would make it clear that the nature of proceedings which have to be kept in abeyance do not include criminal proceedings, which is the nature of proceedings under Section 138 of the N.I. Act...*"

In view of the above, Mr. X will not be able to get the prosecution quashed under Section 14 of IBC.

Answer 5(c)

According to Section 3(7) of Insolvency & Bankruptcy Code, "Corporate Person" means a company

as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider

In *Hindustan Construction Company Limited & Another Vs. Union of India & Others [WP (Civil) No. 1074/2019 with other Civil Appeals]*, a CIRP was sought to be initiated against the National Highway Authority of India. The Supreme Court held that the National Highway Authority of India is a statutory body that functions as an extended limb of the Central Government and performs governmental functions that cannot be taken over by an RP under the Insolvency & Bankruptcy Code or by any other corporate body. Nor can such authority ultimately be wound up under the Insolvency & Bankruptcy Code. For all these reasons, it is not possible to either read in or read down the definition of "corporate person" in section 3(7) of the IBC.

Therefore, TRAI is not a corporate debtor for the purposes of the Insolvency & Bankruptcy Code and, consequently, a Corporate Insolvency Resolution Process against TRAI cannot be initiated under section 7, 9, or 10 of the IBC. Hence, TERO Limited will not succeed in CIRP application against TRAI.

Answer 5(d)

Sections 54A to 54P of the Insolvency & Bankruptcy Code contain provisions relating to Pre-packaged Insolvency Resolution Process.

- An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under subsection (1) of section 7 of the Micro, Small and Medium Enterprises Development Act, 2006. The minimum amount of default for initiating pre-packaged insolvency resolution process is Rs. 10 lakhs.
- Pre-packaged insolvency resolution process shall be completed within a period of one hundred and twenty days from the pre-packaged insolvency commencement date.
- The resolution professional shall submit the resolution plan, as approved by the committee of creditors to the Adjudicating Authority within a period of ninety days from the pre-packaged insolvency commencement date.
- An application for pre-packaged insolvency resolution process may be filed by a corporate applicant. The Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 contains the procedure for pre-packaged insolvency resolution process.
- The corporate debtor shall, within two days of the pre-packaged insolvency commencement date, submit to the resolution professional a list of claims and a preliminary information memorandum. During the pre-packaged insolvency resolution process period, the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be, of the corporate debtor.
- The resolution professional shall, within seven days of the pre-packaged insolvency commencement date, constitute a committee of creditors, based on the list of claims confirmed. As per Section 54I(2), the first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- The committee of creditors (CoC), at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent. of the voting shares, resolve to vest the management of the corporate debtor with the resolution professional.

- The corporate debtor shall submit the base resolution plan to the resolution professional within two days of the pre-packaged insolvency commencement date, and the resolution professional shall present it to the committee of creditors.
- The CoC may provide the corporate debtor an opportunity to revise the base resolution plan prior to its approval or invitation of prospective resolution applicants, as the case may be.
- The committee of creditors may approve the base resolution plan for submission to the Adjudicating Authority if it does not impair any claims owed by the corporate debtor to the operational creditors and conforms to the requirements of section 30(1) & (2) of the Code.
- Where – (a) the committee of creditors does not approve the base resolution plan under subsection (4); or (b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors, the resolution professional shall invite prospective resolution applicants to submit a resolution plan or plans, to compete with the base resolution plan, in such manner as may be specified.
- The committee of creditors shall evaluate the resolution plans presented by the resolution professional and select either BRP or a resolution plan which is significantly better than BRP. The resolution plan approved by the committee of creditors is submitted to the Adjudicating Authority by the Resolution Professional.
- The Adjudicating Authority shall, before passing an order for approval of a resolution plan under this sub-section, satisfy itself that the resolution plan has provisions for its effective implementation.

Benefits of pre-pack insolvency resolution process:

- It consolidates the benefit of both formal and informal proceedings of resolution, thus broadening the options for stakeholders.
- It enables faster resolution as the corporate debtor can prepare a settlement plan or resolution plan with the creditors before going to NCLT.
- Reduced burden on NCLT due to out of court settlements.
- With the suspension of CIRP until March 2021, pre-pack has come as a relief to promoters and corporate debtors.
- It allows the corporate debtor retain control till a settlement is reached with the creditors.

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

Question 6

(*a*) Resolution Professional (RP) of TMT Ltd. filed an application seeking approval of the resolution plan submitted by a resolution applicant, who is a Financial Creditor with 82.7% voting share in the CoC. The plan provided that the resolution applicant will sell the corporate debtor in two years. It provides for generation of income from ongoing operations and no upfront money is being brought in by the resolution applicant. Comment in light of relevant case laws, will the resolution plan be approved by NCLT ?

(*5 marks*)

(b) A key duty of the RP under section 25(2)(h) of the IBC is to invite Prospective Resolution Applicants (PRAs), who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans. The details pertaining to the steps for inviting,

submitting, evaluating, and approving the resolution plan (and timelines in relation to them) are detailed in the CIRP Regulations.

Give the timelines for the following as provided in the CIRP regulations.

(i) Publish brief particulars of the invitation for expression of interest in Form G of the Schedule-I.

(ii) Last date for submission of expression of interest.

(iii) Objection for inclusion or exclusion of a PRA in the provisional list.

(iv) Issue of information memorandum, evaluation matrix and a request for resolution plans.

(v) Submission of resolution plans to the RP.

(*5 marks*)

(c) While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the IBC, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. Explain the purpose of formation of Information utilities highlighting its obligations under Section 214 of the Insolvency and Bankruptcy Code, 2016.

(*5 marks*)

(d) The Committee of Creditors recommended the liquidation of the Gopi Ltd. i.e., corporate Debtor and the National Company Law Tribunal (NCLT) i.e., adjudicating authority did not concur with the decision of the Committee of Creditors. Adjudicating Authority discarded the recommendation of the CoC with 87.30% of vote share and gave its own directives overriding the commercial wisdom of the CoC. Citing relevant case laws, discuss as to what will be the merit of appeal filed by Gopi Ltd against National Company Law Tribunal (NCLT) decision in National Company Law Appellate Tribunal (NCLAT) ?

(*5 marks*)

Answer 6(a)

The facts of the present case are similar to that *of Edelweiss Asset Reconstruction Company Ltd. v. Bharati Defence and Infrastructure Ltd,* wherein the Resolution Professional (RP) filed an application seeking approval of the resolution plan submitted by a resolution applicant, who is a Financial Creditor with 82.7% voting share in the CoC. The plan provided that the resolution applicant will sell the corporate debtor in two years. NCLT, Mumbai Bench noted that the plan does not give due consideration to the interest of all stakeholders, seeks several exemptions, and contains a lot of uncertainties and speculations. It provides for generation of income from ongoing operations and no upfront money is brought in by the resolution applicant. The NCLT Bench also noted that the resolution applicant has proposed to hold majority equity in the corporate debtor, run its operations, enhance its value and over a period endeavour to find a suitable investor/buyer for the same.

Relying on the judgment in the matter of *Binani Industries Limited*, the NCLT Bench observed: "…. resolution plan is for insolvency resolution of the Corporate Debtor as a going concern and not for the addition of value and intended to sale the corporate debtor". It observed that resolution applicant is essentially extending the CIRP period to find an investor, which is not the intention of the legislature. It further observed: "if the ultimate object in the resolution plan is to sell the company, then it can be achieved by sale as a going concern during the liquidation process". Accordingly, it rejected the resolution plan and ordered for liquidation.

Thus, it can be concluded that the resolution plan will not be approved by NCLT.

Answer 6(b)

(i) Publish brief particulars of the invitation for expression of interest in Form G of the Schedule I

Not later than sixtieth day from the insolvency commencement date from interested and eligible prospective resolution applicants to submit resolution plans. (Regulation 36A (1) of CIRP Regulations)

(ii) Last date for submission of expression of interest-

Not less than fifteen days from the date of issue of detailed invitation. (Regulation 36A (3) of CIRP Regulations)

(iii) Objection for inclusion or exclusion of a PRA in the provisional list.

Within five days from the date of issue of the provisional list. Regulation 36A (11) of CIRP Regulations.

(iv) Issue of information memorandum, evaluation matrix and a request for resolution plans-

The resolution professional shall, within five days of the date of issue of the final list under sub-regulation (12) of regulation 36A, issue the information memorandum, evaluation matrix and a request for resolution plans to every resolution applicant in the final list. (Regulation 36B (1) of CIRP Regulations)

(v) Submission of resolution plans to the RP. -

The request for resolution plans shall allow prospective resolution applicants a minimum of thirty days to submit the resolution plan(s). (Regulation 36B (3) of CIRP Regulations)

Answer 6(c)

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

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitation swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017.

Obligations of information utility (Section 214)

For the purposes of providing core services to any person, every information utility shall- –

(a) create and store financial information in a universally accessible format;

(b) accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;

(c) accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;

(d) meet such minimum service quality standards as may be specified by regulations;

(e) get the information received from various persons authenticated by all concerned parties before storing such information;

(f) provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;

(g) publish such statistical information as may be specified by regulations;

(h) have inter-operatability with other information utilities.

Answer 6(d)

The moot question to be decided in proposed appeal to be filed against the Impugned Order passed by the National Company Law Tribunal, as to whether the Adjudicating Authority can discard the recommendation of the Committee of Creditors (CoC) and rather give its own directives overriding the commercial wisdom of the Committee of Creditors.

The Supreme Court passed its order in the case of *K. Sashidhar v. Indian Overseas Bank & Ors. (Civil Appeal No. 10673 of 2018)* wherein the SC, inter alia, has held that

- The National Company Law Tribunal ("NCLT") and the National Company Law Appellate Tribunal ("NCLAT") have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the committee of creditors ("Committee of Creditors").
- Non recording of reasons for approving or rejecting the resolution plan by the concerned financial creditors during the voting in the meeting of Committee of Creditors, would not render the final collective decision of Committee of Creditors nullity per se.
- Concededly, if the objection to the resolution plan is on account of infraction of ground(s) specified in section 30(2) and 61(3), that must be specifically and expressly raised at the relevant time. For the approval of resolution plan by the Committee of Creditors can be challenged on those grounds.

However, if the opposition to the proposed resolution plan is purely a commercial or business decision, the same, being non-justiciable is not open to challenge before the Adjudicating Authority (NCLT) or for that matter the Appellate Authority (NCLAT). If so, non-recording of any reason for taking such commercial decision will be of no avail.

The Hon'ble National Company Law Appellate Tribunal has held that the Committee of Creditors has the discretion to approve any resolution plan and its decision to approve the same cannot be interfered with by the Adjudicating Authority or the Appellate Authority, except for in terms of Section 31(1) to examine compliance of Section 30(2) read with relevant regulations. (*Ref:Kannan Tiruvengandram Vs. M.K. Shah Exports Ltd. & Ors. in and Darshak Enterprise Pvt. Ltd. and Ors. v. Chhaparia Industries Pvt. Ltd. and Ors. E.)*

Decision of Appellate Tribunal's earlier order in case of *Amit Bharana and Ors vs. Gian Chand Narang* Adjudicating Authority must consider/ rely on commercial wisdom of CoC.

The Resolution for Liquidation of the corporate Debtor decision of has been passed by the committee of Creditors was with a majority of by more than the required threshold of 66%. Thus, the decision of liquidation of the corporate Debtor is a valid and in order. The legislature has not endowed the Adjudicating Authority with the jurisdiction or authority to evaluate the commercial decision of the CoC.

In the matter of *vallal RCK Vs. M/s Siva industries and Holdings limited and Ors.* the Hon'ble Supreme court in its judgement dated 3rd June, 2022, observed that when 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority find the decision of the CoC to be wholly capricious, arbitrary, and irrational and de hors the provisions of the statue or the Rules.

OR (Alternate question to Q. No. 6)

Question 6A

(*i*) Creditor means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder. Define creditor and citing relevant case laws express your opinion regarding legal tenability of filing of CIRP by decree holder.

(*5 marks*)

(ii) X was appointed as an official liquidator of ABC Company Ltd. at the time of passing of the order of winding up by NCLT. After few months, X suffered a cardiac arrest and due to his sudden demise, his position has become vacant.

Elucidate the powers of Tribunal w.r.t removal and replacement of liquidator in place of X under Section 276 of the Companies Act, 2013.

(*5 marks*)

(iii) Sarwam Technologies Pvt. Ltd. is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under Section 455 of the Companies Act, 2013. The Board of directors of Sarwam Technologies Pvt. Ltd. intend to file an application for removal of name of company from the Register of Companies (ROC). The Board of directors called a meeting of shareholders and 66% of the shareholders in terms of paid-up capital gave their consent to the proposal and thereafter the application was filed with ROC.

Discuss the tenability of the application filed with ROC for removal of name.

(*5 marks*)

(iv) Critically dwell upon/describe relevant enabling provisions for cross border transactions under Insolvency and Bankruptcy Code, 2016 ?

(*5 marks*)

Answer 6A(i)

According to Section 3(10) of the Insolvency & Bankruptcy Code, "Creditor'" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder.

A financial creditor' has been defined at Section 5(7) of the Insolvency & Bankruptcy Code as follows:

> "Any person to whom a financial debt is owed and includes any person to whom such debt has been legally assigned or transferred." (Emphasis supplied)

An 'operational creditor' has been defined at Section 5(20) of the of the Insolvency & Bankruptcy Code as follows:

> "a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred."

Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution and Liquidation for Corporate Person" & has its own definitions in Section 5.

Section 3 (10) of the Insolvency & Bankruptcy Code definition of "Creditor" includes "financial creditor", "operational creditor" "decree-holder" etc. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II."

In the matter of *Digamber Bhondwe Vs. JM Financial Asset Reconstruction [CA(AT)(Ins) No. 1379 of 2019]* it was held "..... We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of IBC

Sh. Sushil Ansal Vs Ashok Tripathi and Ors, the National Company Law Appellate Tribunal, Delhi (NCLAT) held that no decree holder who is covered within the definitions of creditor given under Section 3(10) of the Insolvency and Bankruptcy Code (IBC) can come within the ambit of the class of a financial creditor. The Tribunal has opined as follows:

We further reject the submission that because in Section 3(10) of I&B Code in definition of "Creditor" the "decree holder" is included it shows that decree gives cause to initiate application under Section 7 of I&B Code. Section 3 is in Part I of I&B Code. Part II of I&B Code deals with "Insolvency Resolution and Liquidation for Corporate Person", & has its own set of definitions in Section 5. But Section 7 or Section 9 dealing with "Financial Creditor" and "operational creditor" do not include "decree-holder" to initiate CIRP in Part II.

This implies that a decree holder is not permitted to initiate any corporate insolvency resolution process (CIRP) against any corporate debtor with the objective of executing a decree under it.

Answer 6A(ii)

Section 276 of the Companies Act, 2013 lays down that the Tribunal may on reasonable cause being shown and for reasons to be recorded in writing, the tribunal may remove the provisional liquidator or the Company liquidator, on any of the following grounds:

a. Misconduct
b. Fraud or misfeasance
c. Professional Incompetence for failure to exercise due care and diligence in performance of the powers and functions
d. Inability to act as provisional liquidator as the case maybe company liquidator
e. Conflict of interest or lack of independence during the term of his appointment that would justify removal

Further, in the event of death, resignation or removal of the liquidator the tribunal may transfer the work assigned to him to another Company liquidator for reasons to be recorded in writing.

In the present case also, due to sudden demise of Mr. X, the Tribunal may transfer the work assigned to Late Mr X to another Company liquidator for reasons to be recorded in writing.

Answer 6A(iii)

A company through its board of directors, can file an application for removal of name of company from the Register of Companies on the following grounds:

(a) Where a company has failed to commence its business within one year of its incorporation; or

(b) Where a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013; or

(c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation. This provision is applicable to companies incorporated after 02nd November, 2018; or

(d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9) of the Companies Act, 2013.

Before making an application to the ROC for removal of the name of the company, the board of directors of the company shall take all the steps necessary in order to extinguish all its liabilities. Approval of the shareholders by way of special resolution or consent of *seventy-five percent* members in terms of paid-up share capital is also required to be taken for filing an application to the ROC for the removal of the name of the company from the Register of Companies.

In the case of a company regulated under a Special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

In the particular case, since the proposal has been approved by only 66% of the shareholders in terms of paid-up capital as against the required percent of 75%, the ROC will reject the application for removal of name of company from register of members.

Answer 6A(iv)

Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 make provisions to deal with cases involving cross border insolvency.

Agreements with foreign countries : Section 234 empower the Central Government to enter into an agreement with other countries to resolve situations pertaining to cross border insolvency.

Section 234 of the Code provides that:

- The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code. [Section 234(1)]
- The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified. [Section 234(2)]

Letter of request to a country outside India in certain cases –

Section 235 of the Code lays down that notwithstanding anything contained in this Insolvency and Bankruptcy Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the adjudicating authority that evidence or action relating to such assets is required in connection with such process or proceeding. [Section 235(1)]

The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request. [Section 235(2)]

The current cross border insolvency framework in India is dependent on India entering bilateral agreements with other countries. Finalisation of bilateral agreements is a long-drawn process as it involves long term negotiations and thus takes a lot of time. Moreover, every trade is distinct and thus it would be difficult for the adjudicating authorities to enforce the agreements/treaties entered into with other countries.

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ARBITRATION, MEDIATION & CONCILIATION

GROUP 2 ELECTIVE PAPER 7.1

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

India's infrastructure sector is experiencing unprecedented growth, driven by the need for modernized urban spaces, enhanced connectivity, and robust real estate developments. Government initiatives such as the Smart Cities Mission, Housing for all, and major transportation projects require expertise in project management, adherence to regulatory standards, and efficient execution of construction activities.

NAL Construction Ltd ('NAL'), with its extensive experience and established presence in the sector, brings invaluable expertise in managing and overseeing large scale projects. Its status as a large corporation ensures adherence to stringent regulatory frameworks and quality standards. On the other hand, Excel Projects Private Limited ('Excel'), known for its innovative construction techniques and swift project execution, brings the technical prowess and operational efficiency needed to meet ambitious project timelines and budgets. Both the companies, collaborated for a development and construction of a land owned by NAL in outskirts of Pune. As per the standard practice by NAL, a Letter of Intent (L.O.I.) was executed by the parties specifying various aspects including a clause that disputes, if any should be resolved through civil courts in Mumbai. Later, a contract was also executed wherein a general reference was made to a set of terms and conditions, which included an arbitration clause as well. The project went on smoothly for more than a year. Subsequently, a dispute arose around a contractual obligation. NAL claimed that Excel failed to adhere to the agreed-upon timelines and quality standards, resulting in substantial project delays and cost overruns. Conversely, Excel argued that the delays were due to unforeseen circumstances and inadequate support from NAL, which hindered their ability to complete the project as planned. Both companies presented extensive documentation and evidence to support their claims, leading to a complex legal battle. From a financial perspective, the dispute had significant implications. NAL sought compensation for the alleged breaches, including damages for the delays and additional costs incurred. Excel on the other hand, is counter-claiming for unpaid dues and additional expenses they incurred due to project scope changes and delays allegedly caused by NAL. The financial stakes are high, and the outcome of this case could set a precedent for future contractual disputes in the industry.

NAL approached Mega Law and Co, a law firm specializing in arbitration matters for professional support to resolve the issues with Excel. Detailed discussions were held with the Senior partners of the law firm about the key aspects of arbitration agreement and the arbitration proceedings. The law firm suggested that they appoint Richard Peter, a London based businessman as an arbitrator. Meanwhile, Excel was not in favour of appointing a foreign professional as an arbitrator and was evaluating to communicate the same to NAL. Based on a legal advice, it filed a case in Civil Court, Mumbai against NAL breach of contract.

With reference to the above facts, answer the following :

(a) Outline the key details that an effective arbitration agreement should contain to efficiently resolve disputes in the background of a settled case law.

(b) Explain the typical steps involved in arbitration proceedings.

(c) Is the proposal to appoint a foreign national appropriate ? Comment on the background of Arbitration and Conciliation Act, 1996.

(d) Excel wanted to challenge the appointment of a foreign national as an arbitrator. Prepare a brief note explaining the grounds for challenging the appointment of an arbitrator.

(e) NAL argued that the agreement contained a valid arbitration clause and the matter should be resolved through arbitration rather than judicial proceedings. Explain with relevant case law.

(5 marks each)

Answer 1(a)

By virtue of the judgements of *Jagdish Chander v. Ramesh Chander* and *K.K. Modi v. K.N. Modi*, the Supreme Court of India has laid down the validity and principles of an arbitration agreement.

The principles laid down in the judgment regarding the arbitration agreement are:

- It must be in writing,
- The agreement to settle the dispute in a private tribunal is mutual,
- The private tribunal has the power to adjudicate disputes without bias and by following the principles of natural justice,
- The parties agree to be bound by the arbitral tribunal's decision,
- The parties must refer the dispute to a private tribunal with no prior reservations,
- The parties must have mutual agreement reflecting from the maxim "consensus ad idem"
- The clauses of the agreement must raise an obligation of performance,
- The clauses of the agreement do not exclude the essentials of separability, severability, autonomy or any other essentials of the agreement.

Answer 1(b)

Typical steps involved in arbitration proceedings are as under:

- Reference to arbitration agreement
- Appointment of an arbitrator
- Preliminary hearing or direct intimation
  - Claimant: Statement of Claims by Claimant - Submission of Rejoinders
  - Respondent: Statement of Counter-claims by Respondent - Submission of Rejoinders
- Submission of document
- Hearings
  - Sufficient Evidence
    - Additional Documents by Claimant
    - Additional Documents by Respondent

- Final hearing
- Publishing of awards

Answer 1(c)

A person who is of sound mind can be appointed as an arbitrator. The nationality of an arbitrator is not specifically restricted. Hence, the arbitrator may be of any nationality. This is as per Section 11 of the Arbitration and Conciliation Act, 1996 ("The Act"). Furthermore, the parties are free to choose the arbitrator and determine the arbitrator's qualifications.

A person to become an arbitrator may qualify the following conditions:

i. He can be a judge; or
ii. He can be an advocate; or
iii. He can be a Company Secretary; or
iv. He can be a Chartered Accountant; or
v. He can be a CMA; or
vi. He can be a maritime expert; or
vii. He can be an executive; or
viii. He can be an engineer; or
ix. He can be a businessman; or
x. He can be other Professional.

However, the above is an inclusive list.

Some arbitral institutions which conducts international arbitration, have included foreigners for being arbitrators. This was to enable the foreign parties to appoint arbitrators of other nationalities whom they consider more appropriate.

In view of the above discussion, it can be said that a proposal to appoint foreign national as arbitrator is appropriate.

Answer 1(d)

A prospective arbitrator is required to provide a written disclosure of certain circumstances that could raise questions about his independence or impartiality under the 2015 amendment to Section 12(1) of the Arbitration and Conciliation Act, 1996(the Act) and seventh schedule thereto.

According to Section 12(1)(a) of the Act, the arbitrator must reveal any direct, indirect, previous, or current relationships with the parties as well as any financial, business, professional, or other interests in the dispute's subject matter that might influence his objectivity. Similar to this, Section 12(1)(b) of the Act refers to any situations that would make it difficult for an arbitrator to dedicate enough time to complete the arbitration within a year.

In the sub-section 12(1)(a), there are two explanations. The Fifth Schedule should be consulted in order to determine if the conditions outlined in Section 12(1)(a) of the Act are present, according to the first. According to the second, such a disclosure must follow the format specified in the sixth schedule.

The fifth schedule deals with following types of relations which might give rise to reasonable doubts:

1. Arbitrator's relationship with parties or counsel

2. Arbitrator's relationship to the dispute
3. Arbitrator's interest in the dispute
4. Arbitrator's past involvement with the dispute
5. Relationship of co-arbitrator's
6. Relationship of the arbitrator with parties and others in the dispute
7. Other Circumstances.

The arbitrator may be contested if the factual situation of a case fits under any of the aforementioned categories. For optimal objectivity, these broad terms cover a variety of situations. However, this schedule's "Explanation 3" notes that if it's a specialised arbitration involving a narrow field and it's customary to select the same arbitrators from a small pool of specialists, then this should be taken into account while implementing these criteria. None of these titles make the appointment of an arbitrator immediately prohibited.

Sub-section 1 is reinforced by Section 12(2) of the Act, which mandates that an arbitrator should disclose any conflict of interest as soon as practicable, unless a written disclosure has already been made.

Other Grounds

Section 12(3) provides an indication of the actual grounds for challenging. An arbitrator may be challenged if his independence and impartiality are questioned as a result of the events described in Section 12(1) of the Act, or if he doesn't meet the agreed-upon requirements.

A party to the dispute who names the arbitrator may object for grounds of which he learns only after the appointment. Any prospective arbitrator who fits into any of the categories listed in the Act's Seventh Schedule is automatically disqualified, according to section 12(5) of the Act, which was added by the 2015 amendment.

The seventh schedule of the Act enumerates the relationship between the Arbitrator, the parties and the disputes that results ineligibility to act as an Arbitrator.

The majority of the headings in the Fifth Schedule are also covered by the Seventh Schedule. Although not as comprehensive as the Fifth Schedule, the list just serves as a barrier to appointment as an arbitrator, as was already established.

The Fifth Schedule *inter alia* includes:

1. Arbitrator's relationship with the parties or counsel
2. Relation of Arbitrator to the dispute
3. Arbitrator's interest in the dispute.

Answer 1(e)

In the landmark case of *NBCC (India) Limited vs. Zillion Infra Projects Private Limited (2024)*, the Supreme Court of India addressed the complex issue of incorporating arbitration clauses by reference in contracts. NBCC and Zillion Infra Projects had entered into a contract that included a general reference to a set of terms and conditions, which in turn contained an arbitration clause. However, the Letter of Intent (L.O.I.) between the parties specified that disputes should be resolved through civil courts in Delhi, rather than through arbitration. The key issue before the Court was whether the arbitration clause from the referenced document was validly incorporated into the contract between NBCC and Zillion Infra Projects. The Court emphasized that for an arbitration clause from another document to be incorporated into a contract, the contract must contain a

clear and specific reference to the arbitration clause. A general reference to another document that includes an arbitration clause is insufficient. The Court reiterated the principles established in the case of *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*, which outlined the conditions under which an arbitration clause can be deemed incorporated:

- Clear reference: The contract must explicitly mention the document containing the arbitration clause.
- Intention to incorporate: There must be a clear intention to incorporate the arbitration clause into the contract.
- Appropriate clause: The arbitration clause should be appropriate and not in conflict with the terms of the contract.

In the *NBCC vs. Zillion* case, the L.O.I. explicitly stated that disputes should be resolved through civil courts in Delhi, indicating that the arbitration clause was not intended to be incorporated. The Supreme Court ruled that the arbitration clause from the referenced document was not applicable, as the contract did not specifically reference it.

In the given situation, it can be said that the contract must contain a clear and specific reference to the arbitration clause. A general reference to another document that includes an arbitration clause is insufficient.

Question No. 2

(a) During an ongoing arbitration between M/s. C Ltd and M/s. T Ltd., one of the members of the Arbitral Tribunal passed away and was substituted, and the proceedings continued with the reconstituted Arbitral Tribunal. Thereafter, during the pendency of the proceedings the Arbitral Tribunal unilaterally increased the fee payable for each session from INR 1,00,000 i.e. the originally agreed fee to INR 2,00,000. While M/s. C Ltd. objected to such revision, M/s T Ltd., despite its objections, deposited the increased fee amount. Apprehending that the payment by M/s T Ltd. would cause the Arbitral Tribunal to treat it partially, M/s C Ltd. filed an application under Section 14 of the Act before the High Court seeking inter alia termination of the mandate of the Arbitral Tribunal (Section 14 application). Subsequently, the High Court dismissed the Section 14 application. Hence, M/s. C Ltd. filed the petition before the Supreme Court. M/s C Ltd. contended that since the entire premise of arbitration is based on party autonomy, the parties to an arbitration are at liberty to fix the fees payable to the Arbitral Tribunal and any alterations to the previously agreed fee could only be done with the consent of the parties. It was also submitted that the insistence on charging the revised fee by the Arbitral Tribunal, despite objections by M/s. C Ltd., would attract the principle of "bias" and as such, the proceedings would not be conducted or concluded with an impartial mind against the party that objected to such unilateral increase.

M/s T Ltd. while refuting the maintainability of Section 14 application and highlighted that such an application could be maintainable only when the eligibility of the Arbitral Tribunal is challenged on the grounds enumerated in Section 12(5) read with the Seventh Schedule of the Arbitration and Conciliation Act, 1996. M/s T Ltd. further contended that in case of circumstances of justifiable reason to doubt the Tribunal's impartiality, the party must raise such grounds before the Arbitral Tribunal in the first instance. If the party is unsuccessful before the Arbitral Tribunal, that would become grounds for a challenge to the award, by virtue of Section 13(5).

Decide the matters with reference to case laws.

(5 marks)

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(b) An agreement dated 22nd April, 1993 ("Agreement") was executed between B Ltd. and K Ltd., under which K Ltd., was to supply and install a computer-based system at B Ltd.'s premises. As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law. Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, B Ltd. appealed to the Supreme Court ("Court").

The parties had initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce, at Paris, subsequently, mutually agreed on 29 November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association, in London.

During the pendency of arbitration proceedings in London, an injunction application was made by appellants, BS Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the grounds that the appellants had an alternative remedy (u/s 44 of the Act., being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court. The appeal filed by B Ltd. before the Division Bench of the Supreme Court was placed for hearing before a three Judge Bench.

Decide the matters with reference to case laws and comment whether Foreign Arbitral Awards can be challenged in Indian Courts as Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of Domestic Arbitral Awards only.

(5 marks)

(c) Disputes have arisen between three brothers namely; Shri A, Shri K and Shri M. All three are sons of late Shri S.N. The three brothers were engaged in joint business in three partnership firms namely; M/s VE, M/s VSE and M/s. K Brothers. The shares of the brothers vary in each of the firms.

The named Arbitrator, Shri B. S. Gupta, entered reference and passed four Awards, Award No. 1 dated 12th May, 2007, Award No. 2 dated 28th May, 2007, Award No. 3 dated 8th June, 2007 and Award No. 4 dated 13th July, 2007. Some other documents including a draft MOU were also drawn up by the Arbitrator but the said documents are not admitted by some of the parties.

Ms. Isha Aggarwal appearing for the Petitioner submits that the third Award was not in the knowledge of the Petitioner at the time of filing of the present petition. She further submits that the arbitration proceedings were conducted in a completely ad hoc and haphazard manner. No hearings were held, and no evidence was led before the Arbitrator. The Arbitrator in fact did not conduct any adjudication in accordance with law. All the four Awards have been simply passed on the basis of the documents/pleadings filed by the parties. It is her case that even self-acquired properties of the Petitioner which are in the name of the Petitioner/ his family members have been wrongly included in the common hotchpotch. It is submitted that the shares of the parties have also been wrongly determined.

Decide the matters with reference to case law and comment whether an arbitral award can be set aside on the ground that parties were not given a chance to be heard.

(5 marks)

Answer 2(a)

The facts of the given situation are similar to the case of *Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons (JV)*. In the matter, Supreme Court while analysing Sections 12, 13, 14 and 15 of the Arbitration and Conciliation Act, 1996(Act) pointed out that the use of the term "bias" has been deliberately avoided in the Act and the expression such as "justifiable doubts about the ... impartiality" of an Arbitral Tribunal has been used instead. The Supreme Court clarified that:

35. ... However, when the grounds enumerated in the Seventh Schedule occur or are brought to the notice of one party unless such party expressly waives its objections, it is ipso facto sufficient for that party, to say that the Tribunal's mandate is automatically terminated and as such, an aggrieved party can directly challenge the mandate of the Arbitral Tribunal before the courts under Section 14 of the Act. In the event a party raises claims of justifiable doubts with respect to the independence or impartiality of an Arbitral Tribunal on grounds enumerated in the Fifth Schedule, the remedy then available with a party is to first apply to the Arbitral Tribunal as per Section 13(2) of the Act. In the event such party is unsuccessful, the Arbitral Tribunal is duty-bound to continue the proceedings, and only once the award is made, the aggrieved party can challenge the award under Section, 34 of the Act.

While referring to the judgment in ONGC, the Supreme Court reiterated that undoubtedly the Arbitral Tribunal's fee cannot be revised unless the parties have agreed to such revision; and in the event that there is an objection by either party, the Arbitral Tribunal ought to either revert to the previously agreed fee or decline to act as the Arbitral Tribunal. That being said, the Supreme Court took into consideration the principles laid down in ONGC, and noted that the insistence of retaining the revised fee, however, would not render the Arbitral Tribunal as ineligible, and thus would not terminate the mandate of the Arbitral Tribunal. In conclusion and while dismissing the present appeal by Chennai Metro, the Supreme Court noted that the *de jure* ineligibility because of existence of justifiable doubts on unenumerated grounds [or other than those specifically provided in Section 12(5)] could not be a gateway to allow challenges against the Arbitral Tribunal, during the course of the proceedings. The Supreme Court recognised that the consequences of granting any exception to Chennai Metro's plea in the present case could "well be an explosion in the court docket" and could lead to other unforeseen results. The Supreme Court also noted that any deviation from the strictly prescribed statutory route with respect to the grounds laid down in the Fifth and Seventh Schedules, could "cast yet more spells of uncertainty upon the arbitration process".

In view of the above, it may be said that the objections of C Ltd. may not be sustainable as objection to such revision doesn't fall under the purview of section 12 or Seventh Schedule of the Act.

Answer 2(b)

The facts of the given situation are similar to the case of *Bharat Aluminium Company. v. Kaiser Aluminum Technical Services Inc.*

In the matter, the Supreme Court of India decided as follows:

(i) Part I and Part II are applicable to different fields. Part I of the Arbitration and Conciliation Act, 1996 (Act) is applicable to all domestic awards, including to awards where both the parties to the dispute are Foreign Parties but the proceedings are held in India, or International Commercial Arbitration held in India.

(ii) Part II of the Act of 1996 applies to enforcement of Foreign Awards in India.

(iii) The principle of territoriality in Model Law is adopted in Act of 1996 *Mutatis Mutandis*.

(iv) Section 48 of Part II of the Act does not confer jurisdiction on two courts to annul the award and is provided only to provide alternative to parties to challenge the award in case, Law of the country where seat of arbitration is located has no provision for challenge of the award.

(v) Interim Relief under section 9 can be awarded in case seat of arbitration in International commercial arbitration in India and thus intervention under section 9 can be sought only with respect to domestic awards. Part II has no provision that grants interim relief leading to the logical inference that Indian Court cannot pass interim orders against award delivered outside India.

(vi) The Arbitral Awards awarded in International Commercial Arbitration with seat of Arbitration outside India shall be subject to the Jurisdiction of Indian Courts only when they are sought to be enforced in India in accordance with Part II of the Act.

(vii) Part I of the Act shall not be applicable to non-convention arbitral awards. The definition of Foreign Award is limited to New York Convention and Geneva Convention and hence the Act does not provide for enforcement of non-convention Arbitral awards.

Principle: It would be against the Provisions of the Arbitration and Conciliation Act, 1996, to interfere with the Foreign Arbitral Award as the Act of 1996 provides for challenging only Domestic Arbitral Awards under Section 34.

The above decision makes it clear that Foreign Arbitral Awards cannot be challenged in Indian Courts as Section 34 of the Arbitration and Conciliation Act, 1996 provides for setting aside of Domestic Arbitral Awards only.

Answer 2(c)

The facts of the given situation are similar to the case of *Adarsh Kumar Khera (Petitioner) vs Kewal Kishan Khera And Ors. (Respondents), decided on 16 January, 2019*.

In this case, the Court has heard the submissions on behalf of the parties. A perusal of the various Awards passed by the learned Arbitrator shows that the Arbitrator has decided the matter simply on the basis of the statement of claims made by all the parties. Though the Arbitrator is not bound by the strict provisions of the Civil Procedure Code, 1908(CPC), each of the parties ought to have been given an opportunity to respond to the case set up by the other, which is a basic feature in any arbitration proceedings. The Respondents submit that even though some properties may be in the name of the Petitioner, or his family members, the same have been purchased from the profits earned by the common businesses. This contention is disputed by learned counsel for the Petitioner, who has objected to the inclusion of the properties which belong to cither him and his wife/son.

The question as to which of the properties need to be considered as properties of the firms. On this issue, the learned Arbitrator, after hearing the parties, would have to adjudicate the shares of each of the partners. This has clearly not been done by the learned Arbitrator.

All parties agree that the four Awards dated 13th July, 2007, 12th May, 2007, 28th May, 2007 and 8th June, 2007 be set aside. The said Awards are accordingly set aside.

The learned Arbitrator would be free to determine as to which of the properties is to be included in the common pool for being divided, the valuation of all movable/immovable assets of the firms, liabilities of the firms and adjustments to the given, the share of each of the parties, the manner of sale of any of the properties including the market rates thereof, the manner of disbursement of

the various amounts due to the respective parties and all other issues which may arise during the course of the arbitration proceedings.

Owing to the age of all the brothers and considering the fact that this petition has remained pending before this Court since 2007, it is directed that the learned Arbitrator would endeavour to conclude the proceedings within a period of 6 months from the date of filing of claims by all the parties.

The arbitral award was set aside since it was made without giving the parties a chance to be heard which is against the principles of natural justice and contrary to the section 18 of the Act which is a non-obstante clause, it was deemed void, and both parties wanted it overturned.

The arbitral award was set aside since it was made without giving the parties a chance to be heard, it was deemed void, and both parties wanted it overturned.

In view of the above mentioned case, it may be said that an arbitral award can be set aside on the ground that parties were not given a chance to be heard.

Question No. 3

(a) Krupa Corporation Limited ('KCL') and ABC Limited entered into a contract for the supply of specialized machinery worth ₹ 10 crore. Disputes arose regarding the quality and timely delivery of the machinery, leading to arbitration proceedings as per their arbitration agreement. The arbitral tribunal issued an award on January 15, 2024, in favor of KCL, addressing several claims, including damages for late delivery amounting to ₹ 25 lakh and compensation for defective machinery totaling ₹ 1 crore. However, after the award was issued, KCL realized that one of their significant claims regarding the reimbursement of inspection costs amounting to ₹ 15 Lakh was omitted from the arbitral award. KCL promptly filed a request for an additional arbitral award to cover this omitted claim on January 25, 2024. The arbitral tribunal acknowledged receipt of the request on January 28, 2024. In their request, KCL argued that the inspection costs were a crucial part of their overall damages and were explicitly mentioned in their original statement of claims. On the other hand, ABC Ltd contested, arguing that the omission of the inspection costs from the arbitral award was intentional and reflected the tribunal's decision on the merits. They asserted that KCL was attempting to modify the award under the guise of an additional award.

Can the arbitral tribunal correct any error in arbitral award ? Explain.

(5 marks)

(b) Altas Limited ('Altas') entered into a contract with the Union of India after successfully bidding in a tender issued by the Ministry of Mining. The contract specified various technical and financial obligations, including the execution of air conditioning and refrigeration services within a stipulated time frame. During the execution of the contract, disagreements emerged concerning the delay in the project, allegedly due to the respondent's actions. Altas claimed that the Union of India had delayed issuing necessary instructions and providing access to the worksite, which hindered timely completion of its obligations. The arbitrator awarded a compound interest rate of 18% per annum on the awarded sum, starting from the date of the award until payment. The Union of India challenged this arbitral award in the Ahmedabad High Court, arguing that the 18% interest rate was excessive and warranted revision. The High Court modified the award, reducing the interest rate from 18% compound interest to 9% simple interest per annum. Altas, dissatisfied with this modification, appealed to the Supreme Court of India, contending that the High Court did not have the authority to alter the arbitral award under the Arbitration and Conciliation Act, 1996, which only permits setting aside an award on limited grounds.

In the background of a judicial pronouncement, explain whether the Court can reduce the rate of interest ?

(5 marks)

(c) T Ltd. (Respondent) awarded a tender for the development of Kolkata Port, to P Pvt. Ltd. (Appellant) for 30 years on a build, operate and transfer (BOT) basis. Afterwards, the Appellant submitted its tariff proposal which included payment of royalty as an element of cost (Royalty payment model). This bid was approved by the Tariff. Authority for Major Ports (TAMP). Accordingly, the parties entered into a license agreement (License Agreement).

The Ministry of Shipping issued a notification clarifying that revenue sharing/royalty payment will not be factored into as cost for fixation or revision of the tariff by TAMP. Accordingly, TAMP revised the guidelines disallowing royalty as an element of cost (the notification). However, its applicability was precluded in cases where the bidding process was finalised so as to avoid a loss to the operator.

Subsequently, a dispute arose between the parties on their royalty payment model. Article 14.3 of the license agreement authorised the Appellant to request amendments in the agreement if there was a change in law. In furtherance of the notification, the Appellant requested the Respondent to amend the License Agreement to incorporate a revenue-sharing model in the agreement. The Respondent declined. The Appellant invoked the arbitration clause under Article 15.3 of the License Agreement.

The tribunal passed an award in favour of the Appellant, holding that there was a change in law. The tribunal's observation was based on the assumption that there was an existing policy, at the time the contract was entered into, stipulating that royalty is to be factored into cost while fixation of tariff. Hence, the tribunal concluded that there was a subsequent change in policy through the notification, which resulted in a change in law. Consequently, the Respondent was directed to convert its container terminal from a royalty payment model to a revenue-sharing model.

The Respondent unsuccessfully challenged the award before the District Court of Kolkata. The Respondent then filed an appeal before the Kolkata High Court under Section 37 of the Arbitration Act. The High Court upheld the Respondent's challenge and set aside the arbitral award on the ground of patent illegality. Aggrieved, the Appellant approached the Supreme Court.

Discuss the matter with reference to a case law and comment whether respondent T Ltd can succeed the case.

(5 marks)

Answer 3(a)

Section 33 of the Arbitration and Conciliation Act, 1996 (Act) provides the provisions relating to Correction and interpretation of award; additional award. It states:

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties–

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it can make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award. The arbitral tribunal may also correct any error of the type mentioned above, on its own initiative, within thirty days from the date of the arbitral award.

According to section 33(4) of the Act, unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

Further as per section 33(5) of the Act, if the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

In view of the above provision, it may be said that Arbitral Tribunal can make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. Further, according to section 33(1)(a), within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award. If the arbitral tribunal considers the request made section 33(1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

Answer 3(b)

The facts of the given situation are similar to the case of *Larsen Air Conditioning and Refrigeration Company vs Union of India*. In this case the dispute revolved around a contract between Larsen Air Conditioning and the Union of India, specifically the Ministry of Defence and Garrison Engineer (P) Factory. The contract led to arbitration due to arising disputes. The arbitral tribunal awarded Larsen Air Conditioning an 18% interest rate on the awarded amount, which included *pendente lite* and future compound interest.

The Union of India challenged this award under Section 34 of the Arbitration and Conciliation Act, 1996(Act), but the District Court dismissed the application. The Union of India then appealed to the High Court of Allahabad, which modified the interest rate from 18% to 9%, interpreting the award under the Arbitration Act of 1940 instead of the 1996 Act. Larsen Air Conditioning then took the matter to the Supreme Court. On August 11, 2023, the Supreme Court reinstated the original 18% interest rate, emphasizing the limited scope of judicial interference under Section 34 of the 1996 Act. The court reiterated that unless the arbitrator explicitly states otherwise, the awarded amount should carry an 18% interest rate from the date of the award to the date of payment.

The Supreme Court underscored that the 1996 Act aims to minimize judicial intervention and does not allow courts to modify arbitral awards. The decision reinforced the principle that arbitral awards can only be set aside on grounds such as patent illegality or denial of natural justice.

In view of the above case law, it can be said that the court cannot reduce/alter the rate of interest.

Answer 3(c)

The facts of the given situation are similar to the case of *PSA Sical Terminals Pvt. Ltd v. The Board of Trustees of V.O. Chidambranar Port Trust Tuticorin (Judgment dated 28.07.2021 in CIVIL APPEAL NOS. 3699-3700 OF 2018)*. In the matter, the rationale was as under:

Supreme Court's decision

The primary questions before the Supreme Court were whether the arbitral tribunal exceeded its jurisdiction by modifying the terms of the parties' contract and whether such award would be

perverse under Section 34 of the Arbitration and Conciliation Act, 1996. The key findings of the Court are as follows:

1. Tribunal's jurisdiction

The Court reiterate that an arbitral tribunal is not a court. Its orders are not judicial orders, its functions are not judicial functions, and it cannot exercise its power *ex debito justitiae*. The Court further clarified that the role of an arbitrator is to arbitrate within the terms of the contract and can only pass orders which are the subject matter of reference. The tribunal has no power apart from what has been given to it by the parties under the contract. If it has travelled beyond the contract, which the tribunal did by thrusting upon a new term in the agreement, it would be acting without jurisdiction.

2. Judicial interference

The Apex Court had held that that the court may interfere with an award if it is against the public policy under Section 34(3) (b) (ii) of the Arbitration and Conciliation Act, 1996. Interference does not entail a review of the merits of the dispute. It is limited to situations where the arbitrator's findings are arbitrary, capricious, and perverse; when the conscience of the court is shocked; or when the illegality is not trivial and goes to the root of the matter.

3. Contractual terms and patent illegality

The Court held that such a change in the formula was de hors the agreement. The tribunal had created a new contract for the parties. A unilateral addition or alteration of contract cannot be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. The award was held to be contrary to the fundamental principles of justice and, resultantly, was set aside.

In view of the above mentioned case, it may be said that T Ltd. may succeed in the given circumstances.

Attempt all parts of either Q. No. 4 or Q. No. 4A

Question 4

(a) Ayush Rao, a retail investor, has recently lodged a formal complaint with the stock exchange against his brokerage firm, Paisamoney Securities Limited ('PSL'). Rao alleges that PSL conducted unauthorized trades in his account, resulting in significant financial losses. He claims that these trades were executed without his consent and in violation of his investment instructions. Rao had previously agreed to the brokerage's terms of service, which included an arbitration clause for resolving disputes. He lodged a formal complaint in the stock exchange's Investor Grievance Redressal Committee (IGRC). IGRC first conducted a preliminary review of Rao's complaint and confirmed that it falls within their jurisdiction. Following this, the stock exchange attempted to resolve the issue through conciliation efforts, which unfortunately did not lead to a satisfactory resolution. As the conciliation process failed, the complaint was referred to arbitration.

Explain the arbitration process in such cases and how the complaints are handled by IGRC.

(5 marks)

(b) Indigo Exports Industries Limited ('IEIL'), a prominent exporter based in India, entered into a financial agreement with Kokoil & Company, a financial services firm also based in India. The agreement specified various terms, including interest rates, repayment schedules, and conditions for drawing upon the credit facility. It also included a clause specifying that any disputes would be resolved through arbitration. IEIL alleged that Kokoil & Company failed to

fulfill its contractual obligations by not disbursing the agreed credit amount as stipulated. IEIL claimed that Kokoil's failure to provide the necessary funds significantly hampered its export operations and led to financial losses. IEIL sought legal recourse to enforce the terms of the agreement and also evaluated the legal remedies available for breach of contract. They requested that the court compel Kokoil & Company to comply with the contractual terms and provide the funds as initially agreed. The parties chose a foreign jurisdiction as the seat for arbitration, but agreed that Indian law would govern the resolution of the disputes.

Discuss the background of settled case laws, whether the parties can choose a foreign seated arbitration with the application of Indian law.

(5 marks)

(c) Mrigya Kon, an Indian investor, opened an investment account with Britko Financial Services Ltd., a UK-based financial institution. The account was intended for managing Mrigya's investment portfolio, which included various financial products such as stocks, bonds, and mutual funds. The dispute arose when Mrigya Kon alleged that Britko mishandled his investment account, leading to significant financial losses. He received inaccurate and misleading account statements, which he argued did not reflect the true performance of his investments. Mrigya experienced delays and inadequate responses from Britko's customer service when he raised concerns about the unauthorized transactions and reporting issues. Despite multiple attempts to resolve these issues through direct communication with Britko, there was no satisfactory resolution. He was evaluating to file a complaint before UK Financial Ombudsman.

Advise Mrigya with respect to mechanism for dispute resolution in the above matter.

(5 marks)

Answer 4(a)

Arbitration processes at stock exchanges serve as mechanisms for resolving disputes between members, brokers, traders, and other participants in the market. The arbitration process at Stock Exchanges is given below:

- Applicant submits arbitration application to Exchange
- Application is verified and sent to Respondent
- Arbitrator appointed and documents forwarded to arbitrator
- Hearings held by arbitrator
- Arbitrator passes award
- Award debited if in favor of constituent
- Appeal filed by aggrieved party
- Hearings held and appeal award passed
- Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 in Court.

If the applicant is not satisfied with award passed by arbitration panel, he can go for appeal against the award to Appellate mechanism in the exchange itself.

Handling of complaints by Investor Grievance Redressal Committee (IGRC)

i. IGRC shall have a time of 15 working days to amicably resolve the investor complaint through conciliation process. If IGRC needs additional information, then IGRC may request the Stock

Exchange to provide the same before the initiation of the conciliation process. In such case, where additional information is sought, the timeline for resolution of the complaint by IGRC shall not exceed 30 working days.

ii. IGRC shall not dispose the complaint citing "Lack of Information and complexity of the case". The IGRC shall give its recommendation to Stock Exchange.

iii. IGRC shall decide claim value admissible to the complainant, upon conclusion of the proceedings of IGRC. In case claim is admissible to the complainant, Stock Exchanges shall block the admissible claim value from the deposit of the member as specified in this regard.

iv. Expenses of IGRC shall be borne by the respective Stock Exchange and no fees shall be charged to the complainant/member.

v. The Stock Exchange shall organize regular training program for IGRC members in consultation with National Institute of Securities Markets ("NISM"). The cost of such program shall be borne by Investor Service Fund ("ISF") of the Stock Exchange.

Alternate Answer

SEBI had issued a master circular on Online Dispute Resolution in the Indian Securities Market (hereinafter referred to as "Master Circular").

The MIIs, under guidance of SEBI, have established and developed a common Online Dispute Resolution Portal ('SMART ODR Portal") for resolving disputes between the parties. The link for the Online Dispute Resolution Portal is https://smartodr.in/.

Initiation of the dispute resolution process:

The investor/client shall first take up the matter with the Market Participant. If the investor/client is not satisfied with the resolution provided by the Market Participant or no action initiated by the Market participants, then the investor/client may register the complaint/dispute in SCORES/ SMART ODR Portal.

It may be noted that in case the investor/client has filed the dispute on SMART ODR Portal, while the complaint is pending on SCORES, then the complaint shall be treated as disposed on SCORES. If the investor/client has filed the dispute on SMARTODR Portal, then subsequently, it cannot file the same complaint on SCORES.

Upon registration of complaint/dispute by the investor/client on SMARTODR Portal, the complaint/ dispute will be assigned to the MII through the SMARTODR Portal. The MII will aim for amicable resolution of complaint/dispute between the investor/client and the Market Participant within 21 calendar days from the date of filing of complaint/ dispute ("Pre-Conciliation Period").

In case the investor/client is not satisfied with the resolution/complaint not resolved during Pre-Conciliation Period, it may initiate conciliation through the SMARTODR Portal.

Market Participant may also initiate online dispute resolution through the SMART ODR Portal after having given due notice of at least 15 calendar days to the investor/client for resolution of the dispute which has not been satisfactorily resolved between them.

Online Dispute Resolution Mechanism

The dispute resolution process under the ODR Mechanism shall have two levels of resolution i.e., Conciliation and Arbitration.

The said mechanism shall be applicable to all the investors/clients/Market Participants who register and lodge their complaint/dispute through SMART ODR Portal.

The Complaint/Dispute lodged through SMART ODR Portal shall mandatorily follow the process of Online Conciliation first and in case of unsuccessful conciliation, the same may be taken up for online Arbitration.

The arbitration process at Stock Exchanges is given below:

- Applicant submits arbitration application to Exchange
- Application is verified and sent to Respondent
- Arbitrator appointed and documents forwarded to arbitrator
- Hearings held by arbitrator
- Arbitrator passes award
- Award debited if in favor of constituent
- Appeal filed by aggrieved party
- Hearings held and appeal award passed
- Petition filed under section 34 of the Arbitration and Conciliation Act, 1996 in Court.

Handling of complaints by Investor Grievance Redressal Committee (IGRC)

i. IGRC shall have a time of 15 working days to amicably resolve the investor complaint through conciliation process. If IGRC needs additional information, then IGRC may request the Stock Exchange to provide the same before the initiation of the conciliation process. In such case, where additional information is sought, the timeline for resolution of the complaint by IGRC shall not exceed 30 working days.

ii. IGRC shall not dispose the complaint citing "Lack of Information and complexity of the case". The IGRC shall give its recommendation to Stock Exchange.

iii. IGRC shall decide claim value admissible to the complainant, upon conclusion of the proceedings of IGRC. In case claim is admissible to the complainant, Stock Exchanges shall block the admissible claim value from the deposit of the member as specified in this regard.

iv. Expenses of IGRC shall be borne by the respective Stock Exchange and no fees shall be charged to the complainant/member.

v. The Stock Exchange shall organize regular training program for IGRC members in consultation with National Institute of Securities Markets ("NISM"). The cost of such program shall be borne by Investor Service Fund ("ISF") of the Stock Exchange.

Answer 4(b)

The following are few case laws wherein the parties were allowed a foreign seated arbitration with the application of Indian law:

In *Atlas Exports Industries vs. Kotak & Company & Reliance Industries Limited v. Union of India*, two Indian parties can choose a foreign-seated arbitration with the application of Indian law [Section 28(1)(a) of the Arbitration and Conciliation Act, 1996]

In a landmark ruling in *PASL Wind Solutions Private Limited v. GE Power Conversion*, CIVIL APPEAL NO. 1647 OF 2021, Supreme Court of India rejected the argument that the designation of a foreign seat between two Indian parties was contrary to public policy, and instead, ruled affirmatively that there was nothing in the (Indian) Arbitration & Conciliation Act, 1996 ('Act') that precluded Indian parties from arbitrating in a foreign seat and that party autonomy and freedom of contract must be upheld.

In *Addhar Mercantile v. Shree Jagdamba Agrico Exports & TDM Infrastructure Private Limited v. UE Development India Private Ltd*, if two Indian parties so choose, the objections to the award would lie in the country of the chosen seat, however, if assets (which in all likelihood would be in India) the award would need to be enforced here.

In *Bhatia International v/s. Bulk Trading*, it was held that Indian courts have the right to use their jurisdiction to test the significance of an arbitral award made in India, even if the actual law of the contract is foreign. The court recognized that Part 1 of the Arbitration and Conciliation Act, 1996 gives effect to UNCITRAL Model Law allowing courts to grant interim relief even when the seat of international commercial arbitration is outside India.

In view of the above, it may be said that the parties are allowed to choose a foreign seated arbitration with the application of Indian law.

Answer 4(c)

The mechanism for dispute resolution is provided below:

- The consumer is required to give the business an opportunity to resolve the claim themselves. The business should address the issue within 8-weeks. If the business fails to resolve the issue, the consumer can file a complaint before UK Financial Ombudsman.
- Initial assessment - Every complaint is assigned a case handler who reviews the complaint and shares their initial thoughts with both the sides.
- Review by ombudsman - If the parties disagree with the initial assessment, they can ask ombudsman to conduct a formal review of the complaint. The ombudsman reviews all facts and evidences and decides the case.
- Binding nature of the decision - The consumer has the option to withdraw from the process at any stage or decline the outcome of the process. However, if the consumer accepts the outcome, then it is legally binding on the businesses.

The Financial Ombudsman is regulated as per the rules published by Financial Conduct Authority. The rules provide the procedure for handling the disputes, fee for the ombudsman services and jurisdiction of the ombudsman office.

OR (Alternate Question to Q. No. 4)

Question 4A

(i) Benton GlobalTech Solutions Private Limited (BGSP), an Indian IT services company, is engaged in an arbitration proceeding against Innovatech Inc., a US-based technology firm. The arbitration is governed by the Arbitration and Conciliation Act, 1996, which permits the use of modern technology in the proceedings. The primary dispute involves allegations of breach of contract, where BGSP claims that Innovatech Inc failed to deliver critical software updates as per the contract terms. Both parties have numerous witnesses located in different parts of the world, making traditional in-person hearings logistically challenging. The dispute centers on allegations that Innovatech Inc failed to deliver crucial software updates on time, as stipulated in their contract with BGSP. The contract also included provisions for ongoing maintenance and support services, which BGSP claims were not provided. The parties had agreed to arbitration under the Arbitration and Conciliation Act, 1996, with London, designated as the seat of arbitration. BGSP has technical experts and witnesses located in multiple Indian cities, including Mumbai, Bangalore, and Hyderabad. Conversely, Innovatech Inc has key witnesses and experts based in New York, San Francisco and Seattle. Due to the global nature of the dispute and the geographical distance between the parties, BGSP

proposed using video conferencing to record witness statements and conduct hearings.

With reference to judicial pronouncements, explain whether arbitration proceedings can be completed using video conferencing ?

(5 marks)

(ii) EcoGreen Industries Limited (EIL), a leading manufacturer of eco-friendly packaging solutions based in Mumbai, India, entered into a distribution agreement with BrightFuture Corp, a Singapore based company specializing in sustainable products distribution. The agreement specified supply of packaging materials, including biodegradable wraps and recycled paper products, to various European retailers. BrightFuture Corp reported consistent delays in receiving shipments from EIL, which affected its inventory and disrupted its supply chain to European clients. Products delivered by EIL, were reportedly not meeting the agreed quality standards. BrightFuture provided evidence of defective items and inconsistencies in product specifications. Disagreements arose over payment terms and amounts, with EIL claiming that payments were not made on time, while BrightFuture contested the amounts billed due to the quality issues. The matter was referred to panel of three conciliators as per the agreement. Draft a conciliation agreement, assuming necessary facts.

(5 marks)

(iii) Techko Inten Private Limited ('TIPL'), a manufacturer of electronic products based in Bangalore, entered into a supply agreement with GreenWave Retailers Limited (GRL), a small retail chain specializing in chip and other ancillary products. Both the parties were registered under the Micro, Small and Medium Enterprises Development Act 2006 (MSMED). The agreement covered supply of solar-powered gadgets, including lanterns and chargers, to GRL's stores across India. GRL experienced repeated delays in receiving shipments from TIPL, disrupting their inventory and causing stockouts in their stores. Products delivered by TIPL many times did not meet the agreed specifications, with instances of defective items. GRL also faced challenges with payment delays due to the additional costs incurred on defective products and the disrupted supply chain. GRL reached out to Sneh, a Senior lawyer to file a case against TIPL. Sneh advised them that they should evaluate considering conciliation rather than arbitration/ legal proceedings and also stated that conciliation and arbitration cannot go hand in hand. In the light of the above case law, state whether Sneh's contention is correct.

(5 marks)

Answer 4A(i)

Online Dispute Resolution (ODR) is the use of internet technology to resolve the disputes between the parties outside of the public court system. In its most basic sense, ODR is the use of technology to 'resolve' disputes. It is not just any form of technology integration (such as electronically scheduling a session), but its active use to help resolve the dispute (such as video conferencing for hearings or electronic document sharing for filing). Though derived from Alternate Dispute Resolution (ADR), ODR's benefit extends beyond just e-ADR or ADR that is enabled through technology. ODR can use technology tools that are powered by AI/ML in the form of automated dispute resolution, script based solution and curated platforms that cater to specific categories of disputes.

In *State of Maharashtra vs. Dr. Praful B. Desai (2003 4 SCC 601)*, the Supreme Court acknowledged the use of video conferencing to record witness statements. Therefore, the submissions and the proceedings can take place online and duly valid under the Arbitration Act. In Grid Corporation of Orissa Ltd. vs. AES Corporation (2002) 7 SCC 736), the Supreme Court explicitly mentions that: "When an effective consultation can be achieved by resort to electronic media and remote

conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties".

In view of the above discussion, it may be said that there is no restriction on use of video conferencing for completion of arbitration proceedings.

Answer 4A(ii)

Conciliation Agreement

This Conciliation Agreement (hereinafter referred to as the "Agreement") is entered into on this ___ day of _____, 2024, by and between:

1. EcoGreen Industries Limited (EIL), a company incorporated under the laws of India, having its registered office at _____, Mumbai, India, (hereinafter referred to as "EIL");
2. BrightFuture Corp, a company incorporated under the laws of Singapore, having its principal office at _____, Singapore, (hereinafter referred to as "BrightFuture");

WHEREAS:

A. EIL is a leading manufacturer of eco-friendly packaging solutions, supplying products including biodegradable wraps and recycled paper products.

B. BrightFuture is a distributor specializing in sustainable products, supplying to various European retailers.

C. The parties entered into a distribution agreement dated ___ (hereinafter referred to as the "Original Agreement"), under which EIL agreed to supply packaging materials to BrightFuture for distribution in Europe.

D. Disputes have arisen between the parties regarding (i) delays in shipment of products by EIL, (ii) quality issues with the delivered products, and (iii) disagreements over payment terms and amounts billed.

E. The parties, in good faith, have agreed to refer their disputes to conciliation under a panel of three conciliators as per the terms set forth in this Agreement.

NOW, THEREFORE, the Parties agree as follows:

1. Appointment of Conciliators

1.1 The conciliation proceedings shall be conducted by a panel of three conciliators ("Panel"). Each party shall appoint one conciliator, and the two appointed conciliators shall mutually agree upon and appoint the third conciliator who shall act as the presiding conciliator.

1.2 The appointed conciliators are:

- Conciliator appointed by EIL: _____
- Conciliator appointed by BrightFuture: _____
- Presiding Conciliator: _____

1.3 In the event of any disagreement in appointing the presiding conciliator, the appointment shall be made in accordance with the rules of [relevant institution or authority, if applicable].

2. Scope of Conciliation

The conciliation proceedings shall address and seek resolution of the following issues:

(a) Alleged delays in shipment of products by EIL and their impact on BrightFuture's supply chain.

(b) Alleged quality issues, including defective items and inconsistencies in product specifications delivered by EIL.

(c) Disputes over payment terms and amounts billed under the Original Agreement.

3. Rules Governing the Proceedings

3.1 The conciliation proceedings shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (India) and any relevant international conciliation rules agreed upon by the parties.

3.2 The language of the conciliation proceedings shall be English.

3.3 The venue of the conciliation proceedings shall be _____ [insert mutually agreed location or specify virtual platform].

4. Conduct of Conciliation

4.1 The Panel shall: (a) Facilitate discussions between the parties in an impartial manner. (b) Assist the parties in identifying mutually acceptable solutions. (c) Strive to resolve the disputes amicably.

4.2 The Panel shall maintain confidentiality of all matters discussed during the proceedings, unless disclosure is required by law or consented to by the parties.

5. Obligations of the Parties

5.1 The parties shall: (a) Participate in good faith in the conciliation proceedings. (b) Provide all necessary documentation and information requested by the Panel to facilitate the resolution of disputes. (c) Refrain from initiating any legal proceedings related to the disputes during the pendency of the conciliation process.

6. Fees and Costs

6.1 The fees of the conciliators and other expenses of the conciliation proceedings shall be shared equally by the parties, unless otherwise agreed in writing.

7. Settlement Agreement

7.1 If the parties reach a settlement, the terms of the settlement shall be recorded in a written agreement signed by the parties and the conciliators ("Settlement Agreement").

7.2 The Settlement Agreement shall be binding and enforceable on the parties as per applicable law.

8. Termination of Proceedings

8.1 The conciliation proceedings shall terminate upon: (a) Signing of the Settlement Agreement by the parties. (b) A written declaration by the Panel that further efforts at conciliation are unlikely to resolve the disputes. (c) A written notice by either party to the Panel indicating a decision to terminate the proceedings.

9. Governing Law

9.1 This Agreement and the conciliation proceedings shall be governed by the laws of India, subject to applicable international conciliation principles.

IN WITNESS WHEREOF, the parties have executed this Conciliation Agreement on the date first above written.

For EcoGreen Industries Limited:

Name: _____

Designation: _____

Signature: _____

For BrightFuture Corp:

Name: _____

Designation: _____

Signature: _____

Witnesses:

1. Name: _____

   Address: _____

   Signature: _____

2. Name: _____

   Address: _____

   Signature: _____

Answer 4A(iii)

One provision can be found in the Micro, Small and Medium Enterprises Development Act, 2006 ("MSME Act") whereby any reference to a Micro and Small Enterprises Facilitation Council ("MSME Council") necessarily requires the MSME Council to initiate a mandatory conciliation process. The provision provides that, in the event conciliation fails, arbitration can be commenced.

MSME dispute resolution system comprises of two stages wherein conciliation is the first one; if the conciliation is unsuccessful, the dispute is elevated automatically to Arbitration.

In a recent case, the Supreme Court was approached by a party aggrieved by a decision of the MSME Council. On being approached by a small-scale company, the MSME Council had issued notices and summons to one Jharkhand Urja Vikas Nigam Limited ("JUVNL"). On JUVNL's failure to respond to the notices and summons, the MSME Council decided the reference against JUVNL, and directed JUVNL to make payments, as claimed, within a period of 30 days. The decision of the MSME Council was challenged before the Rajasthan High Court, which challenge came to be dismissed.

Aggrieved by this dismissal a further Appeal was filed before the Supreme Court.

In deciding the controversy, the Supreme Court struck down the decisions of the MSME Council and held that the MSME Act provides for conciliation and it is only when the same is not successful, the MSME Council is empowered to refer the dispute to arbitration on its own or through any other institution. Pertinently, the Supreme Court clarified, that the MSME Council cannot club the two processes of conciliation and arbitration and pass Order for payment, during conciliation. Applying *mutatis mutandis*, the settled position of law as applicable to private parties, the Court held that if a statute has provided for a dispute resolution mechanism to be followed, the same is to be construed as mandatory and cannot be circumvented by any Authority.

The Supreme Court further explained that there is a fundamental difference between conciliation and arbitration. That is, in conciliation proceedings, the conciliator assists parties to arrive at an amicable settlement. Whereas, in arbitration, an arbitral tribunal adjudicates disputes between the parties.

Further, while interpreting Section 18 of the MSME Act, the Supreme Court held, that the MSME

Council was obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") would apply. In the event conciliation fails and stands terminated, the dispute between the parties will be referred to arbitration. The Supreme Court also rejected the objection, that the remedy available to JUVNL was to apply for setting aside of the decision of the MSME Council, as if, it were an arbitral award. While rejecting this objection, the Supreme Court held that, the decision of the MSME Council was without recourse to arbitration and in disregard of the provisions of the Arbitration and Conciliation Act 1996. Consequently, the decision of the MSME Council was not an arbitral award on account of which, JUVNL was not required to institute proceedings for setting aside of the decision.

PART–II

Question 5

(a) Krish, a long-standing employee of Hind Limited, held a supervisory role and was known for his dedication and hard work. However, he was dismissed from service on grounds of misconduct, for allegedly falsifying expense reports and violating company's policies. Krish challenged his dismissal, stating that it was unfair and conducted without proper inquiry. The employer, Hind Limited, a leading furniture company in India, maintained that the dismissal was justified based on the evidence of misconduct. The case was referred to the labor court for mediation, where both parties presented their cases.

In this background, draft a settlement agreement, assuming necessary facts.

(7 marks)

(b) Fly High Tech Ltd (FHTL), a leading technology company specializing in developing cutting-edge electronic devices, entered into a contract with Global Supplies Private Ltd, a major supplier of electronic components, to supply high-precision microchips essential for FHTL's new product line. The contract specified delivery schedules, quality standards, and penalties for delays. However, FHTL began experiencing significant delays in the delivery of the components, which affected their product development timelines and led to missed market opportunities. It also alleged that the components delivered did not meet the agreed-upon specifications, which further impacted their production processes and caused financial losses. Global Supplies defended itself by asserting that the delays were due to unexpected disruptions in their supply chain, including shortages of raw materials and logistical challenges. It also contended that they had communicated these issues promptly and that the components delivered were within acceptable industry standards, though there were minor discrepancies. Given the complexity of the dispute and the significant financial implications for both parties, the court recommended mediation as a more efficient alternative to extended litigation.

Enumerate the steps involved in Court ordered mediation.

(4 marks)

(c) "The Mediation Bill 2021 ("Bill") was introduced in the Rajya Sabha on 20th December, 2021 with the objective to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, encourage community mediation and make online mediation an acceptable and cost-effective process. The Bill finally came to be passed by Rajya Sabha on 1st August, 2023 and thereafter by the Lok Sabha on 7th August, 2023. On 14th September, 2023, the President on India gave her assent, and the Mediation Act, 2023 ("Act") came into being".

What are the key features of the Act ?

(4 marks)

Answer 5(a)

Settlement Agreement

This agreement is made on this _____ day of _____, 20__ at _____.

BETWEEN

_____ (Full description and address of the Party to be given) of the ONE PART.

AND

_____ (full description and address of the Party to be given) of the OTHER PART.

WHEREAS, the Employee was dismissed from service on grounds of alleged misconduct, specifically for allegedly falsifying expense reports and violating company policies;

WHEREAS, the Employee challenged the dismissal, alleging that it was unfair and conducted without proper inquiry or the opportunity to present his defense;

WHEREAS, the dispute was referred to the labor court for mediation, and both parties presented their cases;

AND WHEREAS, both parties have reached a mutually acceptable resolution of the dispute through mediation.

NOW IT IS AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS

1. The Employer agrees to reinstate the Employee to his previous position as a supervisor, effective immediately upon the signing of this Agreement.
2. The Employer agrees to pay the Employee back wages for the period from [Date of Dismissal] to [Date of Reinstatement], amounting to INR [Amount]. This payment will be made within [X] days of the signing of this Agreement.
3. The Employee acknowledges and accepts a formal warning regarding the alleged misconduct. This warning will be documented in the Employee's personnel file.
4. The Employer agrees to implement a comprehensive training program on workplace conduct and disciplinary procedures. This program will be mandatory for all employees and will commence within [X] months of the signing of this Agreement.
5. The Employee agrees to adhere to all company policies and procedures and to conduct himself in a manner that upholds the standards and values of the Employer.
6. The Employer agrees that no retaliation will be taken against the Employee for challenging his dismissal or for participating in the mediation process.
7. Both parties agree to keep the terms of this Agreement confidential and not to disclose any information related to the dispute or the settlement to any third party, except as required by law.
8. This Agreement shall not be construed as an admission of liability or wrongdoing by either party.
9. This Agreement constitutes the entire agreement between the parties regarding the subject matter hereof and supersedes all prior or contemporaneous agreements, understandings, and negotiations, whether oral or written.

10. This Agreement shall be governed by and construed in accordance with the laws of India.
11. Any disputes arising out of or related to this Agreement shall be resolved through arbitration in accordance with the Arbitration and Conciliation Act, 1996, and the venue of arbitration shall be [City], India.

IN WITNESS WHEREOF, the parties hereto have executed this Settlement Agreement as of the day and year first above written.

_____ _____

Signed by the above named 1st Party — Signed by the above named 2nd Party

(Name, Signature and Details) — (Name, Signature and Details)

Witnesses:

1. _____

   (Name, Signature and Details)

2. _____ _____

   (Name, Signature and Details) — (Authenticated by Mediator)

Answer 5(b)

The process of mediation is often the same between voluntary and court-ordered mediation, the fundamentals of mediation apply to both. The procedure follows a similar pattern, though it may differ slightly depending on the style of the mediator.

Mediation typically involves the following steps:

Introduction - The mediator and the parties will introduce themselves to each other at the start of the mediation. The mediator will also frequently provide an overview of how the process will proceed and establish any ground rules that may be required for the day.

Opening Statements- During this section, the parties will have the opportunity to present their case to the mediator and the other party, explaining what they want and why they want it. This is usually the only opportunity for the parties to present their side of the story to the other party.

Caucuses- After the opening statements, the mediator will frequently separate the parties and participate in individual meetings with each of the parties to gain a better understanding of the case from each side. Whatever either party says to the mediator during these meetings will not be shared with the other party unless both parties agree.

Bargaining- Eventually, the parties will start bargaining for their version of the settlement. In family law cases, this may imply that the parties are negotiating how to divide parenting time, assets, money, and other aspects of their lives. The mediator may direct that the parties work together in the same room, or that the offers be shuttled back and forth.

In both court order mediation and private process, the Mediator will facilitate the parties in arriving at the settlement and not force any decision of his own.

Agreement- The mediation will conclude with the parties reaching an agreement. This can be an agreement to settle the case or an agreement that the parties are unable to settle the case at this time and would like to proceed with litigation.

Answer 5(c)

Key Features of the Mediation Act, 2023

1. Wide Applicability: The Mediation Act, 2023 (Act) is applicable to all disputes between the parties except for where one of the parties is the Central Government or a State Government, or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government. Further, the Act is only applicable to the commercial disputes. Furthermore, Section 43 of the Act introduces the concept of community mediation, requiring the prior agreement of the parties involved. This provision enables the resolution of disputes that have the potential to disrupt the peace, harmony, and tranquility among residents or families in a specific region or neighbourhood. It grants authority to the relevant governing body under the Legal Services Authorities Act, 1987, or the District Magistrate, or Sub-Divisional Magistrate to establish a group of three mediators tasked with conducting the process of community mediation.

2. Party Autonomy: The Act upholds and encourages party autonomy. It stipulates that the parties are at liberty to agree upon a mediator as well as the process of appointment of such mediator. It also permits online mediation as a valid form of dispute resolution if preferred by the parties. The Act presently does not mandate the registration of Mediated Settlement Agreements, thereby allowing the parties to keep their confidentiality. The Act also permits parties to mediation proceedings to mediate in a language or languages of their choosing.

3. Comfort of Confidentiality: Section 15(3) of the Act is intended to preserve the confidentiality of the mediation proceedings, the information the mediator may obtain about parties, and on the subject matter of mediation. Further, Section 22 of the Act provides that the mediator, mediation service provider, parties and participants in the mediation shall keep information and communication relating to the mediation proceedings confidential and no party to the mediation shall in any proceedings before a court or tribunal including arbitral tribunal, be at liberty to rely on or introduce as evidence any such information or communication. Nevertheless, the Act also stipulates that this confidentiality does not extend to the mediated settlement agreement when its disclosure becomes essential for the objectives of registration, enforcement, or challenge.

4. Time Bound Mechanism: In a contemporary era, a prompt resolution of disputes not only conserves the valuable time and finances of the parties involved but also fosters an atmosphere which is conducive to contract enforcement and consequently business growth. The Act has been drafted keeping in mind this need of the hour. As stated hereinabove, the Act provides for mediation proceedings to conclude within a span of 120 days.

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

Question 6

(a) Hiphop Limited, a technology company, engaged Quantum Tech Solutions, an IT service provider, for the development and implementation of a customized software solution. The project faced several issues, including delays in delivery, performance problems, and disagreements over contract terms. Disagreements also arose over the interpretation of contractual terms related to support and maintenance services. Hiphop sought additional support and remedies for the issues encountered, while QuantumTech contended that their contractual obligations had been fulfilled and any additional support was beyond the scope of the original agreement. The parties were unable to resolve these disputes through direct communication, leading to a decision to pursue e-mediation to find a resolution.

What is e-mediation ? Explain the key steps involved in the e-mediation process.

(5 marks)

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(b) Jeet Tech Solutions (JTS) and Inforcom Softwares Ltd. (ISL), both parties found themselves in a commercial dispute regarding a breach of contract over a software development project. The dispute led to significant financial and reputation impacts for both companies. With the aim of resolving their differences, they agreed to appoint a mediator to resolve the conflict.

You are appointed as mediator to resolve the difference between the parties. Highlight the key points to be considered for negotiation.

(5 marks)

(c) Roop filed an application under the Right to Information (RTI) Act, seeking detailed information from the Telangana State Legal Service Authority (TSLSA) regarding the allocation and utilization of funds in various legal aid services. The PIO of TSLSA denied the information on the grounds that it was exempt under Section 8(1)(j) of the RTI Act, which pertains to personal information. Roop challenged this denial, asserting that the information sought was in public interest and related to the transparency and accountability of a public authority. Upon refusal by PIO for disclosing the information, gradually, the matter reached the Central Information Commission (CIC). Roop argued that the information requested was essential for ensuring transparency and accountability in the functioning of TSLSA, and that withholding such information was against the spirit of the RTI Act. Before the CIC could make a ruling, both parties agreed to mediation as suggested by the court to avoid prolonged litigation. A neutral mediator was appointed to facilitate discussions between Roop and TSLSA. One of the parties alleged that the mediator has not maintained confidentiality with regard to the mediation process and transparency was not maintained.

In the background of relevant case law :

(i) Explain the confidentiality aspects in mediation process and exceptions, if any.

(ii) Also state if the information under the RTI Act can be supplied in these circumstances.

(5 marks)

Answer 6(a)

E-mediation refers to the use of electronic communication and technology to facilitate the resolution of disputes between parties. It is a form of online dispute resolution (ODR) that allows people to participate in mediation from different locations and through various digital means, such as video conferencing, email, instant messaging, or web-based platforms. E-mediation can be used to resolve a wide range of disputes, including consumer complaints, workplace conflicts, family disputes, and international disputes.

The process typically involves a neutral third party mediator who helps the parties communicate, identify their needs and interests, explore options, and reach a mutually acceptable solution. The mediator may use various tools and techniques to facilitate the process, such as online whiteboards, document sharing, and virtual breakout rooms.

According to UNCITRAL 'Technical Notes on Online Dispute Resolution 2017' there are three stages in the ODR process:

- First stage a technology enabled negotiation - parties to the dispute attempting to negotiate directly to resolve the matter;
- Second stage facilitated settlement stage - mediator to communicate with disputants to arrive at an amicable settlement;
- Third stage commencement of ODR proceedings - parties will be informed of the process by a neutral third party appointed.

Answer 6(b)

The Key points to be considered for negotiations are as follows:

- Begin Co-operatively and be polite.
- Pay attention to the body language.
- Be transparent of the needs.
- Set your goals in advance.
- Act confident and informed.
- Build trust.
- Try to understand the perspective of the other person.
- Look for common good and not the areas of conflicts.
- Ask Questions.
- Active and Passive listening is required.
- Recognize the dirty tricks if being used.
- Be willing to refer various other means of dispute resolution.
- Be forgiving if the conversation turns into a heated argument.
- Be prepared to walk away if the settlement doesn't come.
- Don't narrow down the discussions to one issue.
- Discuss all the issues one by one.
- Reframe negative statements.
- Separate the people from the problem.
- Justify all offers and concessions.
- Protect the facts and use them when necessary.
- Use silence at the appropriate time.

Answer 6(c)

(i) Confidentiality aspects of mediation process can be understood by referering to the case of Moti Ram (D) Tr. LRs and Anr. v. Ashok Kumar and Anr., in this case the mediator had submitted the mediation report before the court. The Supreme Court held that mediation proceedings were to be completely confidential in nature and that very limited information ought to be conveyed to the court regarding mediation sessions. It also held that the mediator should only submit the executed mediated agreement or merely a statement that mediation was unsuccessful, depending on the outcome. Elaborate details regarding the sessions were not to be revealed before the court.

Further, In the Salem Bar Association v. Union of India case, a committee was formed to regulate mediation proceedings, and the Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 were introduced, which provide non-binding guidelines for court-referred mediation. Rule 20 of these rules establishes all aspects of mediation as confidential, and the Supreme Court recommended that all High courts adopt these rules with certain modifications.

Mediation proceedings are typically kept confidential, and it is considered unethical to disclose any communication that takes place during mediation sessions. This confidentiality has been upheld by courts in various cases, and it is generally not permissible to seek information regarding mediation proceedings through the Right to Information Act, 2005.

In the facts of the given situation, a reference may be made to the decision of Supreme Court in the case of *The Central Information Commission in Rama Aggarwal v. PIO, Delhi State Legal Service Authority. In this case it was* opined that: "The proceedings during mediation are protected under the exceptions in the Right to Information Act 2005 and are not subject to be disclosed as no public interest is served on disclosure and there exists larger public interest protecting the information". Confidentiality of the process should not be such which restricts the mediator to conduct effective monitoring research as well as evaluation of mediation programs during the process.

If such prohibitions are imposed, then it may affect the behaviour of mediator to accomplish his task and he will not be in a position to carry out mediation in an appropriate and valuable manner. Therefore, there are some exceptions to the confidentiality of mediation process which are as follows:

a. When the conflicting parties give their written consent;

b. When there are some statutory obligations to be followed;

c. When mediator is entailed to prepare a written brief or summary or report of mediation;

d. When there are justifiable grounds to believe that disclosure is essential in order to avert any danger or injury to any person or property;

e. When the information is of qualitative or quantitative nature which is further required to be used for research or evaluation purposes.

Considering these exceptional situations in mediation, a mediator conducts private caucuses with the parties to discuss their issues and must inform the parties about the restraints to confidentiality during such sessions.

(ii) In view of the above discussion and the provisions of Right to Information Act, 2005, it can be said that the Information may not be supplied in the given circumstances.

Or (Alternate Question to Q. No. 6)

Question 6A

(i) Himat and Rani were involved in a marital dispute that escalated to the point of legal intervention. Himat filed for divorce on the grounds of mental cruelty, alleging that Rani's behavior had caused him significant psychological distress. Rani, on the other hand, contested the divorce, claiming that Himat's allegations were unfounded and that she wished to continue their marriage. Recognizing the potential for reconciliation and the sensitive nature of marital disputes, the court recommended that the parties undergo mediation.

With reference to a settled case law, examine the validity of Court's decision.

(5 marks)

(ii) Purvi, a young professional working with a Payroll processing company in Chennai, faced a life-altering event when her car collided with a speeding vehicle at an intersection. The impact left her with severe injuries, including multiple fractures and trauma. Amidst physical pain and emotional turmoil, Purvi sought assistance from her insurance company, only to find herself entangled in a claim dispute. The aftermath of the accident presented Purvi

with daunting challenges. Mounting medical bills and the inability to work aggravated her distress. However, her insurance policy coverage became a source of contention when the insurance company disputed the extent of her injuries and the liability of the other party involved in the accident. Having no other alternative, Purvi wanted to appeal against the insurance company, though she knew that the litigation would be costly for her. The insurance company also noticed that the large number of accidents and related claims cast burden on it and the legal system, if they result in litigation.

With reference to a judicial pronouncement, advise the insurance company about the alternate dispute resolution mechanism it should consider.

(5 marks)

(iii) NewTech LLP, a law firm was known for its specialisation relating to arbitration, mediation, conciliation and information-technology related cases. The firm had a technical team, which used to provide inputs based on the usage of various software developed in-house for analysing the data. The Senior Partner of the Firm, wanted to increase the firm's foot print across three other cities in India and was discussing the same with other team members. One of the senior colleagues pointed out that, currently artificial intelligence is more relevant and we need to develop our systems on those lines for serving our clients better. Based on the discussions, the Management of New Tech LLP decided to invest in technology for increasing efficiency and client services. The Senior Partner asked the team to submit a proposal about the benefits of new technology including artificial intelligence driven solutions, which it proposes to use. Prepare a brief note on usage of technology and Artificial Intelligence (AI) in arbitration and conciliation.

(5 marks)

Answer 6A(i)

The facts of the given situation are similar to the case of *K. Srinivas Rao v. D.A. Deepa*, in which while dealing with a divorce matter, the Apex Court went to the extent of saying that criminal courts could also refer to mediation cases where a complaint has been filed under Section 498-A of the Indian Penal Code, 1860.

The Supreme Court further directed all mediation centres to set up pre-litigation desks or clinics to settle matrimonial disputes at the pre-litigation stage. The above case laws seem to indicate that the higher judiciary is by and large in favour of mediation and is keen on pushing all suitable matters to be resolved through mediation instead of adding to the court's burden. However, in reality, Section 89 of the Civil Procedure Code, 1908 (CPC) and the above judicial pronouncements have not had the desired impact due to the lack of adequate training given to the judges in the district judiciary, who are empowered under Section 89 to refer matters to mediation.

The discretion vested in them has not been used to reduce the court's burden in any noticeable manner. Apart from lack of training, there are several systemic issues that have prevented the adoption of mediation, as discussed in the coming section despite the clear mandate given by the judiciary in favour of mediation.

In view of the above mentioned case, it may be said that the decision of the Court is valid.

Answer 6A(ii)

In the case of *M.R. Krishna Murthi v. New India Assurance Co. Ltd. [(2020) 15 SCC 493, (India), 27*] which is relating to justice for road accident victims. It was *inter alia* mentioned that having regard to the fact that large number of accidents are giving rise to phenomenal quantum jump in such cases, methods need to be adopted for quick resolution. Here, mediation as a concept of

dispute resolution, even before dispute becomes part of adversarial adjudicatory process, would be of great significance. Advantages of mediation are manifold. These stands recognised by the Legislature as well as policy makers and need no elaboration. Mediation is here to stay. It is here to evolve. It is because of the advantages of mediation as a method here to find new grounds. It is here to prosper, as its time has come. It is now finding statutory recognition and has been introduced in few Statutes as well. Examples are the Companies Act, Insolvency and Bankruptcy Code, Commercial Courts Act etc. In these enactments provisions are made even for pre-litigation mediation by making this process mandatory. There is, in any case, umbrella provisions in the form of Section 89 of the Code of Civil Procedure which, *inter alia*, provides for court annexed mediation as well.

In view of the decision in above mentioned case, the Insurance Company may opt for mediation.

Answer 6A(iii)

Note on Usage of Technology and Artificial Intelligence (AI) in Arbitration and Conciliation

The use of Artificial Intelligence (AI) in the Mediation process is considered to be the future of Dispute resolution. The below mentioned points emphasizes on the benefits of new technology including AI driven solutions:

I) AI in ODR can be used as follows:

A. Decision Support System (DSS): A DSS can perform simple activities ranging from compiling data to more complex analysis, like suggesting the best strategy for the fairest possible outcome.

B. Expert System (ES): Another way in which AI can be used is as an expert system. An expert system would have the capability to work at the standard of humans and may even be able to exceed the standard. Such a system will be capable of learning by itself and develop knowledge with each case. They differ on the ground that a DSS would assist a human, whereas an expert system would be able to decide and give advice as a human.

II) Software and Tool Support tools are becoming increasingly popular among practitioners. With expert systems, contracts can be analysed in minutes as compared to hours taken by a human. Famous Software/tools which are known and recognised globally are SmartSettle, Adjusted Winner, eBrevia, etc.

III) Benefits: Artificial Intelligence (AI) is a field that uses computer science and robust datasets to solve problems. It includes sub-fields like machine learning and deep learning that are commonly associated with AI. In mediation, the first priority of the neutral party is to make the disputing parties feel comfortable and confident in their confidentiality. AI programs could provide an advantage in this aspect as people might feel more at ease sharing personal information with a non-human party, especially when dealing with sensitive issues like matrimonial disputes. This could benefit parties who don't want their details disclosed to a third person. However, it raises concerns about confidentiality. AI has the potential to reduce the burden on courts since the volume of civil cases in India is high, and many of them can be resolved through alternative dispute resolution (ADR). AI in online dispute resolution (ODR) could make the process more accessible to those who can't afford litigation or physical ADR, especially since miscommunication is a common cause of disputes in civil cases.

Mindtech partnered with an AI solutions provider to develop a custom mediation platform equipped with advanced machine learning algorithms and natural language processing capabilities. The platform was designed to assist mediators and parties involved in disputes

by analyzing case data, identifying patterns, and offering data-driven insights to inform decision-making.

The AI platform analyzed vast amounts of case-related documents, including contracts, emails, and legal briefs, to extract key information and identify areas of contention. It provided real-time analytics and predictive modeling to assess the strengths and weaknesses of each party's arguments, enabling mediators to facilitate more informed discussions and negotiate favorable outcomes.

***

GST AND CORPORATE TAX PLANNING

GROUP 2 ELECTIVE PAPER 7.2

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

(*a*) Sunderwani Pvt. Ltd. is registered with the jurisdictional GST authorities in the State of Rajasthan and operates as wholesale supplier of machines. Company wants to appoint you as a Manager mainly for GST related work. For this purpose company provide you the following information related to the month of April, 2024.

Receipts on outward supply (exclusive of GST) for the month of April, 2024 are as follows :

Particulars	Amount (₹)
Intra-State supply to unregistered person	75,00,000
Inter-state supply to registered person	6,00,000
Amount received for Actionable claim from normal business debtors of intra-state	3,00,000

Assume applicable rate on outward supply as CGST @ 9% and SGST @ 9% and IGST @ 18%.

Details of GST paid on Inward Supply are as follows during the month of April, 2024 :

Particulars	CGST Paid (₹)	SGST Paid (₹)
Raw materials purchase for which invoice is missing but delivery challan is available	1,40,000	1,40,000
Company purchased capital goods of ₹ 4,00,000 and Paid GST ₹ 48,000 on it and claimed depreciation of ₹ 67,200 @ 15% on full amount of ₹ 4,48,000 under Income Tax Act, 1961	24,000	24,000
Tax on Raw materials purchase which used for zero rated outward supply	2,20,000	2,20,000
Motor bus for transportation of persons having approved seating capacity of 14 persons (including driver), depreciation not claimed on GST portion	1,50,000	1,50,000

Details of other Input Services availed during the month of April, 2024 :

S. No.	Particulars
(i)	₹ 50,000 Paid for legal service to an advocate Mr. Sunil Gupta in the course of intra-state, taxable @ 9% CGST, 9% SGST and 18% IGST
(ii)	Paid ₹ 1,60,000 to Mr. Deepak of Gujarat, for renting (including cost of fuel) of motor vehicle designed to carry passengers where supplier opt to pay IGST @ 5%

Additional Information :

(i) All the amount stated in the above tables are exclusive of GST, wherever applicable.

(ii) Aggregate turnover of company in previous year 2023-24 was ₹ 5 Crore.

(iii) Opening balance of input tax credit was NIL.

As a GST Consultant, you are required to give the following answers with references to the GST Law :

(i) Compute the Gross GST Liability to be paid by company under forward charges for the month of April, 2024.

(*2 marks*)

(ii) Compute the Gross GST Liability to be paid by company under reverse charges for the month of April, 2024.

(*2 marks*)

(iii) Compute the Input Tax Credit available for payment of Tax for the month of April, 2024.

(*4 marks*)

(iv) Compute the Net Tax liability for Sunderwani Pvt. Ltd. to be paid in Cash for the month of April, 2024.

(*2 marks*)

(b) Kamal who is proprietor of Kamal General Store a registered supplier under composition scheme in the state of Uttar Pradesh, shut down his Store and disposed off stock as follows :

(i) Donated stock of 200 kg rice to slums, costing ₹ 25,000

(ii) Transferred stock of 50 kg pulses to his brother costing ₹ 20,000

(iii) Scrapped empty bags and cartons and sold for ₹ 6,500

(iv) Consumed stock of 100 kg flour in his family costing ₹ 12,000. Determine whether above disposals will be treated as ''Supply'' under GST ? If yes, calculate the amount of taxable supply.

(*5 marks*)

(c) BGL Gas Limited supplied Industrial Oxygen Gas through pipelines to City Care Hospital Limited. The hospital made monthly payments to the supplier as per contract. Invoice is issued by the supplier for every quarter and supported by a statement of the goods dispatched and payments made, and the recipient has to pay the differential amount, if any accordingly.

The details of the various events are as under :

Date	Events
05.05.2024 05.06.2024 05.07.2024	Payments of ₹ 1.50 lakh made in 5th day of each month (i.e. 1.5 lakh on 5 May, 1.5 lakh on 5 June and 1.5 lakh on 5 July)
03.07.2024	Statement of accounts issued by supplier, with invoice for the quarter April-June, 2024
17.07.2024	Differential payment of ₹ 38,000 received by supplier for the quarter April-June, 2024 as per statement of accounts

From the above information, find out the time of supply as per the provisions of CGST Act, 2017.

(*5 marks*)

(d) Lara Enterprise is a registered Proprietary concern at Varanasi, Uttar Pradesh. It exported Zero rated Dental care solutions to USA. Details of transactions for Exported Goods are mentioned below.

Particulars	Date
Bill of Supply	31.03.2022
Aircraft Left India	02.04.2022

Application for Refund claim was made on 30.03.2024. Acknowledgement for same received on 10.04.2024. However, the department did not process the refund application till 30.06.2024. What legal remedy is available with Lara Enterprise under GST law ? Also discuss the relevant provision of GST law in this regards.

(*5 marks*)

Answer 1(a)

(i) Computation of Gross Tax liability to be paid under forward charges

Particular	Value	Rate	CGST	SGST	IGST
Intra-State supply	75,00,000	9%	6,75,000	6,75,000	-
Inter-State supply	6,00,000	18%	-	-	1,08,000
Actionable claim covered under schedule III not a supply	3,00,000	Nil	Nil	Nil	Nil
Gross GST Liability			6,75,000	6,75,000	1,08,000

(ii) Computation of Gross Tax Liability to be paid under reverse charges

Particular	Value	Rate	CGST	SGST	IGST
Legal service RCM applicable	50,000	9%	4,500	4,500	-

Rent of Motor vehicle Since supplier is paying IGST 5% hence, RCM applicable	1,60,000	5%			8,000
Total RCM Liability			4,500	4,500	8,000

(iii) Computation of Input Tax Credit available for the month of April, 2024

Particular	CGST	SGST	IGST
Raw materials purchase for which invoice is missing but delivery challan is available. [Credit not available if Invoice is missing.]	Nil	Nil	
Purchased of Capital Goods *Note:* No ITC is allowed if depreciation is claimed on full amount (including GST) under Income Tax Act. 1961 on Capital Goods.	Nil	Nil	
Tax on Raw materials purchase which used for zero rated outward supply *Note:* ITC available, for ITC purposes, taxable supplies include zero-rated supplies under rule 43(1)(b) of CGST Rules, 2017. Hence, full ITC is available	2,20,000	2,20,000	
Motor bus for transportation of persons As per section 17(5), no ITC available in respect of motor vehicle for transportation of person having approved seating capacity of not more than 13 persons (including driver), Thus ITC is admissible as the bus seating capacity is 14 persons (including driver).	1,50,000	1,50,000	
Input tax credit is available with respect to GST payable on reverse charge basis.	4,500	4,500	8,000
Total ITC	3,74,500	3,74,500	8,000

(iv) Computation of Net GST Liability to be paid in Cash for the month of April, 2024.

Particular	CGST	SGST	IGST
Output Tax as per forward charge	6,75,000	6,75,000	1,08,000
Less: Available ITC	3,74,500	3,74,500	8,000
	3,00,500	3,00,500	1,00,000
Add: RCM to be paid in cash only, not from ITC	4,500	4,500	8,000
Net GST to be paid in cash	3,05,000	3,05,000	1,08,000

Answer 1(b)

(i). Donation of 200 kg Rice to Slums (Cost: Rs 25,000) GST Treatment: Since Kamal is registered under the composition scheme and did not claim Input Tax Credit (ITC) on the rice, the donation is not considered a "Supply" under GST. Provisions of Schedule I are not fulfilled.
(ii). Transfer of 50 kg Pulses to Brother (Cost: Rs 20,000) GST Treatment: Transfer of goods to a related party (e.g., family member) without consideration is treated as a "deemed supply" under Schedule I of the CGST Act, 2017, even if ITC was not claimed.
(iii). Sale of Scrapped Empty Bags and Cartons (Sale Value: Rs 6,500) GST Treatment: The sale of scrap is treated as a "Supply" under GST, regardless of the amount or the fact that Kamal is under the composition scheme.
(iv). Consumption of 100 kg Flour by Family (Cost: Rs 12,000) GST Treatment: Personal consumption of goods purchased for business purposes is treated as a "deemed supply" under GST. Since Kamal consumed the flour within his family, it is considered a supply.
Total Taxable Supply: Rs. 20,000 + Rs. 6,500 + Rs. 12,000 = Rs. 38,500 Kamal would be required to pay GST on this amount under the composition scheme.

Answer 1(c)

As per the provisions of section 12 of CGST Act, the time of supply for goods is the earliest of the following dates: ● Date of Issue of Tax Invoice ● Last Date of Issue of Invoice as per provisions of section 31 of the CGST Act ● Date of Receipt of Payment (Not Applicable by Notification No. 66/2017)
Date of Receipt of payment is not applicable for advance payments except for Composition Dealers (Notification No. 66/2017)
As per provisions of section 31(4) of CGST Act, in the case of continuous supply of goods, where successive statements of accounts or successive payments are involved. the invoice shall be issued before or at the time each such statement is issued or, as the case may be, each such payment is received.
Hence Time of supply will be: 05.05.2024 for first payment date, of goods valued at Rs. 1.5 lakh (being earlier of the date of payment or the date of invoice, as computed hereunder) 05.06.2024 for second payment date, of goods valued at Rs. 1.5 lakh (being earlier of the date of payment or the date of invoice, as computed hereunder) 03.07.2024 for third payment date, of goods valued at Rs. 1.5 lakh, (being earlier of 05.07.2024, the date of payment or 03.07.2024, the due date of issue of tax invoice)

03.07.2024 for differential payment of Rs. 38,000 received by supplier on 17.07.2024, (being earlier of the date of payment 17.07.2024 or date of issue of tax invoice being 03.07.2024)

Answer 1(d)

Any person claiming the Refund of Tax may make an application before the **Expiry of two years** from the relevant date.

In case of Export of Goods by Air, relevant date is when Aircraft leaves India. Here Aircraft leaves India on 02.04.2022 so application of Refund claim can be filed before 02.04.2024. Here application has been made on 30.03.2024, therefore the application is valid.

Refund order is required to be issued by the proper officer within sixty days from the date of filing of the claim for refund. Accordingly, refund order should be issued by proper officer before 29.05.2024 (1 Day for March + 30 days for April +29 Days of May = 60 Days)

In case of zero- rated supply of goods or services the proper officer is required to grant provisional refund of 90% of the refund claimed by registered person within 7 days from the date of acknowledgement, i.e. by 17.04.2024.

The provisional refund would not be granted to such supplier who was during any period of 5 years immediately preceding the refund period was prosecuted.

Hence, department should process the Refund claim with Interest @ 6% for the period of delay.

Question 2

(a) BCH Ltd, is registered under GST in the state of Maharashtra. It sells readymade cloths across India through e-commerce operator Skart.

Skart is registered with Madhya Pradesh GST Authority as TCS collector and collects Tax (TCS) on supplies made through it.

BCH Ltd made sales of ₹ 4,35,000 and received sales returns of ₹ 42,560 in the month of May, 2024. Sales amount above is exclusive of GST but sales return are inclusive of GST.

Determine the amount of TCS to be collected by Skart for the month of May, 2024. Assume applicable tax rate 6% CGST, 6% SGST and 12% IGST as the case may be. Working Note should form part of your answer.

(*5 marks*)

(b) Farm Tractors Limited, Salem (Tamil Nadu) is engaged in the production and supply of tractors to farmers with a provision of two years warranty for replacement of parts, if any along with first three services to be provided as free of cost from the date of delivery. During the month of April, 2024, 75 farmers who purchased tractors during financial year 2023-24, lodged their warranty claims for replacement of parts. The total input cost (ITC claimed) of these replacements as born by the company was ₹ 4,05,000 including GST @ 12% and ₹ 1,78,000 including GST @ 18%. Later, GST officer reversed all this ITC claimed on warranty alleging that the company provided warranties with no additional consideration charged from farmers. Whether the allegation of the officer is tenable as per GST Law ?

(*5 marks*)

(c) The Electronic Credit Ledgers of Nath Motors Ltd showed the following monthly closing balances for 3 months :

Months	CGST	SGST	IGST	Total ITC balance in all 3 ECL
January, 2024	500	500	4000	5000
February, 2024	1000	1000	2000	4000
March, 2024	1500	1500	1000	4000

The company utilised an ITC of ₹ 3000 out of IGST as available in January, 2024, at the time of filing GSTR 3B for January, 2024 on 18.02.2024. The same was later on reversed on 20.04.2024 due to the wrong availment and utilisation at the time of filing GSTR 3 B for January, 2024. Calculate interest liability, if any on such wrong availment and utilization of IGST under the GST Law.

(*5 marks*)

Answer 2(a)

Section 52 of CGST Act 2017 deals with the matter relating to collection of Tax at Source. It provides that every electronic commerce operator not being an agent, shall collect an amount calculated at such rate not exceeding one per cent., as may be notified by the Government on the recommendations of the Council, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator.

Vide Notification No. 02/2018 – Integrated Tax dated 20.9.2018, the Government has notified rate of one percent.

Explanation - For the purposes of this sub-section, the expression "net value of taxable supplies" shall mean the aggregate value of taxable supplies of goods or services or both, other than services notified under subsection (5) of section 9, made during any month by all registered persons through the operator reduced by the aggregate value of taxable supplies returned to the suppliers during the said month.

Explanation - For the purpose of deduction of tax specified above, the value of supply shall be taken as the amount excluding the central tax, State tax, Union territory tax, integrated tax and cess indicated in the invoice.

Here sales return is inclusive of GST so we have to calculate exclusive Sales return as -

42,560 x 100/ 112 (because its Inter State hence IGST @ 12 % taken) = Rs. 38000

Value for TCS = Rs. 435000 – Rs. 38000 = 397000

Hence TCS would be 1 % of Rs. 3,97,000 = Rs. 3970

Answer 2(b)

As per the CBIC Circular No. 195/07/2023 - GST Dated the 17th July, 2023, the value of original supply of goods (provided along with warranty) by the manufacturer to the customer includes the likely cost of replacement of parts and/ or repair services to be incurred during the warranty period.

Therefore, these supplies cannot be considered as exempt supply and accordingly, the manufacturer, who provides replacement of parts and/ or repair services to the customer during the warranty period, is not required to reverse the input tax credit in respect of the said replacement parts or on the repair services provided.

Also refer to recent few cases decided in which Courts ordered in the same situation as clarified above:

- M/S Bajaj Auto Ltd. vs Commissioner of Central Goods and Service Tax (2022)
- MJS TVS Motor Company Ltd. vs Commissioner of Central Goods and Service (Tax (2022)
- M/S Samsung India Electronics Pvt. Ltd. vs Commissioner of Central Goods and Service Tax (2020)

Thus, in the given case, the allegation of the officer is not tenable with reference to the clarification issued as above and the ITC claimed on replacement cost by the company is legally valid as per law.

Answer 2(c)

Sub-rule 3 of Rule 88B. Manner of calculating interest on delayed payment of tax

In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub-section (3) of section 50, the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50.

Further refer to the recent Circular No. 192/04/2023 GST dated 17.07.2023 issued for clarification on charging of interest under section 50(3) in cases of wrong availment of IGST credit and reversal thereof which clarified as under:

As per Rule 88B of CGST Rules, the amount of ITC available in Electronic Credit Ledger 'ECL', under any of the heads of IGST, CGST or SGST, can be utilized for payment of liability of IGST, it is the total Input Tax Credit 'ITC' available in ECL, under the heads of IGST, CGST and SGST taken together, that has to be considered for calculation of interest under rule 88B and for determining as to whether the balance in the ECL has fallen below the amount of wrongly availed ITC of IGST, and to what extent the balance in ECL has fallen below the said amount of wrongly availed credit.

Thus, in the cases where IGST credit has been wrongly availed and subsequently reversed on a certain date, there will not be any interest liability under section 50(3) if, during the time period starting from such availment and up to such reversal, the balance of Input Tax Credit in the ECL, under the heads of IGST, CGST and SGST taken together, has never fallen below the amount of such wrongly availed ITC, even if available balance of IGST credit in ECL individually falls below the amount of such wrongly availed IGST credit.

However, when the balance of ITC, under the heads of IGST, CGST and SGST of ECL taken together, falls below such wrongly availed amount of IGST credit, then it will amount to the utilization of such wrongly availed IGST credit and the extent of utilization will be the extent to which the total balance in ECL under heads of IGST, CGST and SGST taken together falls below such amount of wrongly availed IGST credit, and will attract interest as per section 50(3) read with section 20 of the IGST Act, 2017 and of rule 88B(3).

Conclusion: With reference the provisions and clarification issued as above,

Since the balances available of ITC (taken together in all three ECL: CGST, SGCT and IGST) during months of January, February and March were 5,000, 4,000 and 4,000 which did not fall below the amount of wrong IGST ITC availed and utilized of Rs. 3,000. The company would not be liable to pay any interest for the period of wrong availment & utilization and later reversal of the same.

Question 3

(a) The GST Commissioner issued a notice to KK Tobacco Co., Kanpur on 20.05.2024 for initiating an audit under section 65 of CGST Act, 2017 with a mention to start the audit from the end of l5 days from the date of notice. The firm received the notice on 26.05.2024. The firm provided records and documents for audit on 20.06.2024 and the audit was started on 25.06.2024 by audit team at the place of business of the firm. What is the date of "commencement of audit" to complete it within the time allowed as per the GST law ?

(*3 marks*)

(b) S Limited and T Limited are related persons. S Limited issued a corporate guarantee to City Bank on behalf of T Limited for availing a working capital loan of ₹ 1 crore, for a period of l8 months further extendable on renewal and charged ₹ 2,00,000 for this service. The open market value of comparable similar transactions in the market is 2,50,000. Calculate the value of supply of this service as taxable in the hands of S Limited.

(*3 marks*)

(c) Puneet developed and launched an online gaming app "GameZ", on 20.03.2024 to start the business of online gaming w.e.f. 0l.04.2024 and registered under GST voluntarily on 20.03.2024. He received initial deposits of ₹ 500 each from 20 persons by the end of March, 2024. He seeks your advice whether he is liable to pay tax on this initial amount of ₹ 10,000 as deposited, when filing return of supply for the month of March, 2024 ?

(*3 marks*)

(d) Vijay started supply of goods within the state of Maharashtra from 1st July 2023. His turnover exceeded ₹ 40 lakh on 25th March, 2024. However, he didn't apply for registration.

Determine the amount of penalty, if any that may be imposed on Vijay under CGST Act, 20l7, if the tax evaded by her, as on said date, on account of failure to obtain registration is ₹ 24,500.

(*3 marks*)

(e) Name the GST Forms to be used in the case of the following situations by the registered persons :

(i) Naresh, by mistake, deposited cash of ₹ 2,550 under the head IGST instead of under the head late fee ₹ 2,000 and interest of ₹ 550. Now he wants to rectify the mistake, if possible. Which form is required to file to rectify this mistake ?

(ii) Aman, a supplier recently registered with GST, incorrectly reports the HSN code in his first GSTR-1 filed. Name the Form this error has impacted resulting in the recipient not be able to claim the correct Input Tax Credit ?

(*2+1=3 marks*)

Answer 3(a)

As per the Explanation of section 65 of CGST Act, the expression '"commencement of audit" is defined as:

- the date on which the records and other documents, called for by the tax authorities, are made available by the registered person

  OR

- the actual institution of audit at the place of business,

whichever is later.

Thus, as per the provisions mentioned above, the date of commencement of audit will be:

- 20.06.2024, the date on which records and documents for audit made available

  OR

- 25.06.2024, the date on which audit was started by audit team at the place of business of the firm.

whichever is later i.e. 25.06.2024

Answer 3(b)

The recent amendment to Rule 28 by introducing new sub-rule (2) of the CGST Rules by Notification No.52/2023 applicable retrospectively from October 26, 2023, introduced a specific provision regarding the valuation of corporate guarantees (CG) when provided between related parties.

This change, specifies that the value of a corporate guarantee for GST purposes should be calculated as either 1% of the guaranteed amount per annum or the actual consideration received, whichever is higher.

Thus, in the question, the value of supply will be:

1% of the guaranteed amount per annum = Rs.1 Crore * 1% /12 * 18 months = Rs.1,50,000 or the actual consideration received = Rs. 2,00,000

whichever is higher = i.e. Rs. 2,00,000

Note: The word per annum inserted vide Notification No. 12/2024 - CT dated 10.07.2024, applicable retrospectively w.e.f. 26.10.2023.

Alternative Answer 3(b)

The recent amendment to Rule 28 by introducing new sub-rule (2) of the CGST Rules by Notification No.52/2023 applicable retrospectively from October 26, 2023, introduced a specific provision regarding the valuation of corporate guarantees (CG) when provided between related parties.

This change, specifies that the value of a corporate guarantee for GST purposes should be calculated as either 1% of the guaranteed amount or the actual consideration received, whichever is higher.

Thus, in the question, the value of supply will be:

1% of the guaranteed amount = Rs.1 Crore * 1% = Rs.1,00,000 or the actual consideration received = Rs. 2,00,000

whichever is higher = i.e. Rs. 2,00,000

Answer 3(c)

Notification No. 66/2017 CT dated 15.11.2017 was earlier issued to exempt all registered persons from the requirement of payment of tax at the time of receipt of advances in the case of supply of goods and provides for payment of tax in such cases at the time of supply as specified in section 12(2)(a).

Now as per the Notification No. 50/2023 CT dated 29.09.2023, w.e.f. 01.10.2023, above said notification has been amended to exclude registered persons making supply of specified actionable claims from the said exemption, so that in case of specified actionable claims, the tax should be paid at the time of receipt of payment for such supplies by the suppliers.

Conclusion: Thus, as per the aforesaid amendment to the earlier notification, Mr. Puneet will be liable to pay tax on this initial amount of Rs. 10000 as deposited, when filing return of supply for the month of March, 2024.

Answer 3(d)

Under section 122(1) of CGST Act, 2017 Where a taxable person who is liable to be registered under this Act but fails to obtain registration, he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded whichever is higher.

Conclusion: Hence Vijay is liable for penalty of Rs. 24,500.

Answer 3(e)

The following GST Forms to be used in the given situations.

(i) GST PMT-09: It is a form used by GST taxpayers to transfer the balance in the Electronic Cash Ledger from one head (or tax type) to another within the same GSTIN. It allows for the correction of incorrect payments made under the wrong tax head (e.g., IGST, CGST, SGST, Cess) or any other type (e.g., tax, interest, penalty, fee)

(ii) GSTR-2A: Incorrect reporting of the HSN code in GSTR-1 will reflect in the recipient's GSTR-2A (auto-populated purchase return) resulting in the recipient not be able to claim the correct Input Tax Credit.

Attempt all parts of either Q. No. 4 or Q. No. 4A.

Question 4

(*a*) Residential Welfare Association of Ekta Co-operative Housing Society, registered under the Societies Registration Act, 1860 charged from its 3 members as below against provision of various services for May, 2024 :

Member	Repair & Maintenance (₹)	Parking Charge (₹)	Water Charges (₹)	Property Tax (Common Area) (₹)	Total (₹)
Pooja-Flat 1	6500	500	2000	800	9800
Pooja-Flat 2	7000	–	500	800	8300
Srinivas	5500	1000	1800	800	9100

Other Information :

(i) Pooja is the owner of flat 1 and flat 2, while Srinivas is owner of only 1 flat.

(ii) All the above flats are same space size in the society.

(iii) Parking and Water Charges are reimbursed by members against their separate individual bills.

From the above information, you are required to explain the provisions of taxability of services provided by the society under GST. Also calculate the taxable amount of Society under GST.

(*5 marks*)

(b) Sumo Motors Limited, a registered person, while filing monthly returns for the months from August, 2019 to March, 2020, made payments of CGST and SGST in a wrong head considering one of its customers supply to be an Intra-State supply, but which was later held to be an Inter-State supply, subject to IGST.

Later on, having realized on its own that the said transaction is an Inter-State supply, the company paid IGST in respect of the said transactions on 10.05.2023 and filed an application

electronically in FORM GST RFD-01 for claim of refund of CGST and SGST as paid under wrong head. However, the application for claim of refund was rejected by the Adjudicating Authority on the grounds of limitation.

Comment whether this rejection of refund was justified in law, with reference to decided case law, if any.

(*5 marks*)

(c) Sonal, a famous Kathak Dancer of Mumbai has received following considerations in the month of February, 2024 :

Particulars	Amount (₹)
(i) Amount received as dance performance at the annual day function of a girls college at Delhi	1,20,000
(ii) Amount received as dance performance at a music concert held at Mumbai	2,50,000
(iii) Amount received for being hired as a brand ambassador by ''PARI : Save Girl Child'', an NGO registered under 12AA of the Income Tax Act, 1961 in the state of Gujarat	20,00,000
(iv) Amount received as coaching fees in recreational activities relating to arts in Mumbai	2,80,000
(v) Amount received as Rent for her house in Mumbai given to Harish a Government Employee for use of his residence @ ₹ 60,000 per month	60,000

Determine the value of taxable supply under CGST Act, 2017, by Sonal for the month of February, 2024. Assume all the above amounts are exclusive of GST.

(*5 marks*)

Answer 4(a)

As per section 2(17) of CGST Act, "Business" includes provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

As per section 2(84) of CGST Act, "Person" includes a co-operative society registered under any law relating to co-operative societies or Society as defined under the Societies Registration Act, 1860.

Thus, Ekta co-operative housing society (being a person as defined above) provides services to its member in the form of facilities or benefits to it member (in course of business) for a consideration. Hence based on above definition and concept of supply, it also gets covered under GST.

Calculation of the taxable amount of Society under GST:

Member	Repair & Maintenance	Parking Charges (Fully Taxable)	Water Charges	Property Tax (Common Area)	Total	Amount to be considered in limit of 7500	Taxable Amount
Pooja Flat 1	6500	500	2000 (non-taxable)	800	9800	7300 (Exempt)	500

Pooja Flat 2	7000	-	500 (non-taxable)	800	8300	7800 (Taxable)	7800
Srinivas	5500	1000	1800 (non-taxable)	800	9100	6300 Exempt	1000
Total							9300

Working Notes:

As per the provisions of GST and decided case laws, the various services provided by society would be exempt/taxable as under:

1. As per Entry 77 of the GST Exemption Notification No. 12/2017- Central Tax (Rate) New Delhi, the 28th June, 2017, the maintenance charges paid by residents to the Resident Welfare Association (RWA) in a housing society is exempt from GST up to an amount of Rs. 7,500 per month per member.
2. If a person owns more than one residence in a society, then a 'separate' ceiling of Rs. 7500 is considered as the second unit also gets an individual exemption of Rs 7500.
3. In case of Parking Charges- Generally charged to members for using space on Parking. It is purely one to one basis and not for common use, it is chargeable to Tax and is not counted in exemption limit.
4. In case of Water Charges:
   - If water charges are collected by society individually on behalf of members, it is not counted for exemption and also not chargeable to tax, since society is acting as agent on behalf of Govt. for the taxes to be paid.
   - If water charges are collected by society for common use, then it is included in the limit of Rs. 7500 and will be taxable too.
5. For property tax charged on Common Area, then it is included in the limit of Rs. 7500.

Answer 4(b)

As per Section 77 of CGST Act, a registered person who has paid the Central tax and State tax or, as the case may be, the Central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed.

As per Rule 89(1A) such application can be filed before the expiry of a period of two years from the date of payment of the tax on the inter-State supply.

Such application is filed electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

Refer to the case of Gajraj Vahan (P.) Ltd. (Petitioner) vs. State of Jharkhand (Respondent); High Court of Jharkhand: May 10, 2023. In the given case the Gajraj Vahan (P.) Ltd. (Petitioner) made payment in a wrong head and there was no dispute regarding the same. However, its claim for refund was rejected by the authority.

It was held that the application for a refund under section 77 for the payment made in the wrong

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head cannot be rejected on the grounds of limitation, vide CBIC Notification issued 35/2021 dated 24.09.2021.

Thus, in the given case, rejection of refund by Adjudicating Authority is not justified as decided in the above case law.

Answer 4(c)

Particulars	Amount (Rs.)
Amount received as dance performance at the annual day function of a girl's college at Delhi (Exempt) [W. N. 1]	-
Amount received as dance performance at a music concert held at Mumbai. (Taxable) [W. N. 2]	2,50,000
Amount received for being hired as a brand ambassador (Taxable) [W. N. 3]	20,00,000
Amount received as coaching fees in recreational activities relating to arts in Mumbai (Exempt) [W. N. 4]	-
Amount received as Rent for her house in Mumbai given to individual for residential purpose (Exempt) [W. N. 5]	-
Total taxable value of supply	22,50,000

Writing Notes:

1. Rs. 1,20,000 is exempt being not more than 1,50,000 as per S. NO. 78 of Exempt Services Notification No.12/2017, Central Tax (Rate) dated: 28.06.2017.
2. Rs. 2,50,000 is taxable amount being more than Rs. 1,50,000 as per S. NO. 78 of Exempt Services Notification No.12/2017, Central Tax (Rate) dated: 28.06.2017.
3. Rs. 20,00,000 is taxable amount being not exempt as per the proviso of S. NO. 78 of Exempt Services Notification No.12/2017, Central Tax (Rate) dated: 28.06.2017.
4. Service by way of training or coaching in recreational activities relating to arts or culture by an individual are Exempt from GST vide Entry 80 of Notification No. 12/2017 Central Tax (Rate) dated: 28.06.2017.
5. Renting of residential dwelling for use of residence to unregistered person is exempt from GST vide Entry No. 12 of Notification No. 12/2017 Central Tax (Rate) dated: 28.06.2017.

OR (Alternate to Q No. 4A)

Question 4A

(*i*) Stonecliff Ltd is engaged in supplying taxable services in Karnataka. The Assistant Commissioner of Central Tax passed an adjudication order under section 73 of the CGST Act, 2017 on 10th June, 2024, which was received by Stonecliff Ltd on 18th June, 2024. In the said order, GST liability of ₹ 5,00,000 (CGST + SGST) was decided along with a penalty of ₹ 50,000 (CGST + SGST).

Stonecliff Ltd was in complete disagreement with said order. So, it filed an appeal before the Appellate Authority on 23rd June, 2024.

Discuss the relevant provision of GST law and determine the amount of pre-deposit (CGST + SGST) to be made by Stonecliff Ltd for filing the appeal.

Whether your answer would be different if Stonecliff Ltd appeals only against part of the demanded amount, say ₹ 3,50,000 and admits the balance liability of tax amounting to ₹ 1,50,000 and proportionate penalty arising from the said order ?

Note : Ignore the amount of interest.

(5 marks)

(ii) EON International Ltd. is registered under GST in Karnataka, Maharashtra, Rajasthan and Punjab. Due to closure of business activities in Karnataka with effect from 3l May, 2024, EON International Ltd. filed an application for cancellation of registration before the jurisdictional tax authorities of Karnataka. The application for cancellation of registration was filed on 30 June, 2024. The registration was suspended with immediate effect from 30 June, 2024, by the jurisdictional tax authorities. The final order of cancellation was dated 3l July, 2024.

You are required to advise EON International Ltd. regarding the last date for filing the final return by it in Karnataka.

Further, EON International Ltd. was also registered as an ISD (Input Service Distributor) in Karnataka. Said registration was cancelled with effect from 30 June, 2024 with an order dated 3l July, 2024. Advise whether the final return is required to be filed upon cancellation of ISD registration by EON International Ltd. ? If yes, what is the due date for filing said final return ?

(*5 marks*)

(iii) "There is no distinction between GST Practitioner and Authorised Representative". Comment of the validity on the above statement, with reference to provision of Goods and Services Tax law.

(*5 marks*)

Answer 4A(i)

Particulars
Section 107(6) provides that no appeal shall be filed before Appellate Authority (AA), unless the appellant pays: a) in full, tax, interest, fine, fee and penalty arising from impugned order, as is admitted by him; and b) 10% of remaining amount of tax in dispute arising from the impugned order subject to a maximum of Rs. 20 crore, in relation to which the appeal has been filed.
However, no appeal shall be filed to Appellate Authority against an order under section 129(3) [order for payment of penalty for release of detained/seized goods/conveyances], unless a sum equal to 25% of the penalty has been paid by the appellant.
Thus, in the given case, Stonecliff Ltd has to make a pre-deposit of 10% of Rs. 5,00,000, which is 50,000 (i.e. CGST Rs. 25,000 and SGST Rs. 25,000).

However, when Stonecliff Ltd admits the partly liability of Rs. 1,50,000 (CGST + SGST) and disputes only the balance tax demanded of Rs. 3,50,000, it has to make a pre-deposit of:

(i) Rs.1,50,000 a tax admitted +

(ii) Rs.15,000 (as proportionate amount of penalty on tax admitted) +

(iii) Rs. 35,000 (i.e. 10% of disputed tax amount i.e. Rs.3,50,000

Total Rs. 2,00,000 (CGST 1,00,000 + SGST 1,00,000).

Answer 4A(ii)

As per section 45 read with rule 81, every registered person who is required to file a return under section 39(1) and whose registration has been cancelled is required to file a final return electronically in Form GSTR-10 through the common portal.

The final return has to be filed within 3 months of the:

(i) date of cancellation or

(ii) date of order of cancellation

whichever is later.

Thus, in the given case, final return for Karnataka registration has to be furnished within three months of the date of order of cancellation of registration i.e. July 31, 2024. Hence, final return has to be filed by EON International Ltd. on or before October 31, 2024.

Further, since an ISD is not required to furnish return under section 39(1) but under section 39(4), final return is not required to be filed upon cancellation of ISD registration. Therefore, EON International Ltd. is not required to furnish final return for ISD registration cancelled.

Answer 4A(iii)

The Statement "There is no distinction between GST Practitioner and Authorised Representative" is not valid. GST Practitioner and Authorised Representative are different person under GST.

The distinction between Authorized Representative and GST Practitioner are as follows

Basis	GST Practitioner	Authorised Representative
Meaning	GST Practitioner is a tax professional who can prepare returns and perform other activities on behalf of the person whom he is representing.	An authorised representative means person who is authorised by a person to appear on his behalf for any proceedings under GST law before Appellate authority.
Scope of work	GST practitioner can be authorised for purposes like furnishing of returns, claiming refund, etc. and also for representation purposes.	Authorised representative can appear before any appellate Authority/ Tribunal.
Passing Exam	For becoming a GST practitioner, a person is required to clear the prescribed examination.	There is no concept of examination for becoming an authorised representative.

Role	An Authorised representative can become a GST Practitioner subject to passing out of prescribed examination.	Any GST practitioner can also act as an authorised representative also.

PART-II

Question 5

(*a*) TTU Limited is considering an expansion plan of its running business. Company wants to choose between a debt offer and an equity offer for its expansion plans. The current plan is as follows :

Particulars	Amount (in crores)
Equity Share Capital (₹ 10 per share)	30
11% Debt	18
Reserve and Surplus	42
Total Capitalisation	90
Total Sales	260
Less : Total Cost	224
EBIT	36
Less : Interest @11%	1.98
EBT	34.02
Less : Tax @ 34.944% (Tax @ 30% + 12% Surcharge + 4% Cess)	11.89
EAT	22.13

The expansion plan is estimated to cost ₹ 50 crores. If the expansion plan is financed through equity, new shares can be sold at the premium of ₹ 10 per share and the price-earnings ratio will be 6 times. If this is financed through debt, the new rate of debt will be 12% and the price-earnings ratio will be l0 times.

The expansion plan will generate extra sales of ₹ 130 crores with a return of 11% on sales before interest and taxes.

If the company is to follow a policy of maximizing the market value of shares, which form of financing should be chosen ?

(*5 marks*)

(b) VRT Limited is a company incorporated under the Companies Act, 1956 which is having two undertakings engaged in manufacture of cement and steel, decided to hive off cement

division to RTY Limited a company incorporated under the Companies Act, 2013 by way of demerger.

The net worth of VRT Limited immediately before demerger was ₹ 45 crore. The net book value of assets transferred to RTY Limited was ₹ 15 crore. The demerger was made in January, 2024. In the scheme of demerger, it was fixed that for each equity share of ₹ 10 each (fully paid up) of VRT Limited, two equity shares of ₹ 10 each (fully paid up) were to be issued.

Mr. Manish held 30,000 equity shares in VRT Limited which were acquired in the financial year 2007-2008 for ₹ 4,00,000. He received 60,000 equity shares from RTY Limited consequent to demerger in January 2024. He sold all the shares of RTY Limited @ ₹ 10 in March, 2024.

Based on the facts of the above information, answer each of following cases separately :

(i) Does the transaction of demerger attract any income tax liability in the hands of VRT Limited or RTY Limited ?

(ii) Would capital gain arise in the hands of Mr. Manish on receipt of shares of RTY Limited in January, 2024 ?

(iii) Whether the sale of shares by Mr. Manish affect the tax benefits availed by VRT Limited and/or RTY Limited ?

(iv) Compute the capital gain in hands of Mr. Manish on sale of share of RTY Ltd. Ignore indexation.

(*5 marks*)

(c) PK Fertilizers Ltd. owning a unit located in SEZ and engaged in the production and export of Industrial chemicals, fertilizers, following information were made available of the company for the FY ended 31.03.2024 in the 6th year of its operations :

Particulars	(Amount in Rs.)		
	SEZ Unit Noida	Non SEZ Unit Pune	Total
Total Turnover	15,60,000	14,20,000	29,80,000
Export Turnover	8,32,000	6,86,000	15,18,000
Profit for the year	3,22,000	5,36,000	8,58,000
Brought forward Business Loss (AY 2021-22)	1,86,000	–	1,86,000
Brought Forward Unabsorbed Depreciation (AY 2022-23)	–	75,000	75,000

Note :

(1) Total turnover and export turnover, both of Non SEZ unit include ₹ 75,000 and ₹ 25,000 towards freight and insurance as charged by the entity in the Bill of Entry.

From the above information, compute the following for assessment year 2024-25 :

(i) Deduction eligible for claim under section 10AA of Income Tax Act.

(ii) Net Taxable Income of the company.

(*5 marks*)

Answer 5(a)

Computation of Market Value of shares under different alternative

Particulars	(Amount in Crores)	
	Alternative	
	Debt	Equity Shares
Present earnings before interest and tax (EBIT)	36	36
Add: Additional Income on sale of Rs. 130 crores @11% before interest and tax	14.3	14.3
Less: Interest on debentures @ 11% Old Fund 12% New Fund (on 50 Cr.)	(1.98) (6.00)	(1.98) ---
EBT	42.32	48.32
Less: Tax @34.944%	14.79	16.88
EAT	27.53	31.44
Earnings per share (I - 27.53/3) (II-31.44/5.5) (old 3 crore share + new 50/20 = 2.5 crore)	9.18	5.72
Price Earnings Ratio	6	10
Market Value of share	55.08	57.20
Conclusion: Since in Alternative 2 market value per share is maximum, so company should choose equity financing for the expansion plan.		

Answer 5(b)

S. No.	Particulars
(i)	No, the transaction of demerger would not attract any income-tax liability in the hands of VRT Limited or RTY Limited.
(ii)	There would be no capital gains liability in the hands of Mr. Manish on receipt of shares of RTY Limited, In case he sells these shares than Capital gains would arise.
(iii)	No, the sale of shares by Mr. Manish would not affect the tax benefits availed by VRT Limited or by RTY Limited.

(iv) Capital gain in the hands of Mr. Manish on sale of shares of RTY Ltd for AY 2024-25

Period of Holding	2007-08 to 2023-2024
Type of Gain	Long Term

Sale Price	Rs. 6,00,000 (60000 shares @ Rs. 10 each)
Less Cost of Purchases Rs. 4,00,000 x 15/45	Rs. 1,33,333
LTCG	Rs. 4,66,667

Answer 5(c)

(i) Computation of eligible deduction for SEZ Unit Noida under section 10AA for A.Y. 2024-25

Particulars	Amount (Rs.)
Profit of SEZ unit	3,22,000
Export Turnover	8,32,000
Total Turnover	15,60,000
Deduction eligible under section 10AA: = Profit of Unit for the year * Export turnover / Total turnover = Rs. 3,22,000 * 8,32,000 /15,60,000 =1,71,733 =50% of 1,71,733 (being 6th year) = 85,867	85,867

(ii) Computation of Net Taxable Income of the PK Fertilizers Ltd for AY 2024-25

Particulars	Amount (Rs.)
Profit for the year (SEZ Unit + Non SEZ Unit)	8,58,000
Less: Brought Forward Losses: - Business Loss – Rs. 1,86,000 - Unabsorbed Depreciation – Rs. 75,000	(2,61,000)
Gross Total Income of the Entity	5,97,000
Less: Deduction eligible & allowed under section 10AA (as per above calculation)	(85867) ₹
Total Income (Net taxable income)	5,11,133

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

Question 6

(a) QTR Ltd sold an undertaking as slump sale which was held by more than 4 years and earned ₹ 15,00,000 as capital gain including gain from depreciable fixed assets.

Income tax department wants to calculate and consider the gain on fixed assets as short term capital Gain since it is arising from depreciable assets u/s 50.

Comment on the action of the department with the help of the decided case law, if any.

(*5 marks*)

(b) RPL Infra Limited, incorporated on 01.04.2023 and entered into an agreement on July 1, 2023 with NHAI, a PSU of the Central Government and started the operation and maintenance of highways and tolls situated in the state of Bihar. The Status of gross investment in capital assets and incomes earned during the year ending 31.03.2024 were as under :

Particulars	Amount (Rs.)
Plant & Machinery	25,00,000
Assembly & Installation Cost of above	1,30,000
Office appliances including computers and computer software	4,60,000
Capital Work in progress (Construction of Office Building)	8,50,000
Net Profits during the year	7,38,000

Note :

(i) Plant and Machinery includes an Excavator machine of cost being 25% of total value of Plant and Machinery which was imported from Dubai on 30.04.2023.

(ii) Assembly and Installation Cost were paid by bank except payments of two labourers of ₹ 10,000 and ₹ 15,000 was made in cash.

(iii) Depreciation rate under income tax was 15%.

From the above information given, compute the following amounts for the Assessment Year 2024-25 :

(i) Allowed deductions under section 35AD, if any available to the company.

(ii) Loss to be carried forward for set off in subsequent Assessment years by the company.

(*4+1=5 marks*)

(c) Sun Limited, an Indian company owned two subsidiary companies including Moon Limited (Singapore), a 100% subsidiary and Mars Private Limited (U.K.), a subsidiary with 75% shareholding held by Sun Limited and 25% shares held by Moon Limited. Sun Limited provides following information for FY 31.03.2024.

Particulars	Amount (Rs.)
Final Dividend from Moon Limited (Singapore)	5,00,000
Interim Dividend from Mars Private Limited (U.K.)	2,50,000
Dividend from Venus Joint Venture LLP (a Joint Venture with the company)	50,000
Interest paid on overdraft facility (Funds borrowed for investments in both the subsidiary companies & JV)	3,00,000
Dividend distributed by the company to shareholders	4,50,000

From the above information, compute the deduction eligible under section 80M for Sun Limited for the assessment year 2024-25.

(*5 marks*)

Answer 6(a)

Computation of Taxable Profits of the Resulting Companies

Particulars
Capital gain tax payable in case of slump sale is to be divided into - a. Capital Gain arising from transfer of short-term capital assets - Capital Assets being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets and b. Capital Gain arising from transfer of long-term capital assets - Capital Assets being one or more undertakings owned and held by an assessee for more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of long-term capital assets.
In case of CIT vs. Equinox Solution Pvt. Ltd (Supreme Court) it was held that Section 45/50(2): If an undertaking is sold as a running business with all assets and liabilities for a slump price, no part of the consideration can be attributed to depreciable assets and assessed as a short-term capital gain u/s 50(2). If the undertaking is held for more than three years, it constitutes a "long-term capital asset" and the gains are assessable as a long-term capital gain
Hence, action of the department in not valid.

Answer 6(b)

(i) Computation of Amount of deductions under 35AD for the Assessment Year 2024-25:

Capital Expenditure Incurred	Amount
Plant & Machinery - Indigenous (25,00,000 * 75%) = 18,75,000 - Imported (25,00,000 - 18,75,000 = 6,25,000) *Note:* Any used P&M is allowed to be transferred to specified business upto 20% of total value of P&M, but it does not include the machines used outside India. Further, Any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if– i. such machinery or plant was not, at any time prior to the date of the installation by the assessee, used in India;	 18,75,000 6,25,000
ii. such machinery or plant is imported into India from any country outside India; and iii. no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of installation of the machinery or plant by the assessee; So, Rs. 6,25,000 Plant and Machinery (Excavator machine) which was imported from Dubai is also eligible for deduction u/s 35AD.	
Assembly & Installation Cost of above (1,30,000 - 15,000 = 1,15,000) *Note:* The payment of Rs. 15,000 (exceed Rs. 10,000) to a laborer was made by other than an account payee cheque, bank draft, ECS, so will be excluded from claim.	1,15,000
Office appliances including computers and computer software Note: This expenditure deemed to be entirely devoted to this business shall be eligible for deduction.	4,60,000
Capital Work in progress (Construction of Office Building) Note: Not eligible since the amount has not yet been capitalized in the books of the company.	Nil
Total amount eligible for deduction under section 35AD	30,75,000

(ii) Amount of loss to be carried forward for set off in subsequent Assessment years:

Particulars	Amount (Rs.)
Total amount eligible for deduction under section 35AD	30,75,000
Less: Net Profits during the year	7,38,000
Business loss carried forward to next year for set off	23,37,000

Answer 6(c)

Computation of Allowed deduction eligible under section 80M of the Income Tax Act, 1961 (the Act)

Particulars	Amount (Rs.)
Final Dividend from Moon Limited (Singapore)	5,00,000
Interim Dividend from Mars Private Limited (U.K.)	2,50,000
Dividend from Venus Join Venture LLP	Nil
Total Dividend Income eligible	7,50,000
Less: Interest Expenses allowed (20% of 7,50,000) Note: As per proviso to section 57 of the Act, Interest expenses incurred can be claimed against dividend income, but shall not exceed 20% of the dividend income. Hence Amount of interest deduction allowed would be lower of 20% of (5,00,000+2,50,000) or 3,00,000 = i.e. 1,50,000	1,50,000
Net dividend Income (A)	6,00,000
Note: The deduction under Section 80M should be calculated on the net dividend, i.e., after deducting expenses directly attributable to earning the dividend income, such as interest on borrowed funds.	
Dividend distributed by the company to shareholders (B)	4,50,000
Deduction eligible under section 80M (A) Net Dividend Income or (B) Dividend distributed by the Company whichever is less	4,50,000

OR (Alternate to Q. No. 6A)

Question 6A

(*i*) Dilip & Sons, a partnership firm is in the business of retail trade, furnishes you the following data for Previous Year ended on 31st March, 2024.

Particulars	Amount (Rs.)	Particulars	Amount (Rs.)
Operating Expenses	32,95,000	Gross receipts	40,00,000
Interest to partner @ 24%	1,00,000		
Salary to partner A	2,30,000		
Salary to partner B	2,85,000		

Net profit	90,000		
Total	40,00,000	Total	40,00,000

All the gross receipts are by account payee cheque only. Advise, whether firm opt for section 44AD of the Income Tax Act, 1961 or not, by comparing the taxable income of the firm for assessment year 2024-25 under both the options.

(*5 marks*)

(ii) JHN Ltd. took over the running business of Vimal, a sole-proprietor by a sale deed. As per the sale deed, JHN Ltd. undertook to pay overriding charges of ₹ 15,000 p.a. to Vimal's wife in addition to the sale consideration. The sale deed also specifically mentioned that the amount was charged on the net profits of JHN Ltd., who had accepted that obligation as a condition of purchase of the going concern. Examine, in the light of a decided case law whether the payment of overriding charges by JHN Ltd. is in the nature of diversion of income or application of income with regard to corporate tax planning.

(*5 marks*)

(iii) Explain the ''Permissive tax planning'' and ''Purposive Tax Planning'' with respect to three examples of each.

(*5 marks*)

Answer 6A(i)

Case 1: If Firm opts for section 44AD of the Income Tax Act, 1961

Particulars	Amount
6% of 40,00,000 deemed P/G/B/P u/s 44AD As all receipts are from Cheque only hence presumptive tax rate will be 6% applicable and not 8%)	2,40,000
Taxable Income	2,40,000

Case 2: If Firm does not opts for section 44AD of the Income Tax Act, 1961

Particulars	Amount
Net Profit	90,000
Add: Interest disallowed u/s 40(b) allowed @ 12% only	50,000
Add: Salary to partners [Rs. 230000+ Rs. 285000]	5,15,000
Book Profits as section 40(b)	6,55,000
Allowable Remuneration as per section 40(b):	
First 3,00,000 @ 90% of the book profit i.e. Rs. 2,70,000 and Balance Rs. 3,55,000 @ 60% i.e. Rs. 2,13,000 = Total (2,70,000 +2,13,000)	(4,83,000)
Taxable Income of Firm	1,72,000

It is therefore better not to opt for section 44AD because income is less by Rs. 68,000 (2,40,000 - 1,72,000) in second option. However, if the firm opts to pay tax as per regular provisions of the Income tax Act, 1961, it shall be necessary to maintain books of accounts and get them audited u/s 44AB of the Income tax Act, 1961 as the profits as per regular provisions is lower than deemed income as per section 44AD of the Income tax Act,1961.

Answer 6A(ii)

The facts of the case are similar to that of the case Jit & Pal X-Rays (P.) Ltd. v. CIT (2004) 134 Taxman 62 (All), where the Allahabad High Court observed that the overriding charge which had been created in favour of the wife of the sole-proprietor was an integral part of the sale deed by which the going concern was transferred to the assessee.

This is obligation, therefore, was attached to the very source of income i.e. the going concern transferred to the assessee by the sale deed.

The sale deed also specifically mentioned that the amount in question was charged on the net profits of the assessee company and the assessee company had accepted that obligation as a condition of purchase of the going concern.

Hence, it is clearly a case of diversion of income by an overriding charge and not a mere application of income.

Thus, the payment of overriding charges by JHN Ltd to Vimal's wife is a case of diversion of income and hence allowed to be deducted from Income of JHN ltd.

Answer 6A(iii)

Permissive Tax Planning: Permissive tax planning refers to the practice of taking advantage of tax provisions explicitly allowed by the law. This form of tax planning follows the letter of the law and involves utilizing specific exemptions, deductions, and incentives provided by the tax code.

Example 1: Investment in Section 80C Instruments

Example 2: Claiming House Rent Allowance (HRA)

Example 3: Utilizing Medical Insurance Premiums

Purposive Tax Planning: Purposive tax planning involves structuring financial activities or transactions in a way that minimizes tax liability, but the primary purpose of these activities is not just to reduce taxes. This type of tax planning aims at achieving business or financial goals while also gaining tax benefits.

Example 1: Setting up a New Business in a Special Economic Zone (SEZ)

Example 2: Structuring a Business as a Partnership or LLP

Example 3: Investing in Infrastructure Bonds

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LABOUR LAWS & PRACTICE

GROUP 2 ELECTIVE PAPER 7.3

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

Question 1

The Excise Department gave an advertisement in the newspaper for certain vacancies of subordinate staff under the signature of Bhuwan. In the advertisement it was clearly mentioned that such staff will be paid the daily wages only.

After some time, the newly recruited subordinate staff in Excise Deptt. started demanding for the equal salary as are being paid to other employees of the same class and when their demand was not accepted by the management, they collectively filed a suit against the department.

In the court, the management argued that the new employees accepted the employment with full knowledge that they will be paid on daily wages only and nothing else, hence the department is not liable to accept their demand.

Based on the given facts, answer the following questions :

(a) The Excise Department in the Court contended that the newly recruited subordinate staff were appointed on daily wages and they have applied in response to an advertisement of the Department and also accepted the terms of such appointment. Whether the contention of the Excise Deptt. to differentiate the wage structure for the same class of employees is tenable in the court of law. Give your answer with the decided case law.

(*5 marks*)

(b) Whether equality of opportunity in matters of public employment is a fundamental right or is a directive principle ? Discuss.

(*5 marks*)

(c) Thakur Prasad, a clerk of the Head Post Office, Jabalpur is being prosecuted for a criminal offence under Section 409, I.P.C. During the pendency of the said case, Lekh Pal, Post Master, Head Post Office, Jabalpur, conducted the departmental enquiry in respect of the same matter. He submitted a report of the departmental enquiry and held Thakur Prasad guilty of a grave misconduct.

As the departmental enquiry was held during the pendency of the criminal prosecutions, the learned Magistrate trying the criminal offence was of the opinion that it amounted to a contempt of court. Decide whether the view of learned Magistrate is legally valid ?

(*5 marks*)

(d) Ramesh was working as a conductor with a State Transportation Corporation from 1st January 2013. On 21st October 2020, finding him guilty of fraud and misappropriation, he was dismissed from the services of the Corporation.

Aggrieved by the order of dismissal, Ramesh raised a dispute and on failure of conciliation the same was referred for adjudication. During the pendency of the above case, by virtue of a settlement under Section 18(1) of the Industrial Disputes Act, Ramesh was appointed as

a fresh entrant by a settlement dated March 6, 2023 and accordingly, he reported for duty with effect from March 16, 2023. As per clause 3 of the settlement, it was agreed by Ramesh that he will not claim any benefit or approved privileges, for the period of his service before dismissal, i.e. for the period from January 01, 2013 to October 21, 2020.

The Corporation announced bonus for the year 2019-20 and 2020-21 after his termination. Since the bonus announced pertained to year during which Ramesh was under employment, he claimed bonus for the period from Corporation.

Based on relevant case law and statutory provisions under The Payment of Bonus Act, 1965, decide the validity of his claim.

(*5 marks*)

(e) A strike call was given by some of the employees. A worker Rohit attended his duty despite threats from the striking employees. While returning after his duty was over, he was assaulted by the striking employees. Whether the injury caused amount to injury arose out of employment under the Employees' State Insurance Act, 1948 ? Explain.

(*5 marks*)

Answer 1(a)

The facts of the case study are like that of the case of Dhirendra Chamoli and Anr. v. State of U.P. (AIR 1982 SC 879). In this case, the Court stated: "The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This Article declares that there shall be equality before the law and equal protection of the law and implicit in it is the further principle that there must be equal pay for work of equal value. These employees who are in the service of the different Nehru Yuvak Kendras in the country and who are admittedly performing the same duties as Class IV employees, must therefore get the same salary and conditions of service as Class IV employees. It makes no difference whether they are appointed in sanctioned posts or not. So long as they are performing the same duties, they must receive the same salary and conditions of service as Class IV employees."

Considering the aforementioned case law, it can be concluded that the contention of the excise department that the newly hired subordinate staff were appointed on a daily wage basis, applied in response to a departmental advertisement, and accepted the terms of their employment is not tenable.

Answer 1(b)

Article 16 assures equality of opportunity in matters of public employment and prevents the State from any sort of discrimination on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. This Article also provides the autonomy to the State to grant special provisions for the backward classes, under-represented States, SC & ST for posts under the State. Local candidates may also be given preference is certain posts.

The equality of opportunity in matters of public employment is a fundamental right enshrined in Part III of the Constitution that has been provided under Article 16 of the Constitution of India, which reads as under:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence,

or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

Answer 1(c)

The present case is similar to the case of *S. Venkata Raman v. Union of India, AIR 1954 SC 37.* In this case the hon'ble Supreme Court, *inter alia* observed that Article 20(2) of the Constitution of India laid down that the holding of a departmental enquiry by the departmental authorities would not be a prosecution for the second time. The Court was of the view that the scope of the criminal prosecution and the departmental enquiry would be separate and independent of each other. For that reason, it was laid down that even if a person were to be acquitted by a court of law, the departmental authorities could still hold a departmental enquiry against the employee.

Applying the principles laid down by their Lordships to the present case, the Court was of the opinion that the mere holding of a departmental enquiry during the pendency of a criminal prosecution in respect of the same subject matter would not amount to contempt of the court.

The position would be different if an attempt is made by the departmental authorities to influence the court in any manner or otherwise to create an atmosphere of prejudice. But the mere holding of a departmental enquiry and even passing an order therein of punishment would not amount to contempt. The departmental authorities are free to exercise such lawful powers, as are conferred on them by the departmental rules and regulations. Such exercise of powers bona fide cannot come within the mischief of the law of contempt.

The view of the learned Magistrate in the case, therefore, in not legally valid.

Answer 1(d)

Section 8 of the Payment of Bonus Act, 1965 provides that every employee shall be entitled to be paid by his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year.

Further, Section 9 of the Act deals with the disqualification for bonus and it states that an employee shall be disqualified from receiving bonus if he is dismissed from service for-

(a) fraud;

(b) riotous or violent behaviour while on the premises of the establishment; or

(c) theft, misappropriation, or sabotage of any property of the establishment.

It is to be noticed that the Payment of Bonus Act, 1965 is a complete and exhaustive Code on the payment of bonus to the employees and the Act gives a right to the employees to receive bonus in accordance with the provisions of the Act. The Act does not permit an employer to withhold payment of a bonus during the pendency of a disciplinary inquiry. It is, therefore, obvious that if an enquiry is pending for a long period, bonus cannot be withheld on that account.

In the case of *Wheel & Rim Company of India Ltd. v. Government of Tamil Nadu*, Hon'ble High Court was not inclined to accept the argument that Section 9 is restricted only to the receiving of bonus by the disqualified employee payable for the accounting year in which the order of dismissal is passed. On a consideration of all the circumstances, and the High Court observed that this disqualification is applicable to whatever bonus was payable under the Act.

In the present case, in as much as the dismissal took place, the employer was entitled to disqualify the employee for the bonus for the accounting year 2019-20 as well as for the accounting year 2020-21.

Moreover, the employee had entered into a settlement under section 18(1) of the Industrial Dispute Act, 1947 by which he gave up his claim prior to his dismissal. Even though the settlement was not marked before the Labour Court, the employee is bound by the said settlement and, therefore, cannot at all claim any benefit for the period prior to this dismissal.

In accordance with the above, Ramesh may not be entitled to the Bonus.

Answer 1(e)

Section 2(8) of the Employees' State Insurance Act, 1948 defines employment injury as a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

It is well settled that an employment injury need not necessarily be confined to any injury sustained by a person within the premises or the concern where a person works. Whether in a particular case, the theory of notional extension of employment would take in the time and place of accident so as to bring it within an employment injury, will have to depend on the assessment of several factors. There should be a nexus between the circumstances of the accident and the employment. On facts, no case could be an authority for another case, since there would necessarily be some differences between the two cases. Therefore, each case has to be decided on its own facts. It is sufficient if it is proved, that the injury to the employee was caused by an accident arising out of and in the course of employment no matter when and where it occurred. There is not even a geographical limitation.

In *E.S.I. Corporation Indore v. Babulal, 1982 Lab. I.C. 468*, the M.P. High Court held that injury arose out of employment where a workman attending duty in spite of threats by persons giving a call for strike and was assaulted by them while returning after his duty was over.

Based on the aforementioned provisions and case law, it can be concluded that when a strike was initiated by certain employees and a worker, Rohit, chose to fulfill his work duties despite facing threats from those participating in the strike, he ultimately sustained an injury due to an assault by the striking employees upon his departure from work.

This injury is considered to have arisen out of his employment, in accordance with the Employees' State Insurance Act, 1948.

Question 2

Suresh Pipes Pvt. Ltd (SPPL) manufactures all types of pipes which are used for residential and commercial complexes. The SPPL is registered under Factories Act, 1948. The company's plant is located in the VKI Industrial Area of Jaipur. The company in order to expand its production capacity, planned to construct a factory building on its the vacant land adjacent to its present plant. The company hired the services of Bharat Ram, a civil contractor, to build the factory premises. The contractor employed 20 workers on the construction site. The payment to the contractor was to be made by the SPPL in stages on the basis of the work certified by an approved civil engineer. The contractor after getting the payment of first stage of construction, disappeared and never visited the site. The workers started demanding the wages from the company.

One day, an Inspector visited to the factory premises. In his inspection report, he pointed out that the establishment is not registered under the relevant Act. The company officials tried to convince the inspector that the company is already registered under the Factories Act, 1948 but the inspector remained static on his report.

Anurag who is a Manager (Administration) of a newspaper titled as 'Khabar Chalisa" and resides in the locality where the SPPL company have its office. Somehow Anurag came to know that SPPL is not paying the wages to the construction workers. He thought it to get publish this news in the 'Khabar Chalisa'. However, Mahesh, the owner of the newspaper, who is a close friend to the Suresh, the Managing Director of SPPL Company advised Anurag not to get the publication of such news in the newspaper since it will affect the image of the company. But Anurag was adamant on the issue, so he decided to quit from the service of 'Khabar Chalisa'. owner the payment of the dues and the gratuity amount. Anurag served in the newspaper publication house for 4 years and 9 months and his last monthly drawn salary was rupees fifty thousand. However, Mahesh refused to make payment of the gratuity amount.

Based on the given facts, answer the following questions :

(a) Who shall be treated as employer of the construction workers, in the given case ?

(b) In the given case, the contractor after getting the first tranche of payment, disappeared and the workers started demanding for wages before the SPPL. Whether the SPPL is liable to make payment of the wages to the construction workers ? Explain.

(c) The SPPL was registered under the Factories Act, 1948 but the inspector qualified the inspection report stating therein that the company is not registered under the relevant Act. Explain the relevant provisions of the Act (in addition to the Factories Act, 1948) under which the company is required to get registered before start of the construction work ?

Give your answer with the decided case laws.

(d) Define the term 'working journalist'. Whether Anurag is entitled to receive the gratuity amount from the owner of 'Khabar Chalisa' under the provisions of the Working Journalists and other Newspaper employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 ? Give reasons.

(e) Whether Anurag can the claim the gratuity amount from the employer under the Payment of Gratuity Act, 1972 ? If so, what shall be the amount of gratuity ?

(*5 marks each*)

Answer 2(a)

Meaning of Employer

In terms of Section 2(1)(i) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 "employer", in relation to an establishment, means the owner thereof and includes, -

(i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;

(ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment;

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor.

In accordance with Section 2(1)(i) of the Act, the company i.e. Suresh Pipes Pvt. Ltd. (SPPL) and the contractor both will be treated as an employer as the construction work has been entrusted by the company to contractor named Bharat Ram.

Answer 2(b)

Responsibility for payment of wages and compensation

Section 45 of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 provides that an employer shall be responsible for the payment of wages to each building worker employed by him and such wages shall be paid on or before such date as may be prescribed. In case the contractor fails to make payment of compensation in respect of a building worker employed by him, where he is liable to make such payment when due or makes short payment thereof, then, in the case of death or disablement of the building worker, the employer shall be liable to make payment of that compensation in full or the unpaid balance due in accordance with the provisions of the Workmen's Compensation Act, 1923 and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

In the present case, the contractor absconded after receiving the initial payment installment, resulting in the workers requesting their wages from Suresh Pipes Pvt. Ltd. (SPPL). Based on the relevant provisions and precedents outlined earlier, it can be determined that SPPL shall be liable to make payment of wages to the construction workers.

Answer 2(c)

Registration of establishment

Section 7(1) of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 provides that every employer shall, -

(a) in relation to an establishment to which this Act applies on its commencement, within a period of sixty days from such commencement; and

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(b) in relation to any other establishment to which this Act may be applicable at any time after such commencement, within a period of sixty days from the date on which this Act becomes applicable to such establishment,

make an application to the registering officer for the registration of such establishment:

Provided that the registering officer may entertain any such application after the expiry of the periods aforesaid if he is satisfied that the applicant was prevented by sufficient cause from making the application within such period.

Case Law

The Hon'ble High Court of Orissa in the matter of *Sterlite Energy Limited v. State of Orissa & Others [reported at 2011 III LLJ 349 (DB)]* has held that the provisions of the Factories Act, 1948 and the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("BOCW Act") do not over-lap, holding that the BOCW Act applies to factories under construction while the Factories Act, 1948 is generally applicable to completed factories.

The issue before the Supreme Court was whether the BOCW Act was applicable to those premises that are registered under the Factories Act, 1948.

The Court held that the establishments/premises registered under the Factories Act, 1948, employing construction workers in the construction of factory premises were not excluded from the application of the BOCW Act in terms of the exclusion clause. The Court reasoned that an establishment/premise would become a factory under Section 2 (m) of the Factories Act only when the manufacturing process as defined under Section 2(k) of the Factories Act commenced. Consequently, the provisions of the Factories Act would apply only when the manufacturing process commences, and even upon commencement of the manufacturing activity, it only covered those workers who are engaged in such manufacturing activity under the Factories Act and not construction workers.

Hence, construction activities that are carried out in relation to establishments/registered premises / licensed under the Factories Act, 1948, would not attract the exclusion clause of the BOCW Act by itself. Workers carrying on such activities would be covered under the BOCW Act.

Answer 2(d)

Section 2(f) of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 states that "working journalist" means a person whose principal avocation is that of a journalist and who is employed as such, either whole-time or part-time, in, or in relation to, one or more newspaper establishments, and includes an editor, a leader-writer, news-editor, sub-editor, feature writer, copy-tester, reporter, correspondent, cartoonist, news photographer and proof-reader, but does not include any such person who—

(i) is employed mainly in a managerial or administrative capacity, or

(ii) being employed in a supervisory capacity, performs, either by the nature of the duties attached to his office or by reason of the powers vested in him, functions mainly of a managerial nature.

Since in the given case, it is mentioned that Anurag is designated as Manager (Administration) in the 'Khabar Chalisa' which is purely a managerial function, hence as per Section 2(f)(i), Anurag is not covered under the definition of a working journalist.

Therefore, Anurag is not entitled to receive the gratuity amount from the owner of 'Khabar Chalisa' under the provisions of the Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

Answer 2(e)

Payment of Gratuity

Section 4(1) of the Payment of Gratuity Act, 1972 provides that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, —

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

In terms of Section 2(e) of the Payment of Gratuity Act, 1972 "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Further, Section 2A of the Payment of Gratuity Act, 1972 lays down that an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service, for any period of one year, he shall be deemed to be in continuous service under the employer for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case.

Thus, in accordance with the above-mentioned provisions, Anurag can claim the gratuity from the employer under the Payment of Gratuity Act, 1972.

Amount of Gratuity

Section 4(2) of the Payment of Gratuity Act, 1972 states that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned.

Explanation to Section 4(2) states that in the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

Section 4(3) further provides that the amount of gratuity payable to an employee shall not exceed such amount as may be notified by the Central Government from time to time.

In the given case, Anurag has served in the publication house for 4 years and 9 months, hence he

is entitled to get the gratuity under section 4(1)(b) read with section 4(2) of the Payment of Gratuity Act, 1972.

Anurag has served for 4 years + 9 months are to be rounded off to one year = total 5 years.

Calculation of gratuity amount

Gratuity=Last drawn salary * (15/26) * Number of years of service

[(50,000*15)/26] *5 = Rs. 1,44,230.76/- round off to Rs. 1,44,231/-

Since the maximum amount of gratuity payable is up to Rs. 10 lakh as per notification of the Central Government, hence in this case Anurag will get Rs. 1,44,231/-.

Question 3

Quality Bank Ltd. is a new private sector bank. It displayed some vacancies of Clerks, Supervisors and Managers in its website. In response to the advertisement the aspirants applied for the various posts according to the required qualifications and experiences.

Dinesh who applied for the post of clerk in the Bank got the job offer. Dinesh was given the appointment to join at its Barmer Branch. Since Dinesh was unemployed before joining this Bank, so he immediately joined without seeing the salary structure. After joining he realized that there is a big disparity between the salary structure of clerk and the officer. Dinesh was not getting the salary as per his expectation, so he made a complaint to the Government of Rajasthan against the Bank for exploitation of the clerical staff and not providing of adequate salary and requested for the revision of the salary under the Minimum Wages Act, 1948.

Pragati also received an appointment letter on 10th July, 2024 from Quality Bank Ltd. She was offered appointment for the post of Assistant Manager and was to report joining at the Bank Branch situated at Johari Bazar, Jaipur on or before the 15th July, 2024. Pragati approached the Branch Manager and showed her appointment letter. After the necessary formalities she joined the Bank on 14th July, 2024.

On 2nd October, 2024 Pragati applied for the maternity leave. The Branch Manager amazed to receive the leave application on the ground of maternity since at the time of joining on 14th July, 2024 Pragati's medical/fitness report was not showing any sign of pregnancy. Pragati then informed to the Branch Manager that she became mother of twin babies on 2nd October, 2024 through surrogacy and both the babies have been handed over to her on this date by the surrogated mother.

However, the Branch Manager was not convinced with the plea of Pragati and he refused to grant the maternity leave. But Pragati proceeded on the maternity leave. The Branch Manager treated the leave availed by Pragati as absence on duty and accordingly deducted the wages and extended her probation period.

Pragati's husband is a pilot in True Aviation Company (TAC). The TAC runs flights in India's air space and connects link between the capital cities and other major cities of India. Aviation companies in order to cut the cost are adopting various measures including the salary cut and reduction in wages. The TAC also adopted these measures and for the FY 2022-23 the company decided not to pay any bonus to the ground staff and air staff including the pilots.

Based on the given facts, answer the following questions :

(a) Whether Pragati was entitled to avail the maternity leave when she herself has not undergone the process of delivering the babies ?

(b) In the given case, Pragati applied for maternity leave on 2nd October, 2024. What would

have been your answer if Pragati had received the twin babies on 15th August, 2024 ?

(c) In the given case Dinesh made a complaint to the Government of Rajasthan for not providing of adequate salary as per the Minimum Wages Act, 1948 to the clerical staff. Whether the Government of Rajasthan is the Appropriate Government and the Minimum Wages Act, 1948 is applicable on banking industry ?

(d) (*i*) Who is the Appropriate Government for the True Aviation Company (TAC) ?

(ii) Whether TAC comes within the purview of the Payment of Wages Act, 1936 ?

(e) Whether the non-payment of bonus amounts to non-compliance of the provisions of the Payment of Wages Act, 1936. Explain.

(*5 marks each*)

Answer 3(a)

In terms of Section 3(ba) of the Maternity Benefit Act, 1961 "commissioning mother" means a biological mother who uses her egg to create an embryo implanted in any other woman. In this case, Pragati has become a mother through surrogacy.

Section 5(2) of the Maternity Benefit Act, 1961 states that no woman shall be entitled to maternity benefit unless she has worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.

Further Section 5(4) of the Maternity Benefit Act, 1961 provides that a woman who legally adopts a child below the age of three months or a commissioning mother shall be entitled to maternity benefits for a period of twelve weeks from the date the child is handed over to the adopting mother or the commissioning mother.

In the given case, Pragati is treated as the commissioning mother as specified under Section 3(ba) of the Act. Further, in terms of Section 5(2) she has worked in the Bank for 80 days (from 14th July to 1st October, both days inclusive) so she is entitled to get maternity benefits.

Further as required by Section 5(4) since the twin babies were received by Pragati on 2nd October, 2024 hence the maternity leave shall start from this date and will remain upto the end of 12 weeks.

Answer 3(b)

Section 5(2) of the Maternity Benefit Act, 1961 states that no woman shall be entitled to maternity benefit unless she has worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery.

In the given case, Pragati joined the Bank on 14th July 2024 therefore from this date i.e. 14th July to 14th August (both days inclusive), she has worked only for 32 days in the Bank which is less than 80 days as mentioned in Section 5(2) of the Act.

Therefore, Pragati would not be entitled to avail the maternity leave since she has not served in the establishment for a minimum period of 80 days.

Answer 3(c)

In terms of Section 2(b) of the Minimum Wages Act, 1948 "appropriate Government" means, —

(i) in relation to any scheduled employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a mine, oilfield or major port, or any corporation established by a Central Act, the Central Government, and

(ii) in relation to any other scheduled employment, the State Government.

The Schedule attached to the Act does not have any mention of the banking industry. Therefore, the Government of Rajasthan is not the Appropriate Government in this case.

Since the banking industry is not included in the Scheduled industry of the Act, therefore the Minimum Wages Act, 1948 is not applicable.

Answer 3(d)(i)

Appropriate Government

In terms of Section 2(i) of the Payment of Wages Act, 1936 "appropriate Government" means, in relation to railways, air transport services, mines and oilfields, the Central Government and, in relation to all other cases, the State Government.

Thus, as per the above definition, the Central Government is the Appropriate Government for the True Aviation Company (TAC).

Alternate Answer

In terms of Section 2(a) of The Industrial Disputes Act, 1947 "appropriate Government" means-

(i) in relation to any industrial dispute concerning any industry carried on by or under the authority of the Central Government, or by a railway company or concerning any such controlled industry as may be specified in this behalf by the Central Government or in relation to an industrial dispute concerning a Dock Labour Board established under section 5A of the Dock Workers (Regulation of Employment) Act, 1948, or the Industrial Finance Corporation of India Limited formed and registered under the Companies Act, 1956, or the Employees' State Insurance Corporation established under section 3 of the Employees' State Insurance Act, 1948, or the Board of Trustees constituted under section 3A of the Coal Mines Provident Fund and Miscellaneous Provisions Act, 1948, or the Central Board of Trustees and the State Boards of Trustees constituted under section 5A and section 5B, respectively, of the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, or the Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956, or the Oil and Natural Gas Corporation Limited registered under the Companies Act, 1956, or the Deposit Insurance and Credit Guarantee Corporation established under section 3 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961, or the Central Warehousing Corporation established under section 3 of the Warehousing Corporations Act, 1962, or the Unit Trust of India established under section 3 of the Unit Trust of India Act, 1963, or the Food Corporation of India established under section 3 or a Board of Management established for two or more contiguous States under section 16 of the Food Corporations Act, 1964, or the Airports Authority of India constituted under section 3 of the Airports Authority of India Act, 1994,or a Regional Rural Bank established under section 3 of the Regional Rural Banks Act, 1976, or the Export Credit and Guarantee Corporation Limited or the Industrial Reconstruction Bank of India the National Housing Bank established under section 3 of the National Housing Bank Act, 1987, or an air transport service, or a banking or an insurance company, a mine, an oilfield, a Cantonment Board, or a major port, any company in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government, or any corporation, not being a corporation referred to in this clause, established by or under any law made by Parliament, or the Central public sector undertaking, subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the Central Government, the Central Government, and

(ii) in relation to any other industrial dispute, including the State public sector undertaking,

subsidiary companies set up by the principal undertaking and autonomous bodies owned or controlled by the State Government, the State Government: Provided that in case of a dispute between a contractor and the contract labour employed through the contractor in any industrial establishment where such dispute first arose, the appropriate Government shall be the Central Government or the State Government, as the case may be, which has control over such industrial establishment.

Thus, as per the above definition, the Central Government is the Appropriate Government for the True Aviation Company (TAC).

Answer 3(d)(ii)

Industrial or Other Establishment

Section 2(ii) of the Payment of Wages Act, 1936 states that "industrial or other establishment" means any–

(a) tramway service, or motor transport service engaged in carrying passengers or goods or both by road for hire or reward;

(aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;

(b) dock, wharf or jetty;

(c) inland vessel, mechanically propelled;

(d) mine, quarry or oilfield;

(e) plantation;

(f) workshop or other establishment in which articles are produced, adapted, or manufactured, with a view to their use, transport, or sale;

(g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges, or canals, or relating to operation connected with navigation, irrigation, development or maintenance of buildings, roads, bridges or mission and distribution of electricity or any other form of power is being carried on;

(h) any other establishment or class of establishment which appropriate Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette.

Thus, in terms of Section 2(ii)(aa) of the Payment of Wages Act, 1936 the True Aviation Company (TAC) comes within the definition of Industrial or Other Establishment thus, TAC comes within the purview of the payment of Wages Act 1936

Answer 3(e)

In terms of Section 2 (vi) of the Payment of Wages Act, 1936 "wages" means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes–

(a) any remuneration payable under any award or settlement between the parties or order of a Court;

(b) any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c) any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e) any sum to which the person employed is entitled under any scheme framed under any law for the time being in force, but does not include –

(1) any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;

(2) the value of any house-accommodation, or of the supply of light, water, medical attendance, or other amenity or of any service excluded from the computation of wages by a general or special order of appropriate Government;

(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(4) any travelling allowance or the value of any travelling concession;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).

In the given case, the TAC has only cut the payment of the bonus. The bonus is not included in the wages. Hence the TAC has not violated any of the provisions of the Payment Wages Act, 1936.

Question 4

Himani after passing of the Professional examination conducted by the MM Professional Institute underwent the requisite training and got the membership of the Institute. She also applied and got the Certificate of Practice. However, Himani was not sure in which field she should start the practice looking to the competition in each of the area, whether it be the company related issues or taxation and the new comers have to face the challenges too. Himani's father, Rakesh is an Advocate and has been in practice for matters relating to the labour laws. Himani used to spend most of the time in her father's office and observed that there is a good scope in doing practice in labour audit.

Rakesh used to discuss with Himani the cases he used to plead in the labour court and most of them were relating to the Provident Fund, Child Labour, Contract Labour, Workmen's Compensation and Industrial Disputes.

Rakesh also introduced Himani to some his corporate clients. Very soon Himani was entrusted to do the labour audit for some of the companies on which various provisions of the labour laws applies.

One day Himani was invited by the City Law College to address the law students on the topic of the Industrial Relations Code, 2019. Himani agreed and prepared her speech and addressed the law students, faculties and distinguished guests which were present in the seminar. The speech of Himani was well appreciated.

During the question-answer session, one of the law students raised a query that Parliament had enacted number of labour laws for regulating employment and conditions of service of workers. Whenever a new law is enacted, it prescribes certain registers to be maintained by the employers and for furnishing of returns of various details to the concerned enforcing authorities. This creates lot of complications on the part of the employer in dealing with compliances of these provisions. Whether the submission of multiplicity of returns can be exempted ? Himani also addressed this issue to the satisfaction of concerned students and for the knowledge of the audience.

Jhanvi, a law faculty of the college, appreciated the speech given by Himani. She also asked Himani, how India has made specific representation of the major deliberative organ of the International Labour Organisation. Himani also elaborated over this issue. At last, Jhanvi gave the vote of thanks.

One day, a case was brought into the knowledge of Rakesh (father of Himani). In this case, there is a factory, in which the workers were agitating against the management and the union leader appealed to the workmen for not going into the factory for work. However, some of the workers ignored the command of the union leader and attended their work schedule in the factory. At the end of the working hours, when the workers (who attended the factory work) were returning to their home, were attacked by other parties and were severally injured. The injured workers asked the management of the factory to provide them the amount of insurance on the plea that it is an employment injury.

Based on the given facts, answer the following questions :

(a) Himani, being a practicing Professional, thought to enter in the field of labour laws. Guide Himani, how she should start her work as a labour auditor ?

(b) Being a student, undergoing the required training under the Himani, you have to prepare a brief note on the Industrial Relations Code, 2019 which can be used for addressing in the City Law College.

(c) During the question – answer session, one of the law students raised a query before Himani that whether the submission of multiplicity of returns under the various labour laws can be exempted ? Draft a suitable reply of such query raised by the student.

(d) (*i*) Explain the meaning of employment injury under the relevant provisions of the law.

(i) Whether the workers who attended the factory work and were attacked by the other parties were eligible to get the insurance coverage ?

(e) India has made specific representation of the major deliberative organ of the International Labour Organisation ? Explain.

(*5 marks each*)

Answer 4(a)

It is always recommended to get insights into the business before performing any compliance activity by interviewing with the concerned department.

Following must be the key areas of discussion to determine the applicability of Labour and Industrial law on the establishment: -

1. Nature of Business
2. Number of offices and branch
3. Number of employees (permanent and contractual both)
4. Status of registrations (if obtained)

Preliminary Steps

1. Identify the laws applicable to the company/establishment based on the nature of the industry and the number of employees.
2. Prepare the checklist, based on discussions for coverage of applicable laws.
3. After the preparation of the checklist, the independent professional has to start compliance with labour laws.

The following key areas must be covered while doing compliances and audits under labour laws: -

1. Whether valid registration or license has been obtained. All dues to employees and workers are paid within the timeline which includes: Monthly Wages (Equal or higher than minimum wages) Bonus Payment, Leave Allowances, Gratuity (in case of left out employee), and Overtime Payment.
2. Check whether leave benefit is entitled to eligible employees (Leaves such as Sick Leave, Casual Leave, Earned Leave, Festival Holidays, and Maternity Leave).
3. Whether the safety and security of employees are ensured (Medical Facility, First Aid Box, etc.).
4. Whether display requirements under the Act have been complied.
5. Whether contributions under laws such as ESI, EPF, Labour Welfare Fund and Profession tax have been made on or before the due date.
6. Check whether all required registers and records are maintained as prescribed under the laws.
7. Whether periodic returns are filed timely. Based on the review, any shortcomings and/or observations must be discussed with the management and their statements on the corrective action plan should be recorded within the expected timeline.

This may be categorized further into High/ Medium/Low based on financial/operational risk and penalties that may be imposed for non-compliance.

Answer 4(b)

Note on The Industrial Relations Code, 2019

The Industrial Relations Code, 2019 was introduced in the Lok Sabha on November 28, 2019. The Code was referred to the Parliamentary Standing Committee on Labour. The report of the Standing Committee was placed before both the Houses of the Parliament on September 15, 2020. The Bill was reintroduced as The Industrial Relations Code, 2020 in Parliament and was passed by the Lok Sabha on 22nd September 2020, Rajya Sabha on 23rd September 2020, and received the assent of the President on 28th September 2020. According to the statement of objects and reasons of the Code, it intends to amalgamate, simplify, and rationalise the relevant provisions of the following three central labour enactments relating to industrial relations, namely: –

(a) the Trade Unions Act, 1926;

(b) the Industrial Employment (Standing Orders) Act, 1946; and

(c) the Industrial Disputes Act, 1947.

The amalgamation of the said laws will facilitate the implementation and remove the multiplicity of definitions and authorities without compromising on the basic concepts of welfare and benefits to workers.

The proposed legislation, namely, the Industrial Relations Code, 2020 would bring the use of technology in its enforcement. All these measures would bring transparency and accountability which would lead to more effective enforcement. The facilitation for ease of compliance of labour laws will promote in setting up of more enterprises thus catalysing the creation of employment opportunities.

The salient features of the Industrial Relations Code, 2020, inter alia, are as follows: –

(a) to define the expression "fixed-term employment" to mean the engagement of a worker on the basis of a written contract of employment for a fixed period. The fixed-term employee will get all statutory benefits like social security, wages, etc, at par with the regular employee who is doing work of the same or similar nature;

(b) to define the term "industry" with certain exceptions;

(c) the definition of "strike" is proposed to be modified to include mass casual leave within its ambit;

(d) to define the term "worker" to include persons in supervisory capacity getting wages up to fifteen thousand rupees within its ambit. At present, under the Industrial Disputes Act, 1947, the definition of 'worker' includes a person in a supervisory capacity getting a salary up to ten thousand rupees per month;

(e) to provide for the obligation on the part of the industrial establishment pertaining to mines, factories, and plantations having one hundred or more workers to take prior permission of the appropriate Government before lay-off, retrenchment, or closure. However, the appropriate Government is proposed to be empowered to modify such threshold number of workers by notification;

(f) to setup a re-skilling fund for the training of retrenched employees, to which the employers will pay a contribution of fifteen days' wages or such other days as may be notified by the Central Government in case of retrenchment of workers;

(g) to provide for a sole negotiating union in an industrial establishment for negotiating with the employer of the industrial establishment, on such matters as may be provided by rules. In case of more than one Trade Union of workers, a Trade Union would be designated as a sole negotiating union if it has the support of seventy-five percent. or more of the workers on the muster roll in an establishment and if no Trade Union has such support strength on the muster roll of an establishment, then a negotiating council will be constituted for negotiation;

(h) to provide for the Industrial Tribunal to be the adjudicating body to decide appeals against the decision of the conciliation officer in place of multiple adjudicating bodies like the Court of Inquiry, Board of Conciliation, and Labour Courts;

(i) the maximum number of members in the Grievance Redressal Committee has been increased from six to ten;

(j) provisions are being made to have two-member Industrial Tribunals, with the second member being from the administrative side, in place of a single member Labour Court and Industrial Tribunal at present. Further, the Tribunal will be empowered to execute the award as a decree of a civil court, which will facilitate the speedy disposal of disputes.

Answer 4(c)

The Labour Laws (Simplification of Procedure for Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 provides for the simplification of procedure for furnishing returns and maintaining registers in relation to establishments employing a small number of persons under certain labour laws.

Further, section 2(c) of The Labour Laws (Simplification of Procedure for Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988 defines Form which means a Form specified in the Second Schedule. The following forms are specified in the second schedule. They are as under:

- Form I - Annual Return (To be furnished to the Inspector or the authority specified for this purpose under the respective Scheduled Act before the 30th April of the following year)
- Form II -Register of persons employed-cum-employment card.
- Form III- Muster roll-cum-wage register.

Small Establishment

In terms of Section 2(e) of The Labour Laws (Simplification of Procedure for Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988, "small establishment" means an establishment in which not less than ten and not more than forty persons are employed or were employed on any day of the preceding twelve months.

Very Small Establishment

In terms of Section 2(f) of The Labour Laws (Simplification of Procedure for Furnishing Returns and Maintaining Registers by Certain Establishments) Act, 1988, "very small establishment" means an establishment in which not more than nine persons are employed or were employed on any day of the preceding twelve months.

Exemption from furnishing or maintaining returns and registers requires under certain labour laws.

Section 4(1) of the Act provides an exemption from furnishing or maintaining of returns and registers requires under certain labour laws, which reads as under:

(1) Notwithstanding anything contained in a Scheduled Act, on and from the commencement of the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by certain Establishments) Amendment Act, 2014, it shall not be necessary for an employer in relation to any small establishment or very small establishment to which a Scheduled Act applies, to furnish the returns or to maintain the registers required to be furnished or maintained under that Scheduled Act:

Provided that such employer–

(a) furnishes, in lieu of such returns, annual return in Form I; and

(b) maintains, in lieu of such registers, –

(i) registers in Form II and Form III, in the case of small establishments, and

(ii) a register in Form III, in the case of very small establishments,

at the work spot:

Provided further that every such employer shall continue to–

(a) issue wage slips in the Form prescribed in the Minimum Wages (Central) Rules, 1950 made under sections 18 and 30 of the Minimum Wages Act, 1948 and slips relating to the measurement of the amount of work done by piece-rated workers required to be issued under the Payment of Wages (Mines) Rules, 1956 made under sections 13A and 26 of the Payment of Wages Act, 1936; and

(b) file returns relating to accidents under sections 88 and 88A of the Factories Act, 1948 and sections 32A and 32B of the Plantations Labour Act, 1951.

(2) The annual return in Form I and the registers in Forms II and III and wage slips, wage books and other records, as provided in sub-section (1), may be maintained by an employer either in physical form or on a computer, computer floppy, diskette or other electronic media:

Provided that in case of a computer, computer floppy, diskette or other electronic form, a printout of such returns, registers, books and records or a portion thereof is made available to the Inspector on demand.

(3) The employer or the person responsible for furnishing the annual return in Form I may furnish it to the Inspector or any other authority prescribed under the Scheduled Acts either in physical form or through electronic mail if the Inspector or the authority has the facility to receive such electronic mail.

(4) Save as provided in sub-section (1), all other provisions of a Scheduled Act, including the inspection of the registers by, and furnishing of their copies to, the authorities under that Act, shall apply to the returns and registers required to be furnished or maintained under this Act as they apply to the returns and registers under that Scheduled Act.

(5) Where an employer in respect of an establishment referred to in sub-section (1), to whom a Scheduled Act applies, furnishes returns or maintains the registers as provided in the proviso to sub-section (1), nothing contained in that Scheduled Act shall render him liable to any penalty for his failure to furnish any return or to maintain any register under that Scheduled Act.

Answer 4(d)(i)

In terms of Section 2(8) of The Employees' State Insurance Act, 1948 "employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

Answer 4(d)(ii)

It is well settled that an employment injury need not necessarily be confined to any injury sustained by a person within the premises or the concern where a person works. Whether in a particular case the theory of notional extension of employment would take in the time and place of accident to bring it within an employment injury, will have to depend on the assessment of several factors. There should be a nexus between the circumstances of the accident and the employment. On facts no case could be an authority for another case, since there would necessarily be some differences between the two cases. Therefore, each case has to be decided on its own facts. It is sufficient if it is proved, that the injury to the employee was caused by an accident arising out of and in the course of employment no matter when and where it occurred. There is not even a geographical limitation.

The facts of the given case are like that of the case of *E.S.I. Corporation Indore v. Babulal, 1982 Lab. I.C. 468*, in which the M.P. High Court held that injury arose out of employment where a workman attending duty despite threats by persons giving a call for strike and was assaulted by them while returning after his duty was over.

Therefore, the factory workers who attended factory work despite the call of the union leader and were attacked and got injured were covered under the definition of employment injury. Thus, worker is eligible to get the insurance coverage.

Answer 4(e)

India has specific representation of each major deliberative organ of the ILO, namely the

International Labour Conferences, Governing Body, and the International Labour Office. The ILO office is located at New Delhi in India.

Indian participation in the ILO's organisation and functioning can be understood in terms of its representation and contribution to the ILO. The organ-wise share of India is listed as below-

1. International Labour Conference

The International Labour Conference (ILC) has continued to meet at least once each year since 1919, (except during external interference during World War II). The conference adopts the biennial programme and budget, sets out the International Labour Standards through conventions and recommendations.

India has participated proactively in these conferences and has also contributed immensely to its membership. Till now the conference has had 4 Indian Presidents in the International Labour Conference, namely Sir. Atul Chatterjee (1927), Shri Jagjivan Ram, Minister for Labour (1950), Dr. Nagendra Singh, President, International Court of Justice (1970) and Shri Ravindra Verma, Minister of Labour and Parliamentary Affairs (1979). India also had 8 Vice Presidents, 2 from the Government, 3 from the Employers and 3 from the Workers' Group. In addition to this, Indian delegates have also chaired the important committees of the conferences.

2. Governing Body

India has been holding a non-elective seat on the Governing Body as one of the 10 countries of chief industrial importance since 1922 in the executive wing of the ILO. Indians have also been appointed as the chairmen of the governing body, viz., Sir Atul Chatterjee (1932-33), Shri Shamal Dharee Lall, Secretary, Ministry of Labour (1948-49), Shri S.T. Merani, Joint Secretary, Ministry of Labour (1961-62) and Shri B.G. Deshmukh, Secretary, Ministry of Labour (1984-85).

The Governing Body used to function through its committees, with India being a member of all its 6 committees. These committees were -

(i) Programme, Planning & Administrative;

(ii) Freedom of Association;

(iii) Legal Issues and International Labour Standards;

(iv) Employment & Social Policy;

(v) Technical Cooperation; and

(vi) Sectoral and Technical Meetings and Related issues.

The system of functioning is now based on functioning through various sections. India is a participant in all the proceedings of the sections which are Institutional Section (INS); Policy Development Section (POL); Legal Issues and International Labour Standards Section (LILS); Programme, Financial and Administrative Section (PFA); High level Section (HL); and Working Party on the Functioning of the Governing Body and the International Labour Conference (WP/GBC).

3. The International Labour Office

Indians have held important positions at the international labour office, which is the focal point of implementation of decision making.

4. International Labour Standards - ILO Conventions

The International Labour Standards are the primary means of bringing about action. They are in the form of convention and recommendations. India has always used the ILO conventions and recommendations as a means of its guiding principle for the creation of national policies. Labour

interests have been furthered through legislative and administrative measures based on ILO instruments. As the conventions are legally binding, India has been selective in ratifying them. They are only ratified when they are in consonance with our local laws. However, the recommendations have played an important part for providing a framework. So far, there are 47 ILO conventions and 1 protocol ratified by India. Out of 47 Convention and 1 protocol ratified by India, of which 39 are in force, 5 Conventions and 0 Protocol have been denounced; 4 instruments abrogated.

5. ILO Conventions Ratified by India

Around 47 conventions were ratified by India.

BANKING & INSURANCE – LAWS & PRACTICE

GROUP 2 ELECTIVE PAPER 7.4

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

Know Your Customer and Anti Money Laundering Guidelines in Banks

Know Your Customer is the process of verifying the identity of customer. The objective of KYC guidelines is to prevent banks from being used, by criminal elements for money laundering activities. It also enables banks to understand its customers and their financial dealings to serve them better and manage its risks prudently.

KYC is the means of identifying and verifying the identity of the customer through independent and reliable source of documents, data or information. For the purpose of verifying the identity of :

- Individual customers, bank will obtain the customer's identity information, address and recent photograph. Similar information will also have to be provided for joint holders and mandate holders.
- Non-individual customers-banks will obtain identification data to verify the legal status of the entity, operating address, the authorized signatories and beneficial owners.

Information is also required on the nature of employment/business that the customer does or expects to undertake and the purpose of opening of the account with the bank.

The KYC guidelines have been put in place by the Reserve Bank of India in the context of the recommendations made by the Financial Action Task Force (FATF) on Anti Money Laundering (AML) standards and on Combating Financing of Terrorism (CFT). The Prevention of Money Laundering Act requires banks, financial institutions and intermediaries to ensure that they follow certain minimum standards of KYC and AML.

KYC is to be provided at the time of opening a new account as well as at periodicity defined by the Reserve Bank of India. It may be necessary to obtain additional information from existing customers based on the conduct of the account, where there are changes to the account or at fixed periodic updation cycles based on the risk categorization of the customer. Similarly, an existing customer will be required to provide fresh KYC for new account opening to adhere to the latest applicable KYC standards.

Banks are entitled to refuse to open an account or discontinue an existing relationship if there is failure to meet the minimum KYC requirements. However, there is flexibility provided to certain categories of customer who are unable to provide the necessary document at the time of account opening.

On the basis of the above facts, answer the following questions :

(*a*) What are the main components of an effective AML/KYC of Banks ?

(4 marks)

(b) (i) How can the banks verify a customer's identity during the KYC process while Opening of Customer Accounts ?

(ii) How to Banks arrive at the risk level of a customer during the KYC process ?

(*2+2=4 marks*)

(c) Explain with a few examples of Red Flags or Indicators of Potential Money Laundering Activities in Customer Accounts.

(*4 marks*)

(d) (*i*) How can Banks ensure the Compliance of AML and KYC Regulations in day-do-day activities of the Banking Business ?

(*ii*) What are the consequences of non-compliance of AML and KYC guidelines ?

(*2+2=4 marks*)

(e) Describe the steps taken by the Bank in case they suspect a customer's involvement in money laundering activities.

(*4 Marks*)

Answer 1(a)

An effective Anti-Money Laundering (AML)/Know Your Customer (KYC) program of Banks typically consists of the following components:

(i) Customer Identification Program (CIP): Procedures to verify and document the identity of customers during onboarding (While Opening the Accounts). Collecting valid identification documents such as government-issued IDs, passports, and utility bills and conducting Enhanced Due Diligence (EDD) for high-risk customers.

(ii) Customer Due Diligence (CDD): Ongoing monitoring of customer activities and risk assessment based on their transactions, source of funds, and background.

(iii) Risk assessment: Banks must assess the risk level of each customer.

(iv) Enhanced Due Diligence (EDD): Additional scrutiny and monitoring for higher-risk customers or transactions.

(v) Transaction Monitoring: Real-time monitoring of customer transactions for detecting suspicious or unusual activities. Investigating and reporting suspicious activities to relevant authorities.

(vi) Reporting: Reporting suspicious transactions to the relevant authorities, such as the Financial Intelligence Unit (FIU).

(vii) Training and Awareness: Ongoing training programs to educate Bank employees about KYC/AML Regulations and its emerging risks.

Answer to Question No. 1(b)(i)

During the Know Your Customer (KYC) process in opening of Customer Accounts, customer identity verification can be done through various means, such as:

(i) Document Verification: Collecting and verifying official documents like passports, driving licenses, or national ID cards.

(ii) Address Verification: Confirming the customer's residential or business address through utility bills, bank statements, or government-issued documents.

(iii) **Biometric Verification:** Using biometric data such as fingerprints or facial recognition for identity verification (By certain Indian and Foreign Banks).

(iv) **Database Checks:** Checking customer information against reliable databases, government registers, or watch lists to identify potential risks or suspicious individuals.

(v) **Digital Verification (E-KYC):** Leveraging third-party APIs to verify customer information in real time.

(vi) **Two-Factor Authentication (2FA):** Sending One-Time Passwords (OTPs) via SMS or email to confirm contact details

By combining these approaches, banks can ensure a robust and compliant customer identity verification process while minimizing risks of fraud.

Answer 1(b)(ii)

Assessing the risk level of a customer during the Know Your Customer (KYC) process involves evaluating factors such as their geographic location, nature of business, source of funds, expected transaction volume, and past financial behaviour. This risk assessment allows financial institutions to categorize customers as Low, Medium, or High Risk. It helps determine the extent of Due Diligence required and the frequency of monitoring for each customer.

Alternative Answer 1(b)(ii)

Banks use a variety of methods to assess a customer's risk level, including:

- **Know Your Customer (KYC) or Customer Due Diligence (CDD) processes:** These processes evaluate factors like a customer's business activities, industry, geographic location, and behavioral patterns.
- **Transaction History:** Analyzing a customer's transaction history can help identify suspicious activities.
- **Business Relationships:** Evaluating a customer's business relationships can help identify suspicious activities.
- **Qualitative and Quantitative Methods:** Banks use a combination of these methods, including collecting data, applying models, conducting scenario analyses, and stress tests.

Answer 1(c)

Red flags or indicators of potential money laundering activities can include:

(i) Large cash deposits or withdrawals that are inconsistent with a customer's profile or known business activities.

(ii) Frequent transactions just below the reporting threshold to avoid detection.

(iii) Unusual patterns of transactions, such as structuring transactions to avoid reporting requirements.

(iv) Transactions involving high-risk countries or jurisdictions known for money laundering or terrorist financing.

(v) Rapid movement of funds through multiple accounts or complex financial structures.

(vi) Unexplained or sudden changes in a customer's transactional behaviour or business activities.

(vii) A customer hesitates or refuses to provide standard KYC documents or details about their business operations.

(viii) Significant transfers are made to an unrelated party without a clear business relationship or contract.

(ix) By monitoring for these red flags and combining them with automated systems for real-time analysis, financial institutions can better detect and mitigate money laundering risks.

Answer 1(d)(i)

To ensure compliance with Anti-Money Laundering (AML) and Know Your Customer (KYC) regulations in day- to-day activities, Banks would:

(i) Adhere to internal policies and procedures established by the institution.

(ii) Conduct thorough customer due diligence and maintain up-to- date customer records.

(iii) Continuously monitor customer transactions for suspicious activities.

(iv) Report any suspicious transactions promptly to the appropriate authorities.

(v) Stay updated on regulatory changes and attend regular training sessions to enhance knowledge of AML/KYC practices.

(vi) Foster a culture of compliance and ethical behaviour within the organization.

(vii) Banks periodically review and update customer information to ensure continued compliance.

Answer 1(d)(ii)

Non-compliance with Anti-Money Laundering (AML) and Know Your Customer (KYC) regulations can have severe consequences for financial institutions, including reputational damage, monetary penalties, legal actions, loss of licenses, Damage to an organization's credibility and performance and restrictions on business operations. Additionally, non- compliance can lead to increased risk exposure to money laundering, terrorist financing, and other illicit activities.

Answer 1(e)

If Banks suspect a customer's involvement in money laundering activities, they must file reports on any illegal transactions. The reports come from a number of organizations that notify government officials of cash transfers that may include consumer theft, drug smuggling, organized crime, and other criminal activities. Bank would follow the institution's established protocols, which typically include:

(i) Documenting and preserving all relevant information and evidence.

(ii) Reporting the suspicious activity to the institution's designated Anti-Money Laundering (AML) officer or compliance department of the Bank.

(iii) Coordinating with the AML officer to file a Suspicious Activity Report (SAR) with the appropriate regulatory authority or Financial Intelligence Unit (FIU).

(iv) Co-operating with law enforcement or regulatory agencies during investigations, if required.

Question 2

(*a*) Reserve Bank of India issued a circular No. RBI/2024-25/28DOR.LIC. REC. 20/16.13.218/2024-25 dated 26.04.2024 for Small Finance Banks as Voluntary Transition of Small Finance Banks to Universal Banks, which provides a transition path for Small Finance Banks (SFBs) to convert into Universal Banks. Such conversion shall be subject to the SFB's fulfilling minimum paid-up capital/net worth requirement as applicable to Universal Banks, satisfactory track record of performance as an SFB and RBI's due diligence exercise. These instructions are issued in

exercise of the powers conferred on the Reserve Bank of India under Section 22(1) of the Banking Regulation Act, 1949.

(i) What is the eligibility criteria for an SFB to transition into a Universal bank as per this circular ?

(ii) What are the conditions that shall be applicable with regard to shareholding pattern ?

(*3+3=6 marks*)

(b) What is the difference between Payment Banks and Small Finance Banks ?

(*4 marks*)

(c) What are the KYC documents required to open a bank account in case of (*i*) a Company and (*ii*) a Trust/AOP/Club/Society ?

(*3+2=5 marks*)

Answer 2(a)(i)

With the objective of bringing better clarity, the eligibility criteria for a Small Finance Banks (SFB) to transition into a Universal Bank are as follows:

(i) scheduled status with a satisfactory track record of performance for a minimum period of five years;

(ii) shares of the bank should have been listed on a recognized stock exchange;

(iii) have a minimum net worth of Rs.1,000 crore as at the end of the previous quarter (audited);

(iv) meeting the prescribed Capital to Risk-weighted Asset Ratio (CRAR) requirements for SFBs;

(v) having a net profit in the last two financial years; and

(vi) having Gross Non-Performing Assets (GNPA) and Net Non-Performing Assets (NNPA) of less than or equal to 3 percent and 1 percent respectively in the last two financial years.

Answer 2(a)(ii)

The RBI has also outlined norms regarding the shareholding pattern-for SFBs wishing to convert to a Universal Bank. There is no mandatory requirement for SFBs to have an identified promoter. However, the existing promoters will continue in the same capacity upon transition to a Universal Bank. Also, SFBs will not be permitted to add or change their existing promoters during the transitioning phase. The conditions for SFBs pertaining to shareholding pattern to apply for a Universal Bank license under the SFB Guidelines 2024 are:

(i) There is no mandatory requirement for an eligible SFB to have an identified promoter. However, the existing promoters of the eligible SFB, if any, shall continue as the promoters on transition to Universal Bank.

(ii) Addition of new promoters or change in promoters shall not be permitted for an eligible SFB while transitioning to Universal Bank.

(iii) There shall be no new mandatory lock-in requirement of minimum shareholding for existing promoters in the transitioned Universal Bank.

(iv) There shall be no change to the promoter shareholding dilution plan already approved by the Reserve Bank.

(v) The eligible SFBS having diversified loan portfolio will be preferred.

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Answer 2(b)

The following is the difference between Payment Banks and Small Finance Banks:

Sr. No.	Payment Bank	Small Finance Bank
1.	Payment Bank can receive deposits and remittances but cannot lend.	Small Finance Bank can lend to small business units, micro and small industries and small and marginal farmers.
2.	Payment Bank can receive deposit from a customer which should not exceed Rs.2.00 Lacs.	Small Finance Bank can provide basic services of accepting deposits and lending.
3.	Payment Bank cannot give loans and cannot issue credit cards but can issue ATM/Debit Cards.	No restriction of area of operation of Small Finance Banks.
4.	Payment Bank can distributes non-risk financial products such as Mutual Fund and Insurance.	Loan portfolio to the extent of 50% or more should constitute loans and advances of up to Rs.25.00 Lacs.
5.	Payment Bank focus on mainly on digital payments and savings.	Focus on broader role, including savings, credit, and financial products for underserved segments.
6.	Examples: Paytm Payments Bank, Airtel Payments Bank, India Post Payments Bank.	Examples: AU Small Finance Bank, Ujjivan Small Finance Bank, Jana Small Finance Bank.

Answer 2(c)(i)

The following are the Know Your Customer documents required to open a bank account in case of a company:

(i) Copy of Certificate of Incorporation (CIN).

(ii) Copy of Memorandum & Articles of Association.

(iii) Copy of PAN of the Company.

(iv) Resolution of the Board of Directors to open an account and list of officials authorized to operate the account.

(v) Identification of authorized signatories should be based on photographs and signature cards duly attested by the company.

(vi) Copies of proof of identify and proof of address along with PAN of managers, officers of employees holding Power of Attorney to transact business on its behalf.

(vii) List of directors along with DIN and copy of Form 32 (if directors are different from AOA)

Answer 2(c)(ii)

The following are the Know Your Customer (KYC) documents required to open a bank account in case of an Association of Person/Body of Individual:

(i) Certificate of Registration, if registered.

(ii) Copy of PAN of Trust / Association / Club / Society.

(iii) Power of Attorney granted to transact business on its behalf, if any.

(iv) Any document listing out the names and addresses of the trustees, sellers, beneficiaries and those holding power of Attorney, and other key officials involved in the day to day management of the trust to the satisfaction of the bank.

(v) Resolution of the managing body of the foundation.

(vi) Declaration of Trust/Bye Law of society/Bye-law of Association/Bye-law of club.

(vii) Attach the Proof of name and address of the founder, Manager/director and the beneficiaries, telephone/fax number, Telephone bill, Utility bill apart from the above (bills not older than two months).

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

Question 3

(*a*) What are the factors that affect the Equated Monthly Instalments or EMI of Bank Loans ?

With the help of the following data, calculate the Equated Monthly Instalment (EMI) of Housing Loan taken by Srinivasan from X bank, Chennai branch for ₹ 50 lakh @10% interest p.a., repayable in EMIs of 15 years.

The following hint may be used to solve.

(1+0.0083) ^ 180 = 4.43)

(*3+3=6 marks*)

(b) A works in a Company and during the year he got transferred from Himachal Pradesh to West Bengal. He wants to open a Bank account in West Bengal but he has no Officially Valid Documents (OVD). What are the documents to be deemed as OVD for the limited purpose of proof of Address to be submitted to the Bank ?

(*3 marks*)

(c) What do you know about operational controls in CBS Banking with regard to :

(a) Personnel Control

(b) Logical Access Control.

(*3+3=6 marks*)

Answer 3(a)

The Three Major Factors that affect the Equated Monthly Instalment (EMI) are Principal of Loan Amount, Rate of Interest and Loan tenure.

(i) Principal Loan Amount: The principal loan amount is the original loan amount that the borrower borrows from the lender. This is the main factor that decides the EMI amount. The higher the principal loan amount higher will be the EMI.

(ii) Rate of Interest: This is the interest rate that is charged on the loan and is also an important factor in deciding the EMI amount. Banks/Financial Institutions calculate the interest based on several factors like your income, repayment capacity, credit history, prevailing market situation, etc.

(iii) Loan Tenure: It is the period given to the borrower by the Bank within which the entire loan has to be paid off by the borrower to the Bank. Longer tenure implies that the borrower needs to pay interest for a longer period to the lender.

EMI is calculated using the formula EMI = $\frac{(PR) \times (1+R)^n}{[(1+R)^n] -1}$

Principal Loan Amount (P) = Rs.50 lakh;

Rate of Interest (R) = 10%;

Loan Tenure (n) = 15 years

Hence EMI for X bank Housing loan can be calculated as follows:

Interest rate (R) = 10%/12 months = 0.0083

Loan period (n) = 15 years = 180 months

Equated Monthly Instalment (EMI) = $\frac{(50,00,000 \times 0.0083) \times (1+0.0083)^{180}}{[(1+0.0083)^{180}] - 1}$

$= \frac{(41500 \times 4.43)}{(4.43-1)}$

= Rs.53,599

Answer 3(b)

The following are the documents to be deemed as Officially Valid Documents (OVD):

(i) Utility bill which is not more than two months old of any service provider (electricity, telephone, post-paid mobile phone, piped gas, water bill).

(ii) Property or Municipal tax receipt.

(iii) Pension or family Pension Payment Orders (PPOs) issued to retired employees by Government Departments or Public Sector Undertakings, if they contain the address;

(iv) Letter of allotment of accommodation from employer issued by State Government or Central Government Departments, statutory or regulatory bodies, public sector undertakings, scheduled commercial banks, financial institutions and listed companies and leave and licence agreements with such employers allotting official accommodation.

Answer 3(c)(a)

Personnel control: In a Core Banking System (CBS) environment, operational controls ensure efficiency, security, and compliance in banking operations. For staff directly involved in CBS operations, personal control relates to responsibilities, authorizations, and monitoring to minimize errors and prevent misuse of systems.

(i) Clear allotment of work and proper segregation of duties.

(ii) Rotation of duties at regular intervals.

(iii) Ensuring authorization limits are defined for various levels of staff and are documented.

(iv) Periodically changing passwords & non sharing of passwords.

(v) Ensuring deletion of passwords of transferred/retired employees. Also ensure that no access is given to employees who are facing suspension/disciplinary action.

Answer 3(c)(b)

Logical Access control: Logical access control deals with safety of CBS assets, maintaining of data integrity etc. To ensure logical access control the following need to be ensured:

(i) Staff should be given access levels on need basis only, that too to specific menus/files that relate to their work, and servers.

(ii) File maintenance access should be restricted to limited number of staff with proper approval and periodic review. Any changes in software/hardware are to be documented.

(iii) Encryption of Password files in the system for restricting the access.

(iv) Security violation alerts should be given immediate attention.

(v) Access to work stations are restricted after working hours.

(vi) Access to sever/modem is to be restricted and controlled.

Or (Alternate Question to Q. No. 3)

Question 3A

(*a*) Calculate the total provision required in respect of the NPA Loan Account of XYZ Ltd at M/s ABC Bank as on 31.03.2024 :

(i) Loan outstanding balance ₹ 4 lakhs.

(ii) ECGC Cover 50 percent.

(iii) Period for which the advance has remained non-performing—More than 2 years remained as DA.

(iv) Value of security held ₹ 1.50 lakhs.

(*3 marks*)

(b) What are the safeguards employed to ensure that the provisions of compromise settlement with borrowers classified as fraud or wilful defaulter, are not mis-utilized ?

(*3 marks*)

(c) Under the Limitation Act, 1963 what is the period of limitation for the following loan documents:

(i) Mortgage loans

(ii) Execution of decree

(iii) Demand loan

(iv) Bill discounted

(v) Deposit Accounts.

(*5 marks*)

(d) A property in the name of a 'A' was given on lease to a bank in 2012. 'A' died. The Bank did not pay rent from August, 2012 to July, 2018. B-A's daughter approached the bank and the Bank immediately paid amount around ₹ 10 lakh.

B contended that the bank should have paid interest on the rent outstanding. She asked

the Bank to pay a sum of ₹ 3 Lakh as interest. The bank refused to pay the interest. She appealed to the Banking Ombudsman for the claim to be paid. In you opinion can Banking Ombudsman decide on this case ? What options does she have to claim the interest from the bank ?

(*4 marks*)

Answer 3A(a)

Provisions required to be made by the Bank:

Particulars	Amount (In Rs.)
Loan Outstanding balance	4.00
Less: Value of Security held	1.50
Unrealised Balance	2.50
Less: ECGC Cover (50% of Unrealisable Balance)	1.25
Net Unsecured Balance	1.25
Total provision to be made as on March 31, 2024	**Rs. 1.25 Lakhs+ Rs. 0.60 Lakhs= Rs.1.85 lakhs**

Working Note:

(i) For an NPA loan account that is more than 2 years overdue, banks need to maintain a provision of 100% of the outstanding loan amount, minus the realizable value of security held.

(ii) Provision for unsecured portion of advance [@ 100 % of unsecured portion] = Rs.1.25 lakhs

(iii) Provision for secured portion of advance as on March 31, 2024 [@ 40% of the secured portion] = 0.60 lakhs

Answer 3A(b)

Compromise settlement of loans is not available to borrowers as a matter of right, rather it is a discretion to be exercised by the lenders based on their commercial judgement.

The prudential guidelines provide sufficient safeguards with regard to such settlements considered by the lenders:

(i) All such decisions are required to be taken by lenders as per their Board approved policies, instead of adopting an ad-hoc approach in each case;

(ii) The circular further strengthens the regulatory guidance by mandating that all such cases of compromise settlement involving borrowers classified as fraud or wilful defaulter must be approved by the Board;

(iii) Such settlements shall be without prejudice to the criminal proceeding underway or to be initiated, if under consideration of the lenders against such borrowers;

(iv) As already mentioned, the extant penal provisions continue to remain applicable in such cases.

(v) Wherever recovery proceedings are pending before a judicial forum, any settlement arrived at with the borrower shall be subject to obtaining a consent decree from the concerned judicial authorities.

(vi) The Boards of lenders have been entrusted with the oversight of the overall trends in approvals of all compromise settlements, including specifically the breakup of accounts classified as fraud, red-flagged, wilful defaulter and quick mortality accounts.

Answer 3A(c)

It is the responsibility of lenders to ensure that all loan documents are properly executed and they are all within the required limitation period as per the limitation act:

Sr. No.	Documents	Period of Limitation
1.	Loan Under mortgage	12 years from the date of documents' execution/ from the date the money becomes due.
2.	Execution of decree	12 years from the date of decree becomes enforceable.
3.	Demand loan	3 years from the date of loan.
4.	Bill Discounted	3 years from the date of when the bill becomes payable.
5.	Deposit Accounts	3 years from the date of deposit become due.

Answer 3A(d)

Banking Ombudsman: The Banking Ombudsman, as a quasi-judicial authority, was introduced under section 35A of the Banking Regulation Act, 1949 by Reserve Bank of India (RBI) with effect from 1995. The Banking Ombudsman is an official authority to investigate the complaint from the customers and address the complaint and thereby bring the solution among the aggrieved parties. So, the Banking Ombudsman plays the role of a mediator and serves the purpose of reconciliation.

The Banking Ombudsman can only decide for cases of deficiency in service by the banks. The customers can approach the Ombudsman with their grievances against the bank where the relationship is of a customer and service provider.

Here in this case the relationship is that of land lady and the tenant and Ombudsman has no role to play. B has an option to approach the court having jurisdiction to decide the case. The court only can adjudicate on the case after hearing both the parties on the case.

PART–II

Question 4

Cyber Security Policy Guidelines of IRDAI to Insurance Companies

Organization's Information and Cyber Security Policy (ICSP) identifies responsibilities and establishes the goals for consistent and appropriate protection of the organization's critical data and Information Assets. Implementing this policy shall reduce risk of accidental or intentional disclosure, modification, destruction, delay, or misuse of Information Assets. This policy enables the Information Security Officer to provide direction for implementing, maintaining and improving the security of Critical data and Information Assets Implementing this policy shall also protect information and information infrastructure in cyberspace, build capabilities to prevent and respond to cyber threats, reduce vulnerabilities and minimize damage from cyber incidents through a combination of institutional structures, people, processes and technology. By implementing this policy, the organization will be able to consistently establish and maintain controls for ensuring confidentiality, integrity and availability of all information

assets. Additionally, it also safeguards working environment for its employees and partners who facilitate and support the goals in services.

Vision : To provide a user-centric trusted and secure set of resources and environment to employees to conduct business, while ensuring protection of organization's information assets including customer data.

Mission : Ensuring the security of all Organization's information assets through implementation of up-to-date security mechanisms for prevention and monitoring of threats; governance of information security related activities and awareness of all employees.

Information Assets comprise data or information recorded in electronic, printed, written, facsimile or other systems as well as the 'system' itself, required for Organization's business purpose or operations. Information Assets include business data, system logs, servers, desktops, network equipment, network media, storage media, paper, people etc.

Organization's Information and Cyber Security Policy applies to Information Assets throughout their lifecycle, including creation, distribution, transmission, storage and disposal such as :

- Information Assets in all forms : electronic, printed, written, facsimile, or spoken etc.
- Individuals or organization accessing the information assets like vendors, service providers, distributors, franchisee, customers, service providers, etc.

The guidelines issued by IRDAI are applicable to all Insurers including Foreign Re-Insurance Branches (FRBs) and Insurance Intermediaries regulated by the Insurance Regulatory and Development Authority of India (IRDAI).

Insurance Agents, Micro-Insurance Agents, Point of Sale Persons and Individual Surveyors will not fall under purview of these guidelines. However, it is responsibility of Insurers to ensure that these entities follow minimum security framework as defined under Insurers' Board approved policy in this regard.

These guidelines are applicable to all data created, received or maintained by regulated entities wherever these data records are and whatever form they are in, in the course of carrying out their designated duties and functions.

- The Applicability of NIST Framework to All Regulated Entities.
- The classification of Insurance Intermediaries based on gross insurance revenue.
- The Auditors report comprising of Audit Summary, overall findings, non-compliances, risk rating.
- The Eligibility Criteria for the Audit firm.
- The Text of Audit Certificate to be certified by the Audit Firm.
- The Text of Audit Certificate to be certified by the Audit Firm for FRBs.

Based on the above passage answer the following questions :

(a) Explain the Principles and Objectives of Information and Cyber Security Guidelines issued by Insurance Regulatory and Development Authority of India (IRDAI) to Insurance Companies.

(*5 marks*)

(b) What are the Responsibilities (defined by IRDAI) of Chief Information Security Officer (CISO) of Insurance Companies.

(*5 marks*)

(c) Enumerate the Internal Audit Guidelines issued by IRDAI Information Security Function of the Insurance Companies.

(*5 marks*)

(d) Explain the Guidelines of IRDAI for usage of social media by Employees of Insurance Companies for personal purposes.

(*5 marks*)

Answer 4(a)

The Information and Cyber Security guidelines issued by the Insurance Regulatory and Development Authority of India (IRDAI) aim to safeguard the sensitive data and digital infrastructure of insurance companies from cybersecurity threats as below:

(i) Information Protection - Information Assets will be protected at a level commensurate with their value and the risk of loss to the organization. Protection should stress the confidentiality, integrity, and availability of Information Assets.

(ii) User Authentication and Authorization - All Users must be uniquely identifiable with access permissions specifically and individually authorized based on their business needs. User access methods should stress strong authentication, appropriate authorization and reliable audit-ability.

(iii) Availability - Information Assets must be available to support Organization's business objectives. Appropriate measures must be taken to ensure the timely recovery of all information and access by authorized individuals

(iv) Integrity - Information Assets must be adequately protected to ensure completeness and accuracy. Validation measures will allow detection of inappropriately modified, deleted, or corrupted information

(v) Continuity - Organization must demonstrate the ability to maintain continuity of operations from business and technology perspectives. All information assets and related policies and procedures of Insurance Company, shall be evaluated from a continuity perspective to support Organization's business objectives. Partners, vendors and service providers must all demonstrate the ability to meet or exceed Organization's continuity objectives at all times.

(vi) Cyber Security Resilience - To enable effective prevention, investigation and prosecution of cybercrime and enhancement of law enforcement capabilities through appropriate legislative intervention.

(vii) Vendor and Third-Party Risk Management: Ensure that third-party vendors and service providers adhere to similar security standards to protect shared systems and data.

(viii) Periodic Security Assessments: Require regular security audits, vulnerability assessments, and penetration testing to identify and address security gaps.

Answer 4(b)

The Chief Information Security Officer (CISO) shall be responsible for carrying out the following functions:

(i) Definition and periodic review of the Information and Cyber Security Policy (ICSP) after due approvals from the Information Security Risk Management Committee (ISRMC).

(ii) Definition and periodic review of Information Security (IS) standards.

(iii) Conducting and coordinating both internal and external IS reviews and assessments.

(iv) Briefing to the Information Security Risk Management Committee (ISRMC).

(v) Be responsible for ensuring reporting of critical or high severity information and cyber security incidents to relevant regulators.

(vi) The CISO shall be responsible for setting IS Standards such as:

(a) IS procedures and any supporting templates

(b) Standards for Technology Risk Assessments (TRA) for any process / technology change or new technology sourcing

(c) Methodology / checklist for performing the TRA and approval matrix based on the results of the TRA.

(d) BCP / DR standards including methodology for conducting Risk Assessment (RA) and Business Impact Analysis (BIA) Project Governance and Project risk management standards including methodology for assessing project risks and reporting project risks to Information Security Team (IS Team).

(e) Application security and Vendor risk assessment standards.

(f) IS related trainings standards including frequency for IS related trainings for employees/ contractors and the IT/IS teams.

(g) Vendor classification standards based on information security requirements including vendor risk assessment standards and periodicity of risk assessment for each classification of vendors, appointment of a third party or an internal team to conduct risk assessment based on vendor criticality.

(vii) Security testing baselines for conducting Vulnerability Assessment and Penetration Testing of IT systems (infrastructure and applications) including mandating the use of internal and external vendors based on asset classification.

(viii) Liaising with the business teams to define the roles within each application under their purview depending upon the business requirements.

(ix) CISO may engage external forensic experts who are certified as well as competent for the job as and when required.

(x) CISO shall review the training / skill set requirements for the Security Operations Center (SOC) / Logical Access Management (LAM) / Data Leakage Prevention (DLP) teams.

(xi) CISO shall be responsible for presenting / escalating the budgetary requirements for resources as well as IS reviews to the Chief Risk Officer (CRO).

Answer 4(c)

Internal Audit Guidelines in respect of Information Security Functions of the Insurance Companies are:

(i) The internal audit and information security functions shall work synergistically: the information security function shall design policies and procedures to protect the organization's information resources, and internal audit shall provide feedback concerning effectiveness of the implementation of these along with suggestions for improvement.

(ii) The Internal audit function shall provide an independent review and analysis of the organization's information security initiatives and objective assurance to the board and

executive management on how effectively the organization assesses and manages its risks, including the effectiveness of the IT Security Operations and Information Security Risk management structure and roles.

(iii) The Internal audit function shall keep the audit committee apprised of emerging risks and effective ways to address them and it shall identify weaknesses in policies and controls in place to mitigate these risks.

(iv) The Internal audit function shall carry out independent assessments reviewing the following aspects of Information Security:

(a) Key information security risks faced by the organization and policies put in place to defend against them.

(b) Effectiveness of the IT Security Operations and Information Security Risk management structure and roles.

(c) Controls put in place by the management to comply with the policies.

(d) Whether existing controls are being used by the functional managers.

(e) Effectiveness of operation of the controls in operations.

Answer 4(d)

Organization's reputation is closely linked to the behaviour of its employees, and everything published reflects on how Organization is perceived. Social media should be used in a way that adds value to the Organization's business. Considering the following points may help avoid any conflict between personal use of social media and an employee's employment at Organization.

(i) When subscribing to or posting information to an online/internet networking service, Organization personnel must not use their organization email address or other Organization details, unless use is required for genuine business and professional purposes.

(ii) The personal image projected in social media affects an individual's reputation and may affect the reputation of Organization. No form of critique or comment on Organization or its business should be made on personal websites or social networking platforms.

(iii) When using social media for personal purposes, employees must not imply they are speaking for Organization. The use of the official e-mail address, official logos or other identification should be avoided, and it should be made clear that what is said is not representative of the views and opinions of Organization.

(iv) Employees should comply with other Organization policies when using social media. For example, staff should be careful not to breach Organization's Confidentiality and Information Security, or the Employee Code of Conduct. If in doubt, don't post it.

(v) Staff should be mindful of their privacy settings.

(vi) Employees should be aware that if they break the law using social media (for example by posting something defamatory), they will be personally responsible.

(vii) Employees should be aware that by revealing certain details they might be more vulnerable to identity theft.

(viii) The Chief Information Security Officer (CISO) shall conduct training and awareness programs along with corporate communication team to educate the employees about information security related social media guidelines and existence and usage of enterprise Data Leakage Prevention (DLP) tools by the Organization.

Question 5

(*a*) "An insurance contract is considered as a contract of utmost good faith and not of caveat emptor ?" Explain.

(*4 marks*)

(b) "Ideally Insurance operations cannot be outsourced". How will you justify this statement ?

(*4 marks*)

(c) What are the different types of Life Insurance ? Explain the features of a Life Insurance Plan.

(*4 marks*)

(d) Sharma insured his goods in a warehouse against fire with XYZ Insurance Company. The goods were burnt and he recovered the full value of ₹ 10,00,000 from the insurance company. Subsequently he also sued the warehouse and recovered as sum of ₹ 10,00,000. Can he retain this money ?

(*3 marks*)

Answer 5(a)

An insurance contract is based on the principle of utmost good faith. The principle of utmost good faith is supported by three important legal doctrines:

(i) Representations.

(ii) Concealment (Intentional failure of the applicant for insurance to reveal a material fact to the Insurer) and

(iii) Breach of warranty (Promise made by the insured in the Contract).

Each Party (Insured and Insurer) to the contract is entitled to rely on good faith upon the representations of the other. Caveat emptor places the onus on the buyer to thoroughly examine a product or service before purchasing. It assumes that buyers have sufficient knowledge and capability to assess the product's value and risks. The rule of Caveat Emptor (Let the Buyer Beware) does not generally apply. The Insurer believes in the representations of the Insured. Representations of insured are statements of his or her age, weight, height occupation, state of health, family and personal history. And from the insurer's side, it is intricate and highly technical. Here both the parties are under an obligation not to attempt to deceive or withhold material information from the other. The insurance contract is voidable at the insurer's option if the representation is material, (If the Insurer knows the true facts, the policy would not have been issued or would have been issued on different terms) False, Reliance (The Insurer relies on the misrepresentation in issuing the policy at a specified Premium) and Innocent or unintentional misrepresentation.

Answer 5(b)

All outsourcing arrangements of an Insurer shall have the approval of a Committee of Key Management Persons and should meet the terms of the Board approved outsourcing policy. The Board or the Risk Management Committee should be periodically apprised about the outsourcing arrangements entered into by the insurer and also confirmation to the effect that they comply with the stipulations of the Authority as well as the internal policy be placed before them. An insurer shall not outsource any of the company's core functions other than those that have been specifically permitted by the Authority. Every outsourcing contract shall contain explicit safeguards regarding confidentiality of data and all outputs from the data, continuing ownership of the data with the insurer and orderly handing over of the data and all related software programs on termination

of the outsourcing arrangement. The management of the insurance company shall monitor and review the performance of agencies to whom operations have been outsourced at least annually and report findings to the Board. The Authority reserves the right to access the operations of the outsourced entity to the extent these are relevant to the insurance company and for the protection of policyholder.

Answer 5(c)

There are five main types of life insurance policies.

(i) **Term Life Insurance:** This policy offers a large sum of money assured to Nominee after death of the Insured at the cost of a nominal premium amount. However, this does not have any maturity value.

(ii) **Endowment Plans:** This plan offers a lump sum amount of money at the end of the tenure of plan. Moreover, it gives a life cover until maturity.

(iii) **Money Back Plans:** These plans provide with an opportunity to enjoy payouts at regular intervals (usually 5 to 10 years). These payouts are a certain percentage of the sum assured under plan.

(iv) **Unit Linked Investment Plans:** This a hybrid product that can be understood as a mutual fund wrapped in a life insurance policy. While offering market-linked incentives, get the comfort of a life cover.

(v) **Annuity/Pension Plans:** This is popular among those investors who want to reap its benefits post-retirement when there is no regular source of income while the expenditure often witnesses an increase. These plans are of two types deferred and immediate. In a deferred annuity plan, start receiving regular income after a few years. On the other hand, immediate annuity plans offer a regular income immediately after the purchase of the plan.

Life insurance is a financial contract which assures to provide the nominee of the policy taker a certain amount of money that has been determined in that individual policy, referred to as the sum assured. Inured need to pay a small amount of money to continue the policy, which is known as the premium. Premiums for an insurance plan depend on the age of an individual primarily. However, it is important to note here that even individuals of the same age might be charged a different premium because it is calculated on various parameters. Some of these parameters include family and medical history, coverage and term, lifestyle habits etc. Apart from giving life cover to the insured, one of the primary features of a life insurance contract is that it also provides maturity benefits.

Answer 5(d)

According to the doctrine of subrogation in a contract of indemnity, an insured cannot be allowed to make any profit from an insurance claim. He cannot take benefit of an insurance policy as well as any other alternative remedies. On the basis of the above principle, Mr. Sharma ought to return a sum of Rs.10,00,000 to the insurance company.

No, Sharma cannot retain the entire sum of Rs. 10,00,000 that he recovered from the warehouse after already receiving Rs. 10,00,000 from the insurance company.

The principle of subrogation allows the insurer, after indemnifying the insured for their loss, to step into the shoes of the insured and recover the compensation from any third party responsible for the loss. The insured is not allowed to profit from the insurance contract, as insurance is meant to compensate for the actual loss suffered, not to enrich the insured.

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

Question 6

(a) Suresh, has a health insurance policy with M/s X Health Insurance Company Limited. The sum insured is ₹ 15 lakh and the policy has a floater option of ₹ 5 lakh. The policy was first taken in 2019 and has been current from them with Suresh paying the renewal premium by due dates. In the currency of the policy with M/s X Health Insurance Company Limited, Mr. Suresh has made some claims, small and big but all these have been rejected by the insurer. The policy is due for renewal on 15th December, 2024. Suresh has been approached by Gopal, an agent of a different company, M/s Y Health Insurance Company Ltd. with a proposal that sounds attractive to Suresh. He wants to change over to M/s Y Health Insurance Company Limited from M/s X Health Insurance Company Limited.

Indicate the option to Suresh and the process involved.

Does M/s X Health Insurance Company Ltd. have any role to play in this move ? Discuss.

(*5 marks*)

(b) A purchased a car getting it financed by XYZ Finance Limited. The car was being used for a company's executives only. The car met with an accident. A filed a claim with the insurance company ABC General Insurance Limited.

The insurance company got the vehicle surveyed and the loss was assessed at ₹ 1,55,000/-. The insurance company paid the claim amount directly to XYZ finance company without any information to A. Moreover the insurance company had also deducted ₹ 36,400/- from the claim on the ground that the driver did not have any endorsement on the license to drive this vehicle for the company.

In this case advise :

(i) Is it right on the part of the insurance company to deduct amount of ₹ 36,400 from the claim amount ?

(ii) Was it right for the insurance company to directly pay the claim amount to the finance company without any information to A.

(*3+3=6 marks*)

(c) Prakash effected insurance on his goods against loss or damage by fire. Prakash and his wife quarrelled and the excited wife set fire and destroyed the goods. Can Prakash recover under the policy ? Can the insurer sue the wife under the doctrine of subrogation ?

(*4 marks*)

Answer 6(a)

One of the facilities offered to a policy holder under the health insurance policies is the right accorded to a policy holder to transfer the credit gained, for pre-existing conditions and time bound exclusions from one insurer to another insurer or from one plan to another plan of the same issuer. It is called portability of an insurance policy.

It is the right conferred on a Policyholder who decides to move from one General or Health insurer to another or to another plan of the same General or Health insurer. Such portability is not applicable to fixed benefits payable under health policies issued by a life insurer. The advantage of portability is the carry forward of the credit accrued on account of having a policy with the previous insurer. Long term benefits gained under the terms of a policy will not be denied by a switch over to

another insurer by the policy holder.

The application for portability will have to be given to the existing insurer who will send it through a portal to the new Insurer who may request for the claim's history and other details from the old insurer who shall give them to the new insurer within a period of 7 days from the date of receipt of request. An insurer may reject the request for portability if the policy holder approaches 60 days before or within 45 days of the date of expiry of the insurance policy. However, an insurer may at their option consider the request for renewal even outside the stated period. The new insurer is under obligation to accept or reject within a period of 15 days from the date of receipt of the Portability form.

If the new insurer does not convey any decision with the aforesaid 15 days, the new insurer is deemed to have accepted the request for portability. No charges for portability can be levied either by the previous insurer of the new insurer. No commission shall be paid to any Agent or Intermediary for the policy which is ported from one insurer to another insurer.

In the present case, Mr. Suresh obviously is a long-standing customer of M/s X Health Insurance Company Ltd. He apparently has accumulated some credits because of the longevity of the policy and his claims profile. Obviously, he is not happy with M/s X Health Insurance Company Ltd and wants to move to M/s Y Health Insurance Company Ltd. Mr. Suresh possibly feels that his needs may be taken better care by the Agent of M/s Y Health Insurance Company Ltd.

In the circumstance, Mr. Suresh has the freedom to ask M/s X Health Insurance Company Ltd. to port his policy to M/s Y Health Insurance Company Ltd. and M/s Y Health Insurance Company Ltd. agreement within the time schedule as prescribed, it can be done whereby all the accumulated credits and benefits under the policy with M/s X Health Insurance Company Ltd. will continue to be enjoyed from M/s Y Health Insurance Company Ltd. under the scheme. Neither M/s X Health Insurance Company Ltd. or M/s Y Health Insurance Company Ltd. or the agent will be entitled to any fees or charges for the portability.

Mr. Suresh can be advised to follow the prescribed procedure and seek portability of his health cover from M/s X Health Insurance Company Ltd. to M/s Y Health Insurance Company Ltd.

Answer 6(b)(i)

No, the insurance company was not right in deducting the amount of Rs. 36,400.00 from the claim amount on the ground that the driver did not have an endorsement on his licence to drive that vehicle. Once a person had a proper licence to drive a four- wheeler, it would mean that he was entitled to drive any car for any owner. Due to this entitlement with the driving licence the driver was allowed to drive the car which met with the accident. The insurance company in such a case was liable to pay the full amount of claim and was not justified in deducting any amount on whatsoever reason.

A, the aggrieved insured person should file a complaint at the appropriate forum, so that the insurance company pays the balance amount along with interest at 12 percent and cost of Rs.10,000/-.

The insured can challenge the deduction, citing relevant judicial precedents and principles of proportionality. Courts or consumer forums are likely to consider whether the breach materially affected the insurer's risk before ruling on the matter.

Answer 6(b)(ii)

No, the insurance company is not right in paying the claim amount directly to the finance company without informing A, the claimant. Even if the insurance company intended to make the claim payment to the finance company it should have informed the claimant insured and asked for his

consent to do so. The insurance company and the financier cannot act in isolation without even informing the insured who has made the claim for the loss. In such case the insurance company should have either paid the claim amount to the insured or should have properly communicated with the claimant and asked for his written consent/no objection certificate to pay the claim amount to the finance company.

Answer 6(c)

Yes, Prakash can recover under the fire insurance policy, provided the following conditions are met:

- **Accidental Nature of the Event:** Insurance policies against fire generally cover losses caused by accidental or unforeseen events. If the wife set the fire intentionally but it was not instigated or abetted by Prakash, the loss may still be considered covered.
- **Policy Terms:** The policy wording will typically include exclusions, such as losses caused by intentional acts or arson by the insured or individuals acting on their behalf.
- **Legal Relationship:** If Prakash's wife is not considered to be acting in collusion with him or on his instructions, her act could be treated as that of a third party. In this case, the insurance policy is likely to cover the loss.

Yes, the insurer can sue Prakash's wife under the doctrine of subrogation if she is deemed responsible for causing the loss:

- **Doctrine of Subrogation:** After indemnifying Prakash for the loss, the insurer gains the right to step into his shoes and recover the amount from the party responsible for causing the damage (i.e., the wife, in this case).
- **Legal Liability:** If Prakash's wife is found legally liable for the damage (e.g., under tort law for negligence or willful destruction of property), the insurer can sue her to recover the amount paid to Prakash.
- **Marital Relationship:** The insurer's ability to sue may be influenced by the jurisdiction's laws regarding the legal liability of spouses to each other. In some jurisdictions, spousal immunity may limit or complicate such lawsuits.

OR (Alternate question to Q. No. 6)

Question 6A

(a) What are the reasons that most of the insured prefer to choose an Individual Agent instead of Corporate Agent or Online purchase of insurance ?

(*5 marks*)

(b) Describe the functions of Reinsurance Broker.

(*5 marks*)

(c) Insurers are well advised to put in place a "whistle blower policy" whereby mechanisms exist for employees to raise concerns internally about possible irregularities, governance weaknesses, financial reporting issues or other such matters. Explain

(*5 marks*)

Answer 6A(a)

The following are the reasons to prefer an Individual Agent against a Corporate Agent:

(i) They give you a choice: Independent agents represent a wide range of insurance providers with various levels of coverage and cost possibilities. Most typically represent five to eight different insurance providers. You don't have to accept a quote from a certain business, and you don't have to spend a lot of time completing numerous online forms to compare quotes. Agents may frequently find a better bargain for your insurance than you might find by looking on your own, thanks to their contacts and market expertise.

(ii) They are licensed experts: Independents can provide straight forward explanations of the intricacies of insurance, assisting you in making correct choices. They make a living by determining the insurance needs of their clients and matching them with the insurer, best able to cover those needs at a cost the client can pay.

(iii) They are personal advisers: Agents ensure that you are appropriately covered in addition to finding you cheap prices. Your agent, who works with you face-to-face, transforms into your personal advisor and takes the time to pay attention to your needs.

(iv) They are your advocate: Your agent can act as your advocate when dealing with the insurance company if you have a billing or claim issue or need to adjust your coverage.

(v) They are right around the corner: Your neighbors are independent agents. They appreciate your interest in your neighborhood and are aware of both its advantage and disadvantages.

(vi) They offer one stop shopping: With the carriers they work with, independent agents may frequently fulfil all of your insurance requirements for life, vehicle, house, and business coverage. Many also provide life and health insurance.

(viii) They are consultants for a lifetime: Periodically, independent agents examine your insurance. Whether you're changing from renting an apartment to buying a home, establishing a business, getting married, remodeling your home, adding a young driver to your auto policy, or looking to insure that retirement condo, they are there to support you through all the transitions in your life.

Answer 6A(b)

Following are the functions that a Reinsurance Broker needs to perform:

(i) The reinsurance broker must be familiarized with the client's business and its risk retention philosophy;

(ii) Maintain proper records of the insurer's business so that the same can be used to assist the reinsurer(s) or other;

(iii) To render advice based on technical data on the reinsurance covers which is available in the international markets of insurance and reinsurance;

(iv) To maintain a database of available reinsurance markets which includes solvency ratings of the individual reinsurers;

(v) To render risk management services for the purpose of reinsurance; Select or recommend a reinsurer or a group of reinsurers;

(vi) To negotiate with a reinsurer on behalf of client;

(vii) To assist in case of commutation of reinsurance contract placed by them;

(viii) Act in a prompt manner on client's instructions and provide written acknowledgements and progress reports;

(ix) Collect and remit premiums and claims/refunds within the time as agreed upon;

(x) Maintain proper records of claims;

(xi) Assisting in negotiations and settlement of claims;

(xii) To exercise diligence and due care at the time of selecting reinsurers and international insurance; brokers with regard to their respective security rating and establish respective responsibilities at the time of engaging their services;

(xiii) To create market capacity and facility for stresses, new and existing businesses and asset class for and from both direct insurers and reinsurers;

(xiv) Rendering preliminary loss advice within a reasonable period of time.

Answer 6A(c)

Insurers are well advised to put in place a "whistle blower policy" where, by mechanisms exist for employees to raise concerns internally about possible irregularities, governance weaknesses, financial reporting issues or other such matters. These could include employee reporting in confidence directly to the Chairman of the Board or of a Committee of the Board or to the Statutory Auditor.

The Whistle-Blower Policy shall inter alia cover the following aspects:

(i) Awareness of the employees that such channels are available, how to use them and how their report will be handled.

(ii) Handling of the reports received confidentially, for independent assessment, investigation and where necessary for taking appropriate follow-up actions.

(iii) A robust anti-retaliation policy to protect employees who make reports in good faith.

(iv) Briefing of the board of directors.

(v) The appointed actuary and the statutory/internal auditors have the duty to 'whistle blow', i.e., to report in a timely manner to the IRDAI if they are aware that the insurance company has failed to take appropriate steps to rectify a matter which has a material adverse effect on its financial condition. This would enable the IRDAI to take prompt action before policyholders' interests are undermined.

***

INSOLVENCY AND BANKRUPTCY– LAW AND PRACTICE

GROUP 2 ELECTIVE PAPER 7.5

Time allowed : 3 hours ***Maximum marks : 100***

NOTE : *Answer All Questions.*

PART-I

Question 1

Background

CIL Limited (hereinafter referred as **'CIL'** or **Corporate Debtor**) is a manufacturer of precision engineering and automobile components, namely crankshafts for tractors, HCVs, LCVs as well as two-wheelers, as also connecting rods, steering knuckles and hubs. **IBD Bank,** one of the **Financial Creditors** of the Company has initiated a Corporate Insolvency Resolution Process (CIRP).

Appointment of Resolution Professional

The National Company Law Tribunal (NCLT) has appointed **Mr. RL** as the Interim Resolution Professional and subsequently, he was confirmed as the **Resolution Professional** (hereinafter referred to as the **"RP"**) by the NCLT.

Receipt and Admission of Claims

The RP received a claim for ₹ **1,850 crores** and after verification of claims, the RP admitted a claim of ₹ **1,780 crores** and the balance of claims was rejected by the RP.

Break-up of Claims Admitted

Out of admitted claim of ₹ 1,780 crores, the Financial Creditors claim was ₹ 1,620 crores, Workmen Wages pending for a period of last 24 months is ₹ 18 crores, Employees pending claims for a period of last 12 months is 15 crores, Claims by Operational Creditors and Statutory Authorities is ₹ 127 crores.

Going forward, the RP published an **"Expression of Interest."** Subsequently, it was revised on three different dates.

The Resolution Applicant (hereinafter referred to as the **'RA'**) submitted its first Resolution

Plan during April, 2019 providing to pay ₹ 75 crores to all the stakeholders including ₹ 62 crores to Financial Creditors **(FCs).**

After a series of negotiations, the RA submitted an addendum to the Resolution Plan during May 2019 by which the RA raised the payment to Financial Creditors to ₹ 74 crores and at the request of the Committee of Creditors (hereinafter referred to as the "CoC". Thereafter, once again, the RA submitted a Revised Plan during June, 2019 wherein the total pay- out was ₹ 86 crores and the Financial Creditors were to be paid ₹ 75 crores.

Further, the statutory requirement of the RP involving two approved valuers for giving reports, apropos fair market value and liquidation value was duly complied with and the figures in both reports were not at great variance.

The final Resolution Plan was submitted on August, 2019, in which the financial proposal/ total pay-

out was increased to ₹ 130 crores and the Financial Creditors were to get upfront payment of ₹ 81 crores towards final settlement.

The total estimated liquidation cost and fee to the Resolution Professional and other connected/ incidental expenses was ₹ 3.30 crores.

Final Approval of the Resolution Plan by CoC.

This final Resolution Plan submitted by the Resolution Applicant during August, 2019 was finally approved by the CoC by a majority of 88% votes. In terms of such approval of the Resolution Plan, the RP moved Approval Application under Sections 30(6) and 31 of the IBC, 2016 seeking approval of the Resolution Plan before the Adjudicating Authority-NCLT.

In terms of the Resolution Plan, for which approval was being sought, the Corporate Debtor would be allowed the benefit of carry forward of its losses in terms of Section 79 of the Income Tax Act, 1961.

The NCLT, vide its order, by which the approval of the Resolution Plan was kept in abeyance, directed the Official Liquidator (OL) to provide the exact figures/value of assets. The same was carried in appeal under Section 61 of the Code by the RA before the NCLAT which passed the impugned Judgment on 19th January, 2022, dismissing the appeal, thereby upholding the order of the NCLT.

It is imperative to note that the moot question involved is the extent of the jurisdiction and powers of the Adjudicating Authority in the background of the admitted and undisputed factual position that no objection was raised by any quarter with regard to any deficiency/irregularity, either by the RP or the Appellant or the CoC in finally approving the resolution plan which was sent to the Adjudicating Authority–NCLT for approval. Further, the NCLT and the NCLAT did not fully recognise that under the Resolution Plan, the Corporate Debtor was set to be revived and not liquidated.

In view of the above, the RA filed an appeal before the Supreme Court.

In the light of the above inputs and referring to the applicable provisions of the IBC Code, 2016 and the Regulations framed thereunder together with the decided case laws, answer the following questions :

(*a*) Discuss whether RA will succeed in the appeal preferred before the Honourable Supreme Court ?

(*6 marks*)

(*b*) (*i*) What is meant by the term 'Hair-Cut' ? In the given case study, what percentage of 'Hair-cut' shall be borne by the Financial Creditors ?

(*ii*) What would be the claim that would be paid out to Workmen and the Employees ?

(*iii*) What would be the total claim that would be paid to the Operational Creditors and the Statutory Authorities ?

(*iv*)What percentage of hair-cut would be borne by the above class ?

(*1+1+1+2=5 marks*)

(*c*) (*i*) State the types of assets classes as defined under the Companies (Registered Valuers and Valuation) Rules, 2017. Who shall appoint Valuers in this regard as per the extant IBBI Regulations ?

(*2 marks*)

(*ii*) Enumerate the provisions of IBBI Regulations with respect appointment of valuers and how many valuers are required to be appointed ?

(*2 marks*)

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(*iii*) Under what circumstance a third Valuer can be appointed ?

(*2 marks*)

(*d*) Referring to suitable case law(s), discuss the scope of Judiciary in the matter of 'Commercial Wisdom' and state who has to exercise 'Commercial Wisdom' judiciously for the benefit of all the stakeholders.

(*4 marks*)

(*e*) The Resolution Plan was approved by 88% votes. What is the minimum percentage of vote required for approval of Resolution Plan and who are all eligible to vote for the Resolution Plan ?

(*2 marks*)

(*f*) Within what period an appeal has to be filed with the National Company Law Appellate Tribunal and Supreme Court and state what orders are appealable ?

(*2 marks*)

Answer (1)(a)

The facts of the question similar to the case of *Ramkrishna Forgings Ltd. v. Ravindra Loonkar, RP of ACIL Ltd. and Anr. Judgement dated November, 21 2023* by Supreme Court of India.

The moot question involved is the extent of the jurisdiction and powers of the Adjudicating Authority to go on the issue of revaluation in the background of the admitted and undisputed factual position that no objection was raised by any quarter with regard to any deficiency/irregularity, either by the RP or the appellant or the CoC, in finally approving the Resolution Plan which was sent to the Adjudicating Authority-NCLT for approval.

Further, the statutory requirement of the RP involving two approved valuers for giving reports apropos fair market value and liquidation value was duly complied with and the figures in both reports were not at great variance. In the present case, both the NCLT and NCLAT erred to fully recognise that under the Resolution Plan, the Corporate Debtor was set to be revived and not liquidated. Thus, the minimum mandatory component in the Resolution Plan was only a reflection of the actual money, including upfront payment, which would go towards the Financial Creditors.

It is worthwhile to note that the Adjudicating Authority has jurisdiction only under Section 31(2) of the Code, which gives power not to approve only when the Resolution Plan does not meet the requirement laid down under Section 31(1) of the Code, for which a reasoned order is required to be passed. The Supreme Court held that the NCLT's jurisdiction and powers as the Adjudicating Authority under the Code, flow only from the Code and the Regulations thereunder. It has been held in *Jaypee Kensington Boulevard Apartments Welfare Association v NBCC (India) Limited, (2022) 1 SCC 401* as under:

'*The adjudicating authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the Committee of Creditors. If, within its limited jurisdiction, the adjudicating authority finds any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court".*

Supreme Court viewed that 'while certainty in law and legal principles is the obvious aim, the law

is to be applied in the context of the facts. If a matter where the facts are stark comes to light, the same would have to necessarily be dealt with by the NCLT within the four corners of the Code itself, having due regard to the extant circumstances. It is for the NCLT to exercise power strictly within the domain permitted by the Code'. The decision of both NCLT and NCLAT is set aside and appeal was allowed and hence, the Resolution Applicant will succeed in his appeal with Supreme Court.

Answer (1)(b)(i)

The term 'Hair Cut', though commonly used in insolvency matters, has not been defined under the Code or the Regulations. Hair-cut is the amount of sacrifice by the Creditors of reduction the corporate debtor gets over the amount claimed by its creditors i.e., Total amount claimed by the Creditor minus total amount settled to creditors of the Corporate Debtor under the Resolution Plan.

Answer (1)(b)(ii)

Total Claims by FCs admitted by the Resolution Professional are Rs. 1620 Crores and Total amount settled to all FCs were Rs. 81 Crores i.e., 5% of the total claim and the Total hair-cut was Rs. 1539 Crores, which is 95% of the total admitted claim amount.

Answer (1)(b)(iii)

Workmen wages claimed and admitted for a period of last 24 Months is Rs. 18 Crores, Employees claim admitted for last 12 months is Rs. 15 Crores will be paid in total as per section 53 of IBC, 2016.

Answer (1)(b)(iv)

Total Claim of Operational and Statutory Authorities was Rs. 127 Crores. The total amount settled to them was Rs. 130 Crores – (Rs. 81 Crores + Rs. 18 Crores + Rs. 15 Crores + Rs. 3.3 Crores) = Rs. 12.7 Crores.

Rs. 127 Crores = 10% is the amount settled and 90% is the amount of Hair Cut given to a class of operational creditors and statutory authority.

Answer (1)(c)(i)

"Asset Classes" means, the definition of which is as provided under the Companies (Registered Valuers and Valuation) Rules, 2017, a distinct group of assets, such as:

- Landing and Buildings,
- Plant and Machinery and
- Securities and Financial Assets.

Resolution Professional has to appoint the Valuers as per Regulation 27 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

Answer (1)(c)(ii)

As per Regulation 27 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the resolution professional shall within seven days of his appointment, but not later than forty-seventh day from the insolvency commencement date, appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor in accordance with regulation 35.

Following persons shall not be appointed as registered valuers, namely: (a) a relative of the resolution professional; (b) a related party of the corporate debtor; (c) an auditor of the corporate debtor at any time during the five years preceding the insolvency commencement date; or (d) a partner or director of the insolvency professional entity of which the resolution professional is a partner or director.

Answer (1)(c)(iii)

As per Regulation 35 of CIRP Regulations, the two registered valuers appointed under regulation 27 shall submit to the resolution professional an estimate of the fair value and of the liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor

If the two estimates of a value in an asset class are significantly different, or on receipt of a proposal to appoint a third registered valuer from the committee of creditors, the resolution professional may appoint a third registered valuer for an asset class for submitting an estimate of the value computed in the manner provided in clause (a).

It may be noted that "significantly different" means a difference of twenty-five per cent. in liquidation value under an asset class and the same shall be calculated as (L1-12)/L1, where, L1= higher valuation of liquidation value and L2=lower valuation of liquidation value.

Answer (1)(d)

The Committee of Creditors (CoC) hold a determinant position in the CIRP as itis subject to the commercial wisdom of CoC to decide whether Corporate Debtor (CD) is to be revived or liquidated. It is a heterogenous body made of financial creditors having varied interests. The CoC is solely responsible for actions and decisions accordant with Section 28 of the Insolvency and Bankruptcy Code, 2016. As abovementioned, the approval threshold by CoC under Section 30(4) of the Insolvency and Bankruptcy Code, 2016 showcases the powers of CoC in determining the fate of corporate debtor. Hence, it is undoubtedly clear that the commercial wisdom is a substantial factor which needs to serve the purpose as entailed in Preamble of the Code.

In *Ramkrishna Forgings Ltd. v. Ravindra Loonkar, RP of ACIL Ltd. and Anr. decided* on November *21, 2023* by Supreme Court of India held that in *Pratap Technocrats Private Limited (supra)*, the Court, after considering the relevant case-laws, pointed out that the Indian Legislature had departed from foreign insolvency regimes, the Apex Court viewed that the jurisdiction of the adjudicating authority and the appellate authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity-based jurisdiction in the adjudicating authority or the appellate authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of IBC and the Regulations under the enactment. Further, the Apex Court held that it also cannot be lost sight of that it is for the Financial Creditors who constitute the CoC to take a call, one way or the other. *Stricto sensu*, it is now well settled that it is well within the CoC's domain as to how to deal with the entire debt of the Corporate Debtor. In this background, if after repeated negotiations, a Resolution Plan is submitted, as was done by the Resolution Applicant, including the financial component which includes the actual and minimum upfront payments, and has been approved by the CoC with a majority vote, such commercial wisdom was not required to be called into question or casually interfered with. The obligation of exploring the panorama of possibilities, including restructuring, negotiation, resolution, etc. before triggering liquidation lies upon the Creditors' Committee and the three broad parameters of value maximization, balancing stakes and keeping of the entity as a going concern shall be kept in mind for selecting the most appropriate disposition. But in the case of *Sunil S. Kakkad v. Atrium Infocom Private Limited*.

The Hon'ble Supreme Court of India in the matter of *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & ors.,* while upholding the constitutional validity of the Code made, inter alia, important ruling with regard to the role of the Committee of Creditor in the CIR process. It had emphasized the primacy of the commercial wisdom of the CoC in the resolution process as to whether to rehabilitate the corporate debtor or not by accepting a particular resolution plan. It also states that prior to approving the resolution plan, the Committee is required to assess the "feasibility

and viability" of the resolution plan, which takes into account "all the aspects of the resolution plan, including the manner of distribution of funds among various class of creditors." In this regard, the Committee is free to negotiate with the resolution applicant by suggesting modifications in the commercial proposal on a case-to-case basis.

Answer (1)(e)

Section 30(4) of the Insolvency and Bankruptcy Code, 2016 states that 'the Committee of Creditors may approve a resolution plan by a vote of not less than sixty-six per cent of voting share of the financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor.

All financial creditors, who are the part of the Committee of creditors are eligible to vote for the approval of Resolution Plan.

Answer (1)(f)

Section 61(1) of the Insolvency and Bankruptcy Code, 2016 states that 'Notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal. Section 61 (2) provides that very appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal.

According to Section 62 of the Insolvency and Bankruptcy Code, 2016, any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

Question 2

(*a*) One of your clients approaches you as a Company Secretary in Practice seeking your advice on initiation of Corporate Insolvency Resolution Process under the provisions of Insolvency and Bankruptcy Code, 2016 ('IBC', 2016) on the following persons and to state under which provisions, the initiation can be done :

(*i*) A Foreign Company (incorporated outside India) and having a place of business in India.

(*ii*) A Partnership Firm registered under Indian Partnership Act, 1932. (*iii*) A wholly owned Foreign Subsidiary of an Indian Holding Company.

(*iv*) A Proprietorship concern which is a guarantor to a Limited Liability Partnership. (*v*) The National Highway Authority of India.

(*vi*) A Public Registered Trust which owns majority stake in an unlisted Public Company.

(*vii*) A Society Registered under the Societies Registration Act.

(*viii*) A NBFC registered with the Reserve Bank of India.

(*ix*) A Nidhi Company registered under the Companies Act, 2013.

(*1×9=9 marks*)

(*b*) Jayparan ("Jay" in short), has paid a sum of ₹ **4 crore** to **RD Developers Private Limited** (hereinafter referred as **'Corporate Debtor'**) who was engaged in real estate business. This sum of ₹ 4 crore was paid in 2010 as earnest money against advance sale consideration for booking of a flat. Since there was no progress in the said project until 2014, Jay sought refund

of the earnest money following which the Corporate Debtor assured to return the same with interest @ 12% per annum.

Since then, the sum of ₹ 4 crore was mutually treated as unsecured loan and reflected accordingly in the books of the account of the Corporate Debtor. Interest thereon was paid by the Corporate Debtor and TDS was also deducted thereon for which confirmation of books of accounts was periodically sought from Jay. Thus, it was contended that the Corporate Debtor by his own conduct changed the status of the home-buyer to a Financial Creditor.

The Corporate Debtor paid regular interest till FY 2016-17. On the grounds of liquidity and financial crunch, he sought waiver of interest from Jay which request was, however declined. It is the contention of Mr. Jay that the Corporate Debtor thereafter, defaulted in making interest payment since 1st October, 2017 and continued to default from FY 2017-18 until FY 2020-21 except for part repayment in 2018. It is further submitted that on the demise of Mr. Jay during October 2018, the loan amount was transferred to the name of his wife, **Kushma Jayparan** which stands confirmed from the confirmation of account for FY 2019-20 signed by the Directors of the Corporate Debtor.

On account of non-payment of debt, a letter dated 1st February, 2021 was sent by Kushma Jayparan to the Corporate Debtor demanding a sum of ₹ 6.20 crores which included principal amount of ₹ 4.09 crores and ₹ 2.11 crores as interest. Since the amount remained outstanding, on behalf of Jay, his wife filed an application under Section 7 of the IBC on 6th October, 2021 for initiating a Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor for the default committed.

The learned Counsel of the Corporate Debtor contended that there was no agreement between Jay and the Corporate Debtor with respect to the amount advanced by him and further, the amount paid by Jay is as an Advance amount for buying a flat under development of the Corporate Debtor. Hence, Jay is only a home buyer and not a Financial Creditor of unsecured loans. It is also the contention of the Corporate Debtor that the investment was made by the Jay to receive returns on investment from the Corporate Debtor. Hence, the sum advanced was in the nature of speculative investment and cannot be treated as a financial debt.

The Adjudicating Authority viewed that as no time period was stipulated in the demand notice, it may be held that no default had occurred and also this date fell in the prohibited period under Section 10A of the IBC, 2016. Thus, the Adjudicating Authority held that in both these circumstances, Section 7 application was non-maintainable. Aggrieved with the findings of the Adjudicating Authority, the wife of Jay preferred an appeal before the National Company Law Appellate Tribunal.

Referring to the relevant case laws and the applicable provisions of the IBC, 2016 and the Regulations made thereunder, answer the following questions :

(*i*) State with reasons whether Kushma Jayparan will succeed in her appeal ? (*5 marks*)

(*ii*) In the light of the provisions of Section 10A of the IBC, 2016, state the legal position if default is committed by the Corporate Debtor during the period between 1st February, 2020 to 1st August, 2020 ?

(*4 marks*)

(*iii*) Referring to the relevant provisions of IBC, 2016 vis-à-vis 'financial debt', analyse :

(*i*) Whether home buyers are a separate class of financial creditors unlike other unsecured financial creditors ?

(*ii*) Also examine whether any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing ?

(*iii*) What is the requisite minimum threshold of allottees eligible to initiate insolvency proceedings against defaulting builders/real estate companies ?

(*7 marks*)

Answer (2)(a)

Section 3(7) of the Insolvency and Bankruptcy Code, 2016 defines that "Corporate Person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.

Accordingly following are the answers for the each of the persons mentioned herein below:

Q. No.	Questions	Answer with reasons
(i)	A Foreign Company (incorporated outside India) and having place of business in India	Since, Company incorporated outside India is not falling under the definition of Corporate Person Application for initiation of CIRP cannot be filed in this case.
(ii)	Partnership Firm registered under Indian Partnership Act, 1932	Since, Partnership Firm is not falling under the definition of Corporate Person Application for initiation of CIRP cannot be filed in this case. However, individual insolvency can be initiated against Partnership Firm under Part III of the IBC.
(iii)	A wholly owned Foreign Subsidiary of an Indian holding Company	Since, Company incorporated outside India is not falling under the definition of Corporate Person. Application for initiation of CIRP cannot be filed in this case
(iv)	A proprietorship concern which is a guarantor to Limited Liability Partnership	Provisions of IBC are applicable to proprietorship concerns which have provided Guarantee to a Corporate person. Hence, CIRP can be initiated by filing application with NCLT.
(v)	National Highway Authority of India	'National Highway Authority of India (NHAI) is a statutory body which functions as an extended limb of the Central Government and performs Governmental functions which obviously cannot be taken over by an RP, or by any other corporate body nor can under the Code. For all these reasons, it is not possible to either read in, or read down; the definition of 'corporate person' in section 3(7) of the Code to include NHAIL (*Hindustan Construction Company Ltd. & Anr. Vs. Union of India & Ors. [WP (Civil) No. 1074 of 2019 with other Civil Appeals*] SC judgement dated 27.11.2019) — Hence, cannot be initiated against Government Authority

(vi)	A Public Registered Trust which owns majority stake in an unlisted Public Company	The Public Registered Trust is not falling under the definition of Corporate Person — Application for initiation of CIRP cannot be filed in this case
(vii)	A Society Registered under Societies Registration Act	The Society Registered under Registration Act not falling under the definition of Corporate Person Application for initiation of CIRP cannot be filed in this case
(viii)	A NBFC registered with Reserve Bank of India.	The definition corporate person specifically excludes 'Financial Service Provider', Since, NBFC which is registered with Reserve Bank of India falls under the definition of 'Financial Service Provider' Application for initiation of 'CIRP cannot be filed in this case
(ix)	A Nidhi Company registered under the Companies Act, 2013	Though Nidhi Company provides certain financial services, it does not fall under the definition of 'Financial Service Provider' as it is regulated by Ministry of Corporate Affairs and hence, falls under the definition of Corporate Person. Application for initiation of 'CIRP can be filed in this case

Answer (2)(b)(i)

The facts of the question are similar to the of *Sushma Paranjpe v. Rohan Developers Pvt.* Ltd. *decided on 06th December 2023*, wherein NCLAT observed that mere insertion of any date in Form 1 at Part IV of the Section 7 application does not make that date of default valid and binding especially when there is no agreement between the two parties as to what shall constitute an event of default. In the absence of agreement specifying the events of default, the alleged date of default cannot be whimsically decided by the creditor and the creditor needs to be put to strict proof to establish the date of default. A plain reading of Section 10A signifies that no application/proceedings under Sections 7, 9 and 10 can be initiated for any default in payment which is committed during Section 10A period. The object and purpose of Section 10A has been explained in the ordinance by which Section 10A was brought into operation. What is essentially barred is initiation of CIRP proceedings when the Corporate Debtor commits any default during the Section 10A period. However, if the default is committed prior to the Section 10A period and continues in the Section 10A period, this statutory provision does not put any bar on the initiation of CIRP proceedings. Thus, the aim and objective of Section 10A was to protect a Corporate Debtor from the filing of any insolvency application against it for any default committed during the period when Covid-19 pandemic was prevailing. It was never intended to cover any default which occurred before Section 10A period and continuing thereafter. The NCLT held that it did not find any cogent basis for the Adjudicating Authority to have dismissed the Section 7 application of the Financial Creditor on grounds of non-maintainability in the context of Section 10A of the IBC. NCLT also observed that the Adjudicating Authority has not returned any findings on the basic issue of debt and default which has been the bone of contention. The NCLT was of the considered view that, prima-facie, the corpus of facts and material on record are sufficiently adequate to consider the present Section 7 application on merits. The appeal is allowed. The impugned order is, therefore, set aside. Without expressing any opinion on the merits of the claim of the Appellant, the Section 7 application filed by the Appellant is revived and remanded back to the Adjudicating Authority to be considered again in accordance with law.

Based on the above decision of NCLAT, Kushma Jayparan will succeed in her appeal.

Answer (2)(b)(ii)

Section 10A of the Insolvency and Bankruptcy Code, 2016 which was specially inserted for the suspension of initiation of corporate insolvency resolution process during the Covid period. The Section provides that notwithstanding anything contained in sections 7, 9 and 10, no application for initiation of corporate insolvency resolution process of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified in this behalf:

Provided that no application shall ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for the said default occurring during the said period. Explanation. - For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply to any default committed under the said sections before 25th March, 2020.

The suspension shall not be applicable for default committed before the period specified period under Section 10A and hence, if the default is committed on 1st February, 2020, the suspension is not applicable and CIRP can be initiated against the corporate debtor. But, if the default committed during the period specified under Section 10A, CIRP cannot be initiated against the corporate debtor. Accordingly, 1st August, 2020 falls under the specified period and hence, CIRP cannot be initiated against the corporate debtor.

Answer (2)(b)(iii)

Section 5(8) of the Insolvency and Bankruptcy Code, 2016 which defines "Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing:

Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing: and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016

Section 5(8)(f) of the Insolvency and Bankruptcy Code explicitly recognizing homebuyers who have made payments against the allotment of a unit in a real estate project as "financial creditors".

Further as per the amendment during 2020, the Insolvency and Bankruptcy Code has undergone further amendment with the addition of a proviso in Section 7. This proviso stipulates the requisite minimum threshold of allottees eligible to initiate insolvency proceedings against defaulting builders

/ real estate corporations. Specifically, it mandates that either a minimum of one hundred allottees from the same real estate project or not less than ten percent of the total number of such allottees under the same real estate project, whichever is less, are eligible to file a petition for initiating the insolvency resolution process.

Home buyers are separate class of financial creditors unlike the other unsecured financial creditors. The position with respect to security hangs in the nature and type of agreement, based on which they may be classified as secured or unsecured creditors.

Question 3

(*a*) **QP Limited** is in textile processing business with 10 Units. It went into a Corporate Insolvency Resolution Process and the Resolution Professional, after completing all processes has made public announcement inviting "Expression of Interest" for a Resolution Plan. One of the Resolution Applicant submitted the Resolution Plan as under :

(*i*) Spin off one of the Units of QP Ltd and merging the same with AB Ltd being one of the group Company of Resolution Applicant.

(*ii*) Issue of equal value of convertible preference shares for ₹ 10 crores with secured redeemable debentures.

(*iii*) Infusion of Funds to the extent of 25% of the total liability to the Financial Creditor to release the factory premises of 2 Units of QP Limited and to sell those 2 Units to the Subsidiary of AB Ltd.

(*iv*) Redeem 5,00,000 preference shares having face value of ₹ 100/- by payment of ₹ 5 per share.

(*v*) Discontinuation of operation of loss-making Unit and increasing the production capacity of the profitable Unit.

(*vi*) Issue of Equity Shares with differential voting rights to the Operational Creditors for the 50% value of their claim.

(*vii*) Conversion of Cash Credit facilities into Term Loan repayable over a period of 3 years with 6 months repayment holiday.

(*viii*) To reduce 5 crores Equity Shares of ₹ 10 each to 5 crores Equity Shares of Re. 1 each.

In the light of the above inputs relating to the resolution plan, you are requested to categorize each of the above items **whether it falls into External Restructuring or into Internal Restructuring.** Also, **sub-classify, whether it is an Operational Restructuring or a Financial Restructuring involving either as a Debt or as an Equity restructuring.**

(*8 marks*)

(*b*) **BK Private Limited (Corporate Debtor)** went into liquidation as no Resolution Plan was received during the Corporate Insolvency Resolution Process. The Corporate Debtor was into auto component manufacturing business. Total Liabilities of BK Private Limited is ₹ 200 crores and total liquidation value of available assets of the Corporate Debtor is ₹ 140 crores. As per the Valuation Report submitted by the Valuers appointed by the Liquidator, the total assets comprised of Land–₹ 60 crores, Buildings–₹ 40 crores, Plant and Machineries–₹ 20 crores, Other Tangible Fixed Assets–₹ 5 crores, Inventories–₹ 3 crores, Receivables–₹ 9 crores and Not Readily Realisable Assets– ₹ 3 crores.

Further in their Valuation Report, the Valuers have reported that the Value of Business without Land and Buildings would be ₹ 50 crores.

The Liability of the Corporate Debtor comprises of the following :

The total secured debts are ₹ 180 crores lent by 3 Banks; Bank A has lent— ₹ 90 crores, Bank B has lent— ₹ 60 crores and Bank C has lent— ₹ 30 crores. All Banks are having equal charge/ right over the assets of the Corporate Debtor.

Apart from the above, Workmen dues for 24 months are ₹ 2 crores and Employee dues for 24 months are ₹ 4 crores. Operational debts ₹ 6 crores and Government dues ₹ 4 crores. The Insolvency process cost including Liquidator Fee is ₹ 4 crores.

The Liquidator of BK Private Limited, approached you to suggest on the various options available for sale of assets of BK Private Limited as per IBBI (Liquidation Process) Regulations, 2016.

Prepare a lot-wise list showing different sale options with values to help the Liquidator to proceed further in the Liquidation process.

(*7 marks*)

(*c*) **MN Limited** is engaged in the business of manufacturing and assembling of high end cars. MN Limited holds 51% of Equity Capital in OP Limited. OP Limited holds 26% of Equity Capital in QR Private Limited and 52% of Redeemable Preference Shares in RS Limited. RS Limited holds 18% of Equity Capital in MN Limited (apart from this RS Limited does not have any control over MN Limited) and QS Auto LLP holds 26% Equity Shares in RS Limited.

75% stake in QS Auto LLP is held by EF Mauritius Limited, a Company incorporated in Mauritius. Further, EF Mauritius Limited has invested ₹ 50 Crores in Non-Convertible Debentures of RS Limited. Apart from this, there is no direct or indirect connection between RS Limited and EF Mauritius Limited.

Considering the definition of 'Group' recommended by Cross Border Insolvency Rules/ Regulations Committee (CBIRC), answer with reasons which of the Companies/Corporate person stated in the question falls under the definition of 'Group Companies' and which of the Companies/Corporate person are not falling under the definition.

(*6 marks*)

(*d*) **Ziko Private Limited** (the Company) was carrying on the business of Readymade Garments manufacturing for selling in the domestic market and also for exports. Due to Covid restrictions during 2020-21, the Company was not able carry out the exports. In the Financial year 2021-22, due to slump in export business, the Company faced cash crunch and was unable to make payments to raw material and other suppliers. One of the suppliers of raw materials, initiated an Insolvency proceedings with the appropriate Adjudicating Authority (AA). The AA ordered for initiation of Corporate Insolvency Resolution Process (CIRP) and appointed an Interim Resolution Professional.

As there was no Resolution Plans received, the IRP moved an application for Liquidation. The AA ordered for Liquidation of the Company and appointed a Liquidator. Thereafter, the Liquidator gave public announcement and was proceeding as per the extant liquidation regulations.

In the meantime, one of the Financial Creditor, who had given working capital loan to the company has filed application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) with the Adjudicating Authority.

In the light of the above inputs, answer the following question under the provisions of the IBC, 2016 and decided case laws, if any.

Where a liquidation process has been ordered/initiated against the Corporate Debtor which eventually falls at the second stage of the CIRP, examine whether the question of initiation of CIRP which is the first stage of resolution process against the same Corporate Debtor arises and stands valid ? Discuss in the light of decided case law.

(*4 marks*)

Answer 3(a)(i)

Spin off one of the Units of QP Ltd and merging the same with AB Ltd. One of the group Company of Resolution Applicant	• External Restructuring • Restructuring through Merger, Demergers

Answer 3(a)(ii)

Issue of equal value of convertible preference shares for Rs. 10 Crore secured redeemable debentures	• External Restructuring • Conversion of debt for issuance of Securities

Answer 3(a) (iii)

Infusion of Funds to the extent of 25% of the Total liability to the Financial Creditors to release the factory premises of 2 Units of QP Limited and to sell those 2 Units to subsidiary of AB Ltd.	• External Restructuring • Restructuring through controlling of stake

Answer 3(a)(iv)

'Redeem 5,00,000 preference shares having face value Rs.100 by payment of Rs. 5 per share.	• Internal Restructuring • Financial Restructuring

Answer 3(a)(v)

Discontinuation of operation of loss-making Unit and increasing the production capacity of profitable Unit.	• Internal Restructuring • Operational Restructuring

Answer 3(a)(vi)

Issue of Equity Shares with differential voting rights to the operational Creditors for the 50% value of their claim	• Internal Restructuring • Financial Restructuring

Answer 3(a)(vii)

Conversion of Cash Credit facilities into term Loan repayable over a period of 3 Years with 6 months repayment holiday.	• Internal Restructuring • Financial Restructuring (Debt)

Answer 3(a)(viii)

To reduce 5 Crores Equity Shares of Rs. 10 each to 5 Crores Equity Shares of Re. 1 each.	• Internal Restructuring • Financial Restructuring (Equity)

Answer 3(b)

Regulation 32 of IBBI (Liquidation Process) Regulations provides that the liquidator may sell:

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively; d) the assets in parcels;

(e) the corporate debtor as a going concern; or

(f) the business(s) of the corporate debtor as a going concern

The assets of the corporate debtor can be sold in auction on the following basis:

Lot 1 The Corporate debtor as a going Concern	Value of all assets of the Corporation Debtor as a going concern - Rs. 140Crores
Lot 2 The business of the corporate debtor as a going concern	Value of Business of the Corporate Debtor as a going concern - Rs. 50 Crores (Other than Land and Building)
Lot 3 Land and Building and Plant Machinery on collective basis	Value of Land and Building and Plant and Machinery of the Corporate Debtor on collective basis –Rs. 120 Crores
Lot 4 Land and building alone excluding all other assets	Value of Land and Building alone of the Corporate Debtor on standalone basis – Rs. 100 Crores
Lot5 Plant Machinery alone excluding all other assets	Plant and Machinery alone of the Corporate Debtor on standalone basis– Rs. 20 Crores
Lot 6 Parcel of Current Assets of the Corporate Debtor	Other tangible assets, Stocks of the Corporate Debtor – Rs. 8 Crores
Lot7 Stocks of the Corporate Debtor	Stocks of the Corporate Debtor – Rs. 3 Crores

Answer 3(c)

As per the recommendation of Cross Border Insolvency Rules/Regulations Committee (CBIRC) "Group" means two or more corporate debtors that are interconnected by control or significant ownership.

"Control" includes the right to appoint majority of the directors or other key managerial personnel entitled to manage the affairs of the body corporate or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly,

including by virtue of their shareholding, management rights, ownership interest, shareholders agreements, voting agreements, articles of association, limited liability partnership agreements or in any other manner.

"Significant Ownership" includes the right to exercise twenty-six per cent or more voting rights; In the given case, there are 2 groups.

Group – 1 consists of:

MN Limited, OP Limited and QR Limited all are directly connected through significant ownership

Group – 2 consists of:

EF Mauritius Ltd., QS Auto LLP and RS Limited all are directly connected through significant ownership, but there is no connection between both the groups through significant ownership or control to the extent on available information.

Answer 3(d)

The facts of the question are similar to the case of *Indiabulls Housing Finance Ltd. v. Shree Ram Urban Infrastructure Ltd*. Indiabulls Housing Finance Ltd. (Appellant) had initiated corporate insolvency resolution Process against Shree Ram Urban Infrastructure Ltd. (Corporate Debtor) under Section 7 of the Insolvency and Bankruptcy Code, 2016.

In the said appeal the NCLAT examined judgments governing the issue to hold that the High Court of Bombay has already ordered for winding-up of corporate debtor, which is the second stage of the proceeding, thus question of initiation of 'Corporate Insolvency Resolution Process' which is the first stage of resolution process against the same Corporate debtor does not arise.

While arriving at its judgment, the NCLAT relied on the case of *Forech India Pvt. ltd. Vs. Edelweiss Assets Reconstruction Company Ltd. & Anr.,* wherein the NCLAT observed that if a Corporate insolvency resolution has started or on failure, if liquidation proceeding has been initiated against the Corporate debtor, the question of entertaining another application under Section 7 or Section 9 against the same very Corporate debtor does not arise, as it is open to the 'Financial Creditor' and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/ Official Liquidator. The NCLAT further opined that once second stage i.e., liquidation (winding-up) proceedings has already been initiated, the question of reverting back to the first stage of Corporate Insolvency Resolution Process or preparation of Resolution Plan does not arise.

Question 4

(a) An agreement was entered into during August, 2006 between the **ZY Infrastructures Private Limited** (hereinafter referred to as 'ZY Infra') and **WV Infrastructure Private Limited** (hereinafter referred to as 'the Corporate Debtor'), for development of land licensed with the ZY Infra admeasuring 8 acres into a residential group housing complex at Bengaluru. However, the ZY infra, being aggrieved by the Corporate Debtor's alleged misconduct in advertising the project under its own name and without mentioning the name of the ZY Infra, sought reference to arbitration during May, 2011.

The arbitral proceedings culminated in an award dated 1st August, 2016 in favour of the ZY Infra. In addition to awarding a monetary claim, the award *inter alia* directed the Corporate Debtor to apply to the authorities for transfer of the requisite licenses to the ZY Infra.

Aggrieved by the award, the Corporate Debtor filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') during September, 2016.

On the same date, the ZY Infra filed execution proceedings in respect of the said award. These execution proceedings were ultimately adjourned *sine die* on 22nd December, 2017 on account of the pendency of the proceedings under Section 34 of the Arbitration Act. These proceedings under Section 34 of the Arbitration Act culminated in the award being upheld by Special Commercial Court with some modifications.

Corporate Debtor who has filed an appeal against the same under Section 37 of the Arbitration Act is stated to be pending.

Meanwhile, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the Corporate Debtor in respect of three real estate projects by certain homebuyers who had invested in these projects. This application under Section 7 of the Insolvency and Bankruptcy Code (hereinafter referred to as 'the IBC') was admitted on 27th March, 2019 by the Adjudicating Authority. On the same date, an Interim Resolution Professional ('IRP') was appointed. The IRP issued a public announcement inviting claims from creditors, in accordance with Section 15 of the IBC read with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the 'IBBI Regulations') on 30th March, 2019.

After receipt of the claims, the IRP constituted the Committee of Creditors ('COC') on 6th November, 2019 and circulated the draft information memorandum and invited expressions of interest from prospective resolution applicants. Five such applications were received.

Thereafter, the IRP was replaced by Resolution Professional (RP) by the COC on 18th June, 2020. The resolution plan as submitted by TSK Residential Welfare Association was approved by the COC by a majority vote of 80.74% on 11th July, 2020. This plan was then submitted by RP to the Adjudicating Authority for approval under Section 31 of the IBC on 8th September, 2020.

ZY Infra sent an email on 19th August, 2020 to RP highlighting their pending claim of ₹ 35 Crores and odd against the Corporate Debtor arising from the arbitral award dated 1st August, 2016, confirmed with certain modifications in the proceedings under Section 34 of the said Act.

However, RP rejected this claim on 25th August, 2020 on the ground that the time period for submitting the claim was within 90 days of initiation of CIRP and the applicant was 287 days late. A Resolution plan had already been passed by the COC.

ZY Infra filed an application under Section 60(5) of the IBC. During the pendency of RP's application for approval of the plan before the Adjudicating Authority, seeking directions to RP that the ZY Infra's claim may be considered on merits.

This relief was granted to the ZY Infra by the Adjudicating Authority vide an order dated 3rd November, 2020 predicated on the following grounds :

(*a*) RP could not have summarily rejected ZY Infra's claim, as this claim would have appeared in the Corporate Debtor's books of accounts;

(*b*) In case such books of accounts were not available, RP had a duty to obtain them and verify the financial position; and

(*c*) as such announcement was made through public newspapers, it was likely that the appellant missed out on the same.

RP thereafter preferred an appeal under Section 61 of the IBC before the National Company Law Appellate Tribunal, New Delhi ('NCLAT') against the Adjudicating Authority's order.

The NCLAT, *vide* the impugned order dated 30th July, 2021, did not favour the view adopted by the Adjudicating Authority. Their reasoning was as follows :

(*i*) RP had effectuated proper service for inviting claims in accordance with Regulation 6 of the IBBI Regulations which only mandates a pronouncement through newspapers and not through personal service—an aspect that was not disputed by the appellant;

(*ii*) The appellant failed to show that it filed its claim as soon as it came to know of the initiation of the CIRP.

(*iii*) RP even filed an application under Section 19 of the IBC before the Adjudicating Authority seeking that a direction be issued to the ex-management to provide all records. Although nothing came of this attempt, it reflected his sincere efforts;

(*iv*) Regulations 12 and 13 of the IBBI Regulations obliged the RP to accept claims filed within the extended period of 90 days of the commencement of CIRP.

(*v*) The resolution plan, as approved by the COC, would be jeopardised if new claims were entertained.

Consequent to the decision of the NCLAT, ZY Infra approached Supreme Court of India for the final resolution.

In the above background mentioning relevant case laws and applicable provisions of IBC and IBBI Regulations answer the following questions :

(*i*) State with reasons and applicable case law, whether the ZY Infra will succeed in its appeal ?

(*5 marks*)

(*ii*) Considering the points raised by National Company Law Tribunal in this case, answer the following questions mentioning the relevant Sections of IBC/IBBI (CIRP) Regulations :

(*a*) In the event of claim received after the specified period, whether the same can be accepted, if yes, state the process for accepting claim after specified period.

(*b*) In case the Books are not provided by the Corporate Debtors, list out the persons/authorities with whom the IRP/RP may access the books or records as per the Regulations.

(*c*) State the modes or medium through which Public announcements have to be published by IRP/RP as per the Regulations.

(*d*) As per the duties specified under the IBC, what type of details/information can be collected by the IRP ?

(*2×4=8 marks*)

(*iii*) Whether the Adjudicating Authority can entertain or dispose of any application on claims by or against the Subsidiary of the Corporate Debtor ? Will your answer differ, if the Subsidiary is the Foreign Subsidiary?

(*4 marks*)

(*b*) **MPCL** (hereinafter referred as **'MPCL/Corporate Debtor'**) imported goods from China for utilising in the construction of MPCL's Power Plant. Unfortunately, CIRP was initiated on MPCL by the Adjudicating Authority and Resolution Professional (RP) was appointed. The Customs

Bank Guarantees were issued by 5 Banks prior to the CIRP initiation of MPCL, with a condition that the said Bank Guarantee shall be kept alive until Unit Nos. 2 & 5 achieves confirmed Mega Power Plant (MPP) status.

Upon expiry of the Customs Bank Guarantees, the Banks requested for renewal of the same pending the grant of MPP status of Unit Nos. 2 & 5. However, the Resolution Professional is of the view that since there are no goods being imported by MPCL or its contractor for the operationalisation of the units of MPCL, there is no exemption which MPCL can claim for customs duty liability.

He further intimated the CoC that these renewals are not necessary for the 'Going Concern' nature of MPCL and the RP was not in favour renewal the Bank Guarantees.

The Banks filed an application before the Adjudicating Authority (AA) against the action of Resolution Professional. However, AA ruled in favour of the RP. Hence, the Banks preferred an appeal against the order of the Adjudicating Authority.

(*i*) In the light of the inputs stated above, examine, stating the relevant case law and the provisions of the IBC, 2016 whether the appeal preferred by the Banks against the order of the Adjudicating Authority is tenable ?

(*4 marks*)

(*ii*) What are the endeavours and authorities of the Interim Resolution Professional to protect and preserve the value of the property of the Corporate Debtor and to manage the operations of Corporate Debtor as a going concern ?

(*4 marks*)

Answer (4)(a)(i)

The facts of the question are similar to the case of *RPS Infrastructure Ltd. v. Mukul Kumar and Anr* , judgement dated September 11, 2023 by Supreme Court of India. The main issue before the Supreme Court is whether the appellant's claim pertaining to an arbitral award, which is in appeal under Section 37 of the Arbitration and Conciliation Act, is liable to be included at a belated stage i.e., after the resolution plan has been approved by the COC. It is undisputed that the process followed by Resolution Professional was not flawed in any manner, except to the extent of whether an endeavour should have been made by Resolution Professional to locate the liabilities pertaining to the said award from the records of the Corporate Debtor.

As per the analysis of the aforesaid plea, it is quite obvious that Resolution Professional did what could be done to procure the Corporate Debtor's records by even moving an application under Section 19 of the IBC. That it was not fruitful is a consequence of the Corporate Debtor not making available the material. It is thus not even known whether there was a reflection in the records on this aspect or not. The IBC is a time bound process. There are, of course, certain circumstances in which the time can be increased. Section 15 of the Insolvency and Bankruptcy Code and CIRP Regulation 6 of the IBBI CIRP Regulations mandate a public announcement of the CIRP through newspapers. This would constitute deemed knowledge on the appellant. In any case, their plea of not being aware of newspaper pronouncements is not one which should be available to a commercial party.

The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. This would result in the reopening of the whole issue, particularly as there may be other similar persons who may jump onto the bandwagon. As described above, in the case of *Committee of Creditors of Essar Steel India Ltd. Vs. Satish Kumar Gupta & Ors. [2019]* Supreme Court cautioned against allowing claims

after the resolution plan has been accepted by the CoC. In view of the above settled position, ZY Infra is not likely to succeed in its appeal.

Answer (4)(a)(ii)(a)

Regulation 13(1) of the IBBI CIRP Regulation provides that the interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.

Regulation 13 (1B) states that in the event that claims are received after the period specified under sub-regulation (1) of regulation 12 and up to seven days before the date of meeting of creditors for voting on the resolution plan or the initiation of liquidation, as the case may be, the interim resolution professional or resolution professional, as the case may be, shall verify all such claims and categorise them as acceptable or non-acceptable for collation.

Yes, the IRP/RP can accept the claim after specified period but within the period mentioned in Regulation 13(1B) i.e., not after 7 days before the CoC meeting in which voting for resolution plan or initiation of liquidation is considered.

Answer (4)(a)(ii)(b)

Regulation 4 of the IBBI CIRP Regulations authorises the resolution professional to access the books maintained with parties. It states that without prejudice to section 17(2)(d), the interim resolution professional or the resolution professional, as the case may be, may access the books of account, records and other relevant documents and information, to the extent relevant for discharging his duties under the Code, of the corporate debtor held with-

(a) depositories of securities;

(b) professional advisors of the corporate debtor;

(c) information utilities;

(d) other registries that records the ownership of assets;

(e) members, promoters, partners, board of directors and joint venture partners of the corporate debtor; and

(f) contractual counterparties of the corporate debtor

Answer {4)(a)(ii)(c)

Regulation 6(2) of IBBI CIRP Regulations states that the public announcement referred to in sub-regulation (1) shall:

(a) be in Form A of the Schedule-I;

(b) be published

(i) in one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the interim resolution professional, the corporate debtor conducts material business operations;

(ii) on the website, if any, of the corporate debtor; and

(iii) on the website, if any, designated by the Board for the purpose.

Answer (4)(a)(ii)(d)

As per Section 18 of the Insolvency and Bankruptcy Code, the interim resolution professional shall perform the following duties:

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to –

(i) business operation for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

Answer (4)(a)(iii)

Section 60(5) of the Insolvency and Bankruptcy Code states that notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its ***subsidiaries situated in India***; and

(c) any question of priorities or any question of law or facts, arising out of orin relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

As per the provisions mentioned herein above, the National Company Law Tribunal can decide on any claim by or against any subsidiaries of the Corporate Debtor which are located in India.

Hence, the NCLT has no jurisdiction to decide on the claim by or against foreign subsidiary of the corporate debtor.

Answer (4)(b)(i)

The facts of the question are similar to the case of *IDBI Bank Ltd. and Ors. v. Mr. Sumit Binani,* RP Decided on 21st December 2023 by NCLAT, Chennai Bench, wherein NCLAT held that as per Sections 25(1), 20(1) read with Section 23(2) of the IBC Code, the RP is duty bound to make every effort to preserve the assets and value of the property of the Corporate Debtor Company and manage it effectively as a 'Going Concern'. Section 15(3) of the IBC Code provides that any costs incurred by the RP in running the business of the Corporate Debtor as a 'Going Concern' forms part of the CIRP costs. When there is no guarantee with respect to the Mega Power Plant (MPP) status of the Non-Operational Units and since there are no goods being imported by the Corporate Debtor Company as it is undergoing CIRP, there is no exemption which the Company can claim for Customs Duty liability and the Corporate Debtor Company need not be burdened with the Commission and renewal charges approximately amounting to Rs. 70 Crores which would only increase the financial burden of the Corporate Debtor Company with no positive benefits accruing.

Under Section 25(1) of the Insolvency and Bankruptcy Code the RP is empowered to reject the CoC proposal for renewal of the Bank Guarantees provided by the Corporate Debtor Company, prior to the initiation of the CIRP as renewing those would not consequently lead to any advantage or any valuable gains. NCLAT concludes that it does not see any substantial grounds to interfere

with the well-considered order of the Adjudicating Authority. Hence, the Appeal was dismissed accordingly at the threshold.

Answer (4)(b)(ii)

As per Sections 20(1) of the Insolvency and Bankruptcy Code, the interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

(2) For the purposes of sub-section (1), the interim resolution professional shall have the authority-

(a) to appoint accountants, legal or other professionals as may be necessary;

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process;

(c) to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property: Provided that no prior consent of the creditor shall be required where the value of such property is not less than the amount equivalent to twice the amount of the debt.

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern; and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern.

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NOTES

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