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# SUGGESTED SOLUTION

## CA FINAL N'19

## SUBJECT : LAW

## Test Code – FNJ 7269

**BRANCH - (  ) (Date : )**

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## DIVISION A: MULTIPLE CHOICE QUESTIONS

| | | | | | |
|---|---|---|---|---|---|
| (1) | (c) | (2) | (a) | (3) | (b) |
| (4) | (b) | (5) | (a) | (6) | (a) |
| (7) | (c) | (8) | (b) | (9) | (d) |
| (10) | (d) | (11) | (c) | (12) | (c) |
| (13) | (b) | (14) | (c) | (15) | (c) |
| (16) | (b) | (17) | (b) | (18) | (a) |
| (19) | (a) | (20) | (c) | | |

## DIVISION B: DESCRIPTIVE QUESTIONS

**1.** **(a)** (i) As per section 149(1) of the Companies Act, 2013, every public company must have at least three directors. A private limited company should have minimum two directors. A one person company (OPC) will have minimum one director. Maximum directors can be 15. Maximum number of directors can be increased beyond 15 by passing a special resolution.

However, MCA vide Notification dated 5-6-2015 issued under section 462 of Companies Act, 2013, the upper limit of 15 directors is not applicable to section 8 (licensed i.e. non-profit) companies.

Therefore, increase in the strength of directors to 20 in the Shiksham Ltd. without passing SR is valid.

(ii) As per section 161(2) of the Companies Act, 2013, the alternate director will vacate his office as soon as the foreign director comes to India. Thus, return of Original director (Mr. Robert)to India would serve. However, if Mr. Robert goes abroad and comes back to India temporarily and leaves country again, thus, becoming unable to transact business, alternate director (Mr. Kabir) would continue for such temporary period.

(iii) As per section 164(2) of Companies Act, 2013, PQR Ltd. is a defaulted company as it failed to filed financial statement in the financial year 2017-2018 . If a company is a defaulting company, any person appointed as director immediately, as per the amendment w.e.f. 7.5.2018, will not be disqualified for first six months after joining i.e., from date of his appointment. Hence the appointment of Mr. Khurana as a director is valid uptil January 2019.

**(b)** **(i)** **Borrowing from Financial Institutions:** As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining

the approval of shareholders in a general meeting, can borrow money including moneys already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company, free reserves and securities premium. Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Since the decision to borrow is to be taken in a meeting to be held on 5th November, 2018, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2018. According to the above provisions, the Board of Directors of PTL Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

| **Particulars** | **Rs.** |
|---|---|
| Paid up Capital | 75,00,000 |
| General Reserve (being free reserve) | 50,00,000 |
| Credit Balance in Profit & Loss Account (to be treated as free reserve) | 10,00,000 |
| Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption) | —— |
| Securities Premium | 2,00,000 |
| Aggregate of paid up capital, free reserve and securities premium | 137,00,000 |
| Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid up capital, free reserves and securities premium | 137,00,000 |
| Less: Amount already borrowed as secured loans | 30,00,000 |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. | 107,00,000 |

**(ii)** **Contribution to Charitable Funds:** As per Section 181 of the Companies Act, 2013, the Board of Directors of a company without obtaining the approval of shareholders in a general meeting, can make contributions to genuine charitable and other funds upto an amount which, in a financial year, does not exceed five per cent of its average net profits during the three financial years immediately preceding, the financial year.

According to the above provisions, the Board of Directors of the PTL Ltd. can make contributions to charitable funds, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Net Profit for the year (as calculated in accordance with the provisions of the

Companies Act, 2013):

| Particulars | Rs. |
|---|---|
| For the financial year ended 31.3.2016 | 12,50,000 |
| For the financial year ended 31.3.2017 | 19,00,000 |
| For the financial year ended 31.3.2018 | 34,50,000 |
| **TOTAL** | **66,00,000** |
| Average of net profits during three preceding financial years | 22,00,000 |
| Five per cent thereof | 1,10,000 |

Hence, the maximum amount that can be donated by the Board of Directors to a genuine charitable fund by PTL Ltd during the financial year 2018 -19 will be Rs. 1,10,000 without seeking the approval of the shareholders in a general meeting.

**2. (a)** The provision of Section 218 of the Companies Act, 2013, states that, the company shall require to take approval of the tribunal before taking action against the employee if there is any pendency of any proceedings against any person concerned in the conduct and management of the affairs company.

The company shall require approval in the following circumstances:

- discharge or suspension of an employee; or
- punishment to an employee by dismissal, removal, reduction in rank or otherwise; or
- change in the terms of employment to the disadvantage of employee(s);

The Tribunal shall notify its objection to the action proposed in writing.

In case, the company, other body corporate or person concerned does not receive the approval of the Tribunal within 30 days of making the application, it may proceed to take the action proposed against the employee. That means it can be consider as a deemed approval by the tribunal.

**Appeal to the Appellate Tribunal**

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of 30 days of the receipt of the notice of the objection, refer an appeal to the Appellate Tribunal in such manner and on payment of fees of INR 1,000 as per the schedule of Fees.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

In the light of the above stated provisions, following are the answers:

- Yes, the termination of Mr. Shram made by the company is totally valid in law

and company can do so by considering deemed approval of tribunal.

- In this scenario, Mr. Shram has not any remedy available. As per the provision of the law appeal to the appellate tribunal can be made only if the person is dissatisfied with the objection raised by the tribunal. Hence, in this case the tribunal has not replied Mr. Shram cannot refer an appeal to Appellate Tribunal.
- In this case, Mr. Shram can refer and appeal to appellate tribunal within 30 days of the receiving letter of objection raised by the tribunal and with payment of Fees on Rs. 1,000 as per schedule of Fees.

(b) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

(i) In respect of item No. (i). i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Sane can not withdraw Foreign Exchange for this purpose

(ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item(ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorized Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

3. (a) (i) The official liquidator can invoke the provisions contained in Section 328 of the Companies Act, 2013 to recover the sale of assets of the company. According to Section 328, if the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within six months before making winding up application, the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

Since in the present case, the sale of immovable property took place on 15th October, 2018 and the company went into liquidation on 10th March, 2019 i.e., within 6 months before the winding up of the company and since the

sale has resulted in a loss of INR 50 lakhs to the company.

The official liquidator will be able to succeed in proving the case under Section 328 by way of fraudulent preference as the property was sold to a private company in which the son of the ex-managing director was interested.

Hence, the transaction made will be regarded as invalid and restore the position of the company as if no transfer of immovable property has been made.

(ii) Section 439 of the Companies Act, 2013 provides that offences under the Act shall be non- cognizable. As per this section:

1. Every offence under this Act except the offences referred to in sub section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code.
2. No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder, member of the company, or of a person authorized by the Central Government in that behalf.

Thus, in the given situation, the court shall not initiate any suo moto action against the director Mr. X without receiving any complaint in writing of the Registrar of Companies, a shareholder of the company or of a person authorized by the Central Government in this behalf.

(b) Section 70 of the PMLA, 2002 states of the offences by companies. According to the provision where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of and was responsible to the company, for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

Where above contravention has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of any company, such director, manager, secretary or other officer shall also

be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

As per the explanation to the section term "Company" means any body corporate and includes a firm or other association of individuals; and the term "Director", in relation to a firm, means a partner in the firm.

Accordingly, following are the answers:

(i) Though Mr. Ramesh was a partner of a firm, he was not aware of proceeds of crimes. He shall not be liable for the punishment for an offence committed by Rajkumar & sons for using of undisclosed foreign income of Subh Labh Pvt Ltd. However, the firm is liable for commission of the scheduled offence.

(ii) Both Mr. Rajkumar, the director and Subh-Labh Pvt. Ltd., the company, are liable for the commission of the scheduled offence as per the above provision.

**4. (a)** Removal of Member of the SEBI (Section 6 of the Securities and Exchange Board of India Act, 1992)

According to section 6 of the Securities and Exchange Board of India Act, 1992, the Central Government shall have the power to remove a member appointed to the Board, if he:

(i) is, or at any time has been adjudicated as insolvent;

(ii) is of unsound mind and stands so declared by a competent court;

(iii) has been convicted of an offence which, in the opinion of the Central Government, involves a moral turpitude.

(iv) has, in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest.

Before removing a member, he will be given a reasonable opportunity of being heard in the matter.

In the present case, a group of complainants have alleged that Mr. Z, is not normal in his behavior, and in rendering of his services in office. He was in a mental distress due financial debt owed for his treatment. This all may be unfavorable to the public interest and so should be removed from his office.

Here, above complainants may approach the Central Government for removal of Mr. Z, a member of the SEBI and if the Central Government is of the opinion that Mr. Z is not competent and was suffering from the mental and physical stress effecting as to rendering of his services/duties in a office as a member of the Board. The Central Government may remove Mr. Z from his office after giving him a reasonable opportunity of being heard in the matter only when Mr. Z is so declared of unsound

mind by a competent court.

Since, in the given case the incompetency of Mr. Z is not so declared by the court, so complaint for removal of Mr. Z is not tenable.

(b) As per the definition of Foreign Contribution given in section 2(1)(h) of FCRA, 2010, "Foreign contribution" means the donation, delivery or transfer made by any foreign source,—

(i) of any article, (except given as a gift for personal use), if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;

(ii) of any currency, whether Indian or foreign;

(iii) security and includes any foreign security under the Foreign Exchange Management Act, 1999.

As per explanation to the section, a donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

Whereas the foreign source as per the definition given in section 2(j) of the FCRA includes a foreign company. Since the Srikripa Ltd. is a foreign company, so donation made by the Srikripa Ltd is a foreign contribution for the religious and charitable purpose.

Whereas, Sai Trust can accept foreign contribution with prior permission of Central Government, if it is not registered under the FCRA. But where if the Sai trust is registered under the FCRA, [section 11 of FCRA, 2010], it may accept the foreign contribution within the limit without seeking prior permission.

**5. (a)** (i) Under section 380(1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents.

(a) A certified copy of the charger, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the Companies (Registration of Foreign Companies) Rules, 2014, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely :

(1) personal name and surname in full;

(2) any former name or names and surname or surnames in full;

(3) father's name or mother's name and spouse's name;

(4) Date of birth;
(5) Residential address;
(6) Nationality;
(7) If the present nationality is not the nationality of origin, his nationality of origin;
(8) Passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)
(9) Income – tax permanent account number (PAN), if applicable;
(10) Occupation, if any;
(11) Whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);
(12) Other directorship or directorships held by him;
(13) Membership Number (for Secretary only); and
(14) E – mail ID.

(d) the name and address or the names and addresses of one or more persons resident in India authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;
(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
(h) any other information as may be prescribed.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

(II) According to section 448 of the Companies Act, 2013, if in any return, report, certificate, financial/statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,

(a) which is false in any material particulars, knowing it to be false; or
(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

In the present case, Mr. Truth, a director of Horizan Private Limited filed returns, report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Truth shall be liable under section 447 for false statements.

**Penal Provisions:** As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less

than 6 months but which may extend to 10 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 3 times the amount involved in the fraud, provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence Mr. Truth, a director of Horizan Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

(b) As per Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

**Explanation–** A person shall be considered independent of the corporate debtor, if he:

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

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

(c) is not an employee or proprietor or a partner:

(i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

As per the given facts, Mr. IP was proposed to be appointed as a resolution professional for the insolvency resolution process initiated against BMR Ltd. Whereas, Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. IP is partner.

Since Mr. R is a partner in IP Entity in which Mr. IP is also a partner, so Mr. IP is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor.

6. (a) Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding Rs. 120 Lakhs in the year in case the effective capital of the company is Rs. 100 crores to 250 crores. However, the remuneration in excess of Rs. 120 Lakhs may be paid if the resolution passed by

the shareholders is a special resolution.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 50 Lacs in the year as remuneration to Mr. Ram is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V.

Whereas with respect to payment to Mr. Bharat, the company proposes to pay suitable additional remuneration to Mr. Bharat, a director, for professional services rendered as software engineer, whenever such services are utilized. According to section 197(4) of the Companies Act, 2013, the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

(i) by the articles of the company, or

(ii) by a resolution or,

(iii) if the articles so require, by a special resolution, passed by the company in general meeting, and

The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

However, any remuneration for services rendered by any such director in other capacity shall not be so included if—

(i) the services rendered are of a professional nature; and

(ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bharat, a director for professional services rendered as software engineer will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

(b) (i) In accordance with the provisions of the Money Laundering Act, 2002, as contained under Section 45, the offences under the Act shall be cognizable and non-bailable. Accordingly, no person accused of an offence punishable for a term of imprisonment under Part A of the Schedule shall be released on bail or on his own bond unless the public Prosecutor has been given an opportunity to oppose the application for such release.

In case of any person who is under the age of 16 years or in case of a woman

or in case of a sick or infirm person, the Special Court can direct the release of such person on bail.

Since, Mr. Minor is of 16 years, he may be released on bail or on his own bond after the public Prosecutor has been given an opportunity to oppose the application for such release.

**(ii)** **Appointment of IRP:** As per Section 16 of the Code where the application for corporate insolvency resolution process is made by an operational creditor and no proposal for an interim resolution professional is made in the said application. The Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional who may act as an interim resolution professional.

The Board shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

**Period of appointment of IRP:** The term of the interim resolution professional shall continue till the date of appointment of the resolution professional under section 22 of the Insolvency and Bankruptcy Code.