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CS PROFESSIONAL JUNE '19

SUBJECT- C.R.V.I.

Test Code - CSP 3008

BRANCH - () (Date :)

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ANSWER : 1

- (A) Corporate restructuring is a **process in which a company changes the organizational structure and processes of the business.** The most common form of corporate restructuring are mergers/ amalgamations, acquisitions/ takeovers, financial restructuring, divestitures/ demergers and buyouts. **Corporate Restructuring can also be resorted in any of the forms like slump sale, leveraged buy – out** or even circumventing the restriction imposed under statutes of by regulators.

As a case of **demerger the Cement division of L & T Ltd.** resulted to Ultratech Cement Co. Ltd. that **resulted in economies of scale and overall competitiveness, multifunctional synergies, combined resource pool, cross leverage financial strengths and increased capacity.** Tata Steel Ltd. acquired overseas Corus Group Plc. That improved the synergies to Tata Steel Ltd. that marshaled the resources for both, **utilization of wide retail and distribution network, technology transfer and enhanced R & D capabilities.** Transfer of undertaking for a lump sum consideration by Piramal Healthcare Ltd. to Abbott Healthcare Pvt. Ltd. with a non – compete clause is slump sale in terms of the Income – tax Act, 1961. Capital gains arising therefrom is taxed as long term if held for more than 3 years prior to transfer or as short term if held for less than 3 years. **Bharti Airtel Ltd. explored the strategy of leveraged buyout** in acquiring Zain Africa International BV majorly financed through borrowed funds. For this purpose, special purpose vehicles are formed. Bharti Airtel structured acquisition through special purpose vehicles thus keeping its financials intact. However, as a guarantor for special purpose vehicles, Bharti Airtel assumes full responsibility.

(5 MARKS)

- (B) **Section 230(6) of Companies Act, 2013 provides that when the Tribunal directs the convening, holding and conducting of a meeting of creditors or members or a class of them,** a particular majority of the creditors or members or a class of them should agree to the scheme of compromise or arrangement. As per the aforesaid sub – section, the majority required is the majority in number representing three – fourth in value of the creditors or members or a class of them, as the case may be, present and voting in the meeting so convened either in person, or by proxy. After the said meeting agrees with such majority, if the scheme is sanctioned, by the Tribunal, it shall be binding upon the creditors or members or a class of them, as the case may be. In the case of **Punjab and Haryana High Court in Hind Lever Chemicals Limited and Another [2005] 58SCL 211 (Punj. & Har.)** /Court held that in our view, the language of Section 230(6) of the Act is totally unambiguous and a plain reading of this provision clearly shows that the majority in number by which a compromise or arrangement is approved should represent three – fourth in value of the creditors/ shareholders who are ‘present and voting’ and not of the total value of the shareholders or creditors of the company.

(5 MARKS)

ANSWER : 2

- (A) **Section 32 extends the jurisdiction of Competition commission of India to inquire and pass orders** in accordance with the provisions of the Act into an **agreement or dominant position or combination, which is likely to have, an appreciable adverse affect on competition** in relevant market in India, notwithstanding that,

- a) an agreement referred to in **Section 3** has been entered into outside India ; or
- b) any party to such agreement is outside India ; or
- c) any enterprise abusing the dominant position is outside India; or
- d) a combination has taken place outside India ; or

- e) any party to combination is outside India ; or
- f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

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

(5 MARKS)

(B) **Goodwill on amalgamation** may be called an **excess payment made in anticipation of future income of the target company** and it should be treated as an asset to be amortized to income over its useful life which may be set as five years or a longer period if there are justifications for the same. Since it is not easy to estimate its useful life, estimation is, therefore, done on a prudent basis.

The following factors are to be taken into account in estimating the useful life of goodwill :

- (i) The **foreseeable life of the business** or industry;
- (ii) The **effects of product obsolescence**, changes in demand and other economic factors;
- (iii) The **service life expectancies of key individuals** or groups of employees;
- (iv) **Expected actions by competitors** or potential competitors; and
- (v) **Legal, regulatory or contractual provisions** affecting the useful life.

(5 MARKS)

ANSWER : 3

(A) **In Jaypee Cement Limited v. Jayprakash Industries Limited [2004]** the Allahabad High Court held that the **combining of the authorized share capital of the transferor company with that of the transferee company** resulting in increase in the authorized share capital of the transferee company **does not require the payment of registration fee or the stamp duty** because there is no reason why the same fee should be paid again by the transferee company on the same authorized capital.

Provisions of mergers and amalgamations in chapter XV of Company Act, 2013 is a complete code or a single window clearance system, NCLT may approve a change in the name of the transferee company as part of scheme of amalgamation for which no compliance is separately needed and provisions of **Section 61** will be deemed to be complied with.

In view of the above decided case laws and the judgments of the Courts it is relevant to state that the objections of the Regional Director will not hold good and are not tenable.

[PMP Auto Industries Ltd. [1992]7CLA 94 [Bom.]

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(5 MARKS)

(B)

- Any scheme which is **fair and reasonable and made in good faith** will be sanctioned if it could reasonably be supported by sensible people to be for the benefit to each class to each class of the members or creditors concerned.
- In *Sussex Brick co. Ltd., Re.* (1960) 1 All ER 772 : (1960) 30. Com Cases 536 (Ch D) it was held, inter alia, that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it.
- It was further held that in order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence.
- It is the consistent view of the Courts/ Tribunal that no scheme can be said to be full – proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal of the petition for sanction of the scheme.
- **If the court / tribunal is satisfied that the scheme is fair and reasonable and in the interests of the general body of shareholders, the court/tribunal will not make any provision in favour of the dissentients.**
- The Courts/Tribunal have gone further to say that a scheme must be held to be unfair to the meanest intelligence before it can be rejected. It must be affirmatively proved to the satisfaction of the Court/Tribunal that the scheme is unfair before the scheme can be rejected by the Court/ Tribunal *English, Scottish & Australian Chartered Bank, Re.* (1893) 3 Chancery 385.

(5 MARKS)

ANSWER : 4

(A) **Amalgamation of an NBFC with a banking company**

Yes, the **designated authority is Reserve Bank of India.** Where the NBFC is proposed to be amalgamated into a banking company, the banking company should **obtain the approval of the Reserve Bank of India after the scheme of amalgamation is approved by its Board but before it is submitted to the High Court /Tribunal for approval.**

The following are ensured while granting the approval :

- (a) The NBFC has violated/ is likely to violate any of the RBI/ SEBI norms and if so, ensure that these norms are complied with before the scheme of amalgamation is approved.
- (b) The NBFC has complied with the 'Know Your Customer' norms for all the accounts, which will become accounts of the banking company after amalgamation.
- (c) The NBFC has availed of credit facilities from banks/ FIs and if so, whether the loan agreements mandate the NBFC to seek consent of the bank /FI concerned for the proposed merger/ amalgamation.

(5 MARKS)

(B) In case of High Court of Gujarat, *Gallops Realty (P) Ltd.*, under provisions of the Companies Act, 2013, petitioner companies i.e., demerged company and resulting company, sought for sanction of composite scheme of arrangement in nature of purchase of share and demerger of hotel business of demerged company to resulting company and consequent restructuring of share capital of demerged company consisting of reduction of paid up share capital as well as utilization of share premium amount.

Regional Director states that as per scheme, capital profit on demerger would be transferred to general reserve in books of resulting company which was not in consonance with generally accepted accounting principles.

Accounting Standard – 14. As – 14 provide that any profit arising out of a capital transaction, like that in case of merger or demerger, ought to be treated as capital profit and hence would be transferred to capital reserve and not to general reserve.

So, it was held that observation of Regional Director was not in consonance with accounting principles in general and Accounting Standard – 14 in particular, as AS – 14 is applicable only in case of amalgamation and not in case of demerger, as envisaged in this scheme.

(5 MARKS)

ANSWER : 5

(A) Observation letter is a **letter on the draft scheme of amalgamation by the stock exchange before the same is filed with the court / Tribunal.** It is a no objection letter or letter with some observations on the scheme.

1. As per **Regulation 37 (1) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015**, the listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before any Tribunal under Sections 230 – 234 and Section 66 of Companies Act, 2013, whichever applicable, with the stock exchange(s) for obtaining Observation Letter or No – objection letter, before filing such scheme with any Tribunal, in terms of requirements specified by the Board or stock exchange(s) from time to time.
2. The listed entity shall not file any scheme of arrangement under Sections 230 – 234 and Section 66 of Companies Act, 2013, whichever applicable, with any Tribunal unless it has obtained observation letter or No – objection letter from the stock exchange(s). [Regulation 37(2)]
3. The listed entity shall place the Observation letter or No – objection letter of the stock exchange(s) before the Tribunal at the time of seeking approval of the scheme of arrangement : [Regulation 37(3)]

The **validity of the ‘Observation Letter’** or No – objection letter of stock exchanges **shall be six months from the date of issuance,** within which the draft scheme of arrangement shall be submitted to the Tribunal.

(5 MARKS)

(B) One of the modes of corporate restructuring strategy is to merge with a sick or a company with accumulated losses. If the scheme of merger gets approval of the competent authority under section 72A of the Income – tax Act, 1961, the resultant company avails the opportunity of getting losses of sick undertakings offset against profit making undertakings of the transferee company. Even if approval by Competent Authority is not obtained, the merged undertakings of the resultant company still avail other benefits and privileges as detailed below under the Income – tax Act, 1961 :

- (a) The benefit of **amortization of preliminary expenses under section 35D** for the balance unexpired period out of 10 or 5 years shall be available to the resultant company.
- (b) **Capital expenditure on scientific research** under section 35 can be availed by the resultant company.
- (c) **Expenditure for patent or copyrights under section 35A** for the balance unexpired period of out of 14 years.
- (d) **Section 35DD for expenses towards amalgamation or demerger** for next 5 years in equal installments.

- (e) Similarly **benefits under sections 35AB(3) and 35ABB** are available to resultant company for the unexpired period if incurred for expenditure on know – how and telecom licenses respectively.

(5 MARKS)