

PAPER- 4 – CORPORATE AND ALLIED LAWS

Question No. 1 is compulsory.

Answer any **five** from the rest

Question 1

- (a) *M/s Growmore Plantations Limited, a listed company has unpaid/unclaimed dividend in respect of 150000 Equity Shares for the past continuous 7 years. This period of 7 years ended on 30th June, 2017. Mr. Prasad the CFO of the company is of the opinion that these 150000 Equity Shares should have been transferred to the DEMAT Account of the Investor Education & Protection Fund (IEPF) Authority within 30 days from the end of the 7 years period i.e. by 30th July, 2017 respectively. Is the opinion of the CFO correct as per the provisions of the Companies Act, 2013 read with rules framed there under? What would be your answer had this continuous period of 7 years expired on 30th November, 2017. Also state the condition under which these equity shares will not be transferred to the IEPF Authority by the company.* **(4 Marks)**
- (b) *ABC Limited, an unlisted company having a paid up share capital of Ten crores of Rupees during the preceding financial year has appointed Shri X, a Fellow member of the Institute of Chartered Accountant of India as Chief Financial Officer of the company who is appointed as Key Managerial Personnel under section 203 of the Companies Act, 2013. Shri X is also a Fellow member of the Institute of Company Secretaries of India. The Company Secretary post has become vacant. In order to reduce the administrative expenses, the Company proposes to appoint Shri X as Company Secretary in addition to Chief Financial Officer post. Whether the proposal is legally valid under the provisions of the Companies Act, 2013?* **(4 Marks)**
- (c) *M/s Systemtek India Private Limited (Appellant-Corporate Debtor) has challenged the order dated 3rd July, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai, in the National Company Law Appellate Tribunal (NCLAT).*

NCLT had admitted the application preferred by appellant under Section 10 of the Insolvency and Bankruptcy Code, 2016 and an order of Moratorium was passed and Insolvency Resolution Professional was ordered to be appointed by the Ld. Adjudicating Authority (NCLT).

The only grievance of the appellant in its challenge is that the movable and immovable property of Guarantor (promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under section 10 against the Appellant by the Ld. Adjudicating Authority (NCLT) which is violative of section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 though the Code prescribes a Moratorium for certain types of transactions. Decide. **(4 Marks)**

- (d) *The promoters of M/s Star Steels Limited, during the month of June, 2017, have raised money from public through issue of prospectus and still have 20 un-utilised amount out the total money so raised. The promoters in control of the company have passed a resolution in the general meeting for effecting change in the objects and/or variations in terms of a contract referred to in the prospectus for utilization of this un-utilised amount in respect of which around 15% of the shareholders have voted against the proposal. The company has decided to give these dissenting shareholders an exit offer as per the Securities Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009. The company seeks your advice regarding the conditions and eligibility under these regulations.* **(4 Marks)**
- (e) *The Board of Directors of M/s XRL Limited, a banking company incorporated in India, for the accounting year ended 31st March, 2018, has transferred 10% of its net profit during the year to the Reserve Fund Account. A few shareholders of the company have objected the above act of the Board on the ground that it is violative of the provisions of the Banking Regulation Act, 1949. The Board of Directors of the company in their defense have stated that the company has received an order dated 30th April, 2018 from the Central Government exempting the company from the provisions of sub section (1) of section 17 of the Act. It is further informed that on the date of the Central Governments order i.e. 30.04.2018 the paid up capital of the company was ₹200 Crores and the amount standing in the Reserve Fund Account and Share Premium Account was ₹100 Crores and ₹75 Crores respectively. Decide whether the order of the Central Government exempting the company is justified as per the provisions of the Banking Regulation Act, 1949.* **(4 Marks)**

Answer

- (a) "According to Section 124(6) of the Companies Act, 2013, all shares in respect of which dividend has not been paid or claimed for seven consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed. The shares shall be transferred irrespective of the fact whether the said dividend has been transferred or to be transferred to the Fund or not.

According to Rule 6(1) of IEPF Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, the shares shall be credited to DEMAT Account of the Authority to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund.

Proviso to the Rule states that in cases where the period of 7 years provided under Section 124(5) has been completed or being completed during the period from 7th September, 2016 to 31st October, 2017, the due date of transfer of such shares shall be deemed to be 31st October, 2017.

In the light of the above provision of law read with the rules, in the case of M/s Growmore Plantations Limited, the due date shall be 31st October, 2017 and 30 days from the due date will be 30th November, 2017 for transfer of shares to the authority. Hence, the opinion of Mr. Prasad, CFO is incorrect.

If this continuous period of 7 years expired on 30th November, 2017, then also the equity shares shall be credited to DEMAT Account of the Authority within a period of thirty days of such shares becoming due to be transferred to the Fund i.e. 30th December, 2017.

Condition under which these equity shares will not be transferred to IEPF Authority:

According to Explanation to Section 124(6) of the Act, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of seven consecutive years, the share shall not be transferred to IEPF.

Also, in respect of which there is specific Order of Court, Tribunal or statutory authority restraining the transfer of such shares and payment of dividends or where such shares are pledged or hypothecated under the provisions of the Depository Act, 1996 or the shares already been transferred under sub-Rule 6(1) the Company shall not transfer the shares to the fund.

- (b) According to Section 203(1) of the Companies Act, 2013, every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel:-
- (a) Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-time Director;
 - (b) Company Secretary; and
 - (c) Chief Financial Officer.

According to Rule 8 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014* every listed company and every other public company having a paid-up share capital of ₹ 10 crore or more shall have whole-time key managerial personnel.

In the instant case, ABC Limited is having paid up share capital of ₹ 10 crore, so it is covered under the above Rule and it is mandatory for it to appoint a whole time KMP. As the term used is 'whole time', therefore, three different individuals are required to hold these three key positions.

In view of the above, the company cannot appoint Mr. X as the Company Secretary of the company in addition to his CFO post. Further, Section 203 of the Act specifically prescribes the word “and” between Company Secretary and CFO. Thus, both the positions are to be held by separate persons.

Hence, the proposal of the company to appoint Mr. X as the Company Secretary is not valid.

- (c) As per the given facts in the question, Appellant, M/S Systemtek India Private Limited, challenged the order passed by the NCLT on the ground stating that the movable and immovable property of guarantor (Promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under Section 10 of the Code against the Appellant.

As per Section 14(1) of the Insolvency and Bankruptcy Code, 2016, on the Insolvency commencement date, the NCLT shall by order declare moratorium prohibiting certain acts by /against the Corporate Debtor. According to clause (c) of the said provision, the order prohibits 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.

The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

The word 'its' used in clause (c) of sub-Section (1) of Section 14 of IBC, 2016, refers to corporate debtor and not the guarantors.

In view of this, the Order of NCLT under Section 14(1)(c) of IBC 2016 is not violative. However M/s Systemtek India Private Limited can challenge the Order of the NCLT on the ground that until the liability of the Company is decisively crystallize, the guarantor cannot be held liable.

- (d) Star Steels Limited wants to utilize the 20% of the unutilized money collected from subscription to shares for other capital works. 15% of the shareholders objected to the proposal and were given an option to exit.

Conditions for exit offer [Regulation 69C of the SEBI (ICDR) Regulations, 2009-Chapter VI-A]

The promoters or shareholders in control shall make the exit offer in accordance with the provisions of Chapter VI-A, to the dissenting shareholders, if:

- (a) the public issue has opened after April 1, 2014; and
- (b) the proposal for change in objects or variation in terms of a contract, referred to in the prospectus is dissented by at least ten per cent of the shareholders who voted in the general meeting; and
- (c) the amount to be utilized for the objects for which the prospectus was issued is less than seventy five per cent of the amount raised (including the amount earmarked for general corporate purposes as disclosed in the offer document).

Eligibility of shareholders for availing the exit offer [Regulation 69D of the SEBI (ICDR) Regulations, 2009- Chapter VI-A]]

Only those dissenting shareholders of the issuer who are holding shares as on the relevant date shall be eligible to avail the exit offer made under Chapter VI-A.

In the instant case, the first condition regarding public offer after 1st April, 2014 is being fulfilled as the company has raised money from public through issue of prospectus in June, 2017.

The second condition regarding minimum 10% dissenting shareholders is also fulfilled as in the question, 15% of the shareholders have voted against the proposal of changing the objects and/or variations in terms of contract referred to in the prospectus.

However, the third condition regarding the amount to be utilized for the objects for which the prospectus was issued is less than 75% of the amount raised is not fulfilled as in the present case, the utilized amount was 80%.

As the third condition is not being fulfilled, the promoters or shareholders in control cannot make the exit offer.

- (e) **Reserve Fund:** According to Section 17 of the Banking Regulation Act, 1949, every Banking Company incorporated in India must create a Reserve Fund and transfer a sum equal to not less than 20 % of its net profits. However, the Central Government is empowered to exempt from this requirement on the recommendation of the RBI. Such exemption will be allowed only:-

- When the amounts in the reserve fund and the share premium account are not less than the paid-up capital of the banking company.
- When the Central Govt. feel that its paid-up capital and reserves are adequate to safe guard the interest of the depositors.

If a banking company appropriates any sum from the Reserve fund or the share premium account, it must be reported to RBI within 21 days explaining the circumstances leading to such appropriation.

In the instant case, the total amount in the reserve fund and the share premium account is ₹ 175 crores which is less than the paid-up capital of the banking company i.e. ₹ 200 crore.

In view of the above the transfer of 10% of its net profits to reserve fund is violative of the provisions of the Banking Regulation Act, 1949. Moreover, the Order of the Central Government exempting the company is not justified as per the provisions of the Banking Regulation Act, 1949.

Question 2

- (a) Referring to the provisions of the Competition Act, 2002, answer the following:

Mr. KUN was initially appointed as the Chairperson of the Competition Commission on 1st June, 2015, for a term of three years, when he exactly attained 58 years of age. The Central Government is considering re-appointing him after his term for the maximum period permissible under the provisions of the Act. State the period till which he can be re-appointed as the Chairperson of the Commission.

What will happen to the place of office of the chairperson, in case vacancy arises due to resignation or death of the Chairperson during the tenure of his office?

What will happen to the place of office of the Chairperson, in case the Chairperson is unable to discharge his functions owing to illness? **(4 Marks)**

- (b) The Promoters of M/s Frontline Limited, a listed public company propose to have the strength of the Board of Directors as eleven. They also propose to make the Managing Director and whole time directors as directors not liable to retire by rotation. Advise on the following matters as per the provisions of the Companies Act, 2013:

(i) Maximum number of persons, who can be appointed as directors not liable to retire by rotation.

(ii) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?

(iii) For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

(iv) Can the Board of Directors increase the strength of companies' directors to 18 from 11 by appointing additional directors through passing single resolution? **(4 Marks)**

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

Paid up Share Capital	₹ 20 crores
Gross Turnover	₹ 500 crores
Bank Borrowings	₹ 40 crores (from a National Bank)
Other Borrowings	₹ 40 crores (from a Public Financial Institution)

Mr. Gupta, a Chartered Accountant employed in the finance and audit department of the company wants to form a Vigil Mechanism for directors and employees of the company.

(1) Advise whether it is mandatory for M/s Dreamworks Limited to formulate a Vigil

Mechanism under the provisions of the Companies Act, 2013 and rules framed there under. (2) Are there any penalties that could be imposed on the company for not formulating the Vigil Mechanism? **(4 Marks)**

- (d) *Mr. PRTJ was appointed as a member of the National Company Law Appellate Tribunal. During the month of April, 2018, he was adjudged as an insolvent by a competent authority. The Central Government after consultation with the Chief Justice of India removed Mr. PRTJ from the membership of the National Company Law Appellate Tribunal. Being aggrieved by the decision of the Central Government, Mr. PRTJ approached you to confirm himself whether the decision of the Central Government was appropriate since, he was not given a reasonable opportunity of being heard as a matter of principle of natural justice. Advise him.*

Also state the circumstances in which the Central Government after consultation with the Chief Justice of India can remove any person from the office of President, Chairperson or any Member of the National Company Law Appellate Tribunal.

Your answer should refer to the relevant provisions of the Companies Act, 2013.

(4 Marks)

Answer

- (a) According to Section 10 of the Competition Act, 2002, the Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. However, no Chairperson or other Member shall hold office as such after he has attained the age of 65 years.

In the instant case, Mr. KUN was initially appointed as the Chairperson of the Competition Commission on 1st June, 2015 for a term of three years, when he exactly attained 58 years of age. After three years i.e. on 1st June, 2018, when Mr. KUN attained the age of 61 years, the Central Government is considering re-appointing him for the maximum period i.e. 5 years. But, he cannot be reappointed for 5 years because he will attain the age of 65 years after completion of 4 years of his term i.e. upto 31st May, 2022.

In the event of the occurrence of a vacancy in the office of the Chairperson **by reason of his death, resignation or otherwise**, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office (Sub-Section 4).

When the **Chairperson is unable to discharge his functions owing to illness**, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions (Sub-Section 5).

- (b) (i) According to Section 152(6) of the Companies Act, 2013, Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation

Directors liable to retire by rotation: $11 \times \frac{2}{3} = 7.3$ or 8

So, maximum number of persons, who can be appointed as directors not liable to retire by rotation: $11 - 8 = 3$.

- (ii) According to Section 152(6)(c) of the Companies Act, 2013, $\frac{1}{3}^{\text{rd}}$ of such of the Directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the number nearest to the $\frac{1}{3}^{\text{rd}}$ shall retire from office. Therefore the Directors liable to retire by rotation are $11 \times \frac{2}{3}$ i.e. 7.3 or 8.

No. of directors to retire at AGM: $8 \times \frac{1}{3}$ i.e. 2.67. Hence nearest to $\frac{1}{3}^{\text{rd}}$ is 3.

- (iii) According to Section 160 of the Companies Act, 2013, a person who is not a retiring director in terms of Section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director.

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

- (iv) According to Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than 15 directors, it can do so after passing a special resolution. Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.

But, these appointments cannot be done through single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement. A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved. [Section 162 of the Act].

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

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

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

- (1) the Companies which accept deposits from the public;

- (2) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.

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

Penalty: According to Section 178(8), in case of contravention of provisions of Section 177, the company shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees, and, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

- (d) According to Section 417(1) of the Companies Act, 2013, the Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who—
- (a) has been adjudged an insolvent; or
 - (b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or
 - (c) has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or
 - (d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or
 - (e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e) without giving him a reasonable opportunity of being heard.

As per the proviso stated above, in case of sub-clause (a), i.e. where there is a case of insolvency, there is no requirement of giving an opportunity of being heard by the member of the NCLAT. Hence, the action taken by the Central Government against PRTJ is valid.

Circumstances under which the Central government can remove the President, the Chairperson etc.,

According to Section 417(2) of the Companies Act, 2013, the President, the Chairperson or the Member shall not be removed from his office except by an order made by the

Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such President, the Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard.

In the instant case, it is advised that the decision of the Central Government to remove (without giving reasonable opportunity of being heard) Mr. PRTJ, member of NCLAT who was adjudged as an insolvent by a competent authority is appropriate as per the clause (a) of Section 417(1) of the Companies Act, 2013

Question 3

- (a) *Moonlight Limited, held its Board meeting through video conferencing. Due to technical problems, the video Recording which was done, could not be retrieved. The Company seeks your advice for the preparation and recording of the minutes of the Board meeting in the above situation, under the provisions of the Companies Act, 2013 and Rules made thereunder.* **(4 Marks)**
- (b) *There is a prohibition on importation of "arms, ammunition or gun power or any other goods" under a particular statute. How would you interpret the words "any other goods" applying the rules of interpretation of statutes? Also state when this particular rule will not be applicable citing an example.* **(4 Marks)**
- (c) *ZYX Producer Company limited has been incorporated recently during the month of April, 2018. The company wants to issue bonus shares immediately due to the fact that the company has earned huge profits during the month of incorporation itself. A Board meeting is proposed to be held to approve this bonus issue. Referring to the provisions of Section 581S of the Companies Act, 1956, advise the Board of Directors of the company.* **(4 Marks)**
- (d) *M/s EVA Optical Networking India Private Limited having its registered office situated in the city of Gurugram, Haryana State, falling within the jurisdiction of Registrar of Companies, NCT, Delhi & Haryana has filed a petition before the Honorable National Company Law Tribunal, New Delhi Bench (NCLT) under the Companies Act, 2013 seeking an exemption be granted to the petitioner company to change the financial year of the company from 1st April to 31st March presently adopted by following the financial year in below manner:-*
- (i) For the next financial year: From 1st April, 2018 to 31st December, 2018 both days inclusive.
- (ii) For the subsequent financial year: Be changed to a period of one calendar year beginning 1st January of one year and concluding on 31st December of the same year.

The Petitioner company in its petition avers that it is a part of EVA Optical Networking Singapore Pvt. Ltd., a company incorporated in Singapore (being the parent company) holding 99% of the Equity Share Capital of the petitioner and the remaining 1% of the Equity Share Capital is held by EVA Optical Networking SE, a company incorporated in Germany, which is represented to be the ultimate holding company. The parent company as well as the ultimate holding company follows their Financial Year as 1st January to 31st December of the same year for the purpose of consolidation of accounts and hence in order to streamline the preparation of the consolidated financials of the parent company, the petitioner company is required to align with it. Advise whether the petition will stand before the Honorable NCLT as per the provisions of the Companies Act, 2013. What would be your answer if M/s EVA Optical Networking India Private Limited was registered as a Specified International Financial Services Center (IFSC) private company?

(4 Marks)

Answer

- (a) According to Sub- Rule 11 of Rule 3 of the *Companies (Meetings of Board and its Powers) Rules, 2014*, at the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, who dissented from the decision taken by majority and the draft minutes so recorded shall be preserved by the company till the confirmation of the draft minutes in accordance with sub-rule (12).

According to Sub- Rule 12 of Rule 3 of the *Companies (Meetings of Board and its Powers) Rules, 2014*,

- (i) The draft minutes of the meeting shall be circulated among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board.
- (ii) Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which his approval shall be presumed.

As per the facts of the question, due to technical problems, the video recordings of a Board meeting of Moonlight Limited, could not be retrieved.

However, the secretary of Moonlight Limited in consultation with the Chairman of the meeting can use the draft minutes that would have been recorded during the meeting to prepare the minutes. Further, when the same minutes will be circulated to the directors, they can give comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the minutes, within seven days or

some reasonable time as decided by the Board, after receipt of the draft minutes. Moonlight Limited may, thus follow the above procedure.

- (b) The word "any other goods" in the given provision of a particular statute will be interpreted through application of the Rule of Eiusdem Generis. According to this Rule, where any Act enumerates different subjects, general words following specific words are to be construed (and understood) with reference to the words that precede them. Those general words are to be taken as applying to things of the same kind as the specific words previously mentioned, unless there is something to show that a wider sense was intended. Thus, the rule of ejusdem generis means that where specific words are used and after those specific words, some general words are used, the general words would take their colour from the specific words used earlier.

For given instance, where there was prohibition on importation of 'arms, ammunition, or gunpowder or any other goods' the words 'any other goods' would be meaning 'of the same kind or species' and shall be construed as referring to goods similar to 'arms, ammunition or gun powder'.

Non- applicability of rule of Eiusdem Generis

The general principle of 'ejusdem generis' applies only where the specific words are all the same nature. When they are of different categories, then the meaning of the general words following those specific words remains unaffected-those general words then would not take colour from the earlier specific words. Even in case, whole genus exhaust, then the larger view will be taken.

It is also to be noted that the courts have a discretion whether to apply the 'ejusdem generis' doctrine in particular case or not.

For example, the 'just and equitable' clause in the winding-up powers of the Tribunal given under Section 271 of the Companies Act, 2013 is held to be not restricted by the first four specific situations in which the Tribunal may wind up a company.

- (c) According to Section 581S of the Companies Act, 1956, the Board of Directors of a producer company can issue bonus shares only by means of resolution passed at the annual general meeting of its members.

Thus, the Board of Directors of ZYX Producer Company can propose the issue of Bonus shares in the Board meeting, however, the same can only be done so only by means of resolution passed at the annual general meeting of its members.

- (d) According to Section 2(41) of the Companies Act, 2013, "financial year", in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year.

Further, in case of a Specified IFSC private company, which is a subsidiary of a foreign company, the financial year of the subsidiary may be same as the financial year of its holding company and approval of the Tribunal shall not be required.

As per the facts of the question, EVA Optical Networking Singapore Pvt. Ltd. (incorporated in Singapore) and EVA Optical Networking SE (incorporate in Germany) together hold all the shares of M/s EVA Optical Networking India Private Limited. Thus, M/s EVA Optical Networking India Private Limited is a subsidiary of a foreign company.

1. Applying the above provisions, M/s EVA Optical Networking India Private Limited, can rightfully apply to Honourable NCLT to seek an exemption to change the next financial year of the company from 1st April to 31st March to 1st April, 2018 to 31st December, 2018 and the subsequent financial year to a period of one calendar year beginning 1st January of one year and concluding on 31st December of the same year in order to streamline the preparation of the consolidated financials of the parent company. Accordingly, the petition will stand before the Hon'ble NCLT as per the provisions of the Companies Act, 2013.
2. If M/s EVA Optical Networking India Private Limited was registered as a Specified International Financial Center (IFSC) private company, its financial year can be same as the financial year of its foreign holding company and approval of the Tribunal shall not be required. The Central Government have exempted such companies in public interest under Section 462 of the Companies, 2013.

Question 4

- (a) (i) *LMN & Company, Chartered Accountants a Limited Liability Partnership firm with CA. L, CA. M and CA. N as partners, is the statutory auditor of a listed company M/s Bright Limited for past 6 years as on 01.04.2014.*

CA.M is also a partner in other Chartered Accountant firm M/s DMC & Company, Chartered Accountants. Advise under the provisions of the Companies Act, 2013 :

- (1) *Upto how many years can LMN & Company continue as statutory auditors of M/s Bright Limited?*
- (2) *What shall be the cooling-off period for M/s LMN & Company with respect to M/s Bright Limited?*
- (3) *Can M/s DMC & Company; be appointed as statutory auditors of M/s Bright Limited and it's another listed subsidiary M/s Dark Limited during such cooling-off period?*

- (4) Can M/s LMN & Company be appointed as internal auditors of M/s Bright Limited and its another listed subsidiary M/s Dark Limited, during such cooling-off period? **(4 Marks)**
- (ii) ABC and Company, Chartered Accountants a partnership firm; is the statutory auditor of M/s Wood Work (P) Ltd. since last 6 financial years as on 01.04.2014. The company has a loan outstanding towards Dena Bank Limited for ₹25 Crores and the, paid-up share capital is ₹25 Crores, as per the audited balance sheet for the year ended on 31.03.2014 respectively. Advise the audit firm upto the year upto which they can continue as statutory auditors of M/s Wood Work (P) Limited as per the provisions of the Companies Act, 2013. **(2 Marks)**
- (b) (i) Explain the meaning of the term "Property" under the Prevention of Money Laundering Act, 2002.
- (ii) Mr. Raja was arrested for Counterfeiting Two Thousand Rupees Notes. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002. **(6 Marks)**
- (c) Chang Limited, a company incorporated in Singapore proposes to issue prospectus offering its securities in India. The Company has no established place of business in India.
- The officer in charge of the issue of the prospectus in India seeks your opinion regarding the provisions relating to registration of the prospectus under the Companies Act, 2013. List out the documents required to be enclosed with the prospectus. **(4 Marks)**

Answer

- (a) (i) **According to Section 139 (2) of the Companies Act, 2013,**
- I. Listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint an audit firm as auditor for more than two terms of 5 consecutive years.
 - II. An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.
 - III. Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as an auditor of the same company for a period of five years.
 - IV. For the purpose of the rotation of auditors, in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of 5 consecutive years or 10 consecutive years, as the case may be.

Applying the above provisions,

- (1) LMN & Company can continue as statutory auditors of M/s Bright Limited for 4 more years from 1.4.2014, i.e. they can continue in office only till 31.3.2018.
- (2) The cooling- off period shall be of 5 years.
- (3) M/s DMC & Company cannot be appointed as a statutory auditor of M/s Bright Limited during the cooling – off period of LMN & Company, as CA. M is the common partner in both LMN & Company and M/s DMC & Company.

However, M/s DMC & Company can be appointed as a statutory auditor of M/s Dark Limited (a listed subsidiary of M/s Bright Limited), during the cooling – off period.

- (4) As per Section 138 (1) of the Companies Act, 2013, every listed company and other prescribed class of companies, shall be required to appoint an internal auditor, who shall either be a chartered accountant or a cost accountant, or such other professional (which may be either an individual or a partnership firm or a body corporate) as may be decided by the Board to conduct internal audit of the functions and activities of the company.

Accordingly, M/s LMN & Company be appointed as an internal auditors of M/s Bright Limited and in its subsidiary M/S Dark Limited (a listed company). The provision of cooling off period as given under Section 139 of the Companies Act, 2013, shall not be applicable on the Internal auditors.

- (ii) Section 139(2) of the Companies Act, 2013, provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint an audit firm as auditor for more than two terms of five consecutive years.

As per the rules of Companies (Audit and Auditors) Rules, 2014 the prescribed classes of companies shall include,

- (a) all unlisted public companies having paid up share capital of rupees ten crore or more;
- (b) all private limited companies having paid up share capital of rupees 20 crore or more;
- (c) all companies having paid up share capital of below threshold limit mentioned in (a) and (b) above, but having public borrowings from financial institutions, banks or public deposits of rupees fifty crores or more.

Since, the Paid- up share capital of M/s Wood Work (P) Ltd. exceeds the prescribed limit, so ABC and Company can continue as statutory auditors of the company only till 31.3.2018 (i.e. 4 more years from 31.3.2014).

Note: Answer may also be framed in view of the amendment made vide the Companies (Audit and Auditors) second amendment Rules, 2017 dated 22nd June, 2017. The limit for paid up share capital has increase from 20 crores to 50 crores.

- (b) (i) According to clause (v) of sub – Section (1) of Section 2 of the Prevention of Money Laundering Act, 2002, "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Explanation.—For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

- (ii) Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering. According to the Section, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.

Since, counterfeiting of rupee notes is a predicate offence, specified under paragraph 1 of Part A of the Schedule (and not under paragraph 2 of Part A of the Schedule), Mr. Raja can be awarded maximum punishment with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

- (c) According to Section 389 of the Companies Act, 2013, no person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by Section 388 and such documents as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, the following documents shall be annexed to the prospectus, namely:

- (a) any consent to the issue of the prospectus required from any person as an expert;

- (b) a copy of contracts for appointment of managing director or anager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;
- (c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;
- (d) a copy of underwriting agreement; and
- (e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

Question 5

- (a) *XYZ Limited is a listed company. The Board of Directors of the company at their meeting held on 1st November, 2017 approved the proposal to issue bonus shares in the ratio of 1:1. Such bonus issue is authorized by its Articles of Association for issue of bonus shares and capitalization of reserves. The company implemented the bonus issue on 15th November, 2017. Whether the company has contravened the provisions of Securities Exchange Board of India (Issue of capital and Disclosure Requirements) Regulation 2009?*

What is the time limit in case there is no provisions in the Articles for capitalization of reserve? **(4 Marks)**

- (b) (i) *The e-forms rolled out by the Ministry of Corporate Affairs (MCA) under the provisions of the Companies Act, 2013 and rules framed thereunder are mandatorily numbered alpha-numeric. Explain this concept. What is the chapter wise nomenclature of e-forms provided by MCA in respect of -1. Acceptance of Deposits by Companies & 2. Management and Administration?* **(2 Marks)**
- (ii) *Mrs. Geeta, wife of CA. 'Deepak' the statutory auditor of M/s Avon Builders Limited, acquired shares in the company for a face value of ₹75000/- on 15th March, 2018. CA. 'Deepak', issued his audit report on 25th April, 2018. Examine the validity of this transaction under the Companies Act, 2013. Would your answer be different if face value of the shares have been ₹150000/- (market value ₹95000/-)?* **(2 Marks)**
- (c) *Mr. AMIT is the Managing Director of ANJ Limited, which is a non-government public company. The directors of CHH Limited decided to appoint Mr. AMIT as the Managing Director of the company, even though Mr. AMIT decided not to vacate his place of office of Managing Director of ANJ Limited. A notice for a Board meeting specifying a resolution containing the proposal of appointment of Mr. AMIT was served to all the eligible directors of CHH Limited. Out of eight directors of the company, six directors attended the meeting and out of them four directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of Directors seek your opinion whether Mr. AMIT can be appointed as the Managing Director, of the company in this situation. Referring to the applicable provisions of the Companies Act, 2013, advise them.* **(4 Marks)**

- (d) *ASK Housing Finance Company Limited are prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited subject to the condition that the loans are guaranteed by M/s. NEWS Pharmacy Limited. M/s NEWS Pharmacy Limited is not a listed company and the company will be exceeding the limits prescribed under the Companies Act, 2013 by providing the guarantees. Advise the company about this legal requirement under the Companies Act, 2013 to give effect to the above proposal. What would be your advice if the company was required to provide security instead of guarantee?* **(4 Marks)**

Answer

- (a) **Bonus Issue:** According to the provisions of Chapter IX of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, a listed issuer may issue bonus shares to its members if it is authorised by its articles of association for issue of bonus shares, capitalisation of reserves, etc.

An issuer, announcing a bonus issue after the approval of its board of directors and not requiring shareholders' approval for capitalisation of profits or reserves for making the bonus issue, shall implement the bonus issue within fifteen days from the date of approval of the issue by its board of directors.

According to the stated facts, Board of Directors of XYZ Limited, approved the proposal to issue of bonus shares in the meeting held on 1st November 2017. This issue of bonus shares, is without requiring shareholders' approval.

Accordingly, XYZ Limited, implemented the bonus issue within fifteen days from the date of approval of the issue by its board of directors (i.e. on 15th November, 2017). So, XYZ Limited is in compliance with the SEBI(ICDR) Regulation, 2009 and thus has not contravened.

Time limit in case no provisions in the Articles: However, if there is no such provision in the articles of association, the issuer shall pass a resolution at its general body meeting making provisions in the articles of associations for capitalisation of reserve. Here, an issuer is required to seek shareholders' approval for capitalisation of profits or reserves for making the bonus issue. Such bonus issue shall be implemented within two months from the date of the meeting of its board of directors wherein the decision to announce the bonus issue was taken subject to shareholders' approval.

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

Chapter wise nomenclature of e-forms provided by MCA:

Sl.no	Chapter number	Chapter name	Nomenclature of e-forms
1	V	Acceptance of Deposit by Companies	DPT
2	VII	Management and Administration	MGT

- (ii) As per Section 141(3)(d)(i) of the Companies Act, 2013, a person who, or his relative or partner is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company, shall not be appointed as an auditor of the company.

However, Rule 10 of the *Companies (Audit and Auditors) Rules, 2014*, states that a relative of an auditor may hold securities in the company of face value not exceeding rupees one lakh.

In the given case Mrs. Geeta, wife of CA. Deepak acquired shares in Avon Builders Limited, in which he was a statutory auditor on 15th March, 2018. Since, the securities held by Mrs. Geeta is within the prescribed limit of ₹ 1 lakh, such a transaction is valid.

Yes, the answer will be different in case where the face value of acquired shares is ₹ 1,50,000. Then in that case:

- (i) Corrective action to maintain the limit specified (i.e., 1 lac) shall be taken by the auditor within 60 days of such acquisition, or
- (ii) Auditor has to vacate his office.

(c) Appointment of Key Managerial Personnel

As per Section 203(3) of the Companies Act, 2013, a whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

However, the above sub-Section (3), shall not disentitle a key managerial personnel from being a director of any company with the permission of the Board.

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

In the given case, unanimous consensus of all the directors present at the meeting was lacking. Hence, Mr. Amit cannot be appointed as a Managing Director of CHH Limited.

- (d) As per Section 186(2) of the Companies Act, 2013, no company shall directly or indirectly
- (a) give any loan to any person or other body corporate;

- (b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
- (c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,
exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more, except with the prior approval by means of a special resolution passed at a general meeting.

However, explanation provided in Section 186(2) of the Companies Act, 2013 states that for the purposes of this sub-Section, the word "person" does not include any individual who is in the employment of the Company.

As per the given facts, ASK Housing Finance Company Limited was prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited on the condition that such loans are guaranteed by the M/s NEWS Pharmacy Limited exceeding the limits prescribed in the Companies Act, 2013.

Here, the loans are to be guaranteed by M/s. News Pharmacy Limited for its employees which falls within the purview of the explanations which includes guarantees given for the employees. So, Section 186(2) shall not be applicable to it. Hence, it can give the guarantee without any condition on the limits imposed in the Section 186(2). Hence, there are no legal requirements to be fulfilled under the Companies Act, 2013 to give effect to the above proposal.

Answer will remain the same, even if the company provides security instead of guarantee as the provisions of the Section 186(2) are applicable for providing security also.

Question 6

- (a) *In public interest, HEM Stock Exchange Limited was issued an order by the Stock Exchange Board of India to produce certain information and explanation relating to its operation in writing. The management of the stock exchange were reluctant to part with such information with SEBI and approached you to seek your advice in the following matters:*
 - (i) *Duty of HEM Stock Exchange Limited to furnish periodic returns to SEBI;*
 - (ii) *Power of SEBI to ask for the information asked as stated above, over and above the periodic returns;*
 - (iii) *Period for which the Stock Exchange is required to maintain the books of accounts which may be inspected by SEBI.*
 - (iv) *Duty of the Stock Exchange and the persons dealing with the stock exchange with regard to the information sought for by SEBI.*

Advise them referring to the relevant provisions of the Securities Contracts (Regulation) Act, 1956. **(4 Marks)**

- (b) *Some creditors of NTY Limited approached you to guide them to apply to the Tribunal for seeking an order for conducting an investigation into the affairs of the company due to the fact that the business of the company is being conducted with intention to defraud its creditors. Referring to the provisions of the Companies Act, 2013, guide them regarding the circumstances under which and how a person, not being a member of the company can apply to the Tribunal to seek an order for conducting an investigation into the affairs of a company.* **(4 Marks)**
- (c) *BDLK Limited decided to go for voluntary winding up and accordingly the Board of Directors at a meeting of the Board are about to take the necessary steps to initiate the winding up proceedings. The Board of Directors of the company approached you for guidance in this regard. Please list out the steps required under the Insolvency & Bankruptcy Code 2016 before approval of such liquidation proposal with specific reference to meetings and actions of relevant stakeholders.* **(4 Marks)**
- (d) *M/s Sunshine Oils Limited, a listed company as at 31st March, 2018 as per the audited financial statements is having 200 depositors with ₹50 Crores of deposit in the company. Out of the total 200 depositors 20 depositors of the company have formed a group and have appointed Mr. Ram (a practicing advocate who is not one of the depositor) as their representative to file an application in the National Company Law Tribunal (NCLT) to bring a Class Action suit against the management of the company as they are of the opinion that the management and conduct of affairs of the company are being conducted in a manner which is prejudicial to the interest of the depositors being oppressive. Will the application of Mr. Ram be admitted by the Honourable Tribunal. Discuss with reference to the provisions of the Companies Act, 2013?* **(4 Marks)**

Answer

- (a) The question can be answered with reference to Section 6 of the Securities Contract and (Regulations) Act, 1995 which empowers the Central Government to call for information. Accordingly:
- (i) **Duty of HEM Stock Exchange Limited to furnish periodic returns to SEBI:** Every recognized stock exchange should furnish periodical returns to SEBI in the prescribed format. These Returns contain information on current affairs of the Exchange including volume and value of transactions, short deliveries, important decisions taken by Board etc. [Section 6(1) of the Securities Contracts (Regulation) Act, 1956].
- (ii) **Power of SEBI to ask for the information asked as stated above, over and above the periodic returns:** SEBI may by order in writing call for information or explanation relating to affairs of an Exchange or its member. [Section 6(3)(a) of the Act]

- (iii) **Period for which the Stock Exchange is required to maintain the books of accounts which may be inspected by SEBI:** Every Stock Exchange has to maintain books of accounts for a period of 5 years and these books may be inspected by SEBI at any point of time. [Section 6(2) of the Act]
- (iv) **Duty of the Stock Exchange and the persons dealing with the stock exchange with regard to the information sought for by SEBI:** Every Director, Manager, Secretary or officer of the Exchange; every member of such stock exchange; if the member of the stock exchange is a firm, every partner, manager, secretary or other officer of the firm and every other person or body of persons who has had dealings in the course of business with any of the persons mentioned above whether directly or indirectly, is bound to provide information to Enquiry officer or SEBI representative who are looking into the affairs of the Exchange. [Section 6(4) of the Act]

- (b) According to Section 213(b)(i) of the Companies Act, 2013,

The Tribunal may, on filling of an application by any other person (not being a member of company) or otherwise, if the Tribunal is satisfied that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose, may order after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

The creditors of NTY Ltd should be guided in terms of the provisions stated above.

- (c) **Voluntary Winding Up:** As per Section 59 of the Insolvency and Bankruptcy Code, 2016, the voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by the Board (IBBI).

Conditions of initiation of voluntary liquidation proceedings: Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

- (a) a declaration from majority of the directors of the company verified by an affidavit stating that they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and the company is not being liquidated to defraud any person;
- (b) the declaration given above shall be accompanied with the following documents

namely:

- (i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
 - (ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;
- (c) within four weeks of a declaration under sub-clause (a) above, there shall be—
- (i) a **special resolution of the members of the company in a general meeting** requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
 - (ii) a **resolution of the members of the company in a general meeting** requiring the company to be liquidated voluntarily **as a result of expiry of the period of its duration**, if any, fixed by its articles, or

on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, **creditors representing two thirds in value of the debt of the company shall approve the resolution passed** under sub-clause (c) within seven days of such resolution.

Notification to Registrar of company and the Board: The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

- (d) M/s. Sunshine Oils Limited, a listed company as at 31st March, 2018, as per the audited financial statements is having 200 depositors with ₹50 crores of deposit in the company. Out of total 200 depositors, 20 depositors of the company have formed a group and have appointed Mr. Ram (a practising Advocate who is not one of the depositors) as their representative. To bring a class action suit against the management of the Company.

Section 245(3)(ii) of the Companies Act, 2013 prescribes that the requisite number of depositors to file an application shall not be less than 100 depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less. However, Section 245(3)(ii) of the Companies Act, 2013 is silent regarding the minimum percentage of the depositors and no Rules have been prescribed till date.

Further, as per Section 432, a party to any proceeding or appeal before the Tribunal or Appellate Tribunal as the case may be, may appear in person or authorize one or more Chartered Accountant or Company Secretaries or Cost Accountants or legal practitioners or any other person to present his case before the Tribunal or Appellate Tribunal as the case may be.

Section 245(10) states that subject to the compliances of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section(1). In view of the above, the application of Mr. Ram who is a representative of depositors will be admitted by the Hon'ble Tribunal, provided, the requirement of minimum number of members filing the application under Section 245(3)(ii) is fulfilled.

Question 7

Answer any **four** of the following:-

- (a) *M/s Sagar Retail Mega Mart Ltd. applied for winding up on 1st April, 2018 before the Honourable Tribunal by passing a special resolution as per the provision of section 271(1)(a) of the Companies Act, 2013 on account of fall in business and continued losses but not due to inability to pay debts. The company was in the business of ordinary retail trade of multiple branded goods. A few shareholders of the company have alleged before the Honourable Tribunal that the company had failed to maintain proper books of accounts for over a period of more than three years immediately prior to the date of winding up application and the sole reason cited by them in support of their allegation is that no proper statements of all goods sold and purchased by the company have been kept as such every officer in default must be punished as per the provisions of the Companies Act, 2013. Mr. Ravi the CFO and officer in default do not refute the allegation of non-maintenance but is of the opinion that this act as per the provision of the Companies Act, 2013 is not punishable. Decide whether the opinion of the CFO is correct. Would your answer be different had the business of the company be wholesale trade instead of ordinary retail trade?* **(4 Marks)**

- (b) *M/s TAS Constructions Private Limited, an operational creditor on 2nd April, 2018 being the default date issued a demand notice through speed post to M/s Dheeraj Constructions Private Limited, an unpaid operational/corporate debtor demanding payment of its invoice dated 19th March, 2018 for ₹5,60,000 (15 days payment terms) towards supply of certain works contract services as per the provisions of section 8(1) of the Insolvency and Bankruptcy Code, 2016 and rules framed there under/s*

Dheeraj Constructions Private Limited on receipt of the demand notice informed the operational creditor, that vide their e-mail dated 30th March, 2018, addressed to the company and all its directors, they have disputed the invoice on the quality of the services rendered and were withholding payment till the dispute is settled but without initiating any legal proceedings under any law for the time being in force. The operational creditor on expiry of the period of 10 days from the date of delivery of the demand notice and non-payment of its dues approached the Adjudicating Authority for the initiation of the corporate insolvency resolution process under section 9(1) of the Insolvency and Bankruptcy Code, 2016. Will the application of the operational creditor filed under section

9 (1) read with section 8(2) (a) of the Insolvency and Bankruptcy Code, 2016 be permitted? **(4 Marks)**

- (c) *M/s Kashi Mutual Benefits Nidhi Ltd. is incorporated as a Nidhi Company under the Companies Act, 2013. The Board of Directors of the company seeks your advice on the following issues as per the provisions of the Companies Act, 2013 read with rules. Advise.*

- (i) *The Board of Directors is planning to issue preference shares.*
- (ii) *The Board of Directors have decided to provide Locker Facilities on rent to its members and have estimated that rental income from such letting will be around 30 of the gross income of the company.*
- (iii) *The Board of Directors of the company is planning to declare dividend for the current year at 45%.*
- (iv) *The Board of Directors of the company have decided to appoint Mr. Prince (a minor) as a member of the company.*

- (d) *M/s Star Life Insurance Company Limited issued a life insurance policy in favour of Mr. Raj, which came into force on March, 2014. In February 2017 the insurer came to know that there was a mis-statement involving a material fact (without any fraud involved) and repudiated the policy. The insurer till the date of repudiation had collected ₹3,00,000/- as premiums under the policy. Mr. Raj did not contest the repudiation but requested the insurer for return of the premiums paid till the date of repudiation to which the insurer refused citing material mis-statement of facts due to which refund cannot be made. Advise Mr. Raj whether the insurer is valid in refusing the refund of the premiums collected as per the provisions of the Insurance Act, 1938. **(4 Marks)***

- (e) *In terms of the provisions of the Foreign Exchange Management Act, 1999, Mr. SAM is a person of Indian origin resident outside India. He wants to acquire some immovable properties in India not being agricultural property, plantation or a farm house.*

Referring to the provisions of the Foreign Exchange Management Act, 1999, state the permitted sources, means and restrictions imposed in this regard,

*Also state the provisions where the acquisition will be in the form of gift or inheritance by Mr. SAM. **(4 Marks)***

Answer

- (a) **Failure to maintain proper books of accounts [Section 338(1) of the Companies Act, 2013]**

- where a company is being wound up, if it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the commencement of the winding up,

- every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable,
- be punishable with imprisonment for a term which shall be not less than one year but which may extend to three years and with fine which shall not be less than 1 lakh rupees but which may extend to three lakh rupees.

Conditions when it shall be deemed that proper books of account have not been kept [Section 338(2) of the Act]: For the purposes of sub-Section (1), it shall be deemed that proper books of account have not been kept in the case of any company,—

- where the business of the company has involved dealings in goods, statements of the annual stock takings and, except in the case of goods sold by way of ordinary retail trade, of all goods sold and purchased, have not been kept.

In the instant case, no proper statements of all goods sold and purchased by the company engaged in ordinary retail trade is kept. It shall be deemed that proper books of account have been kept as ordinary retail trade is an exception under sub-Section (2). Thus, opinion of CFO is correct and punishable.

If the company is engaged in wholesale trade instead of ordinary retail trade, then it is deemed that proper statements of all goods sold and purchased by the company engaged in wholesale retail trade is not kept for more than 3 years period immediately prior to the date of winding up application. Hence, in this case, the CFO opinion will not hold good and will be punishable.

- (b) The given problem is based on Section 9(1) of the Insolvency and Bankruptcy Code, 2016. According to the provision, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the Adjudicating Authority for initiating corporate insolvency resolution process.

However, as per Section 8(2)(a) of the Code, the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about existence of dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

Facts given states that the Dheeraj Constructions Private Limited on receipt of the demand notice, informed M/s TAS Constructions Private Limited (Operational Creditor) that through email dated 30th March, 2018, addressed the company and all its directors, of the dispute on the invoice and withholding of the payment till the settlement of the dispute.

The provision of Section 8(2)(a) envisages existence of dispute, if any and record of the pendency of the suit or arbitration proceedings filed by the Corporate Debtor before receipt of such notice or invoice in relation to such disputes: thus existence of disputes and record of pendency of the suit or arbitration proceedings both are to be filed. Whereas, Section 5 (6) defines 'disputes' as disputes includes a suit or an arbitration proceedings relating to:

- (a) The existence of the amount of the debt
- (b) The quality of goods or service or
- (c) The breach of the representation or the warranties.

The Supreme Court has settled the position in the case of Mobilox Innovations Private Limited Vs. Kirusa Soft Ware Private Limited and Innoventive Industries Vs ICICI Bank by deciding that "and" used in Section 8(2)(a) has to be read as disjunctively and "and" to be read as "or" else, the purpose of the IBC will be defeated.

Hence, the requirement of Section 8, to bring to the notice of the operational creditor about an existence of dispute only and not along with the record of the pendency of the suit or arbitration proceedings as settled by the Supreme Court in the cases referred above filed before the receipt of such notice or invoice in relation to such dispute have been complied with and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute, have been complied with.

So, the application of M/s TAS Constructions Private Limited (Operational Creditor) shall not be permitted under Section 9 of the Insolvency and Bankruptcy Code, 2016 as Dheeraj Construction Private Limited has complied the provisions of Section 8(2)(a) of the IBC, 2016.

- (c) (i) According to Rule 4(2) and 6(b) of the *Nidhi Rules, 2014*, no Nidhi shall issue preference shares. So, the boards of Directors of M/s Kashi Mutual Benefits Nidhi Ltd. cannot issue preference shares.
- (ii) According to Rule 6(e) of the *Nidhi Rules, 2014*, Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year. So, the board of directors cannot provide locker facilities on rent to its members on which the rental income will be around 30% of the gross income of the company.
- (iii) According to Rule 18 of the *Nidhi Rules, 2014*, a Nidhi shall not declare dividend exceeding 25% or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:—
 - (a) an equal amount is transferred to General Reserve;

- (b) there has been no default in repayment of matured deposits and interest; and
- (c) it has complied with all the rules as applicable to Nidhi.

In the instant case, the Board of Directors cannot declare dividend at the rate of 45%.

- (iv) According to Rule 8(3) of the Nidhi Rules, 2014, a minor shall not be admitted as a member of Nidhi. However, deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of *Nidhi*.

Hence, the Board of directors of the company cannot appoint Mr. Prince (a minor) as a member of the company.

- (d) As per Section 45 of the Insurance Act, 1938, in case of repudiation of the policy on the ground of misstatement of a material fact, and not on the ground of fraud, the premiums collected on the policy till the date of repudiation shall be paid to the insured or the legal representatives or nominees or assignees of the insured within a period of ninety days from the date of such repudiation.

In the given case, M/s Star Life Insurance Company Limited repudiated the life insurance policy of the insured Mr. Raj. Mr. Raj requested the insurer for return of the premiums amount ₹3,00,000 paid till date of repudiation. Insurer refused to refund on the basis of misstatement of facts (without any fraud involved) .

As per the above given provision, M/s Star Life Insurance Company Limited is liable for the refund of the premium amount and accordingly Mr. Raj is advised that he is entitled to claim premium amount collected on the policy within the period of the 90 days from February 2017 (date of repudiation).

- (e) **Acquisition of immovable properties in India by a person of Indian origin resident outside India:**

A person of Indian origin resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.

Sources: In case of acquisition of immovable property, payment of purchase price, if any, shall be made out of

- (i) funds received in India through normal banking channels by way of inward remittance from any place outside India or
- (ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.

Restriction: It is also provided that no payment of purchase price for acquisition of immovable property shall be made either by traveller's cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

Acquisition in the form of gift

A person of Indian origin resident outside India may acquire any immovable property in India other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India.

Acquisition in the form of inheritance

A person of Indian origin resident outside India may acquire any immovable property, in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India.