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GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

Syllabus 2017

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MODULE 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

These answers have been written by competent persons and the Institute hope that the GUIDELINE ANSWERS will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

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

CONTENTS

MODULE 2

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

MODULE II PAPER 4

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

NOTE : *Answer All Questions.*

PART-I

Question 1

(a) In a review meeting of XYZ Ltd, a company incorporated under the Companies Act, 2013, the Company Secretary was asked by the Managing Director to brief about the Disclosures to be made by a listed entity at website of the company irrespective of its type. Give details of any such eight disclosures as a Company Secretary of the company indicating the section/rule, purpose and mode. Explain the requirements as per Regulation 46 of SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 in this regard.

(4+1=5 marks)

(b) RV group of companies are Healthcare Providers. They comprise of healthcare companies, including hospitals, clinics, and pharmaceutical companies. They are subject to stringent regulations like the Health Insurance Portability and Accountability Act (HIPAA) and the Food and Drug Administration (FDA) regulations.

The applicable audit in healthcare typically focuses on patient privacy, data protection, billing practices, and regulatory compliance related to pharmaceuticals and medical devices. They are in a dilemma whether compliance audit will be applicable to the company as they were of the view that Compliance audits are applicable to a wide range of companies, depending on the industry, regulatory environment, and specific legal requirements. The applicability of a compliance audit typically depends on several factors, including the size of the company, the industry it operates in, the jurisdictions in which it conducts business, and the specific laws and regulations that govern its operations.

Along with the definition of Compliance audit, state :

(i) Whether it is applicable to the above company.

(ii) Is Compliance audit same as audit of financial statements & performance audit ? To whom should Compliance Audit be reported.

(iii) State the concerns of the Compliance audit.

(*1+2+2=5 marks*)

(c) Explain the consequences of non-maintenance of record citing a leading case.

(*5 marks*)

(d) Two Boeing 549 FLY airplanes crashed due to flaws in the aircraft's design and software. Investigations revealed that Boeing had failed to comply with regulatory requirements and that its compliance management systems were inadequate in identifying and addressing safety concerns. Along with the explanation of compliance management and its needs for a

company, specify what should be ensured by a company secretary for effective compliance management system. Also state four benefits of Corporate Compliance Management.

(*5 marks*)

Answer 1(a)

Disclosures to be made at website of the Company

Under the Companies Act, 2013, the following disclosures are required to be made at the website, if any, of the company:

S. No.	Section/Rule	Purpose	Mode
1	Section 12 and Rule 26 of the Companies (Incorporation) Rules, 2014	Publication of name by company	Every company which has a website for conducting online business or otherwise, shall disclose/publish its name, address of its registered office, the Corporate Identity Number, Telephone number, fax number if any, email and the name of the person who may be contacted in case of any queries or grievances on the landing/ home page of the said website.
2	Rule 4(3) of the Companies (Acceptance of Deposits) Rules, 2014	Circular for Inviting Deposits from the public	Every Company inviting deposits from the public shall upload a copy of the circular on its website, if any.
3	Rule 10 of the Companies (Management and Administration) Rules, 2014	Closure of Register of Members or Debenture Holders or other Security Holders	Closure of Register of Members or Debenture Holders or other Security Holders. The company shall publish notice at least seven days prior to such closure as may be specified by SEBI in case of a listed company or intends to get its securities listed on the website as may be notified by the Central Government and on the website, if any, of the Company.
4	Section 101 & Rule 18(3) (ix) of the Companies (Management and Administration) Rules, 2014	Notice of the General Meeting	The notice of the general meeting of the Company shall be simultaneously placed on the website of the Company and on the website as may be notified by the Central Government.
5	Section 110 & Rule 22 (4) & 22 (13) & 22 (16) of the Companies (Management and Administration) Rules, 2014	Postal Ballot	The notice of the postal ballot shall be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members. The results of the postal ballot shall be declared by placing it, along with the scrutinized report, on the website of the company.

S. No.	Section/Rule	Purpose	Mode
6	Section 115 & Rule 23(4) of the Companies (Management and Administration) Rules, 2014	Resolutions Requiring Special Notice	Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, such notice shall be posted on the website, if any, of the company.
7	Section 124(2) Unpaid Dividend Account		The Company shall, within a period of 90 days of making any transfer of an amount under section 124(1) to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the website of the Company, if any, and also on any other website approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.
8	Section 135(4) and Rule 9 of the Companies (Corporate Social Responsibility Policy) Rules,2014	Disclosures about Corporate Social Responsibility Policy (by a company to whom CSR is applicable)	The Board of every Company shall disclose contents of Corporate Social Responsibility Policy in its report and also place it on the Company's website, if any.
9	Section 136(1) Right of Member to Copies of Audited Financial Statement	Placing of audited accounts of companies.	A listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website. Every listed company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of subsidiary on its website subject to the proviso related to foreign subsidiary.
10	Section 168 & Rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014	Notice of Resignation of director	The Company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12 and post the information on its website, if any.

S. No.	Section/Rule	Purpose	Mode
11	Section 230(3) & Rule 7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016	Advertisement of the notice of the meeting pursuant to exercise of power to Compromise or make arrangements with creditors and members.	The notice of the meeting under section 230(3) of the Act, shall be placed on the website of the company, if any in Form No. CAA.2 at least 30 days before the date fixed for the meeting and in case of listed companies, also on the website of SEBI and recognized stock exchanges where the securities of the company are listed

As per regulation 46(2) of Securities and Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015, the listed entity shall disseminate the following information under a separate section on its website:

(a) details of its business;

(b) terms and conditions of appointment of independent directors;

(c) composition of various committees of board of directors;

(d) code of conduct of board of directors and senior management personnel;

(e) details of establishment of vigil mechanism/ Whistle Blower policy;

(f) criteria of making payments to non-executive directors , if the same has not been disclosed in annual report;

(g) policy on dealing with related party transactions;

(h) policy for determining 'material' subsidiaries;

(i) details of familiarization programmes imparted to independent directors including the following details:-

(i) number of programmes attended by independent directors (during the year and on a cumulative basis till date),

(ii) number of hours spent by independent directors in such programmes (during the year and on cumulative basis till date), and

(iii) other relevant details

(j) the email address for grievance redressal and other relevant details;

(k) contact information of the designated officials of the listed entity who are responsible for assisting and handling investor grievances.

As per Regulation 46 of Securities and Exchange Board of India (Listing Obligation and Disclosure Requirements) Regulations, 2015, it is mandatory for a listed entity to maintain a functional website containing the basic information about the listed entity.

Answer 1(b)

As per Compliance Auditing Guidelines issued by the Comptroller and Auditor General of India (C & AG), the Compliance audit is the independent assessment of whether a given subject matter is in

compliance with applicable authorities identified as criteria. Compliance audits are carried out by assessing whether activities, financial transactions and information comply in all material respects, with the authorities who govern the audited entity.

(i) Yes, it is applicable to RV group of companies.

(ii) The compliance audit is completely different from the audit of financial statements and from performance audits. The compliance audits may be conducted separately on a regular basis, as distinct and clearly-defined audits each related to a specific subject matter.

Compliance audits may be planned, performed and reported separately to the Board, Senior Management or Regulators.

(iii) Compliance auditing may be concerned with:

- Regulatory - adherence of the subject matter to the formal criteria emanating from relevant laws, regulations and agreements applicable to the entity.
- Propriety - observance of the general principles governing sound financial management and the ethical conduct of public officials.

Answer 1(c)

In the matter of M/*s SDU Holdings Private Limited, the Registrar of Companies, Bangalore*, has passed an adjudication order by imposing of penalty, for violation of provisions of section 88 of the Companies act, 2013. As per the provisions of the Companies Act, 2013, every company limited by shares shall from the date of its registration, maintain a register of its members in form no. MGT-1.

During the course of enquiry pursuant to section 206 of the Companies Act 2013, the inspection officer persuaded the statutory registers maintained by the company and noticed that the register Form No. MGT-1 maintained by the company is incomplete. Taking on account of defaults, the adjudication officer gave reasonable opportunity of being heard to the company and every officer in default by way of giving personal hearing notice.

Consequently, the Adjudicating Officer, after having considered the facts and circumstances of the case and also the submissions made by the company and its director during the personal hearing decided to impose the penalty on the company and its directors for non-compliance of section 88 of the Companies Act, 2013.

Answer 1(d)

Explanation and its needs:

Compliance Management is the method by which corporate manage the entire compliance process. It includes the compliance program, compliance audit, compliance reporting etc. and in other words it is called compliance solution. Compliance management is the routine tools for effective governance. Corporate compliance management involves a full process of research and analysis as well as investigation and evaluation. Corporate compliance is an ongoing process, and businesses especially ones that have incorporated under any statue need to make sure that they are following the rules set in place.

Company Secretary to ensure:

The company secretary have to advise company in totality to provide full, timely and intelligible information. To enable company to put in place an effective Compliance Management System, company secretaries should ensure that the company:

- Adheres to necessary industry and Government regulations.
- Changes business processes according to legislative change.

- Realigns resources to meet compliance deadlines.
- Reacts quickly and cost-effectively if regulations change.

Benefits of Corporate Compliance Management:

- Better compliance of the law.
- Real time status of legal/statutory compliances.
- Safety valve against unintended non-compliances/prosecutions etc.
- Real time status on the progress of pending litigation before the judicial/1quasi judicial authority.
- Detection of non-compliances at early stage and thus saving cost by avoiding penalties/ fines which may arise and minimizing litigation.
- Improved operations and higher productivity.
- Better brand image and positioning of the company in the market.
- Goodwill among the customers, shareholders, investors, stakeholders and regulators.
- Better employee engagement and retained talent.
- Enhanced credibility/creditworthiness that only a law-abiding company can command.
- Recognition as good corporate citizen.

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

Question 2

(a) (i) Apart from the master data, available at the MCA portal that can be resorted to mere reproduction of the particulars of charges in form of Search and Status Report is not sufficient. State what else it requires.

(ii) A Search and Status Report should always be supported by expert observations on the charges created by the borrower in respect of the subject lender. It is necessary to peruse the observations/comments offered and the same should be read in conjunction with the Report. The observations/comments of the experts/professional (company secretary in practice) will certainly help to throw additional light on certain points which would have missed the attention of the "lenders" when the Form CHG-1 was presented before them for signature. In other words, it does not necessarily mean verbatim reporting of the information as made available but also supplemented by observations/comments by the person who furnishes the report. Elucidate the factors that should be taken care by the professional while providing search report.

(*1+4=5 marks*)

(b) Explain the Know Your Member (KYM) Proforma for ICSI Members indicating its purpose and procedure relating to its submission.

(*5 marks*)

(c) Explain the role of a Company Secretary as a Secretarial Auditor in a company incorporated under the Companies Act, 2013 as well as in Certification Services except in representation services.

(5 marks)

(d) As MCA-21 offers the facility to view documents and also search and other facilities of public documents. Some information are available free, some on payment of fees and certain documents are not allowed for inspection. List all such documents. Rajesh, a user paid the requisite fees and have once gone through the documents he wished. User Rajesh facing some issues wanted to access the documents again. It was refused to him. Rajesh was in a dilemma, even after paying fees, why he was refused. Guide Rajesh the period and time up to which he can inspect the documents and what he will have to do if he wanted to inspect the documents again.

(5 marks)

Answer 2(a)(i)

The master data, available at the Ministry of Corporate Affairs portal that can be resorted to mere reproduction of the particulars of charges in form of Search and Status Report, is not sufficient.

It also requires:

- A thorough study of the particulars relating to the amount secured by the charge and the terms and conditions governing the charge.
- An analysis of the security available to a particular lender for its advances.
- A comparison of charges created in favour of a particular lender vis-a-vis other lenders.

Answer 2(a)(ii)

(ii) While providing search report the following factors should be taken care by the professional:

- The Search and Status Report should give exact details of particulars of charges/ modifications/ satisfactions as effected, filed and registered from time to time.
- Identify those charges and modification of charges, which have been created in favour of a particular lender.
- Take the particulars of the documents creating the charge as specified in Form CHG- 1 and Form CHG-9 under the Companies Act, 2013 or Form 8 under the Companies Act, 1956.
- Ascertain as to whether the amount secured by the charge as per the documents executed has been duly mentioned.
- Ascertain as to whether 'properties' offered as security are mentioned as per the documents creating the charge and attached with the Forms and verify whether they are as per the terms of Sanction.
- Check whether the terms and conditions governing the charge have been mentioned.
- Ascertain whether the name of the lender is properly mentioned.
- In case of modification of charge ascertain whether the names of documents effecting the modification are mentioned and whether the particulars of modification are clearly mentioned.
- In case of charge, the particulars of documents attached with forms, amount secured by the charge as per the documents and/or sanction ticket, the properties/assets secured by the charge, the terms and conditions governing the charge and the name of the lender is properly mentioned in the relevant columns of Form CHG-1.

Answer 2(b)

Introduction of Know Your Member (KYM) proforma for ICSI members:

The "Know Your Member" (KYM) proforma submitted by the members of the Institute, is required to verify their identity/details on similar lines with that of KYC used by banks. This KYM facility is expected to prevent identity theft of members by fraudulent elements and help the Institute to maintain updated information about the members.

The members should submit two documents along with the KYM proforma duly filled and signed - one document which serves as Proof of Identity (PoI)) and another document which serves as Proof of Address (PoA). A member should submit any one of the following five documents notified as 'Officially Valid Documents' (OVDs) by the Government of India as proof of identity:

- Passport;
- Driving Licence;
- Voters Identity Card;
- PAN Card; or
- Aadhaar Card issued by UIDAI

If any of these documents also contain the address details, then same is accepted as a 'proof of address'. If the document(s) submitted by the member for proof of identity does not contain address details, then the member should submit another document which contains address details such as Water bill, Telephone (landline or post- paid mobile bill), Electricity bill, Income Tax Assessment Order, Proof of Gas Connection, Certificate from Employer of reputed companies on letter head, Applicant's current and valid ration card, Photo Passbook of running Bank Account (Scheduled Public Sector Banks, Scheduled Private Sector Indian Banks and Regional Rural Banks only).

Answer 2(c)

Role of Company Secretary as Secretarial Auditor:

Section 204 of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, requires that the following classes of companies are required to obtain Secretarial Audit Report from Company Secretary in practice and shall annex the same with its Board's report made in terms of sub-section (3) of Section 134 of Companies Act, 2013:

(a) Every listed company;

(b) Every public company having a paid-up share capital of 50 crore rupees or more; or;

(c) Every public company having a turnover of 250 crore rupees or more.

(d) Every company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.

Explanation: - The paid-up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account.

Further, pursuant to Regulation 24A of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, every listed entity and its material unlisted subsidiaries incorporated in India shall undertake Secretarial Audit and shall annex with its Annual Report, a Secretarial Audit Report, given by a Company Secretary in Practice, in such form as may be specified.

The Board of the company is required to explain in full any qualification or observation or other remarks made by the Company Secretary in Practice in his report.

Role of Company Secretary in Certification Services

Rule 8 (12) of the Companies (Registration office and fees) Rules, 2014 provides that the following e-forms filed by companies, other than one person companies and small companies, under sub rule (1) of rule 9, shall be pre certified by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice, namely:- INC-21, INC-22, INC-28, PAS-3, SH-7, CHG-1, CHG-4, CHG-9, MGT- 14, DIR-6, DIR-12, MR-1, MR-2, MSC-1, MSC-3, MSC-4, GNL-3, ADT-1, NDH-1, NDH-2, NDH-3;

The following e-forms filed by companies, other than one person companies and small companies, under sub- rule (1) of rule 9, shall be pre-certified in the following manner, namely: -

- GNL-1 - optional pre-certification by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice;
- DPT-3 - certification by Auditors of the company;
- MGT-10-certification by a Company Secretary in whole-time practice;
- AOC-4 certification by the Chartered Accountant or the Company Secretary or as the case may be by the Cost Accountant, in whole-time practice.
- MGT-7 CS in practice or in whole time management.

E-form DIR-3 shall be filed along with attestation of photograph, identity proof and proof of residence of the applicant by the Chartered Accountant or the Company Secretary or as the case may be the Cost Accountant, in whole-time practice.

E from DIR-3 KYC: Every Director who has been allotted DIN on or before the end of the financial year, and whose DIN status is 'Approved', would be mandatorily required to file form DIR-3 KYC before 30th September of the immediately next financial year which also require certification.

Further, the company secretaries also provide the following certification services under various other regulations:

- Certification to the effect that all transfers have been completed within the stipulated time.
- Half-yearly certificate regarding maintenance of 100% security cover in respect of listed non-convertible debt securities.
- Certificate regarding compliance of conditions of corporate governance.
- Certification in case of offer/allotment of securities to more than 49 and up to 200 investors.
- Certificate that none of the directors on the board of the company have been debarred or disqualified from being appointed or continuing as directors of companies by the Securities Exchange Board of India/ Ministry of Corporate Affairs or any such statutory authority under Regulation 34(3) read with Schedule V Para-C Sub clause 10 (i) of the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015.

Answer 2(d)

The Ministry of Corporate Affairs website provides many information relating to the Company. Some information are available without payment of fees like Name of the Company, CIN, Authorized and paid up capital, Name and address of the Directors etc. The website also provides for the viewing of document by public on payment of requisite fee.

Public documents include the following:

a) Incorporation documents

b) Certificates, including Incorporation certificate and Charge creation, modification and satisfaction certificates

c) Charge documents

d) annual returns and balance sheet

e) change in directors and other e-forms

However, there are certain documents which are not allowed for public inspection. For example, no person shall be entitled to inspect or obtain copies of the resolutions filed under section 179(3) of Companies Act, 2013 and rules made thereunder.

MCA-21 offers the facility to view documents and also search and other facilities of public documents. This facility is handy for users and banks and financial institutions while sanctioning loans. This facility enables viewing of public documents of companies for which payment has been made by user. The document can be viewed only within 7 days after the payment has been confirmed. Also, the documents are available for only 3 hours after the user has started viewing the first document of the company-

After payment of the prescribed fee on the MCA21 portal, the documents are typically available for immediate viewing and download.

When accessing documents physically at the ROC office, the fee typically covers a single-use inspection or obtaining a certified copy of the documents. The document or certified copy provided to the applicant does not usually come with a time-limited viewing period since the applicant is provided with a physical copy.

If the applicant needs additional copies or wish to inspect the documents again, the applicant would need to pay the fee again for another inspection.

Once the applicant has paid the fees and accessed the documents online, they are usually available for viewing and downloading for a limited period. As per the MCA21 portal's usual practice, the documents can be accessed for 7 days from the date of payment.

Conclusion: After this period, if Rajesh need to access the documents again, he needs to make a fresh payment.

OR (Alternate Question to Q. No. 2)

Question 2A

(i) A Company Secretary in practice expresses his/her opinion on any report or statement given to any business or enterprise in which he/she, his/her firm, or a partner in his/ her firm has a substantial interest. Whether he/she has committed any misconduct ? Also explain any eight other misconducts.

(5 marks)

(ii) A Company Secretary in Practice before undertaking the work relating to pre-certification has not thoroughly read the requirements of the provisions of the Companies Act, 2013 and Rules made thereunder and is also not familiar with the actual practices that are being followed in this regard.

As a result, while doing certification of forms of a Company Milk Bread Ltd., he/she did not notice that the forms he/she was certifying were not digitally signed by the director or

person authorised by Milk Bread Ltd. Also, he/she did not follow the due procedure before the certification, including approval by the Company, if any. Explain the aspects which a Company Secretary should ensure before undertaking the work relating to pre-certification ?

(*5 marks*)

(iii) (a) The role of a company secretary is not a clerical or limited to the secretarial one in the usual sense. Now the responsibilities of the company secretary have evolved from that of a "note taker" at board meetings or "administrative servant of the Board" to one which encompasses a much broader role of acting as "Board Advisor" and having responsibility for the organisation's corporate governance. Comment.

(b) The Company Secretaries have played a vital role as a bridge between society and business. Explain with reference to role of Company Secretary as a Champion of Good Corporate Governance.

(*3+2=5 marks*)

(iv) Indicate the key documents that the professionals are required to analyse in order to conduct the due diligence of documents in relation to listed companies while preparing the search and status report for the transactions relating to the public issues, takeovers, mutual funds, buy back and debt offer.

(*5 marks*)

Answer 2A(i)

Professional Misconduct Covered under the Second schedule:

Yes, if a Company Secretary in practice expresses his/her opinion on any report or statement given to any business or enterprise in which his/her, his/her firm, or a partner in his/her firm has a substantial interest, it is a professional misconduct covered under the Second Schedule and comes under its Part-I relating to Professional misconduct in relation to Company Secretaries in Practice.

Other misconducts are mentioned as under:

PART I - Professional misconduct in relation to Company Secretaries in Practice

A Company Secretary in practice shall be deemed to be guilty of professional misconduct, if he-

1. discloses information acquired in the course of his professional engagement to any person other than his client so engaging him, without the consent of his client, or otherwise than as required by any law for the time being in force
2. certifies or submits in his name, or in the name of his firm, a report of an examination of the matters relating to company secretarial practice and related statements unless the examination of such statements has been made by him or by a partner or an employee in his firm or by another Company Secretary in practice
3. permits his name or the name of his firm to be used in connection with any report or statement contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast
4. expresses his opinion on any report or statement given to any business or enterprise in which he, his firm, or a partner in his firm has a substantial interest
5. fails to disclose a material fact known to him in his report or statement but the disclosure of which is necessary in making such report or statement, where he is concerned with such report or statement in a professional capacity;

6. fails to report a material mis-statement known to him and with which he is concerned in a professional capacity;
7. does not exercise due diligence, or is grossly negligent in the conduct of his professional duties;
8. fails to obtain sufficient information which is necessary for expression of an opinion or its exceptions are sufficiently material to negate the expression of an opinion;
9. fails to invite attention to any material departure from the generally accepted procedure relating to the secretarial practice;
10. fails to keep moneys of his client other than fees or remuneration or money meant to be expended in a separate banking account or to use such moneys for purposes for which they are intended within a reasonable time.

Answer to Q. No. 2A(ii)

Professionals like Company Secretary in Practice (PCS) before undertaking the work relating to pre-certification should thoroughly read the requirements of the provisions of the Companies Act, 2013 and Rules made thereunder and be familiar with the actual practices that are being followed in this regard. He/she should particularly ensure the following:

- Ensure that Letter of Engagement/Board Resolution authorizing the professional for the assignment by the company to be obtained (where the statutory requirement is there for the board resolution or general meeting resolution then a copy of the extract of such resolution shall be obtained by PCS. Wherever the instance is possible it is recommended to record such appointment in the Minutes of the Board meetings);
- Maintain a physical/scanned copy of all documents verified (subject to confidentiality requirement);
- Ensure that all relevant documents and attachments are legible and visible;
- Verify the documents from the original records of the company and then seek the soft copies for form filing;
- Correctness of the records and the material departure from the facts;
- The form to be digitally signed by the Director or person authorized by the company;
- Before certification of any form, the person should be aware about the relevant provisions under the Act and Rules made thereunder;
- Due procedures to be followed before the certification, including approval by the Company, if any.

Answer to Q. No. 2A(iii)(a)

Company Secretaries are globally recognized as the part of the senior management of the company. However, the company secretaries are typically named a corporate secretary or secretary in the various countries according to the prevailing law in such country.

In any company, the role is not clerical or limited to the secretarial one in the usual sense. Now the responsibilities of the company secretary have evolved from that of a "note taker" at board meetings or "administrative servant of the Board" to one which encompasses a much broader role of acting as "Board advisor" and having responsibility for the organization's corporate governance. The company secretary ensures that an organization complies with relevant legislation and regulation, and keeps board members informed of their legal responsibilities. Company secretaries

are the company's named representative on legal documents and it is their responsibility to ensure that the company and its directors operate within the law.

The Board as a whole, particularly the chairman, relies on the company secretary to advise them not only on Role of the directors' and their statutory duties under the prevailing law and various disclosure obligations but also in respect of corporate governance requirements and practices and effective board processes. This specialized role of the company secretary has emerged to position them as one of the key managerial personnel within the organization.

It is also their responsibility to register and communicate with shareholders, to ensure that dividends are paid and to maintain company records, such as lists of directors and shareholders and annual accounts. In many countries, private companies have traditionally been required by law to appoint one person as a company secretary and this person will also usually be a senior board member.

Answer 2A(iii)(b)

Due to the separation of ownership and management, society depends largely upon professionals for the healthy growth of corporates and protection of the interests of the society. Also the responsibility for developing and implementing processes to promote and sustain good corporate governance has fallen largely within the remit of the company secretary. Therefore, Company Secretaries have played a vital role as a bridge between society and business. The profession of Company Secretaries is seen by society as the champion of good corporate governance, in ensuring that corporates:

- run their businesses in accordance with the laws of the land;
- follow ethical and honest practices in business;
- protect and promote the interests of investors who invest their hard earned savings in the capital of the company;
- maintain transparency and provide correct and adequate information and disclosures about their business activities;
- run their business in a sustainable manner; and
- work in the larger interests of society.

Answer 2A(iv)

Key documents to be analyzed while preparing the search and status report relating to the transactions undertaken by the company:

1. In case of Public Issues –
    a) Draft Offer Documents filed with SEBI
    b) Red Herring Prospectus filed with SEBI
    c) Final Offer Documents filed with SEBI
2. In case of Takeovers -
    a) Letter of Offer
    b) Formats as per SEBI (SAST) Regulations 2011
    c) Other Documents
3. In case of Mutual Funds -
    a) Draft document

b) Statement of Additional Information (SAI)

c) Scheme Information Document (SID)

d) Key Information Memorandum (KIM)

4. In case of Buybacks -

a) Tender Offers

b) Open Market through Stock Exchanges

5. In case of Debt Offer Document -

a) Draft filed with SE

b) Final filed with ROC

PART-II

Question 3:

(a) Eye Care, a leading manufacturer of optical and digital equipment, was involved in a cover-up of INR 100 billion in investment losses over three decades.

As a result, audit was conducted to investigate and analyse financial records in a detailed and systematic manner, usually for the purpose of uncovering fraud, embezzlement, or other financial crimes.

It involved the use of specialized auditing and investigative techniques to identify and document suspicious activities or discrepancies within financial statements.

The audit uncovered a complex scheme involving the use of acquisition fees and advisory payments to conceal losses.

Identify the type of audit conducted and explain its meaning and also explain its increasing utility in today's era.

(5 marks)

(b) Exon India Limited, a subsidiary of a Foreign Multinational Company, was embroiled in one of the most high-profile corporate governance scandals. The company was accused of financial irregularities, including manipulation of accounts and failure to comply with corporate governance norms.

Exon India Limited overstated its revenues and profits for several years. This manipulation went undetected. The failure was part of a broader governance failure that involved financial misreporting and hiding the true financial position of the company from shareholders and regulatory bodies.

The audit required to be conducted, was not conducted by the company. This audit is generally designed on the principle of "Prevention is better than cure" rather than post mortem exercise and to find faults.

This audit is a comprehensive review of the non-financial aspects of a company's operations, focusing on compliance with laws, corporate governance standards, various legal and regulatory requirements, particularly those related to corporate governance and operational processes.

It ensures that the company operates within the legal framework and adheres to best

practices, thereby protecting the company and its stakeholders from potential risks and liabilities.

This type of audit plays a critical role in maintaining the company's integrity, transparency and accountability. Identify and explain the audit required. Elucidate its needs.

(5 marks)

(c) As the internal audit is concerned with an evaluation of both internal control as well as the quality of actual performance. The management of Young Ltd. was of the view that the internal auditor should :

(i) see whether the lines of authority and responsibility are clearly defined and communicated to all the organisational levels.

(ii) examine whether there is a satisfactory balance between authority and responsibility of important executives.

(iii) examine the reasonableness of the span of control of each executive.

(iv) examine whether there is a unity of command.

(v) examine whether there is a sufficient flexibility in the day to day working of the organisation.

(vi) evaluate the process of managerial development. Identify and discuss the internal auditor's involvement in areas of operation as per the above acts.

(5 marks)

Answer 3(a)

Type of Audit:

The audit conducted is Forensic audit.

Meaning:

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

Its use in today's era:

Recent corporate accounting scandals at various corporates forensic auditing has now considered as new area of auditing to detect the frauds in companies that suspected fraudulent transactions.

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

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

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

Answer 3(b)

The term "Secretarial Audit" is a mechanism which is connected with the audit of the non-financial aspects of the company. It gives necessary comfort to the management, regulators and the stakeholders, as to the compliance by the company of applicable laws and the existence of proper and adequate systems and processes in the company.

Every Company, while pursuing its business activities, has to comply with the rules and regulations relating to the Companies Act, Securities laws, FEMA, Industry Specific laws and General laws like Labour laws, Competition law and Environmental and Pollution related laws and should also pursue the good governance practices. Secretarial Audit covers non-financial aspects of the business impact on the performance of the company and verifies compliances of applicable laws, regulations and guidelines. Nonetheless, this exercise will enhance the capabilities of the management and also mitigates business & reputation risk to a great extent. It also provides a basis for evaluating the manner in which the affairs of a company are conducted to a great extent.

The Secretarial Audit postulates for an independent verification of the records, books, papers and documents by a Company Secretary in Whole Time Practice, to check the compliance status of the company according to the provisions of various statutes, laws and rules & regulations and also to ensure the compliance of legal and procedural requirements and processes followed by the company.

Secretarial Audit is accordingly an independent and objective assurance activity intended to add value and improve operations of a company. It helps to accomplish the organization's objectives by bringing a systematic, disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes.

Need for Secretarial Audit:

Secretarial Audit is the process of independent verification, examination of level of compliance of applicable Corporate Laws to a company. The audit process if properly devised, ensures timely compliance and eliminates any un-intended non-compliance of various applicable rules and regulations. An action plan of the corporate secretarial department is to be designed so as to ensure that all event based and time-based compliances are considered and acted upon. Secretarial audit is to be designed on the principle of "Prevention is better than cure" rather than post mortem exercise and to find faults.

- It has effective mechanism to ensure that the legal and procedural requirements are duly complied with.
- It provides a level of confidence to the directors & key managerial personnel etc.
- Directors can concentrate on important business matters as Secretarial Audit ensures legal and procedural requirements.
- It strengthens the image and goodwill of a company in the minds of regulators and stakeholders.
- Secretarial Audit is an effective governance and compliance risk management tool.
- Secretarial Audit helps the investor in analyzing the compliance level of companies and thus evaluate the quality of its governance/ decision making process, thereby increases the reputation.

Answer 3(c)

Review of Organizational Structure:

The internal auditor should conduct an appraisal of the organization structure to ascertain whether it is in harmony with the objectives of the enterprise and whether the assignment of responsibilities is in consonance therewith. For this purpose, he should review the manner in which the activities of the enterprise are grouped for managerial control.

(i) **Examining that Lines of Authority and Responsibility are clearly defined and communicated to all the organisation levels:** The internal auditor should see whether the lines of authority and responsibility are clearly defined and communicated to all the organizational levels. He should examine the organization chart to find out whether the structure is simple and economical and that no function enjoys an undue dominance over the others. He should particularly see that the responsibilities of managerial staff at headquarters do not overlap with those of chief executives at operating units. This situation often results in organizational chaos.

(ii) **Examining whether there is a satisfactory balance between authority and responsibility of important executives:** The internal auditor should examine whether there is a satisfactory balance between authority and responsibility of important executives i.e., the authority of each executive should be commensurate with the responsibility assigned to him. This can be evaluated by discussing the problems of operations and implementation with various executives.

(iii) **Examining the reasonableness of the span of control of each executive:** The internal auditor should examine the reasonableness of the span of control of each executive (the number of sub-ordinates that an executive controls). There should be a proper balance between the span of control of different executives at different levels.

(iv) **Examining whether there is a unity of command:** He should examine whether there is a unity of command i.e., whether each person reports only to one superior. Where dual responsibilities cannot be avoided, the primary one should be specified and the specific responsibility to each senior fixed. This must be made known to all concerned.

(v) **Examining whether there is a sufficient flexibility in the day to day working of the organization:** He should examine whether there is a sufficient flexibility in the day to day working of the organization and that initiative is not being stifled by a strict adherence to rules. One way of reducing organizational rigidity without sacrificing control is to have a quick and free flow of information within the enterprise.

(vi) **Evaluating the process of managerial development in the enterprise:** Finally, he should evaluate the process of managerial development in the enterprise. This is a vital aspect in a fast-growing enterprise. Unless executives are properly groomed to take over positions of responsibilities when senior people retire, there is bound to be organizational chaos.

Question 4:

(a) Explain any six criteria for suspension of the trading in the shares of the listed entities as per SEBI (LODR) Regulation, 2015.

(b) The audit checklist assists auditors in conducting a thorough, systematic and consistent audit. Outline the benefits of audit check lists in view of above statement.

(c) The working paper file contains the documents relating to the work performed by the auditor. Outline any six of such documents.

(d) Outline any six pre-requisites for the audit reporting.

(e) A social audit is a way of measuring, understanding, reporting and ultimately improving an organization's social and ethical performance. Explain the statement and implications of Social Audit.

(3 marks each)

Answer 4(a)

The criteria for suspension of the trading in the shares of the listed entities as per SEBI (Listing Obligations and Disclosure Requirements) Regulation, 2015 read with SEBI Master Circular SEBI/HO/CFD/PoD2/CIR/P/0155 dated 11.11.2024 include the following:

1. Failure to comply with regulation 17(1) with respect to board composition including appointment of woman director for two consecutive quarters
2. Failure to comply with regulation 18(1) with respect to constitution of audit committee for two consecutive quarters
3. Failure to comply with regulation 27(2) with respect to submission of corporate governance compliance report for two consecutive quarters
4. Failure to comply with regulation 31 with respect to submission of shareholding pattern for two consecutive quarters
5. Failure to comply with regulation 33 with respect to submission of financial results for two consecutive quarters
6. Failure to comply with regulation 34 with respect to submission of annual report for two consecutive financial years
7. Failure to submit information on the reconciliation of shares and capital audit report, for two consecutive quarters
8. Receipt of the notice of suspension of trading of that entity by any other recognized stock exchange on any or all of the above grounds

Answer 4(b)

The benefits of the audit checklists are as under:

a) Promote planning for the audit.

b) Ensure a consistent audit approach.

c) Act as a sampling plan and time manager.

d) Serve as a memory aid.

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

f) Audit checklists provide assistance to the audit process.

g) Auditors need to be trained in the use of a particular checklist and be shown how to use it to obtain maximum information by using good questioning techniques.

h) Checklists assist an auditor to perform better during the audit process.

i) Checklists help to ensure that the audit is conducted in a systematic and comprehensive manner and adequate evidence is obtained.

j) Checklists provide the structure and continuity to the audit and ensure that the audit scope is being followed.

k) Checklists provide a means of communication and a place to record data for use for future reference.

l) A completed checklist provides objective evidence that the audit was performed.

m) A checklist provides a record.

n) Checklists can be used as an information base for planning future audits.

o) Checklists can be provided to the auditee ahead of the onsite audit.

Answer 4(c)

The working papers may include:

(a) Planning documents and audit programs.

(b) Internal control questionnaires, flowcharts, checklists and narratives.

(c) Notes and minutes resulting from interviews.

(d) Organizational data, such as charts with job descriptions, process chart.

(e) Copies of important documents.

(f) Information about operating and financial policies.

(g) Results of control evaluations.

(h) Letters of confirmation and representation.

(i) Analysis and test of transactions, processes.

(j) Results of analytical review procedures.

(k) Audit reports and management responses

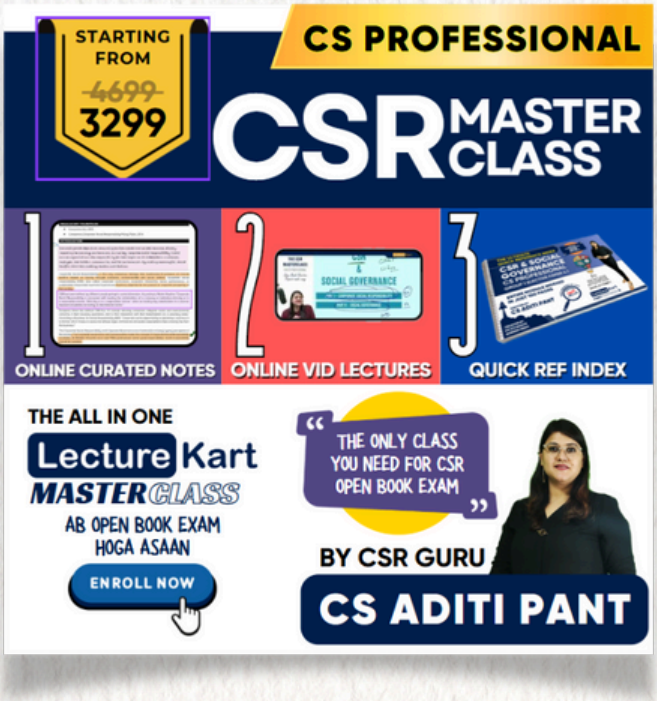
(l) Audit correspondence that documents the audit conclusions reached.

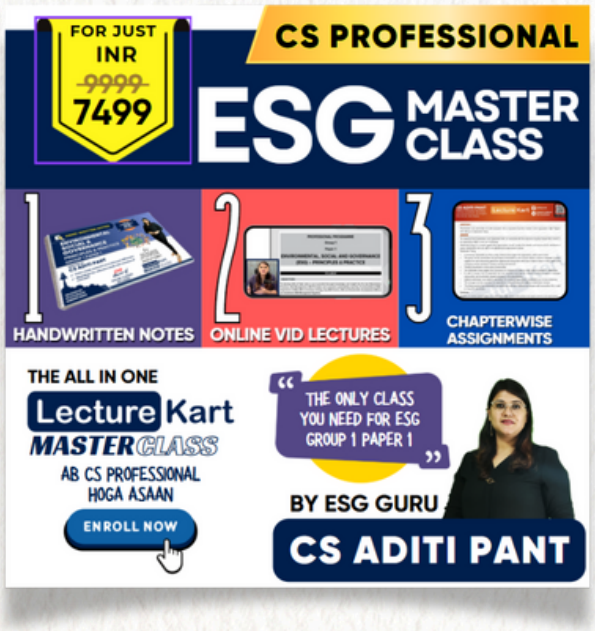
Answer 4(d)

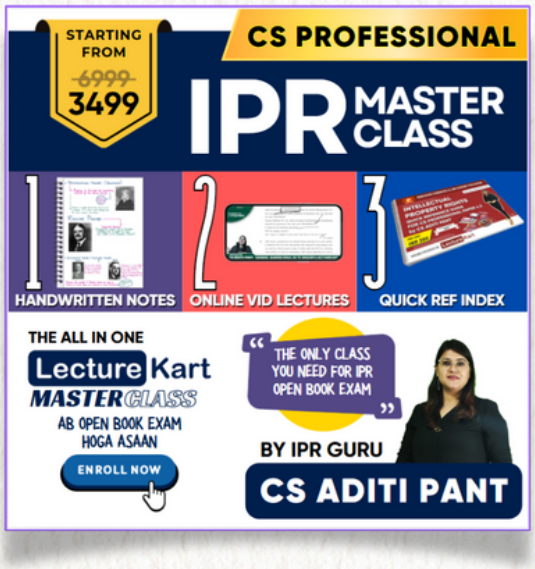
Pre-requisite for Audit Reporting

An Audit report should be:

- Accurate - Free from errors and distortions and faithful to the underlying facts.
- Objective - Fair, impartial, and unbiased and is a result of a fair minded and balanced assessment of all significant and relevant information.
- Clear - Easily understandable and logical, avoiding unnecessary technical language and providing all significant and relevant information.
- Concise - To the point, avoid unnecessary elaboration, superfluous detail, redundancy, repetitiveness and wordiness.
- Constructive - Helpful to the engagement client and the organization and leads to improvements where needed.
- Complete - Lacking nothing that is essential to the target audience and includes all significant and relevant information and observations to support recommendations and conclusions.
- Timely - Opportune and expedient, depending on the significance of the issue, allowing management to take appropriate corrective action.







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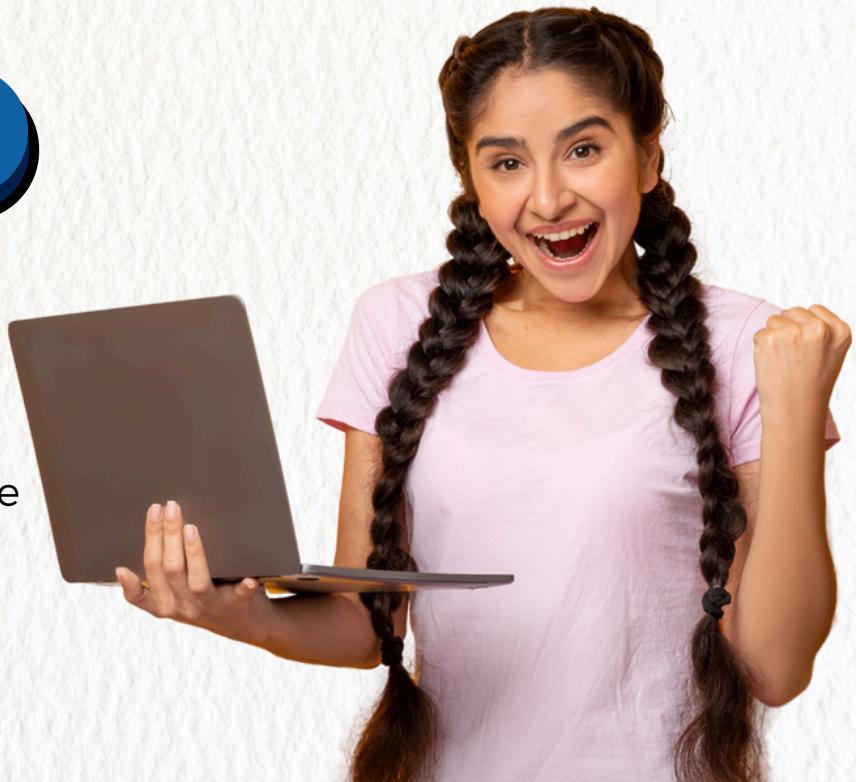

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Answer 4(e)

A Social Audit is a way of measuring, understanding, reporting and ultimately improving an organization's social and ethical performance. A social audit helps to narrow gaps between vision/ goal and reality, between efficiency and effectiveness. It is a technique to understand, measure, verify, report on and to improve the social performance of the organization.

Social auditing creates an impact upon governance. It values the voice of stakeholders, including marginalized/ poor groups whose voices are rarely heard. Social auditing is taken up for the purpose of enhancing local governance, particularly for strengthening accountability and transparency in local bodies.

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

The key difference between development and social audit is that a social audit focuses on the neglected issue of social impacts, while a development audit has a broader focus including environment and economic issues, such as the efficiency of a project or programme.

A social audit is an official evaluation of an organization's involvement in social responsibility projects or endeavors. For example, a local family store makes a clothing donation to an NGO that has a homeless shelter for women and children. The store makes a similar donation three times a year. This is something that a social audit might uncover. Factors examined by a social audit include records of charitable contributions, volunteer events, and efficient utilization of energy, transparency, work environment, and employees' wages.

Implications of Social Audit:

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

Question 5:

(a) Urgent Pay Payment Systems, a payment processing company, experienced a data breach that compromised over 80 million credit and debit card numbers. The breach was attributed to the company's failure to implement effective security measures, including regular Information Systems Audit that might have detected the vulnerabilities exploited by hackers. Along with the general objectives highlight the critical importance of conducting regular Information System audits to identify and mitigate potential risks. List out some areas to be tested.

(*5 marks*)

(b) The terms of Audit Engagement may result from a change in circumstances affecting the need for the service or a restriction on the scope of Audit Engagement, whether imposed by Management or caused by other circumstances :

(i) Why a basis of change may be considered reasonable or unreasonable ?

(ii) What precautions the auditor should take while accepting the change ?

(*3+2=5 marks*)

(c) The ICSA (UK) Code of Professional Ethics and Conduct comprises core principles for its members to follow. Explain.

(*5 marks*)

Answer 5(a)

Information systems auditing or systems audit is an ongoing process of evaluating controls, collecting and evaluating evidence to determine whether a computer system safeguards assets, maintains data integrity, allows organizational goals to be achieved effectively, and uses resources efficiently. Thus, information systems auditing supports traditional audit objectives; attest objectives (those of the external auditor) that focus on asset safeguarding and data integrity, and management objectives (those of the internal auditor) that encompass not only attest objectives but also effectiveness and efficiency objectives.

General objectives of Information System Audit:

- Validation of the organizational aspects and administration of the information service function.
- Validation of the controls of the system development life cycle.
- Validation of access controls to installations, terminals, libraries, etc.
- Automation of internal auditing activities. Internal training.
- Training members of the information service function department.

An information systems audit performed in an organization is a comprehensive examination of a given targeted system. The audit consists of an evaluation of the components which comprise that system, with examination and testing in the following areas:

- High-level systems architecture review
- Business process mapping (e.g., determining information systems dependency with respect to user business processes)
- End user identity management (e.g., authentication mechanisms, password standards, roles limiting or granting systems functionality)
- Operating systems configurations (e.g., services hardening) Application security controls
- Database access controls (e.g., database configuration, account access to the database, roles defined in the data base) Anti-virus/Anti-malware controls
- Network controls (e.g. running configurations on switches and routers, use of Access control lists, and firewall rules)
- Logging and auditing systems and processes
- IT privileged access control (e.g. System Administrator or root access)
- IT processes in support of the system (e.g. user account reviews, change management)
- Backup/Restore procedures

During the System audit, the auditors are required to understand and evaluate the overall control environment. The control environment reflects the overall attitude of, awareness of, and actions by the board of directors, management, and others concerning the importance of internal controls in the enterprise.

Answer 5(b)(i)

A request from the Appointing Authority to change the terms of Audit Engagement may result from a change in circumstances affecting the need for the service or a restriction on the scope of Audit Engagement, whether imposed by Management or caused by other circumstances. The Auditor shall consider the justification given for the request, particularly the implication of a restriction on the scope of the Audit Engagement.

A change in circumstances that affects the Auditee's requirements may be considered a reasonable basis for requesting a change in the Audit Engagement.

A change may not be considered reasonable if it appears that the change relates to information that is incorrect, incomplete or otherwise unsatisfactory. For example, where the Auditor is unable to obtain sufficient appropriate audit evidence regarding labour law compliance by the company and the Appointing Authority asks for the Audit Engagement to be changed to a review engagement to avoid a modified opinion or a disclaimer of opinion.

With mutual consent the terms of the Audit Engagement may be changed. When such changes are there, the Auditor shall obtain the supplementary/revised engagement letter with a justification for the change and it shall be duly signed by the Appointing Authority. The impact of such change on the level of assurance shall be ascertained before accepting the same. If such change is likely to result in a lower level of assurance, then the Auditor may accept such change only if such change can adequately be covered by way of modified report.

Answer 5(b)(ii)

The Auditor should take the following precautions while accepting the change:

(1) The Auditor should not agree to a change in the terms of the Audit Engagement which restricts the scope of audit provided under any statute.

(2) If the term of the Audit Engagement is changed when it is expected that Auditor may have to issue a modified report, such type of change should be resisted.

(3) Any request to change to avoid or circumvent unfavorable Auditor's report is also unjustified and should not be accepted.

(4) If the terms of the Audit Engagement are changed before the completion of the audit, the Auditor should not disregard the evidences obtained prior to the change in scope of audit.

Answer 5(c)

The ICSA (UK) Code of Professional Ethics and Conduct comprises four core principles to which all Fellows, Associates, graduates, students and affiliated members registered need to follow:

1. **Integrity**

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

   - acting professionally in your business dealings;
   - displaying a proper understanding and appreciation of your role and responsibilities;
   - being respectful of others at all times;
   - not accepting or offering improper gifts, hospitality or other inducements;

- avoiding conflicts of interest, or, where a conflict arises, making sure that everyone involved is aware of the interest;
- recognising and considering the ethical issues arising from, and the interests of the groups or
- stakeholders who may be affected by, your choices, decisions and actions; avoiding involvement in any unethical, misleading, illegal or covert behaviour;
- not knowingly ignoring (or turning a blind eye to) unethical, misleading, illegal or obscure behaviour; and
- avoiding bringing the profession into disrepute.

2. High standard of service/professional competence

A high standard of service or professional competence should be delivered throughout one's working life. This involves an understanding of relevant technical, professional and business developments. Professional competence also takes account of the wider implications and expectations of our members. This includes:

- maintaining professional knowledge and skills which are required to perform the role which you are employed to carry out;
- completing CPD as required by the UKRIAT Committee (this does not apply to students);

  communicating effectively and promptly with your clients, colleagues and stakeholders to ensure that they are able to make informed decisions;
- acting within your level of competence; if this requires an admission to your client that you are unable to perform a task then this should be communicated effectively;
- upholding the requirements of the Royal Charter and byelaws made under it; and
- respecting the confidentiality of information acquired through professional relationships save where there is a legal or regulatory requirement to disclose or report that information.

3. Transparency

Transparency requires that members are clear and open in their business and professional conduct. This includes:

- being open and frank in any business dealings;
- not being underhand in any business transaction; and
- treating all work as if it was reported in the public domain.

4. Professional behavior

Professional behavior requires that members act in a way which conforms to the relevant laws of the jurisdiction in which they are residing and/or undertaking business transactions. It requires them also to pay regard to all regulations which may have a bearing on their actions and to adhere to the byelaws, specifically byelaw which states that the following actions or inactions may result in disciplinary proceedings:

- becoming bankrupt or insolvent;
- being convicted of an offence which might bring discredit on the Institute or the profession;

  failing to uphold the code of professional conduct and ethics;

- behaving, by doing something or not doing something, in a way considered by the Disciplinary Tribunal to bring the Institute or the profession into disrepute;
- disobeying any decisions of the Council or of one of its Divisional Committees; breaking any of the Institute's byelaws or Charter or Regulations;
- failing to comply or co-operate with a disciplinary investigation; or
- failing to comply with a decision or any conditions made by a Disciplinary or Appeal Tribunal.

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

Question 6

(a) Explain Ethical Dilemma with two examples.

"When tracked in a situation that the approach does not work, it can be resolved by a right versus right dilemma by finding the highest right". With reference to this, write the three ways to make the best choice when faced with these types of dilemmas *(5 marks)*

(b) Lemon Ltd. was involved in a banking fraud worth approximately Rs. 1,220 crores. The company was accused of siphoning off funds from loans provided by various banks, with the money allegedly being diverted to shell companies and related parties. Although Serious Fraud Investigation Office (SFIO) eventually conducted a detailed investigation, the probe was initiated after initial investigations by other agencies like the ED and CBI.

Given the complexity of the financial transactions and the potential involvement of multiple stakeholders, the need for an SFIO investigation was evident. The SFIO's eventual involvement helped to uncover the detailed modus operandi of the fraud. Specify such other cases in which it is necessary to investigate into the affairs of a company along with the procedure of investigation to be followed by SFIO. (*5 marks)*

(c) X is a Company Secretary in Practice and has more than 5 years post-qualification experience as company secretary. X wants to get himself empanelled as Peer Reviewer. Citing the relevant provisions and procedure, state whether X is eligible for the empanelment with justification. *(5 marks)*

Answer 6(a)

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

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

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

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

dilemmas can be seen everywhere in daily lives. However, everybody has their own particular experience towards ethical dilemma. Ethical dilemmas assume that the chooser will abide by societal norms, such as codes of law or religious teachings, in order to make the choice ethically impossible.

Some examples of ethical dilemmas include:

- A secretary discovers her boss has been laundering money, and she must decide whether or not to turn him in.
- A doctor refuses to give a terminal patient morphine, but the nurse can see the patient is in agony.
- While responding to a domestic violence call, a police officer finds out that the attacker is the brother of the police chief, and the police chief tells the officer to "make it go away"
- A government contractor discovers that intelligence agencies have been spying on its citizens illegally, but is bound by contract and legalities to keep his confidentiality about the discovery.

"When tracked in a situation that the approach does not work, it can be resolved by a right versus right dilemma by finding the highest right". With reference to this, the three ways to make the best choice when faced with these types of dilemmas are as follows:

- Ends-based: Select the option that generates the best for the most people.
- Rule-based: Choose as if you're creating a universal standard. Follow the standard that you want others to follow.
- Care-based: Choose as if you were the one most affected by your decision. Once you have identified an ethical right versus right dilemma, lay out your options according to these three principles.

One approach will immediately present itself as the "most right".

Answer 6(b)

Cases to be investigated:

As per Section 212 (1) of the Companies Act, 2013, the Central Government may assign the investigation into the affairs of a company to the Serious Fraud Investigation Office-

(a) on receipt of report of the Registrar or Inspector under section 208;

(b) on intimation of a special resolution passed by a company requesting an investigation into its affairs;

(c) in public interest;

(d) on the request of any Department of Central Government or State Government.

The procedure of investigation to be followed by SFIO:

i. On receipt of such order from the Central Government, Director, SFIO may designate such number of Inspectors as he may consider necessary for the purpose of such investigation.

ii. As per sub-section (3) of section 212 of Companies Act, 2013, the investigation into the affairs of a company shall be conducted in the manner and by following the procedure specified in Chapter XIV of Companies Act, 2013. The SFIO shall submit its report to the Central Government within the period specified in the order.

iii. As per sub-section (4) of section 212 of Companies Act, 2013, the Director SFIO shall cause the affairs of the company to be investigated by an investigating officer, who shall have the powers of the Inspector under section 217 of the Companies Act, 2013.

iv. As per sub-section (5) of section 212 of Companies Act, 2013, it shall be the responsibility of the company, its officers and employees, who are or have been in the employment of the company to provide all information, explanation, documents and assistance to the investigating officer as he may require for conduct of investigation.

v. As per sub-section (11) of section 212 of Companies Act, 2013, the Serious Fraud Investigation shall submit an interim report, if so directed by the Central Government.

vi. As per sub-section (12) of section 212 of Companies Act, 2013, on completion of investigation, the SFIO shall submit the Investigation Report to the Central Government.

Answer 6(c)

Empanelment of Peer Reviewers:

The Peer Review Board has been empowered to maintain a panel of Reviewers. Para 10 of the Peer Review Guidelines provides for the qualifications of the reviewer which is as under:

1. The nature and complexity of Peer Review require the exercise of professional judgement. Accordingly, an individual to be empaneled as Peer Reviewer shall (Qualifications):
   (a) Be a member with at least 10 years of post-qualification experience as Company Secretary;
   (b) Be currently holding Certificate of Practice as issued by the Institute.
2. Further to be empanelled as Peer Reviewer, a member shall not have (Disqualifications): -
   a) disciplinary action / proceedings pending against him during the past 3 years.
   b) been convicted by a Competent Court whether within or outside India, of an offence involving moral turpitude and punishable with transportation or imprisonment;
3. The Board may examine the quality of the report and shall have powers to remove the Reviewer from the panel of Peer Reviewers, in case the quality of the review/report fails to match the desired standards.
4. Sitting members on the Council / Regional Council and sitting Office Bearers of Managing Committee of the Chapter(s) of the ICSI shall not act as Peer Reviewers till they demit their office.
5. The Board has prescribed a format for inviting applications from members fulfil the above criteria who are willing to be empaneled as Reviewers. The application form seeks to collate information on the experience of the member, infrastructure available, professional experience, educational qualification, practice areas, etc. which would enable the Board to assess the core competence of the applicant for empanelment as reviewer. When a Peer Review is required to be conducted, the Board would endeavour to match the relevant experience and standing of the Reviewer with the profile of the P.U. which is to be Peer Reviewed.

A copy of the application format for empanelment of Reviewer may be downloaded from the webpage of the Peer Review Board at the ICSI portal www.icsi.edu.

In view of the above X is not eligible for the empanelment as Peer Reviewer because he does not meet the requirement of post-qualification experience of 10 years.

OR (Alternate Question to Q. No. 6)

Question 6A

(i) AB Ltd. wants to acquire XY Ltd. The areas required to be covered by auditors were financial statements, tax compliance, contracts, intellectual property, human resources, IT systems, regulatory compliance, and potential legal issues. It appointed independent auditors with expertise in mergers and acquisitions to have a thorough review of the acquired company's financial records, operations, systems, and other pertinent aspects to ensure a comprehensive understanding of XY Ltd. and to identify potential risks, liabilities, or discrepancies that could affect it's decisionmaking process or its ability to integrate the acquired company successfully to assess the financial, legal, operational, and strategic aspects of the target company.

Identify the audit conducted by the independent auditors and give an elaborate discussion on it, specifying its part. Who else can perform such audit and also specify what does it include ? (5 marks)

(ii) Adjudication at SEBI (Securities and Exchange Board of India) refers to the legal process by which SEBI, as a regulatory authority, investigates and resolves cases related to violations of securities laws, regulations, and guidelines. SEBI has the power to adjudicate on matters such as insider trading, fraudulent practices, non-compliance with disclosure requirements, and other offences under the SEBI Act, the Securities Contracts (Regulation) Act, and related regulations.

Adjudication at SEBI is crucial for maintaining market integrity and protecting investors' interests by ensuring that all market participants adhere to the regulatory framework. Do you agree ? Explain Adjudication at SEBI. (5 marks)

(iii) When a practicing professional in practice faces a conflict of interest during performing a professional service, explain the instances in which conflict of interest may arise and what steps an auditor shall take to identify the circumstances that might create a conflict of interest. (5 marks)

Answer 6A(i)

AB Ltd. should conduct takeover audit. To provide the desired results to an investor and to ensure that the acquisition is executed in the most effective manner, the concept of the takeover audit has been evolved, the takeover audit provides a cost benefit analysis to suggest a strategic plan for the long-term investment strategy. The audit provides for the Acquisition Audit as well as the Inter se Transfer performed by the acquirer.

Internal auditors or professionals with this domain expertise can contribute significant value by ensuring that a vibrant due diligence process is in place and operating as intended.

Takeover audit for merger/acquisition/ takeover could be done as three parts: pre acquisition, post-acquisition and sell-side.

A rigorous audit vide due diligence process help companies take advantage of legitimate new business opportunities, while at the same time help minimize the risks. A strong audit cum due diligence process is critical to ensure that the acquirer is fully aware of all aspects of the proposed transaction and provides access to vital intelligence that is used to negotiate the final price and integrate the new subsidiary more effectively.

The takeover audit primarily includes:

- Identification and Categorisation: Identify and categorises of acquirer i.e. promoter, promoter group, person in control, persons acting in concert, associates, immediate relatives etc.

- Timely Disclosures: Ensuring that the timely disclosures have been made by promoters, members of promoter group and PAC's relating to acquisition, transfer and encumbrance.
- Monitoring of Promoters Holdings: Effective monitoring of the holdings of promoters, members of promoter group and PACs and take necessary action as required.
- Timely Intimation: Ensuring that timely intimation is sent to stock exchanges in respects of transfers exempt under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations) Regulations, 2011 (SAST Regulations).
- Timely reports under SAST: Ensuring that timely reports are filed in respect of transfers exempt under SEBI (SAST) Regulations with stock exchanges and SEBI, if applicable.
- Checking timely compliances: Thoroughly examine the takeover regulations through checklist and timeline for compliances.

Answer 6A(ii)

Securities and Exchange Board of India (SEBI) under Section 11C of SEBI Act, 1992: In cases where the Securities and Exchange Board of India (SEBI) has reasonable ground to believe that-

a) the transactions in securities of a company are being dealt with in a manner detrimental to the investors or the securities market;

b) or any intermediary or any person associated with the securities market has violated any of the provisions under SEBI laws, or the rules or the regulations made or directions issued by the Board thereunder, the Board may, at any time by order in writing, direct any person specified in the order to investigate the affairs of such intermediary or persons associated with the securities market and to report thereon to the Board.

Further, the Investigation authority may call for original or certified copies of the all the books, registers, other documents and record of, or relating to, the company or, as the case may be; and keep in its custody for six months.

The investigation authority may examine on oath, any manager, managing director, officer and other employee of any intermediary or any person associated with securities market in any manner, in relation to the affairs of his business and may administer an oath accordingly and for that purpose may require any of those persons to appear before it personally.

In case, where any person fails without reasonable cause or refuses for such action shall be punishable with imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.

Further, the Investigating Authority may make an application to the Judicial Magistrate of the first class having jurisdiction for an order for the seizure of such books, registers, other documents and record. After considering the application and hearing the Investigating Authority, if necessary, the Magistrate may, by order, authorise the Investigating Authority-

i. to enter, with such assistance, as may be required, the place or places where such books, registers, other documents and record are kept;

ii. to search that place or those places in the manner specified in the order; and

iii. to seize books, registers, other documents and record, it considers necessary for the purposes of the investigation:

However, the Magistrate or Judge of the Designated Court should not authorize seizure of books, registers, other documents and record, of any listed public company or a public company (not

being the intermediaries specified under section 12) which intends to get its securities listed on any recognized stock exchange unless such company indulges in insider trading or market manipulation.

Yes. I agree. Adjudication at SEBI is crucial for making market integrity and protecting investors' interests by ensuring that all market participants adhere to the regulatory framework.

Answer 6A(iii)

A practicing professional in practice may face a conflict-of-interest situation while performing a professional service. A conflict of interest creates a threat to objectivity and may create threats to the other fundamental principles. Such threats may be created when:

- The professional provides a professional service related to a particular matter for two or more clients whose interests with respect to that matter are in conflict; or
- The interests of the professional with respect to a particular matter and the interests of the client for whom the professional provides a professional service related to that matter are in conflict.

An auditor shall not allow a conflict of interest to compromise professional judgment. Examples of situations in which conflicts of interest may arise include:

1. Transaction advisory service: Providing a transaction advisory service to a client seeking to acquire an audit client of the firm, where the firm has obtained confidential information during the course of the audit that may be relevant to the transaction.
2. Auditing competitive clients: Auditing two clients at the same time who are competing to acquire the same company where the audit report might be relevant to the parties' competitive positions.
3. Auditing clients in legal dispute: Taking audit assignment of two clients regarding the same matter, who are in a legal dispute with each other
4. Audit report for Licensor and License: Providing an audit report for a licensor on royalties due under a license _agreement when at the same time advising the licensee of the correctness of the amounts payable.

Before accepting a new client relationship, engagement, or business relationship, an auditor shall take reasonable steps to identify circumstances that might create a conflict of interest, including identification of:

1. The nature of the relevant interests and relationships between the parties involved; and
2. The nature of the service and its implication for relevant parties.

It is expected that the Auditor shall not have any conflict of interest with the Auditee. If the Auditor has any such interest, it is the duty of the Auditor to disclose such interest/ conflict of interest to the Auditee before accepting the Audit Engagement.

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CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING-UP

MODULE 2 PAPER 5

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

NOTE : *Answer All Questions.*

PART-I

Question 1

(*a*) "Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain pre-determined objectives at corporate level." Comment on the statement and explain the objectives behind Corporate Restructuring.

(*5 marks*)

(b) "Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets". Comment on the statement highlighting the reasons for Divestitures.

(*5 marks*)

(c) Section 233 of the Companies Act, 2013 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow. Mention the conditions.

(*5 marks*)

(d) Is it possible to retain the same characters of various reserves of transferor Companies amalgamation, mergers or demergers as per Standards of Accounting concepts or conventions ? Discuss.

(*5 marks*)

Answer 1(a)

Corporate Restructuring aims at improving the competitive position of an individual business and maximizing its contribution to corporate objectives. It also aims at exploiting the strategic assets accumulated by a business i.e., monopolies, goodwill, exclusivity through licensing, etc. to enhance the competitiveness advantages. Thus, corporate restructuring helps in bringing an edge over competitors, in highly competitive world, cost cutting and value addition are very important to get highlighted.

Objectives may include the following:

- To enhance shareholders value
- Deploying surplus cash from one business to finance profitable growth in another
- Exploiting inter-dependence among present or prospective businesses
- Risk reduction
- Development of core-competencies

- To obtain tax advantages by merging a loss-making company with a profit-making company
- Revolution in information technology has made it necessary for companies to adopt new changes for improving corporate performances.
- To become globally competitive
- To increase the market share
- Convertibility of rupee has attracted medium-sized companies to operate in the global markets.
- Competitive business necessitated to have sharp focus on core business activities, to gain
- synergy benefits, to minimize the operating costs, to maximize efficiency in operation and to tap the managerial skill to the best advantage of the firm.
- By diversification of business activities, the minimization of business risk is possible and it enables the firm to achieve at least the minimum targeted rate of return

With the integration of sick unit into the successful unit, the adjustment of unabsorbed depreciation and write off of accumulated loss is possible and thereby the successful unit can have strategic tax planning

Answer No. 1(b)

Divestiture means selling or disposal of assets of the company or any of its business undertakings/ divisions, usually for cash (or for a combination of cash and debt) and not against equity shares to achieve a desired objective, such as greater liquidity or reduced debt burden. Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets.

Reasons for Divestitures

- Huge divisional losses
- Continuous negative cash flows from a particular division
- Difficulty in integrating the business within the company
- Unable to meet the competition
- Better alternatives of investment
- Lack of technological upgradations due to non-affordability
- Lack of integration between the divisions

Answer No. 1(c)

Section 233 outlines a list of conditions which companies proposing to enter into fast-track mergers are required to follow:

A notice of the proposed scheme soliciting objections or suggestions from the Registrar and the official liquidators to be issued by the transferor or the transferee companies within thirty (30) days.

If any objections or suggestions are received, then the same are considered in their respective general meetings and approved/disapproved by their respective members.

A declaration of solvency is required to be filed by both the companies involved in the merger.

The scheme has to be approved by majority of creditors representing nine-tenths in value of the creditors or class of creditors of the respective companies.

The transferee company is required to file a copy of the approval in the prescribed manner, with

the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

On receiving the said scheme, if the Registrar or the Official Liquidator does not have any objections or suggestions to the scheme, the Central Government shall register the said scheme and issue a confirmation thereof to the companies.

If the Registrar or Official Liquidator has any objections or suggestions, the same may be communicated to the Central government within a period of thirty days. In the absence of any such communication, it would be presumed that no objections were raised.

If the Central Government after receiving the objections or suggestions or for any other reason forms the opinion that the said scheme is not in public interest or in the interest of the creditors, it can file an application before the Tribunal within a period of sixty days.

After filing of such application, the Tribunal has to render its judgment. If it is of the opinion (with reasons recorded in writing) that the scheme should be considered as per the procedure laid down in section 232, it may give directions accordingly.

Answer No. 1(d)

Scheme of merger or amalgamation implies a process where the legal ownership or operational control or other structures of the company are reorganized.

- The Institute of Chartered Accountants of India (ICAI) has formulated Accounting Standard (AS) -14 'Accounting for Amalgamation'.
- AS-14 lays down the accounting and disclosure requirements in respect of amalgamation of companies, as well as treatment of resultant of goodwill or reserves.
- As per AS-14, amalgamation may be cither in the nature of merger or in the nature of purchase
- In case of amalgamation in the nature of merger, the identity of the reserves is retained and shall be reflected in the financial statements of the Transferee Company in the same form in which they appeared in the balance sheet of the transferor company prior to amalgamation.
- General reserve of the Transferor Company remains part of general reserve of the Transferee Company and similarly, Capital Reserve or Revaluation Reserve forms part of the Capital or Revaluation Reserve of the Transferee Company.
- Consequently, reserves available for distribution of dividends prior to amalgamation would also be available for distribution of dividends post amalgamation.

Where amalgamation is in the nature of purchase, none of the reserves are retained in the books of the Transferee Company. In other words, none of the reserves are recorded in the books of the Transferee Company. However, only statutory reserves retain the character and recorded in the Balance Sheet of Transferee Company.

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

Question 2

(a) Balance Sheet of XYZ Ltd. as on March 31, 2024 is as follows :

Liabilities	Amount (₹)	Assets	Amount (₹)
Paid up capital 1,20,000 equity shares of ₹ 10 each	12,00,000	Fixed Assets	36,00,000

Liabilities	Amount (₹)	Assets	Amount (₹)
Free reserves	18,00,000	Stock	10,00,000
Securities premium	6,00,000	Debtors	8,00,000
Debentures	25,00,000	Cash and bank balance	18,00,000
Creditors	11,00,000	—	—
Total	72,00,000	Total	72,00,000

On the above date shares are brought back by the company to the extent possible, at a premium of ₹ 40 per share. Determine the number of shares to be brought back with necessary workings.

(*5 marks*)

(b) "ECBs are commercial loans raised by eligible resident entities from recognised non- resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling etc. The parameters apply in totality and not on a standalone basis."

Mention the three tracks for raising loans through ECB, also various types of ECBs that can be raised.

(*5 marks*)

(c) "There have been occasions when shareholders holding miniscule shareholdings have made frivolous objections against the restructuring scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections." Comment on the statement with relevant case law.

(*5 marks*)

Answer No. 2(a)

The amount of buyback of shares will be the least of the following two amounts:

Paid up capital before buyback ₹12,00,000

Free reserves ₹18, 00,000

Total paid up capital & free reserves ₹30, 00,000

(1) 25% of free reserves & paid-up capital ₹7,50,000

(2) Amount of equity available after satisfying minimum post buyback debt/equity ratio is ₹18,00,000

Post buyback debt/equity ratio is calculated as follows:

Debt/equity ratio=debt (after buyback) / equity (after buyback)

2= (25, 00,000+11, 00,000)/ equity

Equity=36, 00,000 /2 =Rs.18, 00,000

Amount of equity available for buyback = equity before buyback-equity required after buyback.
=Rs. (36,00,000-18,00,000) =Rs.18,00,000

Amount of buyback permissible is Rs.7,50,000

(i.e. lower of the two amounts Rs.7, 50,000 & Rs.18, 00,000)

Number of shares to be bought @ Rs.50= 750000 =15,000

Answer No. 2(b)

Track I: Medium term foreign currency denominated FCB with minimum average maturity of 3/5 years.

Track II: Long term foreign currency denominated ECB with minimum average maturity of 10 years.

Track III: Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

Various types of ECB: ECBs can be raised as:

1. Loans, e.g., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g.
   (a) Securitized instruments (e.g. floating rate notes / fixed rate bonds / non-convertible, optionally convertible or partially convertible preference shares/debentures
   (b) FCCB
   (c) FCEB
3. Buyers' credit / suppliers' credit.
4. Financial lease.

However, ECB framework is not applicable in respect of the investment in non-convertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

Answer 2(c)

A scheme of merger and amalgamation is approved by majority shareholders, in a meeting, duly convened and conducted under the supervision of the Tribunal. The Tribunal shall sanction the scheme only if the same is approved by the required shareholders' majority.

Every shareholder has the freedom to voice his opinion in the meeting or through an affidavit submitted to the Tribunal. Dissenting shareholders represent those members who do not agree with the resolution, i.e., they vote against the resolution. Such dissenting members are given opportunity to express their opinions during the decision-making process.

However, there have been some occasions where shareholders holding a small number of shares, have made frivolous objections against the scheme, just to defer the implementation of scheme.

On various such instances, the Courts have overruled their objections, but companies had to bear the consequences in the form of time and cost over-runs.

In 2003, Parke-Davis India Ltd. and Pfizer Ltd. were considering implementation of a scheme of merger. The minority shareholders of Parke-Davis India Ltd. objected to the scheme on the grounds that approval from requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed a petition before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme. Later, the dissenting shareholders filed a Special Leave Petition with the Supreme Court. Finally, the Supreme Court dismissed the petition filed by the shareholders. Parke-Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

«Similarly, in the case of the merger of Tomco with HLL, the minority shareholders put forward an argument that, as a result of the amalgamation, a large share of the market would be captured by HLL.

However, the Court turned down the argument and observed that there was nothing unlawful or illegal about it.

To curb such practice of frivolous objections, Section 230(4) of the Companies Act, 2013 provides that in a scheme of arrangement any person or persons holding at least 10% of the shareholding or 5% of the total outstanding debt can put objection to the proposed scheme.

OR (Alternate question to Q. No. 2)

Question 2A

(*i*) Explain the term "trigger point" in reference to takeover code.

Explain whether the public announcement is required in the following case :

The Paid-up Equity Share Capital of A Ltd is 5000 shares as on April 01, 2024. The promoters hold 2000 shares as on April 01, 2024, which is 40% as on April 01, 2024. The promoters comprise of three shareholders :

- A who holds 1100 shares (i.e. 22%)
- B who holds 750 shares (i.e. 15%) and
- C who holds 150 shares (i.e. 3%).

The company makes a preferential allotment of 400 shares to A as a result of which the post issue shareholding of A would be 1500 shares.

(*5 marks*)

(ii) "Due diligence is an investigation or audit of a potential investment. It seeks to confirm all material facts in regard to a sale. It is a way of preventing unnecessary harm/ hassles to either party involved in a transaction." Explain the statement.

(*5 marks*)

(iii) "The success of a merger or acquisition depends on whether synergy is achieved. Synergy takes the form of revenue enhancement and cost savings". Give your opinion indicating the benefits that companies can derive upon by merging.

(*5 marks*)

Answer No. 2A(i)

By trigger points, it is meant that the threshold levels upon reaching which, an acquirer, either on its own individual account or along with Persons Acting in Concert (PAC) acquiring shares or voting rights in a target company is required to make a public announcement for an open offer and comply with the other provisions of the Takeover Code with regard to an open offer.

Let us determine whether there would be a trigger using the methods.

(2400/ 5400) % - (2000/5000) % = 44.44% - 40% = 4.44%.

Since the acquisition by all the promoters together does not exceed 5% in a financial year there is no trigger.

However, we need to check what would be the post issue holding of A the allottee, who is currently

holding 22% of the paid-up capital of the company, with respect to the fully expanded capital which works out to 1500/5400 = 27.77%, by virtue of which he has crossed the initial threshold limit of 25% as stipulated in Regulation 3(1) of the Takeover Regulations. Therefore, A has triggered the Code and is under an obligation to make a public announcement.

Answer No. 2A(ii)

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

Due diligence is an investigation of a business or person prior to signing a contract, or an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations.

A common example of due diligence in various industries is the process through which a potential acquirer/ investor evaluates a target company including its assets for an acquisition.

The theory behind due diligence holds that performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available to decision makers and by ensuring that this information is systematically used to deliberate in a reflexive manner on the decision at hand and all its costs, benefits, and risks.

Due diligence is integral to business. It is exercised in a simple over-the-counter transaction or a complicated merger and acquisition transaction. For instance, while acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, product and brand involved, position in the debt market, status of legal and statutory compliances, past performance, etc. It is also essential to study the previous financial reports to analyse the company's performance, to check the company background, its promoters, general reputation, and return to the existing shareholders.

Answer No. 2A (iii)

Mergers and acquisitions have one common goal of creating synergy that makes the value of the combined companies greater than the sum of the two parts. The success of a merger or acquisition depends on whether this synergy is achieved. Synergy takes the form of revenue enhancement and cost savings. By merging, the companies hope to benefit from the following:

Becoming bigger: Many companies use M&A to grow in size and leapfrog their rivals. While it can take years or decades to double the size of a company through organic growth, this canbe achieved much more rapidly through mergers or acquisitions.

Pre-empted competition: This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles.

Domination: Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such transaction would have to face regulatory authorities.

Tax benefits: Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive.

Economies of scale: Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increased total output of a product.

Acquiring new technology: To stay competitive, companies need to stay on top of technological

developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.

Improved market reach and industry visibility: Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.

Question 3

(a) Explain "Deemed approval" as per provision of section 31(11) of the Competition Act, 2002.

(*3 marks*)

(b) Explain the provisions relating to appeal from Orders of Tribunal as per section 421 of the Companies Act, 2013.

(*3 marks*)

(c) A Ltd. acquires B Ltd., on 1st April, 2024 and discharges consideration for the business as follows :

(i) Issued 21,000 fully paid equity shares of ₹ 10 each at par to the equity shareholders of B Ltd.

(ii) Issued fully paid up 15% preference shares of ₹ 100 each to discharge the preference (₹ 2,00,000) of B Ltd. at a premium of 10%.

(iii) It is agreed that the debentures of B Ltd. (₹ 75,000) will be converted into equal number and amount of 13% debentures of A Ltd.

Calculate the amount of purchase consideration.

(*3 marks*)

(d) Business Combinations (IND AS-103) applies to a transaction or other event that meets the definition of a business combination." Mention three cases where IND AS-103 does not apply.

(*3 marks*)

(e) Explain the provisions related to combinations under section 5 of the Competition Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors.

(*3 marks*)

Answer No. 3(a)

Deemed approval

A deeming provision has been introduced by section 31(11). It provides that, if the Commission does not, on expiry of a period of 210 days from the date of filing of notice under section 6(2) pass an order or issue any direction in accordance with the provisions of section 29(1) or section 29(2) or section 29(7), the combination shall be deemed to have been approved by the Commission. In reckoning the period of 210 days, the period of thirty days specified in section 29(6) and further period of thirty working days specified in section 29(8) granted by Commission shall be excluded. Furthermore, where extension of time is granted on the request of parties the period of two hundred ten days shall be reckoned after deducting the extended time granted at the request of the parties.

Answer No. 3(b)

Appeal from Orders of Tribunal (Section 421)

(1) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(4) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

Answer to Q. No. 3 (c)

Calculation of purchase consideration

(i) 21,000 equity shares Rs. 10 =2, 10,000

(ii) 15% preference shares of Rs.200000*110% =2,20,000

Total =4, 30,000

(iii) Not to be included in purchase considered as it is payment to debenture holders.

Answer No. 3(d)

Business Combinations (IND AS-103) does not apply to the following:

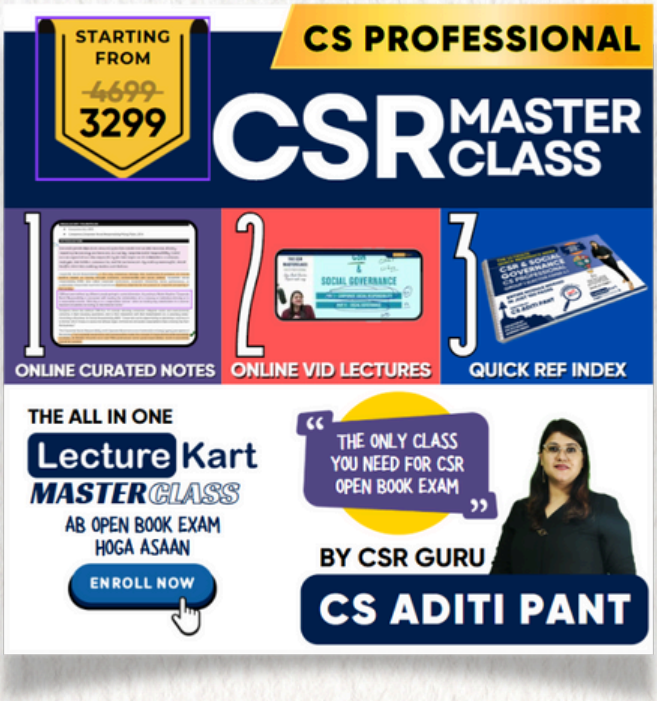
(a) The formation of a joint venture

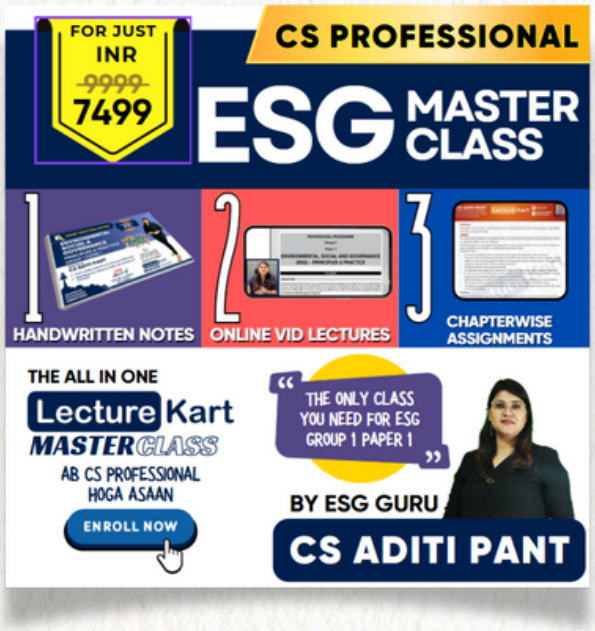
(b) The acquisition of an asset or a group of assets that does not constitute a business. In such cases the acquirer shall identify and recognise the individual identifiable assets acquired (including those assets that meet the definition of, and recognition criteria for, intangible assets in Ind AS 38 Intangible Assets) and liabilities assumed. The cost of the group shall be allocated to the individual assets and liabilities on the basis of their relative fair values at the date of purchase. Such a transaction or event does not give rise to goodwill.

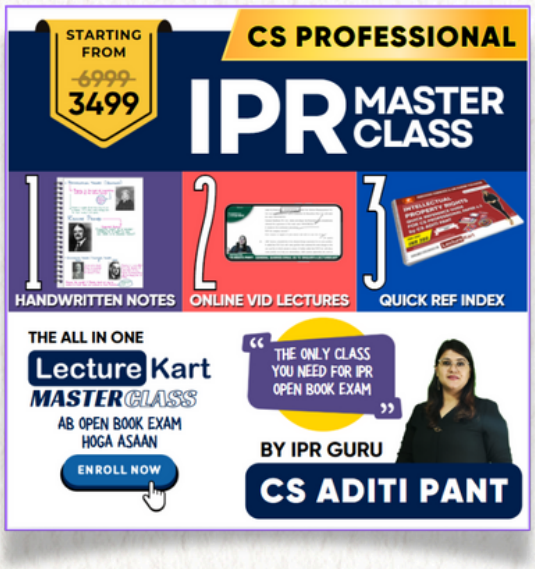
(c) Accounting for combination of entities or business under common control.

Answer 3(e)

In exercise of the powers conferred by Section 54(a) of the Competition Act, 2002, the Central Government in the public interest hereby exempts all cases of combinations under section 5 of the Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the Oil and Gas Sectors, from the application of the provisions of







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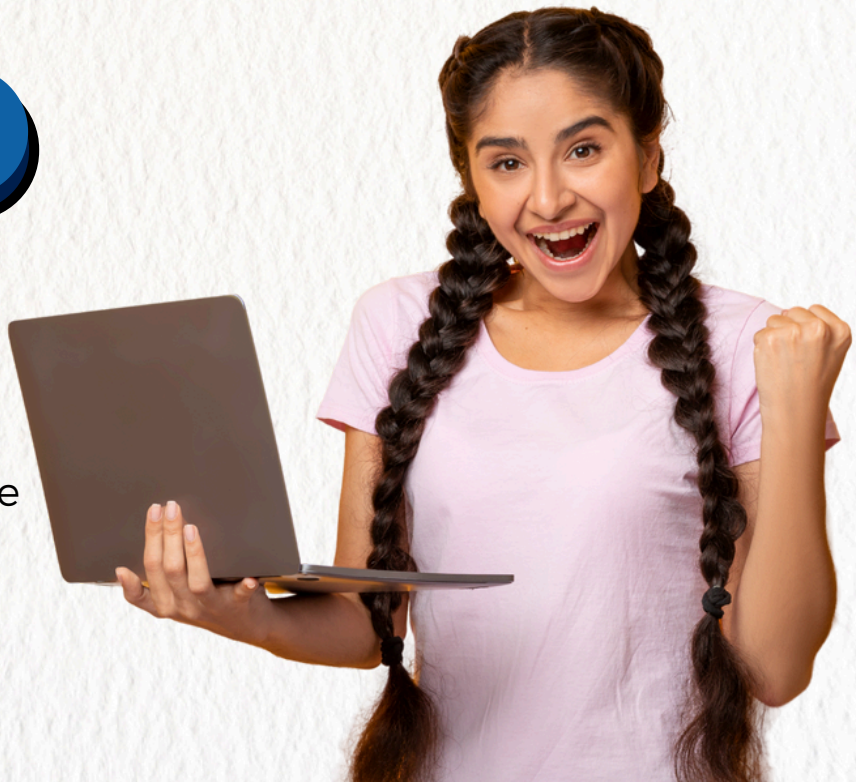

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sections 5 and 6 of the Act, for a period of five years from the date of publication of this notification in the Official Gazette.

The exemption, which was initially valid for five years until November 21, 2022, has been extended for another five years, now valid until November 21, 2027.

Paving a way for fast-track consolidation in the oil and gas sector, the Ministry of Corporate Affairs, Government of India has exempted all cases of combinations involving CPSEs operating in OGS, along with their wholly or partly owned subsidiaries operating in OGS, from Section 5 and Section 6 of the Competition Act, 2002.

PART-II

Question 4

(a) A partnership firm has been set up for objects for rendering professional or financial services etc. It wants to appoint itself as a registered valuer under rule 3 of The Companies (Registered Valuers and Valuation, Rules, 2017. Comment and advice whether the firm is eligible for appointment as a registered valuer.

(*5 marks*)

(b) Explain the term "Insolvency Commencement Date" as defined under section 5(2) of The Insolvency and Bankruptcy Code, 2016. What are the acts prohibited on the insolvency commencement date as per provisions of the section 14(1) of the Code ?

(*5 marks*)

(c) Contracts entered into and in force need to be replaced by fresh contracts after merger or takeovers of entities, pursuant to orders passed by Courts or Tribunals." Do you agree ? Give reasons.

(*5 marks*)

(d) Explain the concept of 'Qualifying Debt' and 'Excluded Debt' under The Insolvency and Bankruptcy Code, 2016.

(*5 marks*)

Answer No. 4 (a)

Rule 3(2) of the Companies (Registered Valuers and Valuation) Rules, 2017 provides that no partnership entity or company shall be eligible to be a registered valuer if-

(a) it has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is a subsidiary, joint venture or associate of another company or body corporate;

(b) it is undergoing an insolvency resolution or is an undischarged bankrupt.

(c) all the partners or directors, as the case may be, are not ineligible under clauses (c), (d), (e), (f), (g), (h), (i), (j) and (k) of sub-rule (1);

(d) three or all the partners or directors, whichever is lower, of the partnership entity or company, as the case may be, are not registered valuers; or

(e) none of its partners or directors, as the case may be, is a registered valuer for the asset class, for the valuation of which it seeks to be a registered valuer.

Therefore, from the above, it may be concluded that the firm is eligible to appoint itself as registered valuer.

Answer No. 4(b)

According to Section 5(12) of the Insolvency & Bankruptcy Code, "Insolvency Commencement Date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be.

Section 14(1) of the Insolvency & Bankruptcy Code provides for moratorium. It provides that subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

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

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

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

Answer No. 4(c)

Mergers, amalgamations, acquisitions, takeovers or any other kind of corporate restructuring is undertaken for the purpose of expansion, growth or diversification of business.

- However, corporate restructuring is much more than economic synergies, but it covers other intangible factors as well, such as corporate cultures, practices, policies, and environment etc.
- Thus, timely integration of systems, applications and data provide the corporate information needed to achieve the post-merger objectives
- Post-merger reorganization includes the reorganization of each and every aspect of a company's functional area for the purpose of achieving the planned objectives of takeover, amalgamation, merger or demerger.
- Every scheme of merger and amalgamation is sanctioned by the Court or Tribunal Post-merger, transferor company is dissolved and all its assets and liabilities are transferred to the transferee company. Further, the companies shall also ensure that the contracts entered by the merging entity shall continue to be transferred in the name of merged entity.
- However, other aspects in the contracts with a third party may require company to inform about merger or may give rise to other party to terminate the contract.
- Normally lease agreements, that contain fixed tenure may release the landlord from such restriction in the event of restructure of lessee entity.

- Further, the merged entity would need to check various rights and obligations mentioned in the contracts with third parties and should allocate teams to identify and ensure compliance of those requirements. In short, all existing contracts with its terms shall be reviewed.

Answer No. 4(d)

Qualifying Debt means amount due, including interest or any other sum due in respect of the amounts owed under any contract, by the debtor. However, qualified debt does not include -

- an excluded debt;
- a secured debt; and
- any debt, which is incurred 3 months before the date of application for Fresh Start Process {Section 79(19) of the IBC}.

Excluded Debt means

- liability to pay fine/penalty imposed by a Court or Tribunal;
- liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation;
- liability to pay maintenance to any person under any law for the time being in force;
- liability in relation to a student loan;
- any other debt as may be prescribed {Section 79(15) of the IBC}.

Question 5

(*a*) "Resolution Professional may be replaced at any time during the corporate insolvency process by the committee of creditors". Comment.

(b) "The UNCITRAL Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases". Explain.

(c) Mr. S, a company secretary in practice, was last appointed by M/s C Ltd. as secretarial auditor up to March 31, 2022. He now wants to be appointed as a liquidator. Advice and also comment on his eligibility to be appointed as liquidator.

(d) Explain the provisions of continual disclosures under regulation 30 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011.

(e) Explain the term "Discovered Price" as defined under regulation 20 of The SEBI (Delisting of Equity Shares) Regulations, 2021.

(*3 marks each*)

Answer No. 5(a)

Section 27 provides that a resolution professional may be replaced at any time during the corporate insolvency resolution process by the committee of creditors by a sixty-six percent majority of voting shares.

Section 27 of the Code reads as follows:

(1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under subsection (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section."

Answer No. 5(b)

The Model Law focuses on four elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.

a) Access

These provisions give representatives of foreign insolvency proceedings and creditors a right of access to the courts of an enacting State to seek assistance and authorize representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.

b) Recognition

One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings in order to avoid time-consuming legalization or other processes that often apply and to provide certainty with respect to the decision to recognize.

These core provisions accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative of those proceedings.

Provided it satisfies specified requirements, a qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its center of main interests at the date of commencement of the foreign proceeding or a non-main proceeding, taking place where the debtor has an establishment. Recognition of foreign proceedings under the Model Law has several effects — principal amongst them is the relief accorded to assist the foreign proceeding.

c) Relief

A basic principle of the Model law is that the relief considered necessary for the orderly and fair conduct of cross border insolvencies should be available to assist foreign proceedings. By specifying the relief that is available, the Model law neither imports the consequences of foreign law into the insolvency system of the enacting State nor applies to the foreign proceedings the relief that would be available under the law of the enacting State. Key elements of the relief available include interim relief at the discretion of the court between the making of an application for recognition and the decision on that application, an automatic stay upon recognition of main proceedings and relief at the discretion of the court for both main and non-main proceedings following recognition.

d) Cooperation and coordination

These provisions address cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings concerning that debtor. The Model law expressly empowers courts to cooperate in the areas governed by the Model law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between representatives, both foreign and local, is also authorized. The provisions addressing coordination of concurrent proceedings aim to foster decisions that would best achieve the objectives of both proceedings, whether local and foreign proceedings or multiple foreign proceedings.

Answer 5(c)

Regulation 3 of the IBBI ((Liquidation Process) Regulations, 2016 provides for eligibility for appointment as a liquidator. According to it, an insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person.

Explanation:

(1) A person shall be considered independent of the corporate person, if he

(a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner

(i) of a firm of auditors or secretarial auditors or cost auditors of the corporate person; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm,

at any time in the last three years.

(2) An insolvency professional shall not be eligible to be appointed as a liquidator if he, or the insolvency professional entity of which he is a partner or director is under a restraint order of the Board.

(3) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.

(4) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.

For being eligible to become a liquidator, Mr. S shall first be an insolvency professional. As question is silent whether he is an insolvency professional or not, even if it is assumed that he is an insolvency professional still Mr. S is not eligible to be appointed as a liquidator in the question as he was a secretarial auditor of M/s. C Ltd. till 31st March 2022 i.e. within last three financial years.

Answer No. 5 (d)

Regulation 30 of SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations states that:

1. Every person, who together with persons acting in concert with him, holds shares or voting rights entitling him to exercise twenty-five per cent or more of the voting rights in a target

company, shall disclose their aggregate shareholding and voting rights as of the thirty-first day of March, in such target company in such form as may be specified.

2. The promoter of every target company shall together with persons acting in concert with him, disclose their aggregate shareholding and voting rights as of the thirty-first day of March, in such target company in such form as may be specified.
3. The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the end of each financial year to :
   (a) every stock exchange where the shares of the target company are listed; and
   (b) the target company at its registered office.

Answer No. 5(e)

Regulation 20 of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2021 dealing with discovered price.

Regulation 20 (1) provides that after fixation of the floor price under 19 in terms of regulation 19A of these regulations, the discovered price shall be determined through the reverse book building process in the manner specified in Schedule II of these regulations and shall be disclosed in the detailed public announcement and the letter of offer by the Manager of the offer.

The acquirer shall have the option to provide an indicative price in respect of the delisting offer, which shall be higher than the floor price calculated in terms of regulation 19A of these regulations.

The acquirer shall also have the option to revise the indicative price upwards before the start of the bidding period and the same shall be duly disclosed to the shareholders. (6) The acquirer may, if it deems fit, pay a price higher than the discovered price determined in terms of sub-regulation (1).

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

Question 6

(a) "One of the main functions of the committee of creditors (constituted by the Interim Resolution Professional under section 21 of the Code) is the appointment of the Resolution Professional." Explain the provisions relating to the appointment of Resolution Professional as per section 22 of the Code.

(*5 marks*)

(b) A director of a company in CIRP had moved the Hon'ble NCLT, Mumbai Bench, seeking the right to participate in the meetings of the Committee of Creditors (CoC) and access all the documents and/or information including the resolutions plans being discussed in the meetings of the CoC, for effective participation in the meetings. The Hon'ble NCLT on August 1, 2018 held that the directors have the right to attend the CoC meetings as per Section 24 of the Code. However, the directors could not receive information that is considered confidential by the resolution professional or the CoC, including the resolution plans. In the first appeal, the decision of the NCLT was upheld by the appellate tribunal on August 9, 2018. The director then moved the Supreme Court, challenging the decision of the appellate tribunal. Discuss citing relevant case law.

(*5 marks*)

(c) What are the duties of resolution professional before initiation of pre-packaged insolvency resolution process ?

(*5 marks*)

Answer No. 6(a)

Appointment of Resolution Professional

One of the main functions of the committee of creditors (constituted by the Interim Resolution Professional under section 21 of the Code) is the appointment of the Resolution Professional.

Appointment of Interim Resolution Professional — Section 22 provides that at the first meeting of the committee of creditors which is held within seven days of its constitution, the committee of creditors by a majority vote of not less than sixty-six per cent of the voting share of the financial creditors, may either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

[Section 22(1) and Section 22(2)]

Communication of decision — According to clause (a) of sub-section 3 of section 22, where the committee of creditors resolves to continue the interim resolution professional as resolution professional, it shall communicate its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority. The appointment of interim resolution professional as resolution professional will be subject to a written consent from the interim resolution professional in the specified form.

Application before Adjudicating Authority — In case, if the committee of creditors resolves to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional along with a written consent from the proposed resolution professional in the specified form. [Section 22(3)(b)]

Confirmation by Insolvency and Bankruptcy Board — The Adjudicating Authority shall forward the name of the resolution professional proposed under clause (b) of sub-section (3) to the Board for its confirmation and shall make such appointment after confirmation by the Board. [Section 22(4)]

If the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

[Section 22(5)]

Answer No. 6(b)

Vijay Kumar Jain v. Standard Chartered Bank and Others

The Hon'ble Supreme Court held that the scheme of the Code makes it clear that the directors, though not members of the COC, have a right to participate in every meeting of the COC. In addition, for effective participation as vitally interested parties in discussion on resolution plans, they have the right to receive copies of the resolution plans presented to the COC. The Hon'ble Supreme Court also clarified that under Regulation 21(3) (iii) of the CIRP Regulations, the notice of the COC meeting, which is required to be given to the directors as well, must contain copies of all the documents relevant for matters to be discussed, including the resolution plans.

The Hon'ble Supreme Court considered the directors to be vitally interested on two counts:

1. Such directors are often guarantors and bound by the approved plan, which may scale down their own debts.
2. The directors, being well versed in the affairs of the company, may be able to assist the COC on determining whether the resolution plan addresses the cause of default by the company (a mandatory requirement for resolution plans).

The Hon'ble Supreme Court also clarified that any concerns over breach of confidentiality may be alleviated by the resolution professional obtaining a confidentiality undertaking from the directors, which may also contain an indemnity to the resolution professional against any breach. Thus, based on the decision by the Hon'ble Supreme Court, the director may be given copies of the resolution plan and other related documents, provided he is ready to sign the confidentiality agreement.

Answer No. 6(c)

As per Section 54 B (1), the insolvency professional, proposed to be appointed as the resolution professional, shall have the following duties commencing from the date of the approval under clause (e) of sub-section (2) of section 54A, namely:

(a) prepare a report in such form as may be specified, confirming whether the corporate debtor meets the requirements of section 54A, and the base resolution plan conforms to the requirements referred to in clause (c) of sub-section (4) of section 54A;

(b) file such reports and other documents, with the Board, as may be specified; and

(c) perform such other duties as may be specified.

Section 54B (3) provides that the fees payable to the insolvency professional in relation to the duties performed under subsection (1) shall be determined and borne in such manner as may be specified and such fees shall form part of the pre-packaged insolvency resolution process costs, if the application for initiation of pre-packaged insolvency resolution process is admitted.

OR (Alternate question to Q. No. 6)

Question 6A

(*i*) Section 81 of the IBC 2016 provides for the imposition of an interim moratorium. The purpose of the interim moratorium is to provide a conducive environment for the debtor to initiate a fresh start process. The interim moratorium provisions shall have effect from the date of filing of such application up to the date on which such application is admitted or rejected by the adjudicating authority. Mention the information that is required to be provided the application as per section 81(4) of the Code.

(*5 marks*)

(ii) Prabhu Polyesters Ltd. is undergoing Corporate Insolvency Resolution Process as per Insolvency and Bankruptcy Code, 2016. Committee of Creditors is constituted. In the mean time, the Corporate Debtor, Prabhu Polyesters Ltd. made a settlement with the applicant financial creditor and desires to get the application withdrawn. What will be your advice to Prabhu Polyesters Ltd. regarding the withdrawal of its application.

(*5 marks*)

(iii) "Debt restructuring involves a reduction of debt and an extension of payment terms or change in terms and conditions." Analyze the statement indicating that any resolution plan needs to be consented by the Committee of Creditors and approved by the National Company Law Tribunal (NCLT).

(*5 marks*)

Answer No. 6A (i)

According to Section 81(4) of the Insolvency and Bankruptcy Code, 2016, the application under Section 81(3) shall contain the following information supported by an affidavit, namely:

(a) a list of all debts owed by the debtor as on the date of the said application along with details relating to the amount of each debt, interest payable thereon and the names of the creditors to whom each debt is owed;

(b) the interest payable on the debts and the rate thereof stipulated in the contract;

(c) a list of security held in respect of any of the debts,

(d) the financial information of the debtor and his immediate family for up to two years prior to the date of the application;

(e) the particulars of the debtor's personal details, as may be prescribed;

(f) the reasons for making the application;

(g) the particulars of any legal proceedings which, to the debtor's knowledge has been commenced against him;

(h) the confirmation that no previous fresh start order under this Chapter has been made in respect of the qualifying debts of the debtor in the preceding twelve months of the date of the application.

Answer No. 6A(ii)

As per new section 12A of the Insolvency & Bankruptcy Code, the Adjudicating Authority may allow the withdrawal of application, on making an application by the applicant with the approval of 90% voting share of the Committee of Creditors

Pursuant to regulation 30 of the IBBI (Resolution Process of Corporate Persons), 2016, such an application for withdrawal after constitution of CoC can be made by the applicant through interim resolution professional or resolution professional as the case may be.

Sub-regulation (2) provides that the application shall be made in Form FA of the Schedule-I accompanied by a bank guarantee- (a) towards estimated expenses incurred on or by the interim resolution professional for purposes of regulation 33, till the date of filing of the application under clause (a) of sub regulation (1); or (b) towards estimated expenses incurred for purposes of clauses (aa), (ab), (c) and (d) of regulation 31, till the date of filing of the application under clause (b) of sub-regulation (1).

Such an application shall be considered by CoC within seven days of its receipt.

Where such an application is approved by the committee with ninety percent voting share, the resolution professional shall submit such application along with the approval of the committee, to the Adjudicating Authority on behalf of the applicant, within three days of such approval. The Adjudicating Authority may, by order, approve the application submitted pursuant to which the applicant shall deposit an amount, towards the actual expenses incurred for the purposes referred to in clause (a) or clause (b) of sub-regulation (2) till the date of approval by the Adjudicating Authority, as determined bythe interim resolution professional or resolution professional, as the case may be, within three days of such approval, in the bank account of the corporate debtor, failing which the bank guarantee received under sub-regulation (2) shall be invoked, without prejudice to any other action permissible against the applicant under the Code .

Answer No. 6A(iii)

In case of Corporate Insolvency Resolution Process (CIRP), corporate restructuring strategies include organizational restructuring and financial restructuring.

- Financial restructuring is the process of reorganizing the financial structure, which primarily

comprises of equity and debt capital financial restructuring is undertaken either to recover from financial distress or as part of company's general financial strategy, such as gaining higher market share, seize emerging market opportunities, risk reduction, better debt management.

- Debt restructuring is the process of reorganizing the whole debt capital of the company in negotiation with bankers, creditors, vendors. It involves a reduction of debt and an extension of payment terms of change in terms and conditions.
- Restructuring includes alteration of the repayment period, repayable amount, the amount of instalments, rate of interest, sanction of additional credit facility, enhancement of existing credit limits, compromise settlements etc.
- One of the best methods for corporate debt restructuring is debt-equity swap where specified shareholders have right to exchange stock for a predetermined amount of debt in the same company. In debt-equity swap, borrowings are exchanged with shares of the company.
- The resolution plan shall be submitted by a resolution applicant. The Committee of Creditors shall approve a resolution plan by a vote of not less than 66% majority of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Insolvency and Bankruptcy Board of India.
- Once the resolution plan is approved by the Committee of Creditors, it is presented to the Adjudicating Authority (NCLT) for its approval.
- Thus, under the Insolvency and Bankruptcy Code, a resolution plan requires the consent of the Committee of Creditors and thereafter the approval of the Adjudicating Authority (NCLT).
- As per section 31, the NCLT shall review the resolution plan sanctioned by the Committee of Creditors. If NCLT is satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements, it shall approve the resolution plan.
- After NCLT approval, the resolution plan shall be binding on the Corporate Debtor and its employees, members, creditors, guarantors and other stakeholders involved in resolution plan.

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RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES & REMEDIES

MODULE 2 PAPER 6

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

NOTE : *Answer All Questions.*

Question 1

(a) Shreekant, booked two newly launched SUVs "Zeta", in Jan 2023 from VayuGati Limited, a prominent automobile manufacturer in India. Such booking amount was to be deposited without knowing the price of the car and without knowing when the vehicle would be made available. The car got launched in June 2023 when prices and delivery time frame of the same was announced. The base model was launched at ₹ 12.74 lacs (ex-showroom price) and the other models were priced accordingly. As per Shreekant, this was an unreal price for the product as the market was expecting the prices to be around ₹ 10.00 lacs. Lot of dealers in the market forced accessories, extended warranty etc. to customers before promising delivery of their much-awaited launch. He further stated that by such conduct in the market, VayuGati Limited generated an artificial hype in the market that there will be 8 to 10 months of waiting on this product. Customers, expecting a huge waiting period, proceeded to buy the car without thinking through whereas it is observed that actual sales pattern of the car is reducing month by month post the launch. As per Shreekant, seeing the sales pattern, VayuGati Limited started to do deep discount on new bookings, calling it with a different name "Thunder", loaded with lot of freebies. He asked VayuGati Ltd to refund the excess price charged on his bookings which the company rejected and said that there is no reduction in prices from their side and they are not planning any refund.

Aggrieved by the refusal of the VayuGati Ltd to grant him a refund, Shreekant has filed an application with present information with the Competition Commission of India alleging that the Company has abused its dominant position in the market and imposed unfair and unethical pricing strategy with respect to his bookings 'Zeta', which also amounts to an unfair trade practice. Hence, it should be penalized as well as directed to refund the excess charged. He has also stated that till the time the Commission's inquiry in the matter is completed, the VayuGati Ltd be stopped from any selling 'Zeta' cars in the Indian market.

Referring to the judicial pronouncement, analyze and decide whether Shreekant's allegation be accepted by CCI.

(5 marks)

(b) FK Logistics Pvt Ltd, RK Infrastructure Pvt Ltd and SK Systems Pvt Ltd jointly submitted a scheme of amalgamation before Hon'ble NCLT. Upon investigation, it was found that an enquiry with respect to FK Internet Pvt Ltd (group company of FK Logistics Pvt Ltd) was pending. Based on this ground, NCLT rejected application of the scheme of amalgamation.

All three (3) parties to the scheme of amalgamation jointly filed an appeal against the order of NCLT rejecting scheme of amalgamation stating the reason that FK Internet Pvt Ltd is not the subject matter of the scheme and pending enquiry was not against any of the transferor or transferee company. Is the joint petition by the Company to the scheme of amalgamation

maintainable against the order of NCLT and appeal be allowed ? Support your answer with relevant and decided case law.

(5 marks)

(c) Serious Fraud Investigation Office (SFIO), being a multi-disciplinary organization under the Ministry of Corporate Affairs, consisting of experts from various fields for detecting and prosecuting white collar crimes/frauds. Under what circumstances, Central Government may assign investigations into the affairs of the Company to SFIO ? Who can be released on bail by a Special Court even if guilty of an offence by SFIO ?

(5 marks)

(d) Mr. Y, the Informant filed an application under the Competition Act, 2002 ('Act'). He alleged contravention of the provisions of the Act by M/s PQR Limited, the Opposite Party, by virtue of controlling more than half of the upscale multiplex screens in India, which is in a dominant position in the film exhibition market and has abused its dominance by according special treatment to films of powerful and monetarily affluent production houses and constraining the entry of films by independent filmmakers. It is also stated that Opposite Party has indulged in cartelization and vertical integration by entering into business of film production, film distribution and film exhibition with the big production houses. As per the Informant, his films suffered due to the alleged undercurrent of anticompetitive conduct by the Opposite Party, which is a result of collaboration/ cooperation between big production houses and the Opposite Party, creating entry barrier for films by independent film producers.

In the light of judicial pronouncement, comment if the appeal of Mr. Y will be allowed before Competition Commission of India.

(5 marks)

Answer 1(a)

The facts of the given situation are similar to case of "*Harmit Ahuja v. Maruti Suzuki India Ltd*" as decided by Competition Commission of India (Commission).

In this case the Informant had made allegations with regard to abuse of dominant position by Maruti Udyog Ltd. (OP). As such, the first step the Commission shall had to advert to was to define a 'relevant market' and assess whether the OP was in a position of dominance in the same.

As the allegations made in the present information pertain to the car Jimmy", an SUV, it was noted from the information available in the public domain and evidently, in 2022 and 2023, the SUV sales made by the Maruti Suzuki were 249100 and 206000 respectively, while the sales made by Mahindra & Mahindra were 239800 and 204500 respectively. Assuming that the above stated data comprises the entire SUV segment of the passenger cars markets in India, the market share of the Maruti Suzuki in the same in 2022 and 2023 comes to approx. 22% and 21.5% respectively.

It was laid down that in light of the data extracted above, in the opinion of the Commission, Maruti Suzuki does not hold a market share large enough to enable it to operate independently of competitive forces prevailing in the market or to affect its competitors or consumers or the market in its favour. As such, Maruti Suzuki does not appear to be a dominant player in the market. Therefore, in the opinion of the Commission, a case of violation of the provisions of Section 4 of the Competition Act, 2002 (Act) cannot be made out against Maruti Suzuki.

Further, the Commission also noted that the grievance raised by the informant is an *inter-se* dispute between the informant and Maruti Suzuki regarding the price of the product sold by Maruti Suzuki to the information. In the opinion of the Commission, on the basis of the grievances alleged by the

informant, no competition issue or concern seems to arise from the facts and allegations stated by the informant. Once a buyer purchases a product from a seller at a given price, it cannot insist to avail benefit of any future discount which may be offered on such product by the seller. The discounted price alleged also does not seem to be predatory in nature.

In view of the above, the Commission was of the considered opinion that no prima facie case of contravention of the provisions of Section 4 of the Act was made out against Maruti Suzuki in the present matter.

Applying the ratio of the above decision to the given situation, it can be said that Shreekant's allegations against VayuGati Ltd. may not be accepted by CCI as VayuGati Ltd. does not appear to be a dominant player in the market and also once Shreekant purchases a car from VayuGati Ltd at a given price, he cannot insist to avail benefit of any future discount which may be offered on such product by Vayugati Ltd.

Answer 1(b)

This facts of the given situation are similar to the case between *Flipkart Logistics Pvt Ltd & Ors v. Regional Director, South East Region & Ors.*

The appellants jointly filed a petition for amalgamation before the National Company Law Tribunal (NCLT). Appellants 1 & 2 were the transferor companies and appellant no 3 was the transferee company. Upon coming to know that an enquiry with respect to Group Company of companies involved in scheme of amalgamation was pending, NCLT rejected the scheme of amalgamation. Aggrieved by the decision, parties choose to appeal against the order of NCLT to National Company Law Appellate Tribunal.

Having heard, learned counsel for both the sides, it appears that the reasons recorded in impugned order by the Ld. NCLT cannot be maintained. The enquiry was not against any of the Transferor or Transferee Companies. It was against Flipkart Internet Pvt. Ltd. The said Company is not the subject matter of the scheme. Also, the appellants had already given undertakings to ensure that if the inquiry against Flipkart Internet Private Limited has findings proved against them, then the appellants and their Promoters and Directors and Shareholders shall remain responsible for any liability, if any, getting attracted against them.

Going through the records and considering the submissions made, an impugned order was set aside and allowed the appeal. Also, scheme of amalgamation was sanctioned with modification that appellants no 1 to 3 shall be bound by undertaking that "Appellant no 1, 2 and 3, their promoters and Directors and Shareholders shall remain responsible for any liability, if any, getting attracted against them due to the enquiry against "Flipkart Internet Pvt. Ltd". The scheme as regards the Appellants will be treated as approved to the extent of the Amalgamation of the Appellant nos 1, 2 and 3. The matter was remitted back to the Ld. NCLT and request to issue further formal order (s) required to be issued, within a month of receipt of copy of this judgement and order.

In view of the case discussed above, it can be said that joint petition is maintainable, and appeal may be allowed.

Answer 1(c)

Circumstances under which the Central Government may assign investigations into the affairs of the Company to SFIO

As per section 212(1) of the Companies Act, 2013(the Act), without prejudice to the provisions of section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office–

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

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

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

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

Provisions relating to Bail by Special Court

As per section 212(6) of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973/Bharatiya Nagarik Suraksha Sanhita, 2023, offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless–

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

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

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

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

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

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

As regards bail, even when the person is found to be guilty, the Special Court has not been conferred with any powers under Section 212 of the Act to grant bail in such circumstances.

Answer 1(d)

The fact of the given situation are similar to the case decided by Competition Commission of India (CCI) in the matter of *Yogesh Pratap Singh (Informant) And PVR Ltd. (Opposite Party)*.

CCI Order under Section 26(2) of the Competition Act, 2002

In this case, the Hon'ble Competition Commission of India was of the view that the commercial wisdom of the exhibitors is largely governed by consumer demand and unless harm to competition is apparent, any intervention will only lead to undesirable consequence by taking away the autonomy of such undertaking and substituting the decision of such entity by the decision of the

regulator. In the realm of competition law, it is widely understood that firms have an autonomy to choose their trading partners as long as the exercise of such autonomy does not affect the fair functioning of the markets. The Commission in its various orders has upheld the freedom enjoyed by the enterprises in the market subject to compliance of the provisions of the Act. Hon'ble Commission is of the view that there must be autonomy available to the exhibitors to deal with movies the way they want, in alignment with their business requirements and subject to provisions of the Act.

In this vein, nobody can ask for an absolute right to deal with a particular business. Similarly, there is no absolute right of refusal. This will depend upon the facts and circumstances of each case. Thus, the right to choose a movie for exhibition lies with Opposite Party and this freedom cannot be curtailed by compelling it to exhibit the movie of the Informant unless and until it causes any harm to competition. CCI is of the opinion that, *prima facie*, as there appears no discernible competition concern in the matter, it would not be appropriate for the Commission to delve into allegations of abuse of dominant position which requires delineation of relevant market. Accordingly, the Commission does not deem it necessary to delineate the relevant market and undertake further assessment thereupon. With regard to applicability of Section 3(4) of the Competition Act, 2002 (Act), the Commission is of the view that the existence of an agreement/arrangement between the parties is a *sine qua non* which aspect is neither captured in the Information nor any material evidence given in relation thereto. Further, the Commission notes that the mere fact that the Opposite Party is vertically integrating itself with film production does not *per se* amount to any contravention of Section 3(4) of the Act.

In view of the above case, it can be said that the appeal of Mr. Y may not be allowed before Competition Commission of India.

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

Question 2

(a) Mr. A who was a director in ABC Limited, had directorships for more than 20 companies till 31.03.2015. He tendered his resignation as the director in one of the Company. The same was accepted by the Board of Directors of the Company on 29.12.2015. However, the intimation of his resignation was sent to the Registrar of Companies vide Form DIR-12 on 10.02.2016. The respondent has violated the provisions under Section 165(1) read with Section 165(3) of the Companies Act, 2013 which is punishable under Section 165(6) of the Act. The NCLT, Kolkata bench has imposed compounding fees of certain amount which is less than minimum fees prescribed under Section 165(6) of the Companies Act, 2013. Being aggrieved with this order, Registrar of Companies (RoC) has filed an Appeal. Discuss the matter with relevant case laws and decide the appeal.

(4 marks)

(b) "NCLT works on the lines of a normal Court of law in the country and is obliged to fairly and without any biases determine the facts of each case and decide with matters in accordance with principles of natural justice and in the continuance of such decisions, offer conclusions from decisions in the form of orders". Discuss the statement with reference to constitutional provisions of tribunals under the Companies Act 2013 its purposes, power and proceeding before it.

(4 marks)

(c) Mr. Amitabh is a judicial magistrate in a lower court. He was appointed to hold office of the special court for the speedy disposal of the pending cases under the Companies Act,

2013. Decide as per the applicable provisions of the Companies Act, 2013 whether the appointment of Mr. Amitabh is tenable.

(4 marks)

(d) ABC Ltd and RST Ltd after amalgamation became new company and renamed as XYZ Ltd. Before amalgamation, both companies were major market player in the cement business. After amalgamation, they acquired monopoly status in the market and driving out existing competitors out of the market by setting up cut throat pricing. Over a period of time, pricing for cement was set in such a manner that it is almost impossible for any new competitor to enter the market. After 2 years of this combination when media started making noise about this merger and adverse pricing of cement, Competition Commission of India came into action and set up an inquiry whether such combination has caused appreciable adverse effect on competition in India. Media approached Managing Director of XYZ Ltd to ask whether inquiry by CCI would make them to reduce cement prices in the market or they will amend pricing agreement with dealers or what will be Company's approach to this enquiry?

MD of XYZ Ltd responded to media that CCI now has no right to set up inquiry now, it is time barred. Hence, he is not worried about enquiry at all as it is illegal. Do you agree with MD's opinion that CCI cannot initiate inquiry now and it is illegal ? Explain.

(4 marks)

Answer 2(a)

The facts of the given situation are similar to decided case of *Registrar of Companies, West Bengal vs Karan Kishore Samtani* before National Company Law Appellate Tribunal (NCLAT).

Fact of the case:

The respondent was the director, for more than 20 companies till 31.03.2015. The respondent tendered his resignation as the director of the Company M/s Fabius Properties Pvt. Ltd. The same was accepted by the Board of Directors of the Company on 29.12.2015. However, the intimation of his resignation was sent to the Registrar of Companies *vide* Form DIR-12 on 10.02.2016.

The respondent has violated the provisions under Section 165(1) read with Section 165(3) of the Companies Act, 2013(Act) which is punishable under Section 165(6) of the Act, The NCLT, Kolkata bench has imposed compounding fees of 50,000/- which is less than minimum prescribed under Section 165(6) of the Companies Act, 2013. Being aggrieved with this order ROC has filed this Appeal.

Decision:

The issue for consideration was, whether Tribunal can impose the compounding fees under Section 441 (1) of the Companies Act, 2013 less than minimum prescribed for the offence under Section 165 (1) read with Section 165(6) of the Companies Act, 2013.

The NCLAT held that the NCLT, Kolkata Bench has failed to notice the minimum fine prescribed under Sub-Section 6 of Section 165 of the Companies Act, 2013 which was applicable at relevant time.

The Respondent has contravened the provisions of 165(1) of the Companies Act, 2013 which is punishable under Sub-Section 6 of Section 165 of the Companies Act, 2013. Taking into consideration, the facts and circumstances of the case, NCLAT imposed minimum fine at the rate of five thousand rupees for every day for the period 01.04.2015 to 21.02.2016 i.e. 272 days.

The NCLAT quantified the penalty amount to Rs. 13,60,000/-. The Respondent had paid Rs. 50,000/- after adjustment, and later he was liable to pay 13,10,000/-.

Therefore, the Respondent was directed to pay such amount within a period of 60 days in National Company Law Tribunal, Kolkata.

Hence, considering the decision of NCLAT in the above matter, the appeal of ROC may be held as tenable.

Answer 2(b)

Section 408 of Companies Act, 2013(Act) deals with the provisions of constitution of National Company Law Tribunal ("NCLT" or "The Tribunal).

The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013(Act) *w.e.f.* 01st June 2016. The setting up of the NCLT as a specialized institution for corporate justice is based on the recommendations of the Justice Eradi Committee.

NCLT works on the lines of a normal Court of law in the country and is obliged to fairly and without any biases determine the facts of each case and decide with matters in accordance with principles of natural justice and in the continuance of such decisions, offer conclusions from decisions in the form of orders. The orders so formed by NCLT could assist in resolving a situation, rectifying a wrong done by any corporate or levying penalties and costs and might alter the rights, obligations, duties or privileges of the concerned parties. The Tribunal is exempted from the requirement to adhere severe rules with respect to appreciation of any evidence or procedural law.

As per Section 424 of the Act, the Tribunal shall not, while disposing of any proceeding before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice, and, subject to the other provisions of this Act or of the Insolvency and Bankruptcy Code, 2016 and of any rules made thereunder, the Tribunal shall have power to regulate their own procedure.

The Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath,

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office:

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it ex parte:

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed

All proceedings before the Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 (Punishment for false evidence) and 228 (Intentional insult or interruption to public servant sitting in judicial proceeding), and for the purposes of section 196(Using evidence known to be false) of the Indian Penal Code, and the Tribunal shall be deemed to be civil Court for the purposes of section 195(Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence) and Chapter XXVI(Provisions as to offences affecting the administration of Justice) of the Code of Criminal Procedure, 1973.

Any order made by the Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction:

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

Further, as per Sec 420 of the Act, the Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, or, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties.

Further, as per Sec 421 of the Act, any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal established under Sec 410 of the Act. And no appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

Answer 2(c)

According to section 435(1) of the Companies Act, 2013(Act), the Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452,by notification establish or designate as many Special Courts as may be necessary.

Further as per section 435(2) of the Act, a Special Court shall consist of–

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,

who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

In view of the above provision it may be said that if Amitabh is Metropolitan Magistrate or a Judicial Magistrate of the First Class of the Lower Court, the appointment is tenable and if not, then the appointment is not tenable.

Answer 2(d)

According to Section 20(1) of the Competition Act, 2002, Competition Commission of India (CCI) may, upon its own knowledge or information relating to acquisition referred to in clause (a) of Section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

This inquiry is optional. To initiate inquiry, CCI must have an opinion that such a combination has caused or is likely to cause an appreciable adverse effect on competition in India.

At the same time, proviso to Section 20(1) states that CCI shall not initiate an inquiry after the expiry of one year from the date on which such combination has taken effect.

In view of the above provisions, it is clear that opinion of MD of XYZ Ltd is correct. As CCI is initiating inquiry after 2 years of completion of combination is time barred.

OR (Alternate question to Q. No. 2)

Question 2A

(i) An investigation under section 210 of Companies Act, 2013 was undergoing for Forever Sisters Pvt. Ltd. Before commencement of the investigation, the company concluded its salary revision cycle in the month of May 2024 for FY 2023-24 and paid arrears for April 2024 along with salaries for May 2024. Miss Richa was given a promotion with a special hike in salaries stating that she works with the Executive Director on various confidential projects. When investigation commenced in July 2024, confidential projects came under scanner and investigating agencies called up Executive Director along with Miss Richa for a formal high-level enquiry cum discussion to know more about the project in August 2024. On the very next day of this communication, the Executive Director called back the promotion of Miss Richa sensing that projects under investigation will take a back seat and there is no point spending such a huge amount on Miss Richa anymore. When this event of taking back promotion was challenged by investigation agency. Executive Director said that it is purely a financial decision depending upon viability of the project and he does not need any written approval from Tribunal to demote his employees. Analyze and decide the contention of Executive Director whether he is right or wrong.

(4 marks)

(ii) Miss Pragya, a GST inspector, stopped a conveyance carrying goods worth ₹ 40,000/- from the state of Punjab to state of Rajasthan. It was stopped on the border area while entering the state of Rajasthan asking Nitin, in charge of the conveyance, to produce invoice, lorry receipt along with e-way bill and get the goods inspected. Nitin is of the opinion that inspection of the conveyance carrying goods is not justified as value of goods does not exceed ₹ 50,000/- and e-way bill is not required for such transportation of goods from Punjab to Rajasthan. From the provision of Central Goods and Services Tax Act, 2017, analyze and decide whether Nitin's contention is correct or not.

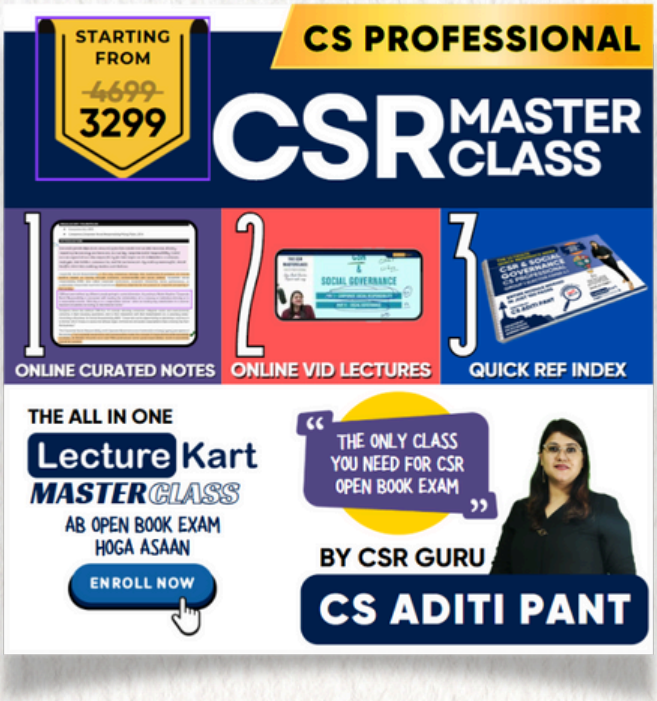
(4 marks)

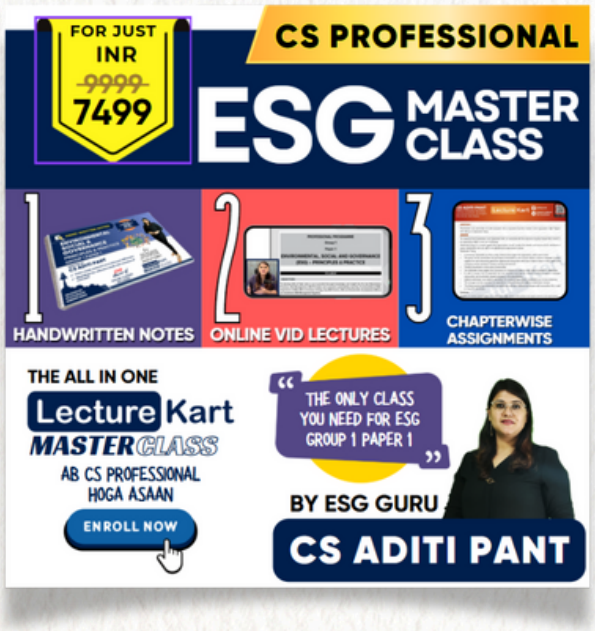
(iii) An offence under Companies Act, 2013 was compounded by RST Ltd and compounding order was issued by the compounding authority specially for offences by the Company and the Directors of the Company as officer in default. Company has paid the compounding fee. After the payment, compounding authority came across certain facts about the offence. If those facts would have surfaced at the time of deciding compounding fee, compounding authority would have levied higher fee. Since suppression of fact was higher, compounding authority open the matter and revised the compounding fee and asked Company to pay the differentials. Evaluate tenability of action of the compounding authority in light of judicial pronouncement.

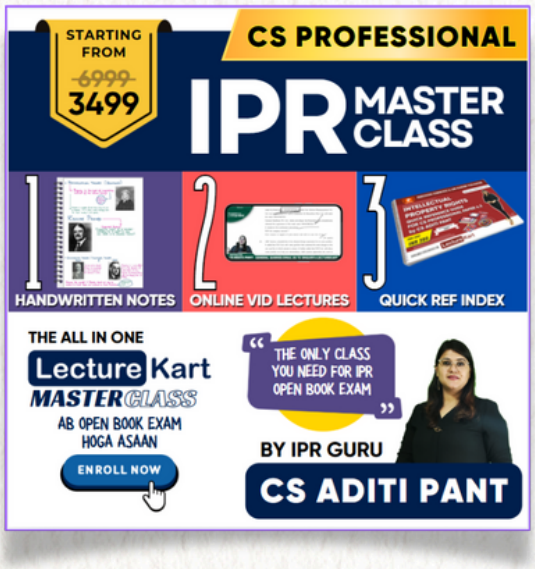
(4 marks)

(iv) "No person shall indulge in manipulative, fraudulent or an unfair trade practice in securities markets. Dealing in securities shall be deemed to be a manipulative fraudulent or an unfair trade practice if it involves certain activities stated under SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003". Discuss the statement with applicable provisions under the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

(4 marks)







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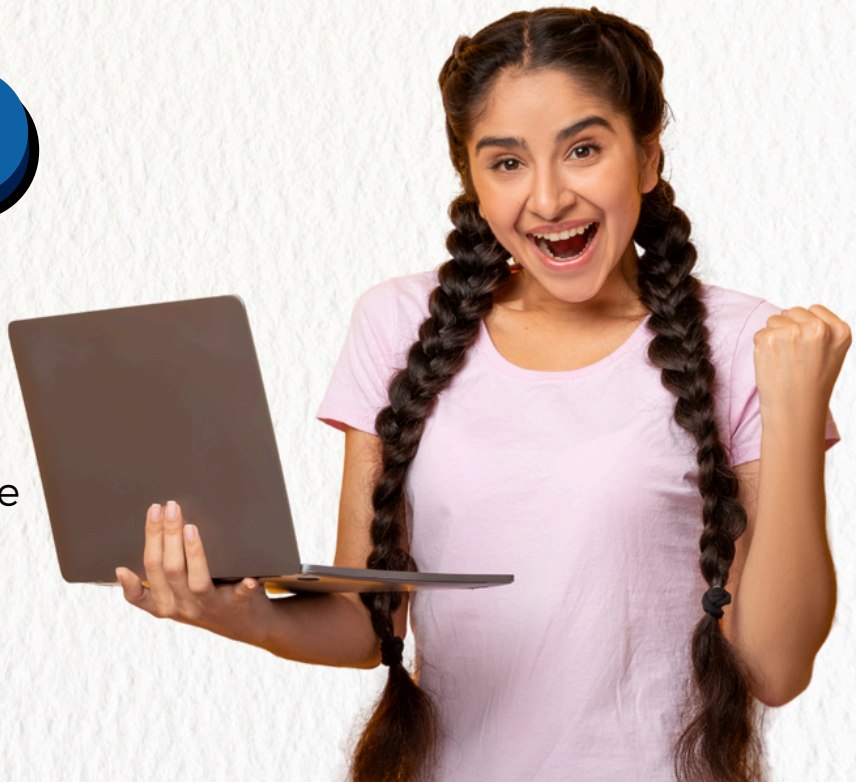

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Answer 2A(i)

Section 218 of the Companies Act, 2013 (Act) provides protection to employees during investigation. During the course of any investigation and during pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company. Such company, other body corporate or person shall not discharge or suspend or punish any employee without approval of the Tribunal. This protection is available to employees during the investigation of the affairs or other matters of or relating to a company, other body corporate or persons or of the membership, ownership of shares or debentures.

Following actions are not permitted without approval of the Tribunal:

- To discharge or suspend any employee; or
- To punish any employee, whether by dismissal, removal, reduction in rank or otherwise; or
- To change the term of employment to his disadvantages.

Further Section 218(5) of the Act clarifies for the removal of doubts that the provisions of Section 218 shall have effect without prejudice to the provisions of any other law for the time being in force.

In the given situation, investigation is undergoing and Miss Richa is demoted during its pendency without any approval from Tribunal, which falls under the category of "change the terms of employment to his disadvantage" and hence, contention of Executive Director is wrong.

Answer 2A(ii)

According to Section 68 (1) of Central Goods and Services Tax Act, 2017, the Government may require the person in charge of a conveyance carrying any consignment of goods of value exceeding such amount as may be specified to carry with him such documents and such devices as prescribed.

According to Section 68(3), where any conveyance referred to in sub-section (1) shall be intercepted by the proper office at any place, he may require the person in charge of the said conveyance to produce the documents prescribed under the said sub-section and devices for verification, and the said person shall be liable to produce the documents and devices also allow the inspection of goods.

Further, under Rule 138 of the Central Goods and Services Tax Rules, 2017(Rules), the requirement of generating the E-way bill and carrying the same along with the goods in movement is applicable only when the value of the goods being transported, exceeds Rs. 50,000/-.

Further under Rule 138B(1) of the rules, the Commissioner or an officer empowered by him in this behalf may authorize the proper officer to intercept any conveyance to verify the e-way bill in physical or electronic form for all inter-State and intra-State movement of goods.

Also according to rule 138B(3) of the rules, the physical verification of conveyances shall be carried out by the proper officer as authorised by the Commissioner or an officer empowered by him in this behalf.

Provided also that on receipt of specific information on evasion of tax, physical verification of a specific conveyance can also be carried out by any other officer after obtaining necessary approval of the Commissioner or an officer authorised by him in this behalf.

In view of the above provision, it may be said that GST inspector Miss Pragya, if authorised under Rule 138B can intercept the vehicle and require the person in charge of the conveyance, Nitin, to produce the required documents and also take other necessary action as provided by this rule. Hence, Nitin's contention is not correct as far as interception of the conveyance is concerned. But

his contention is correct that e-waybill is not necessary for goods valuing less than Rs. 50,000/- as far as documentation is concerned.

Hence, Nitin's contention is incorrect that interception is not justified.

Answer 2A(iii)

It is well settled principle that once an offence is compounded, penalty or prosecution proceeding cannot be taken for same offence. (*PP Varkey V. STO*)

In S Vishwanathan v. State of Kerala, it was held that once the matter is compounded, neither department nor assesse can challenge the compounding order. Department cannot reopen the matter on the reason that actual suppression was much higher.

In the given situation, the action of Compounding Authority may not be tenable as offence is compounded, order is passed and compounding fees has been paid by RST Ltd. Compounding Authority does not have the authority to undo the whole process of compounding even if they come to know that suppression of fact was higher while deciding compounding fee.

Answer 2A(iv)

According to regulation 4(1) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, without prejudice to the provisions of regulation 3, no person shall indulge in a manipulative, fraudulent or an unfair trade practice in securities markets.

Explanation.– For the removal of doubts, it is clarified that-

(i) any act of diversion, misutilisation or siphoning off of assets or earnings of a company whose securities are listed or any concealment of such act or any device, scheme or artifice to manipulate the books of accounts or financial statement of such a company that would directly or indirectly manipulate the price of securities of that company, or

(ii) transactions through mule accounts for indulging in manipulative, fraudulent and unfair trade practice shall be and shall always be deemed to have been included in sub-regulation (1).

According to regulation 4(2) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, dealing in securities shall be deemed to be a manipulative fraudulent or an unfair trade practice if it involves any of the following:

(a) knowingly indulging in an act which creates false or misleading appearance of trading in the securities market;

(b) dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss;

(c) inducing any person to subscribe to an issue of the securities for fraudulently securing the minimum subscription to such issue of securities, by advancing or agreeing to advance any money to any other person or through any other means;

(d) inducing any person for dealing in any securities for artificially inflating, depressing, maintaining or causing fluctuation in the price of securities through any means including by paying, offering or agreeing to pay or offer any money or money's worth, directly or indirectly, to any person;

(e) any act or omission amounting to manipulation of the price of a security including, influencing or manipulating the reference price or bench mark price of any securities;

(f) knowingly publishing or causing to publish or reporting or causing to report by a person dealing in securities any information relating to securities, including financial results, financial statements, mergers and acquisitions, regulatory approvals, which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

(g) entering into a transaction in securities without intention of performing it or without intention of change of ownership of such security; and

(h) selling, dealing or pledging of stolen, counterfeit or fraudulently issued securities whether in physical or dematerialized form: Provided that if:-

(i) the person selling, dealing in or pledging stolen, counterfeit or fraudulently issued securities was a holder in due course; or

(ii) the stolen, counterfeit or fraudulently issued securities were previously traded on the market through a bonafide transaction,

(iii) such selling, dealing or pledging of stolen, counterfeit or fraudulently issued securities shall not be considered as a manipulative, fraudulent, or unfair trade practice;

(I) disseminating information or advice through any media, whether physical or digital, which the disseminator knows to be false or misleading in a reckless or careless manner and which is designed to, or likely to influence the decision of investors dealing in securities;

(j) a market participant entering into transactions on behalf of client without the knowledge of or instructions from client or misutilizing or diverting the funds or securities of the client held in fiduciary capacity";

(k) circular transactions in respect of a security entered into between persons including intermediaries to artificially provide a false appearance of trading in such security or to inflate, depress or cause fluctuations in the price of such security;

(l) fraudulent inducement of any person by a market participant to deal in securities with the objective of enhancing his brokerage or commission or income;

(m) an intermediary predating or otherwise falsifying records including contract notes, client instructions, balance of securities statement, client account statements; or

(n) any order in securities placed by a person, while directly or indirectly in possession of information that is not publically available, regarding a substantial impending transaction in that securities, its underlying securities or its derivative;

(o) knowingly planting false or misleading news which may induce sale or purchase of securities;

(p) mis-selling of securities or services relating to securities market; Explanation- For the purpose of this clause, "mis-selling" means sale of securities or services relating to securities market by any person, directly or indirectly, by—

(i) knowingly making a false or misleading statement, or

(ii) knowingly concealing or omitting material facts, or

(iii) knowingly concealing the associated risk, or

(iv) not taking reasonable care to ensure suitability of the securities or service to the buyer}

(q) illegal mobilization of funds by sponsoring or causing to be sponsored or carrying on or causing to be carried on any collective investment scheme by any person.

Explanation - 1: For the purposes of this sub-regulation, for the removal of doubts, it is clarified that the acts or omissions listed in this sub-regulation are not exhaustive and that an act or omission is prohibited if it falls within the purview of regulation 3, notwithstanding that it is not included in this sub-regulation or is described as being committed only by a certain category of persons in this sub-regulation.

Explanation – 2: Market Participant shall include any person or entity registered under Section 12 of the Act and its employees and agents.

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

Question 3

(a) An application for settlement proceedings from Mr. Vikas, a registered broker, has been pending with SEBI for a long time. SEBI is of the opinion that alleged default for which settlement proceedings are initiated affected the integrity of the market and hence thinking to reject the same. As a procedure, SEBI asked Vikas to appear before the internal committee of the Board to deal with the entire proceeding related matters/issues. Vikas failed to appear before the committee on the scheduled date. The internal committee of the Board gave him another opportunity to appear before them on another date so that his version can also be heard and recorded before any decision is taken. Unfortunately, Vikas failed again to appear before them without assigning any reason or giving any notice to the Board. Considering non-appearance before the internal committee for the second time, Board rejected his application for the settlement proceeding. Analyze and decide whether SEBI can reject application for the settlement proceeding from Vikas based on this ground ?

(4 marks)

(b) Mr. R, a qualified Company Secretary and Cost Accountant is a Managing Director of PQR Limited, which is engaged in trading of chemicals. There are certain irregularities in the operation of Company, against which few shareholders filed an application in NCLT under Sec. 241 of the Companies Act, against the company which resulted in termination of Mr. R from the company. The said order was challenged by Mr. R in the appropriate court. In the meantime, Mr. R. got an offer for appointment as Company Secretary in ABC Limited and he joined there. Is there any restriction under law in the above-mentioned case ? State the legal position of Mr. R. under relevant law.

(4 marks)

(c) Several large companies and financial institutions worldwide no longer exist or have been taken over precisely because they neglected the basic rules of risk management and control. Elucidate reasons which lead to some risk management problems in relation to corporate governance that appeared in many financial institutions according to OECD (2009).

(4 marks)

(d) Mr. A is the Company Secretary of PQR Limited. The Chairman of company asked Mr. A to inform the Board about the procedural requirements for Significant Beneficial Owner (SBO) under Section 90 of the Companies Act, 2013 and Rules made thereunder. You are assisting Mr. A in preparation of the note regarding SBO. Prepare a brief note in this regard. Also mention under what circumstances the company can file an application before the National Company Law Tribunal (NCLT) in case SBO makes non-compliance.

(4 marks)

Answer 3(a)

As per Regulation 5(2) of the Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 the Board may not settle any specified proceedings, if it is of the opinion that the alleged default:

(i) has market wide impact, or

(ii) caused losses to a large number of investors, or

(iii) affected the integrity of the market.

Further, as per regulation 6(1) of Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018, an application may also at any time be rejected on the following grounds:

(a) Where the applicant refuses to receive or respond to the communications sent by the Board;

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

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

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

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

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

In the given situation, Board/SEBI rejected Vikas's application for settlement proceedings after his non-appearance before the internal committee of the SEBI/Board for the second time. As per regulations mentioned above, considering that SEBI/Board was of the opinion that the alleged default affected the integrity of the market and also the fact that the applicant who is required to appear, did not appeared before the Internal Committee on more than one occasion, thereby meeting both the criteria under Regulations 5(2)(iii) and 6(1)(c) under which, an application may be rejected.

Hence, it may be said that Board/SEBI can reject the application.

Answer 3(b)

Section 243 of the Companies Act, 2013(Act) provides the provisions relating to Consequences of Termination or Modification of Certain Agreements. It states:

(1) Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,–

(a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;

(b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

(1A) The person who is not a fit and proper person pursuant to sub-section (4A) of section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

(1B) Notwithstanding anything contained in any other provision of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office.

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

(2) Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1) or sub-section (1A), and every other director of the company who is knowingly a party to such contravention, shall be punishable with fine which may extend to five lakh rupees.

In the given context of the order for termination of Mr R, from the office of Managing Director of PQR Ltd, Sec 243 of the Act only provides for restriction on holding any office of directors or any other office connected with the conduct of management of affairs of company for a period of 5 years from the date of the said decision. However, in the given case, Mr R, has joined as a Company Secretary of another company named ABC Limited and as such, the said appointment in another company is not restricted by Section 243. Accordingly, the said appointment of Mr R in ABC Limited is valid under the law.

Answer 3(c)

Risk management is an integral component of corporate governance and good management. There is a growing realization that corporate governance has an impact on enterprise risk management. Several large companies and financial institutions worldwide no longer exist or have been taken over precisely because they neglected the basic rules of risk management and control. Some common risk management problems in relation to corporate governance that appeared in many financial institutions before and during the crisis according to the OECD (2009) was because:

- Risks were frequently not linked to strategy which is a key issue to ensuring that the risk management has a focus on the business context.
- Risk definitions are often poorly expressed. Better risk definitions (context, event, consequence) are contrary to a lot of current thinking in risk management which has shorten risk descriptions to the smallest number of words possible.
- Organizations weren't always in a position to develop intelligent responses to risks.
- Boards didn't take stakeholders and guardians into account in detailing responses to risk.
- Important parts of the value chain were outsourced to others.

Answer 3(d)

Procedural requirements for Significant Beneficial Owner(SBO)

Procedural requirement for SBO under Section 90 of the Companies Act, 2013(Act) and Rules made thereunder are as follows:

- Every reporting company, which is required to comply with sec 90, shall take necessary steps to identify if there is an individual who is a Significant Beneficial Owner ("**SBO**") in relation to the company in terms of Rule 2(1)(h) of the Companies (Significant Beneficial Owners) Rules, 2018 ("**SBO Rules**") and require him to file a declaration in Form BEN-1 to the reporting Company.
- Further, as per Sec 90(5) of the Act, without prejudice to the generality of the procedure as above stated, every reporting company shall give notice, in Form No. BEN-4, to any person (whether he is a member of the company or not) where company believes or has reasonable cause to believe-
  - to be a SBO of the company;
  - to be having knowledge of the identity of a SBO or another person likely to have such knowledge; or
  - To have been a SBO of the company at any time during the immediately preceding last 3 years from notice is issued, Further, who is not registered as a significant beneficial owner with the company as required under section 90. Such a person has to provide such information with 30 days from receipt of notice from reporting company.
- Also, as per Rule 2A of the SBO Rules, without prejudice to the generality of the steps stated above, every reporting company shall give notice, in Form No. BEN-4, seeking information about the SBO, to such member *(other than an individual)*, who holds not less than ten per cent of its (a) shares, or (b) voting rights, or (c) right to receive or participate in the dividend or any other distribution payable in a financial year;
- The SBO, so identified shall submit the Declaration in Form BEN-1 with the company, within 90 days from 01-Jul-2019 i.e., the commencement of Companies (Significant Beneficial Owners) second Amendment Rules, 2019. Further, where an individual becomes SBO, subsequently, he has to file such form within 30 days from acquiring such ownership and any change thereon.
- Upon receipt of declaration as above, the reporting company shall file a return in Form No. BEN-2 with the Registrar in regards with such declaration, within 30 days along with the fees.

The company shall maintain a register of significant beneficial owners (SBO) in Form No. BEN-3.

Application to the Tribunal (NCLT) in case SBO makes non-compliance

The reporting company shall make the application to the tribunal if: Such person fails to provide the information required by notice in form BEN-4 within 30 days or Information provided is not satisfactory within a period of 15 days of the expiry of the period specified in the notice, for order directing that the shares in question be subject to restrictions with regards to Transfer of interest, Suspension of all rights (right related to dividend or voting right) attached with the shares. Further, the tribunal after giving the opportunity of being heard to both the concerned parties, pass the order as deemed fit, within 60 days of receipt of application. Further, if any party is aggrieved by the order, may make application for relaxation or lifting of the restrictions within 1 year from the date of order. If no such application has been filed within a period of 1 year from the date of the order, such shares shall be transferred, without any restrictions, in the Government bank's account i.e. IEPF Account.

OR (Alternate question to Q. No. 3)

Question 3A

(i) "The term 'Adjudicating Authority', as defined in Section 5(1) of IBC cannot come within the ambit of court as defined in Section 2(29) of the Companies Act, 2023." Discuss the statement with relevant case law.

(4 marks)

(ii) Discuss the remedies available for Preference shareholders in relation to redemption of preference shares.

(4 marks)

(iii) "As the public conversation on the role of companies in addressing environmental and social issues continues to evolve, boards should consider how their risk oversight role specifically applies to Environmental, Social and Governance (ESG)-related risk." Discuss the statement.

(4 marks)

(iv) Write short notes on punishment for vexatious search under Prevention of Money Laundering Act, 2002.

(4 marks)

Answer 3A(i)

In the case of *Vijay Pal Garg and Others Vs. Pooja Bahrey* as decided by the National Company Law Appellate Tribunal (NCLAT), New Delhi, it was observed that:

The term Adjudicating Authority, as defined in Section 5(1) of Insolvency and Bankruptcy Code, 2016 (IBC) cannot come within the ambit of court as defined in Section 2(29) of the Companies Act, 2013. In fact, Section 2(29)(i) of the Companies Act defines 'Court' the High Court having jurisdiction in relation to the place at which the registered office of the Company concerned is situated etc. Section 2(29)(ii) of the Act speaks of 'District Court' and Section 29(iii) deals with the Court of Session, Section 29(iv) pertains to the Special Court constituted under section 435 and Section 29(5) is concerned with any Metropolitan Magistrate or Judicial Magistrate of the 1st Class.

Likewise, the term Tribunal is defined under section 2(90) of the Companies Act which means the NCLT constituted under Section 408 of the Companies Act, 2013.

It is significant to point out that a court of Law exercises judicial power in discharging judicial function and finally arrive at a conclusion. A 'Tribunal' is similar to a 'Court' but it is not a 'Court'. In short, the 'Court' means a 'Court' of civil judicature and the 'Tribunal' means body of men appointed to decide the disputes /controversies (of course judicial power of the state being conferred in it). The procedure of a 'Court of Law' and 'Tribunal' will differ but they function in their own field. However, a 'court of Law' and the 'Tribunal' act judicially in both senses. To put it lucidly, a Tribunal does not have the trappings of a 'court'.

Thus, keeping in mind a prime fact that the Tribunal/Adjudicating Authority is guided by the Principles of Natural justice and is to follow the procedure prescribed under section 213(b) of the Companies Act, 2013 comes to an 'irresistible' and inescapable conclusion that the Adjudicating Authorities (Tribunal) in law is not empowered to order an investigation directly to be carried out by the Central Government.

It was observed that an Adjudicating Authority (Tribunal), as a competent / appropriate authority in terms of Section 213 of the Companies Act, 2013 has an option to issue notice in regard to the charges / allegations levelled against the promoters and others (including the Appellants) of course

after following the due procedure enshrined under Section 213 of the Companies Act, 2013. In case, an ex facie / prima facie case is made out, then, the Tribunal is empowered to refer the matter to the Central Government for an investigation by the inspectors and upon such investigation, if any action is required to be taken and if the Central Government subjectively opines that the subject matter in issue needs an investigation, through the Serious Fraud Investigation Office, it may proceed in accordance with the law.

Answer 3A(ii)

The matter of remedies available for preference shareholders in relation to redemption of preference shares has been discussed in the case of *Bank of Baroda Vs. Aban Offshore Limited* as decided by the National Company Law Appellate Tribunal (NCLAT), New Delhi.

The National Company Law Appellate Tribunal (NCLAT), New Delhi held that intention of the legislature while promulgating Section 55 of the Companies Act, 2013 was to compulsorily provide for redemption of preference shares by doing away with the issue of irredeemable preference shares. Therefore, even though there is no specific provision stipulated under the Companies Act, 2013 through which relief can be sought by preference shareholders in case of non-redemption by the company or consequent non-filing of petition under Section 55 of the said Act, the intention of the legislature being clear and absolute, Tribunal's inherent power can be invoked to get an appropriate relief by an aggrieved preference shareholder(s).

Alternatively, preference shareholders coming within the definition of 'member(s)' under Section 2(55) read with Section 88 of the Companies Act, 2013, may file a petition under Section 245 of the said Act, as a class action suit, being aggrieved by the conduct of affairs of the company. Thereby, it was held that preference shareholders are not remediless and for redemption of preference shares, they can file an application under Section 55(3) of the Companies Act, 2013 or alternatively they may also file application under Section 245 of the Companies Act, 2013 as a class action suit and the NCLT while exercising the inherent power viz. Rule 11 of NCLT Rules, 2016 can pass appropriate order.

With the above discussions, the court was of the view that the preference shareholders are not remediless and for redemption of preference share, can file application under Section 55(3) of the Companies Act, 2013. They may also file application under Section 245 of the Companies Act, 2013 as a class action suit and the NCLT while exercising the inherent power viz. Rule 11 of NCLT Rules, 2016 can pass appropriate order.

The Hon'ble Supreme Court, while considering an appeal by the Company against the above order, upheld the order passed by the NCLAT.

Answer 3A(iii)

As the public conversation on the role of companies in addressing environmental and social issues continues to evolve, boards should consider how their risk oversight role specifically applies to ESG-related risk. In large part, the board's function in overseeing management of ESG-related risks, such as supply chain disruptions, energy sources and alternatives, labor practices and environmental impacts involves issue-specific application of the risk oversight practices discussed in this memo. However, due to the fact that the public and investors have increasingly begun to scrutinize how a company addresses ESG issues, the board should ensure that its risk oversight role is satisfied in regard to ESG risk management.

ESG matters often have important public, investor and stakeholder relations dimensions. The board should work with management to identify ESG issues that are pertinent to the business and its customers and decide what policies and processes are appropriate for assessing, monitoring and managing ESG risks. The board should also be comfortable with the company's approach

to external reporting of the company's overall approach, response and progress on ESG issues. It is also increasingly important for directors and management who engage with shareholders to educate themselves and become conversant on the key ESG issues facing the company.

In certain cases, the board may wish to consider receiving regular briefing on relevant ESG matters and the company's approach to handling them. Creating more focused board committees or sub-committees, such as a "corporate responsibility and sustainability" committee that is specifically tasked with oversight of specified ESG matters or updating existing committee charters and board-level corporate governance guidelines to address the board's approach to such topics may also be considered. Of course, the board should ensure that any committee tasked with ESG risk oversight properly coordinates with any other committees tasked with other types of risk oversight (i.e., the audit committee) so that the board as a whole is satisfied.

Answer 3A(iv)

Section 62 of the Prevention of Money-Laundering Act, 2002(Act) provides the provisions relating to punishment for vexatious search. It states:

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

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

(b) detains or searches or arrests any person,

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

Question 4

(a) Mr. X is aggrieved by an order passed by the Adjudicating Authority under the Prevention of Money Laundering Act (PMLA), 2002. He seeks your Advice for filing an appeal against the said order. Advise the appropriate court where the said order can be challenged by Mr. X. Also state the procedure of filing appeal.

(4 marks)

(b) The Supreme Court in its landmark case of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., held that all cases relating to trade, commerce, contracts, consumer disputes and even tortious liability can normally be mediated. Citing disadvantages of adjudicatory process, explain the importance of mediation, being non- adjudicatory process.

(4 marks)

(c) Explain whether the following offences are compoundable, if yes, by whom ? Also state the fine/imprisonment as per provisions of the Companies Act, 2013 :

(i) Non-compliance of direction issued relating to restriction of name of company u/s 16.

(ii) Failure to file declaration not holding beneficial interest in any share under section 89(5).

(iii) Contravention of the provisions of Sec. 247 by the valuer.

(iv) Committee default in complying with the requirements relating to formation of companies with charitable objects, etc. under section 8(11).

(4 marks)

(d) To protect interest of land revenue, Pallav's Gurgaon flat was attached under search and seizure conducted by authorized officer under Income Tax Act, 1961. It was attached with the order in writing from Director General. Pallav took possession of the flat from the builder just 3 months before the attachement. Due to attachment, he could not move to his own flat. He waited for withdrawal of attachment for a year but there was no movement in the search and seizure case. He filed an application to the Income Tax Authority to lift the order of attachment stating that this is a provisional attachment and it cease to have effect after 6 months of seizure automatically. Analyze the validity of Pallav's contention as attachment was made with prior written approval from Director General of Income Tax.

(4 marks)

Answer 4(a)

Appellate Tribunal {Section 25 of the Prevention of Money Laundering Act (PMLA), 2002}

The Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers, and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

Appeal to Appellate Tribunal {Section 26 of the Prevention of Money Laundering Act (PMLA), 2002}

(1) Save as otherwise provided in sub-section (3), the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal.

(2) Any reporting entity aggrieved by any order of the Director made under sub-section (2) of section 13, may prefer an appeal to the Appellate Tribunal.

(3) Every appeal preferred under sub-section (1) or sub-section (2) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Adjudicating Authority or Director is received and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1) or sub-section (2), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Director, as the case may be.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of filing of the appeal.

Further, as per Sec 41 of the PMLA, No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Director, an Adjudicating Authority or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Answer 4(b)

Mediation and Conciliation are all basically non-adjudicatory dispute resolution processes, where a neutral third-party renders assistance to the parties to the disputes to reach a satisfactory

settlement. The neutral third-party listens to the parties, ascertains the facts and circumstances and the nature of disputes, identifies the causes for the difference or conflict and facilitates the parties to reach an amicable settlement.

The object of mediation is to offer to the litigant public, a speedy and satisfactory alternative dispute resolution process in certain types of civil cases. When the cases suitable for negotiated, settlements are referred to mediation, the benefits are twofold:

- The parties find an amicable solution by the negotiated settlement
- The courts will have more space to deal with cases which require to be adjudicated by courts. Building awareness regarding mediation and invoking mediation as an alternative dispute resolution process is only to supplement the functioning of courts, with reference to certain types of civil cases. Mediation is not intended to and in fact cannot, replace courts.

Disadvantages of adjudicatory process:

- Delay in resolution of the dispute
- Uncertainty of outcome
- Inflexibility in the result / solution
- High cost
- Difficulties in enforcement and
- Hostile atmosphere

Answer 4(c)

(i) Non-compliance of direction issued relating to restriction of name of company under section 16 of the Companies Act, 2013

As per Section 16(3) of the Companies Act, 2013(Act), if a company makes default in complying with any direction given under section 16(1), the Central Government shall allot a new name to the company in such manner as may be prescribed and the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name, which the company shall use thereafter. Provided that nothing in this sub-section shall prevent a company from subsequently changing its name in accordance with the provisions of section 13. However, there is no monetary penalty prescribed under Sec 16(3).

Accordingly, penalty can only be levied on the company, only under Sec 450 of the Act, which provides that the company and every officer of the company who is in default or such other person shall be liable to a penalty of Rs. 10,000/-, and in case of continuing contravention, with a further penalty of Rs. 1,000/- for each day after the first during which the contravention continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default or any other person.

In view of the above, it can be said that the offence does not come under the purview of compounding but comes under the purview of Adjudication under section 454 of the Companies Act, 2013.

(ii) Failure to file declaration not holding beneficial interest in any shares under section 89(5) of the Companies Act, 2013

If any person fails to make a declaration as required under section 89(1) or section 89(2) or section 89(3) of the Companies, 2013, he shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with a further penalty of two hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.

In view of the above, it can be said that the offence does not come under the purview of compounding but comes under the purview of Adjudication under section 454 of the Companies Act, 2013.

(iii) Contravention of the provisions of section 247 of the Companies Act, 2013

According to section 247(3) of the Companies Act, 2013, if a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be liable to a penalty of fifty thousand rupees.

Provided that if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

In view of the above, it can be said that this offence does not come under the purview of compounding but comes under the purview of Adjudication under section 454 of the Companies Act, 2013.

Further, if the contravention is with an intention to defraud the company or its members then the offence is non compoundable.

(iv) Committing default in complying with the requirements relating to formation of companies with charitable objects, etc. under section 8(11)

According to section 8(11) of the Companies Act, 2013, if a company makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the Directors and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees:

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

In view of the above, it can be said that the offence is Compoundable and powers vested with National Company Law Tribunal.

If the matter comes under the purview of proviso to section 8(11)

According to section 447 of the Act, Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.

In view of the above, it can be said that Offence is compoundable if comes under the purview of 2nd proviso of section 447. The offence can be compounded by National Company Law Tribunal. In any other situation, offences are not compoundable.

Answer 4(d)

According to Section 132 (9B) of the Income Tax Act, 1961 where, during the course of the search or seizure or within a period of 60 days from the date of which the last of the authorizations for search was execute, the authorized office, for reasons to be recorded in writing, is satisfied that for the purpose of protecting the interest of revenue, it is necessary so to do, he may with the previous approval of the Principal Director General or Director General or the Principal Director or Director, by order in writing, attach provisionally any property belonging to the assesses, and for the said purposes.

According to Section 132 (9C), every provisional attachment made under sub-section 9B shall cease to have effect after the expiry of six months from the date of order referred to in sub-section 9B.

While applying the above provisions to given circumstances, it can be said that Pallav contention to Income Tax Authority is correct to lift the attachment as every provisional attachment shall cease to have effect after the expiry of six months from the date of order.

Question 5

(a) ABC Ltd. is a technological start up in the sphere of Artificial Intelligence, Machine Learning and Data Science. The company is into developing the latest and user-friendly technology related solution for meeting day to day life challenges for human being. They hired analytical engineers and skilled manpower in all positions whether senior, middle level and juniors. Since that manpower comes from different background, culture and walks of life, company may face certain crisis in terms of bonding and jelling between employees and due to which work may suffer as everyone will work in silos. Triggering this situation, the founders of the company thought that there might be more crisis in the time to come which they can come across while running the company. They approached you, being a practicing professional, to inform them about the various types of crisis in the organization which they need to manage. Write a brief note for the founders of the company on the types of crisis which they need to manage by preparing crisis management plan.

(8 marks)

(b) Mr. N was appointed as Director (Engineering) in HAL Ltd. Though he was from engineering background, he had a liking to understand the legal aspects. He had read well about the procedures but required some clarity. In one of the conversations, he asked Company Secretary to brief him about a reasonable opportunity of being heard to be given before the adjudicating officer prior to imposing any penalty. Prepare a brief note in terms of Section 454(4) of the Companies Act 2013 read with Rule 3 of the Companies (Adjudication of Penalties) Rules, 2014.

(8 marks)

Answer 5(a)

Crisis management is the identification of threats to an organization and its stakeholders, and the methods used by the organization to deal with these threats. Due to the unpredictability of global events, organizations must be able to cope with the potential for drastic changes in the way they conduct business.

Crisis management is not necessarily the same thing as risk management. Unlike risk management, which involves planning for events that might occur in the future, crisis management involves reacting to negative events during and after they have occurred. Crisis can either be self-inflicted or caused by external forces.

Types of Crisis:

1. **Natural Crisis:** Disturbances in the environment and nature lead to natural crisis. Such events are generally beyond the control of human beings. For e.g., Tornadoes, Earthquakes, Hurricanes, Landslides, Tsunamis, Flood, Drought all result in natural disaster.
2. **Technological Crisis:** This arises as a result of failure in technology. Problems in the overall systems lead to technological crisis. For e.g., Breakdown of machines, corrupted software and so on give rise to technological crisis.
3. **Confrontation Crisis:** This arise when employees fight amongst themselves. Individuals do not agree to each other and eventually depend on non-prodcutive acts. For e.g., boycotts, strikes for indefinite periods and so on.

   In such type of crisis, employees disobey superiors, give them ultimatums and force them to accept their demands.
4. **Crisis of Malevolence:** Organizations face crisis of malevolence when some notorious employees take the help of activities and extreme steps to fulfil their demands.
5. **Crisis of Organizational Misdeeds:** This arise when management takes certain decisions knowing the harmful consequences of the same towards the stakeholders and external parties.

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

   - Crisis of Skewed Management, for example, A company asks the employees to work for long extended hours without proper rest being available.
   - Crisis of Deception, for example, Misleading advertisements
   - Crisis of Management misconduct, for example, Corruption in management
6. **Crisis due to workplace violence:** Such type of crisis arises when employees are indulged in violent acts such as beating employees, superiors in the office premises itself.
7. **Crisis due to Rumors:** Spreading false rumors about the organization and brand lead to crisis. Employees must not spread anything which would tarnish the image of their organization.
8. **Bankruptcy:** A crisis also arises when organizations fail to pay its creditors and other parties. Lack of fund leads to crisis.
9. **Crisis due to natural factors:** Disturbances in environment and nature.
10. **Sudden Crisis:** As the name suggests, such situations arise all of a sudden and on an extremely short notice. Managers do not get warning signals and such as situation is in most cases beyond anyone's controls.
11. **Smouldering Crisis:** Neglecting minor issues in the beginning lead to smoulding crisis later. Managers often can foresee crisis but they should not ignore the same and wait for someone else to take action. Warn the employees immediately to avoid such a situation.

Answer 5(b)

According to section 454(4) of the Companies Act, 2013, the adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company, the officer who is in default or any other person.

Rule 3 of The Companies (Adjudication of Penalties) Rules, 2014 provides the provisions relating to Adjudication of Penalties. It states:

(1) The central government may appoint any of its officers, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of the Act.

(2) Before adjudging penalty, the adjudging officer shall issue a written notice in the specified manner, to the company, the officer who is in default or any other person, as the case may be, to show cause, within such period as may be specified in the notice (not being less than fifteen days and more than thirty days from the date of service thereon), why the penalty should not be imposed on it or him.

(3) Every notice issued under sub-rule (2), shall clearly indicate the nature of non-compliance or default under the Act alleged to have been committed or made by such company, officer in default, or any other person, as the case may be and also draw attention to the relevant penal provisions of the Act and the maximum penalty which can be imposed on the company, and each of the officers in default, or the other person.

(4) The reply to such notice shall be filed in electronic mode only within the period as specified in the notice:

Provided that the adjudicating officer may, for reasons to be recorded in writing, extend the period referred to above by a further period not exceeding fifteen days, if the company or officer in default or any person as the case may be, satisfies the adjudicating officer that it or he has sufficient cause for not responding to the notice within the stipulated period or the adjudicating officer has reason to believe that the company or the officer or the person has received a shorter notice and did not have reasonable time to give reply.

(5) If, after considering the reply submitted by such company, its officer, or any other person, as the case may be, the adjudicating officer is of the opinion that physical appearance is required, he shall issue a notice, within a period of ten working days from the date of receipt of reply fixing a date for the appearance of such company, through its authorised representative, or officer of such company, or any other person, whether personally or through his authorised representative:

Provided that if any person, to whom a notice is issued under sub-rule (2), desires to make an oral representation, whether personally or through his authorised representative and has indicated the same while submitting his reply in electronic mode, the adjudicating officer shall allow such person to make such representation after fixing a date of appearance.

(6) On the date fixed for hearing and after giving a reasonable opportunity of being heard to the person concerned, the adjudicating officer may, subject to reasons to be recorded in writing, pass any order in writing as he thinks fit including as order for adjournment:

Provided that after hearing, adjudicating officer may require the concerned person to submit his reply in writing on certain other issues related to the notice under sub-rule (2), relevant for determination of the default.

(7) The adjudicating officer shall pass an order,-

(a) within thirty days of the expiry of the period in sub-rule (2),or of such extended period as referred therein, where physical appearance was not required under sub rule (5):

(b) within ninety days of the date of issue of notice under rule (2),where any person appeared before the adjudicating officer under sub rule (5):

Provided that in case an order is passed after the aforementioned duration, the reasons of

the delay shall be recorded by the adjudicating officer and no such order shall be invalid merely because of its passing after the expiry of such thirty days or ninety days as the case may be.

(8) Every order of the adjudicating officer shall be duly dated and signed by him and shall clearly state the reasons for requiring the physical appearance under sub-rule (5).

(9) The adjudicating officer shall send a copy of the order passed by him to the concerned company, officer who is in default or any other person or all of them and to the Central Government and a copy of the order shall also be uploaded on the website.

(10) For the purposes of this rule, the adjudicating officer shall exercise the following powers, namely:-

(a) to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case after recording reasons in writing;

(b) to order for evidence or to produce any document, which in the opinion of the adjudicating officer, may be relevant to the subject matter.

(11) If any person fails to reply or neglects or refuses to appear as required under sub-rule (5) or sub-rule (10) before the adjudicating officer, the adjudicating officer may pass an order imposing the penalty, in the absence of such person after recording the reasons for doing so.

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

(a) size of the company;

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

(c) injury to public interest;

(d) nature of the default;

(e) repetition of the default;

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

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

Provided that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Act.

(13) In case a fixed sum of penalty is provided for default of a provision, the adjudicating officer shall impose that fixed sum, in case of any default therein.

(14) Penalty shall be paid through Ministry of Corporate Affairs portal only.

(15) All sums realized by way of penalties under the Act shall be credited to the Consolidated Fund of India.

Explanation 1 - For the purposes of this rule, the term "specified manner" shall mean service of documents as specified under section 20 of the Act and rules made thereunder and details in respect of address (including electronic mail ID) provided in the KYC documents field in the registry shall be used for communication under this rule.

Explanation 2 - For the purposes of this rule, it is hereby clarified that the requirement of submission of replies in electronic mode shall become mandatory after the creation of the e-adjudication platform.

Question 6

(a) Miss Fala Fatima is accused of certain offences and is being tried under the Criminal Procedure Code. Miss Tamanna is the complainant. Based on her complaint, the magistrate summoned Miss Fala Fatima to the court. On the day appointed for the appearance, she did not appear before the magistrate. Observing that Miss Fala Fatima did not obey the summons, the Magistrate acquitted her in the case. Applying provisions of the Criminal Procedure Code, analyze and decide whether acquittance of Miss Fala Fatima by Magistrate is correct or not.

(4 marks)

(b) Based on the mistake apparent from the record, Rahul filed an application before the Tribunal to rectify the mistake. Rahul filed the application on 31st December 2022 against the order dated 31st December 2021 i.e., within one year of the order passed by the Tribunal. Tribunal reverted to Rahul in the month of January 2024 reverting that since limitation period of two years is over from the date of order, it is not possible to rectify the mistake in the order. The tribunal also stated that even if the limitation period would have been over, it is a discretionary power of the Tribunal whether to consider the application for rectification or not. Analyze whether Tribunal's view is correct or not based on judicial pronouncements.

(4 marks)

(c) "In satisfying their risk oversight function with respect to cyber security, boards should evaluate their company's preparedness for a possible cyber security breach." Discuss the statement.

(4 marks)

(d) Discuss the concept of insolvent trading under the Companies Act, 2013.

(4 marks)

Answer 6(a)

As per Section 256 (1) of the Criminal Procedure Code, 1973, (CrPC) if summon has been issued on a complaint, and on the day appointed for the appearance of accused, or any day subsequent thereto on which the hearing may be adjourned, the complainant does not appear, the Magistrate may take any one of the following steps:

a. He may acquit the accused.

b. He may adjourn the case to any other day.

c. He may dispense with the personal attendance of the complainant and proceed with the case.

In our case, Miss Fala Fatima, being the accused, did not appear as per summons, and the facts of the case do not mention about the failure on part of Miss Tamanna, i.e., the complainant and therefore the Magistrate has no power to acquit the accused in the given situation.

Hence, the acquittance of Miss Fala Fatima is incorrect as per CrPC provisions.

Answer 6(b)

As per section 420(2) of the Companies Act, 2013, the Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

Further, pursuant to Rule 11 of National Company Law Tribunal Rules, 2016, Tribunal has inherent power to make such order as may be necessary for meeting the end of justice or to prevent abuse of the process of the tribunal, and accordingly, the Tribunal can rectify the order passed by its own.

In *Sree Ayyanar Spinning & Weaving Mills Ltd. v. Commissioner of Income Tax , 2008 (301 ITR 434)*, it was held that under first part of the provision, the tribunal is empowered to suo-moto rectify any mistakes apparent on record any time within two years from the date of its original order. Under the second part, either the taxpayer or the department may file an application highlighting the mistake apparent on record.

In light of the provision, the Apex Court held that the appellate tribunal took time beyond the stipulated period even though the application was filed well within the period. Thus, in the mentioned event the applicant has filed the application within the stipulated period of two years from the date of original order, it is binding for the appellate tribunal to decide the matter on the basis of merits and not on the ground of limitation.

Thus, Section 420(2) read with Rule 11, 154 and 155 of National Company Law Tribunal Rules, 2016 when interpreted in light of the above referred case law, clearly substantiate that the Tribunal has the responsibility under Sec 420(2) and not just a discretionary power to rectify a mistake apparent from the record is brought to its notice within 2 yrs form the date of order on an application by a party under the Act.

Accordingly, the Tribunal's view to deny the rectification of mistake is not justified

Answer 6(c)

In satisfying their risk oversight function with respect to cyber security, boards should evaluate their company's preparedness for a possible cyber security breach, as well as the company's action plan in the event that a cyber security breach occurs. With respect to preparation, boards should consider the following actions, several of which are also addressed in The Conference Board's "A Strategic Cyber-Roadmap for the Board" released in November 2016:

- identify the company's "Crown Jewels"-i.e., the company's mission-critical data and systems-and work with management to apply appropriate measures outlined in the National Institute of Standards and Technology (NIST) Framework.
- ensure that an actionable cyber incident response plan is in place that, among other things, identifies critical personnel and designates responsibilities; includes procedures for containment, mitigation and continuity of operations; and identifies necessary notifications to be issued as part of a pre-existing notification plan.
- ensure that the company has developed effective response technology and services (e.g., off-site data back-up mechanisms, intrusion detection technology and data loss prevention technology)
- ensure that prior authorizations are in place to permit network monitoring.
- ensure that the company's legal counsel is conversant with technology systems and cyber incident management to reduce response time.

Answer 6(d)

There is no doubt that corporate powers of the Board of Directors continue to exist until a company is ordered to be wound up. Section 277(3) of the Companies Act, 2013 (corresponds to section 445(3) of the Companies Act, 1956) states that the winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued. However, even before a winding up commences, which in

any case as stated in section 441 of the Companies Act, 1956 (corresponding to section 357 of the Companies Act, 2013), is the date of presentation of a petition for the winding up of a company, the Board of Directors of the company must ensure that if there is no reasonable prospect of paying its debts, the company should not contract for further debts and obtain goods and services on credit. Such trading will constitute insolvent trading and it may expose it directors to consequences trading (carrying on the business of a company with an intention to defraud).

Though the provisions of Chapter XX of the Companies Act, 2013 relating to winding up of companies commencing from section 270 to section 365 have been brought into force, it is worth noting that in the case of a voluntary winding up. Section 308 of the Companies Act, 2013 states that a voluntary winding up shall be deemed to commence the date of passing of the resolution for voluntary winding up under section 304. Section 309 of the Companies Act, 2013 declares that that the corporate state and corporate powers of the company shall continue until it is dissolved. In any winding up other than a voluntary winding up, section 357(2) of the Companies Act, 2013 relating to the winding up of a company by the Tribunal shall be deemed to commence at the time of the presentation of the petition for the winding up itself.

In *Re: William C. Leitch Bros. [1932] 2 Ch. 71*, it was held that of a company continues to carry on business and to Incur debts at a time when to the knowledge of the director, there is no reasonable prospect of the creditor ever riving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud.

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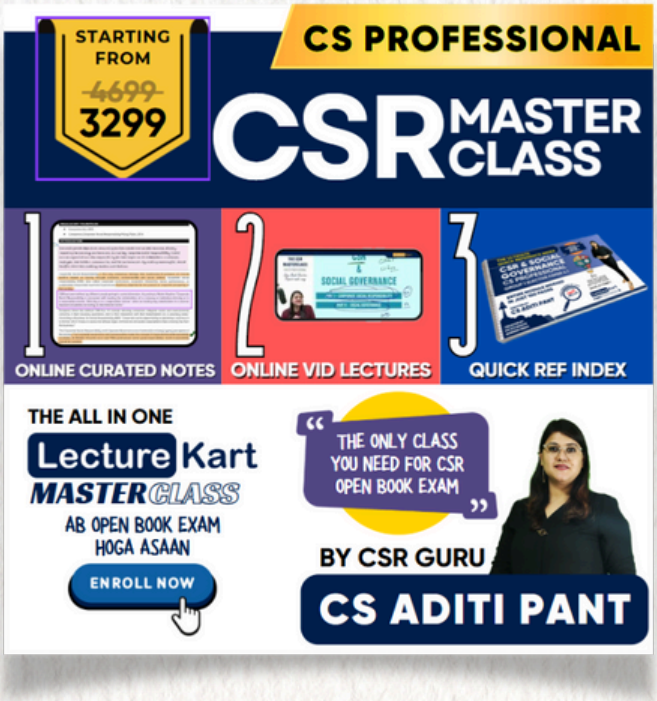
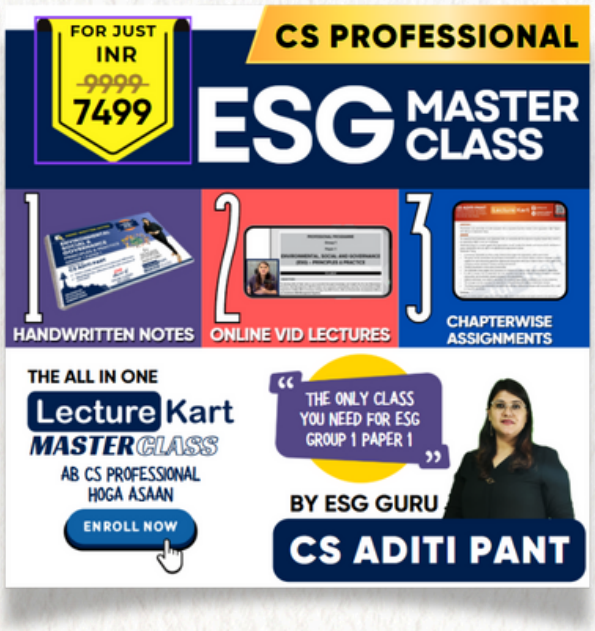
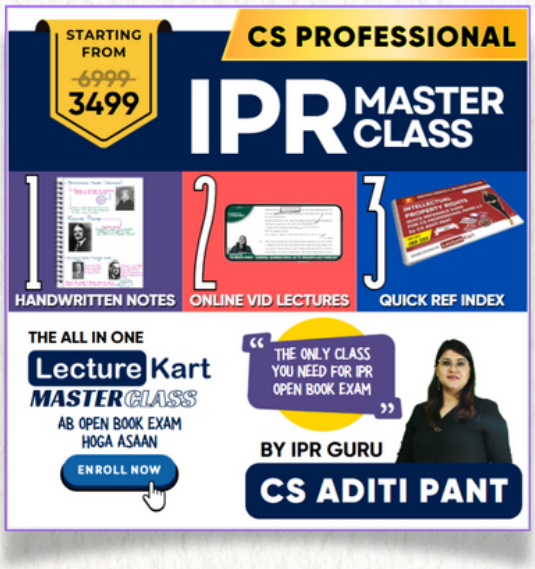
NOTES







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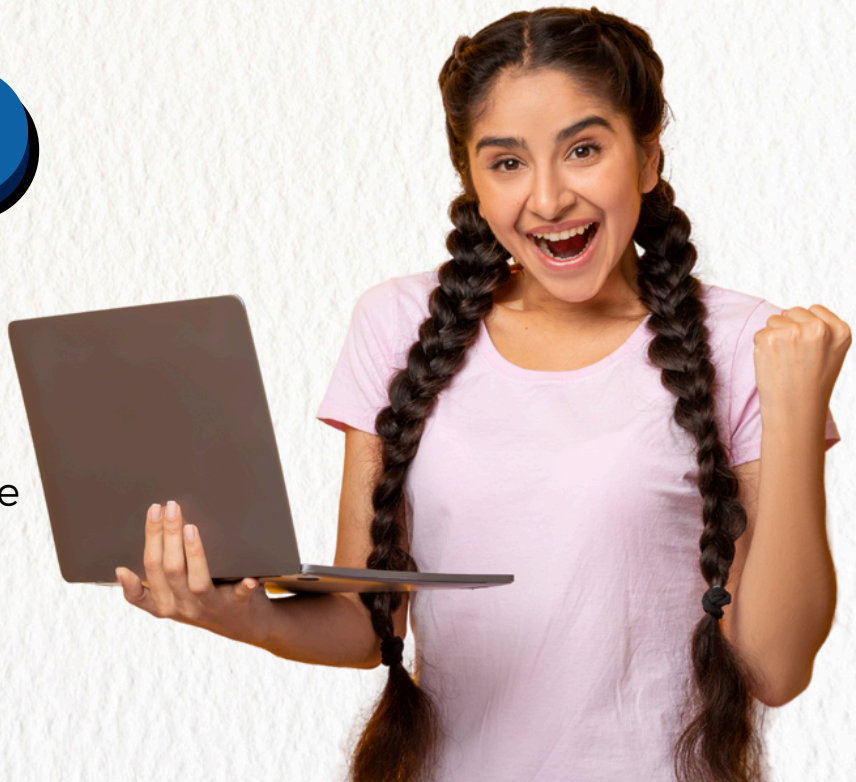

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