FINAL – MAY 2018

PAPER 4: CORPORATE & ALLIED LAW

Test Code –: FTP 4
Branch (MULTIPLE) Date :
100 MARKS

Note: *Question No. **1** is compulsory. Answer any **five** from the rest*

Question 1

a.

1. There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place. The Companies Act lays down the provisions for holding meetings by video conferencing, sending notices, procedures at the meeting etc. **(1 mark)**
   Therefore, there is no difficulty in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with. **(1 mark)**
2. Section 173 (3) of the Companies Act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting. **(1 mark)**
   However, considering the importance of Board Meetings and the responsibilities placed on the directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings. As a matter of good secretarial practice, the notice should include full details and particulars of the business to be transacted at the Board Meetings. The articles of association of the company may make it mandatory to do so in almost all cases. **(1 mark)**

b.

In the given problem, on commission of default by the Wisdom Ltd., Mr. F filed an application for initiating corporate insolvency resolution process before adjudicating authority. Further, Mr. X another financial creditor moved an application for initiation of insolvency resolution process against the Wisdom Ltd. **(1 mark)**
According to the section 6 of the Code, where any corporate debtor commits a default, a financial creditor, Operational creditor or the Corporate debtor itself may initiate insolvency resolution process against such corporate debtor. **(1 mark)**

But as per Section 13 of the Code, once an application is admitted by the Adjudicating authority, it shall by an order declare a moratorium for the purposes referred to in section 14. Then causes a public announcement of the initiation of CIRP by IRP and call for the submission of claims under section 15 and appoint an IRP in the manner as laid down in section 16 of the Code. Public announcement lays down all the relevant information related to the CIRP. So that the all creditors entitled under the law can raise their claim in this case. **(1 mark)**

So, no further application for initiation of CIRP against the same debtor (i.e, Wisdom Ltd.) can be initiated. So, Mr. X, cannot file an application on initiation of CIRP, however, is entitled under the law to raise his claim in this case against the Wisdom Ltd. **(1 mark)**

c. **Reporting of frauds by auditor and other matters:** As per section 139 read with rule 13 of the Companies (Audit and Auditors) Rules, 2014, if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud, which involves or is expected to involve individually an amount of rupees one crore or above, is being or has been committed against the company by its officers or employees, the auditor shall report the matter to the Central Government. **(1 mark)**

The auditor shall report the matter to the Central Government as under: - **(2 marks)**

(i) **the auditor shall report the matter to the Board or the Audit Committee**, as the case may be, immediately but not later than two days of his knowledge of the fraud, seeking their reply or observations within forty-five days;

(ii) **on receipt of such reply or observations**, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within fifteen days from the date of receipt of such reply or observations;

(iii) **in case the auditor fails to get any reply or observations from the Board or the Audit Committee** within the stipulated period of forty-five days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;

(iv) **the report shall be sent to the Secretary, Ministry of Corporate Affairs** in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same;

(v) **the report shall be on the letter-head of the auditor** containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and

(vi) The report shall be in the form of a statement as specified in **Form ADT-4.**

Details of each of the fraud reported to the Audit Committee or the Board during the year shall be disclosed in the Board's Report by the company: - **(1 mark)**

(a) Nature of Fraud with description;

(b) Approximate Amount involved;

(c) Parties involved, if remedial action not taken; and

(d) Remedial actions taken.

d. **Enterprise:** The term 'enterprise' is defined in section 2(h) of Competition Act, 2002. Accordingly, 'enterprise' means a person or a department of the Government, who or which is engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. But the term does not include any activity of the Government relatable to sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. **(1 mark)**

Certain specific activities of Government departments like dealing with atomic energy, etc. and sovereign functions of the Government (like police, defence, etc.) are excluded from the purview of the said terms. Hence, a Government department engaged in the activity of providing service in the form of supply of water for irrigation to the agriculturists after levying charges can be considered as an 'enterprise' within the meaning of section 2(h) of the Competition Act, 2002. **(1 mark)**

Consumer: The term 'consumer' is defined in section 2(f) of Competition Act, 2002. Accordingly, 'consumer' means any person who buys any goods for a consideration, which has been paid or promised or partly paid and partly promised, whether such purchase of goods is for resale or for any commercial purpose or for personal use. **(1 mark)**

Hence, it is not necessary that a person must purchase the goods for personal use in order to be considered as a 'consumer' under Competition Act, 2002. Even a person purchasing goods for resale or for any commercial purpose will also be considered as a 'consumer' within the meaning of Section 2(f) of Competition Act, 2002. **(1 mark)**

e. **General conditions for public and right issues under the SEBI(ICDR) Regulation 2009:** As per the Regulation 4 of the SEBI(ICDR) Regulation 2009, any issuer offering specified securities through a public issue and rights issue shall satisfy the conditions of this Chapter at the time of filing draft offer document with the Board and at the time o f registering or filing the final offer document with the Registrar of Companies or designated stock exchange, as the case may be.**(1 mark)**

Further the regulation provides that an issuer making a rights issue of specified securities, shall make disclosures as specified in Part G of Schedule VIII, in the offer document and abridged letter of offer, if the issuer or any of its promoters or directors is a wilful defaulter. Here the promoters or promoter group of the issuer, shall not renounce their rights except to the extent of renunciation within the promoter group. **(1 mark)**

However, no issuer shall make, **(1 mark)**

(b) public issue of equity securities, if the issuer or any of its promoters or directors is a wilful defaulter; or

(c) a public issue of convertible debt instruments if,

  (i) the issuer or any of its promoters or directors is a wilful defaulter, or

  (ii) it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months.

So, accordingly issuer can proceed to offer the securities though right issue of specified securities.

Yes the answer will differ in the case of public issue of equity securities if the issuer or any of its promoters or directors is a wilful defaulter. Accordingly, the issuer cannot proceed with the public issue. **(1 mark)**

Question 2

a.

(i) **Class of companies required to appoint Internal Auditor:** Section 138 of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014 prescribes the class of companies required to appoint Internal Auditor. According to it, following class of companies shall be required to appoint an internal auditor or a firm of internal auditors.

1. Every listed company;**(1 mark)**
2. Every unlisted public company having –**(1 ½ marks)**
   (a) Paid up share capital of 50 crore rupees or more during the preceding financial year; or
   (b) Turnover of 200 crore rupees or more during the preceding financial year; or
   (c) Outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; or
   (d) Outstanding deposits of 25 crore rupees or more at any point of time during the preceding financial year; and
3. Every private company having –**(1 ½ marks)**
   (a) Turnover of 200 crore rupees or more during the preceding financial year; or
   (b) Outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

As per the facts given in the question, PQR Limited is an unlisted public company with the paid up share capital of Rs. 80 crores during the preceding financial year with the turnover of Rs. 110 crores. Since PQR Limited fulfills one of the criteria with paid up share capital of more than 50 crore rupees during the preceding financial year, it is mandatory for the PQR Limited to appoint an internal auditor for the financial year 2016-2017. **(2 marks)**

(ii) As per the section 138(1), an internal auditor shall either be a Chartered Accountant (engaged in practice on not) or a Cost Accountant, or such other professional as may be decided by the Board. Even an employee of the company may also be appointed as an Internal auditor of the company as per the Rule 13 of the Companies (Accounts) Rules, 2014. **(2 marks)**

b.

1. If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay by way of remuneration any sum exclusive of sitting fees to its directors, including any managing or whole-time director or manager except in accordance with the provisions of Schedule V.		1
2.If the company is not able to comply with such provisions of Schedule V in the above case, then <u>previous approval of the Central Government shall be taken.</u>		1

3. If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.		1
4. The company shall not waive the recovery of any sum refundable to it unless permitted by the Central Government.		1

c. As per Section 8 of the Foreign Exchange Management Act, 1999 where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by Reserve Bank of India. **(1 mark)**

But as per section 9(e) of the said Act, this provision shall not apply to foreign exchange acquired from employment, business trade, vocation, service honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank of India may specify. **(1 mark)**

The Reserve Bank of India has specified the following persons with the limits for possession and retention of foreign currency by a person resident in India: **(1 mark)**

i) Any person may possess foreign coins without any restriction to the amount.
ii) Any person resident in India is permitted to retain in aggregate foreign currency not exceeding USD 2,000 or its equivalent in the form of currency notes/bank notes or travelers cheques acquired by him;
iii) Any person resident in India but not permanently resident therein is permitted to hold the foreign currency without limit, if the foreign currency was acquired when he was resident outside India and was brought into India and declared to the custom authorities.

In the given case as Mr. Rajat earned a sum of USD 3000 as a honorarium when he was in employment in China. But in view of the restrictions under FEMA and the aforesaid regulation he can retain foreign exchange up to USD 2000 only and not more than that. **(1 mark)**

Question 3

a.

1. As per Section 151 of the Companies Act ,2013 , A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed.		1
2. Also , The Companies (Appointment and Qualification of directors) Rules, 2014 provides for the procedure for appointment of Small shareholders' director according to which: (i) A listed company, may upon notice of not less than (a) one thousand small shareholders; or (b) one- tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.		2
3. Therefore , only listed companies are required to appoint a small shareholder director if their shareholders requests so or on its own volition.		0.5

4. But an unlisted company need not appoint a small shareholders director on the petition of its members as it is not statutorily required to do so.		0.5

b. The applicability of the provisions of CSR to the Company is as under:

As per section 135 of the Companies Act, 2013, every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee and the Board of every such company shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy, provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities. **(1 mark)**

It is further provided that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.**(1/2 mark)**

The definition of net profits under Rule 2(f) means the net profit of a company as per its Financial Statement prepared in accordance with the applicable provisions of the Act, but does not include the following namely: **(1 mark)**

(a) Any profit arising from any overseas branch or branch of the company, whether operated as a separate company or otherwise; and

(b) Any dividend received from other companies in India which are covered and complying with the provisions of section 135 of the Act.

As per point no (ii) reported by Mr. Nikunj, states that all the branches located in India have not earned any profit since 2013-14 onward, meaning thereby all the net profits being earned by the Company pertains to the overseas branches. As provided in the definition of net profit, under the CSR Rules, it does not include the net profit earned by the overseas branch(s); therefore, the provisions of CSR for incurring expenses during the Financial Year 2016-17 are not applicable. **(1 mark)**

In view of the above, it is clear that though the company has spent 1.10 per cent of the average net profits of the Company made during the three preceding immediately financial years, which is not statutorily required for the Company to spend and as such there is no violation of the provisions of the Companies Act. **(1/2 mark)**

c. Section 12 of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries or a person carrying on a designated business or profession. According to sub-section (1), every banking company, financial institution and intermediary or a person carrying on a designated business or profession shall – **(2 mark)**

a. maintain a record of all transactions, including information relating to transactions covered under clause (b), in such manner as to enable it to reconstruct individual transactions;

b. furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

c. verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;
d. identify the beneficial owner, if any, of such of its clients, as may be prescribed;

e. maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential. **(1/2 mark)**

The records referred to in clause (a) of sub-section (1) shall be maintained for a period of five years from the date of transaction between a client and the reporting entity. **(1/2 mark)**

The records referred to in clause (e) of sub-section (I) shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later. **(1/2 mark)**

The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter. **(1/2 mark)**

d. (4 marks)

The Companies (Appointment and Qualification of Directors) Rules, 2014 lays down the procedure for cancellation or surrender or deactivation of DIN as under:
The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received from any person, cancel or **(1 mark)** deactivate the DIN in case -
(a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number; **(1/2 mark)** (b) the DIN was obtained in a wrongful manner or by fraudulent means; Provided that before cancellation or deactivation of DIN pursuant to the above clause (b), an opportunity of being heard shall be given to the concerned individual. **(1/2 mark)**
(c) of the death of the concerned individual; **(1/2 mark)**
(d) the concerned individual has been declared as a person of unsound mind by a competent Court; **(1/2 mark)** (e) if the concerned individual has been adjudicated an insolvent. **(1/2 mark)** (f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN. **(1/2 mark)**

Question 4

a.

1. Section 218 of the Act deals with the Protection of Employees during Investigation and relevant provisions are as under:

Approval of tribunal to take action against the employee: Notwithstanding anything contained in any other law for the time being in force, if –

a. **during the course of any investigation of the affairs** and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or **(1 mark)**

b. **during the pendency of any proceeding** against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes –

- to discharge or suspend any employee; or
- to punish him whether by dismissal, removal, reduction in rank or otherwise; or
- to change the terms of employment to his disadvantage the company, other body corporate or person, as the case may be shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned. **(1 mark)**

(2) **Action against employee:** if the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-section (1), the approval of the Tribunal, then the only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

In the instant case, the action taken by Damage Ltd. to suspend Mr. Z, the CFO of the company is valid as the company approached the Tribunal on 3rd January, 2017 for the proposed action and on 15th February, 2017 passed an order of suspension without waiting the orders from Tribunal (after 30 days of making the application)

(2 marks)

2. Investigation into affairs of related companies : Section 219 of the Companies Act, 2013, provides for power of Inspector to conduct investigation into the affairs of related companies etc., if an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of: -

(a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;

(b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;

(c) any other body corporate whose Board of Directors comprises nominee s of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(d) any person who is or has at any relevant time been the company's managing director or manager of employee, he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed. In view of above, the Inspector is permitted to investigate the holding company.

(4 marks)

b .

A) 1. Under section 196(2) of the Companies Act, 2013 lays down that no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No concession or exception is allowed by the Act to private companies.		1
2. Hence, 'X' cannot be appointed as Managing Director for life in a private company.		
3. Further, section 196(4) of the Companies Act, 2013 provides that a managing director, whole-time director or manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Schedule V of the Act.		1
4. From the above, it is clear that 'X' cannot legally appoint anyone including 'G' to succeed him as the managing director of the company and consequently 'G' cannot succeed 'X' as Managing Director of the company after the death of 'X'.		
B) 1. Section 169(1) of the Companies Act, 2013 empowers the company to remove a director, by ordinary resolution before the expiry of his period of office after giving him an opportunity of being heard.		1
2. This section applies to both public and private companies. It applies to all directors except a director appointed by the Tribunal under section 242 of the Act.		

3. This section applies to both public and private companies. It applies to all directors except a director appointed by the Tribunal under section 242 of the Act. The above provision applies to the Managing Director also as he is a director of the company and the member of its Board of Directors. Hence, it is possible for the company in general meeting to remove 'X' before the expiry of his term of office by an ordinary resolution		1

c.

Penalty for default in case of stock brokers: Section 15F of Securities and Exchange Board of India Act, 1992 provides for penalty for default in case of stock brokers. If any person who, is registered, as a stock broker under this Act: **(2 marks)**

(1) fails to issue contract notes in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to for which the contract note was required to be issued by that broker;

(2) fails to deliver any security or fails to make payment of the amount due to the investor in the manner or within the period specified in the regulations, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which he sponsors or carries on any such collective investment scheme including mutual funds subject to a maximum of one crore rupees.;

(3) charges an amount of brokerage which is in excess of the brokerage specified in the regulations, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to five times the amount of brokerage charged in excess of the specified brokerage, whichever is higher.

Factors for taking into account while action

While adjudging quantum of penalty under section 15J, the adjudicating officer shall have due regard to the following factors: **(2 marks)**

(1) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the defaults.

(2) the amount of loss to an investor or group of investors as a result of the default.

(3) the repetitive nature of the default.

Taking into consideration the above factors, the adjudicating officer may levy a maximum penalty as prescribed in section 15F for default by the concerned stock broker in making the payment to the investor.

Question 5

a. (i) The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting.

Section 118 of the Companies Act, 2013, deals with Minutes of Proceedings of General Meeting, Meetings of Board of Directors and Other Meetings and Resolutions Passed by Postal Ballot. The section provides certain exemptions to matters from inclusion in the minutes. **(1 mark)**

Exemptions from inclusion in minutes of the meeting: There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting, -

(a) is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company. **(1 mark)**

Absolute discretion of chairman: The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds as specified above. Hence, the Chairman can exercise his discretion of not including the undesirable remarks from the minute of the 17th Board meeting of Jai Entertainment Ltd. **(1 mark)**

(ii) Draft Minutes (5 marks)

Minutes of 17th meeting of the Board of Directors of Jai Entertainment Limited held on _____ the _____ 2017, at B -17, Industrial Area, Suncity Present :

1. _____Chairman
2. _____ Director
3. _____ Director

In attendance Secretary

Item No. 1 : Leave of Absence

Leave of absence was granted to _____ Director.

Item No. 2 : Confirmation of minutes of the 16th Board meeting :

The minutes of the 16th meeting of the Board of Directors held on _____ were considered and confirmed.

Item No. 3: Appointment of Managing Director:

The Board noted the appointment of Mr. Kaabil, director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

"*Resolved* that Mr. Kaabil who fulfils the conditions specified in Parts I and II of Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five years effective from _____ and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Resolved further that the Secretary of the Company be and is hereby directed to file the necessary returns with the registrar of Companies and to do all acts and things as may be necessary in this connection."

Item No. 4: Next Board Meeting:

The next meeting of the Board will be held on _____the _____20____ at the registered office of the company.
The meeting ended with a vote of thanks to the chair.

b. According to Section 413(1) of the Companies Act, 2013 the President and every other Member of the Tribunal 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 for another term of five years.

Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains, -

a. in the case of the President, the age of sixty-seven years;

b. in the case of any other Member, the age of Sixty-five years. **(2 marks)**

In the instant case, Mr. D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years o n 30th June, 2017. He can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30 th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30 th June, 2020. **(2 marks)**

c. **Tenure of office of Presiding Officer and other Members of Securities Appellate Tribunal (Section 15N**)- According to the provision, the Presiding Officer or every Judicial or Technical Member of the Securities Appellate Tribunal(SAT) shall hold office for a term of five years from the date on which he enters upon his office, and shall be eligible for reappointment for another term of maximum five years.

Provided that no Presiding Officer or the Judicial or Technical Member shall hold office after he has attained the age of seventy years. **(2 marks)**

As per the given provision, during re-appointment, Mr. Z was of 69 years. As per the section he shall be eligible for reappointment for another term of maximum five years but as per the proviso no Presiding Officer or the Judicial or Technical Member shall hold office after he has attained the age of seventy years.

Accordingly, in the given case Mr. Z can be re-appointed but only for one year. **(2 marks)**

[Note: This section is inserted by the Finance Act, 2017 vide Gazette Notification dated March 31, 2017. W.e.f. from April 26, 2017]

Question 6

a. **Unpaid Dividend Account:** According to the section 124 of the Companies Act, 2013 where a dividend has been declared by a company but has not been paid or claimed within thirty days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

(3 marks)

Default in transferring of amount: If any default is made in transferring the total amount as referred above or any part thereof to the Unpaid Dividend Account of the company, it shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

Where the payment of dividend have not been claimed by the shareholders, there the company Adarsh Ltd. shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of unpaid/ unclaimed dividend to a special account to be opened by the company in any scheduled bank to be called the Unpaid Dividend Account.

Since the Adarsh Ltd. put the unpaid dividend amount in circulation for the business purpose, it is considered as default made on the part of the company in transferring the total amount to the

Unpaid Dividend Account of the company. Here the company shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum.

(5 marks)

[Note: The Ministry of Corporate Affairs notified Section 124 of the Companies Act, 2013 vide Notification S.O. 2866 (E) dated 5th September, 2016 w.e.f. 7th September, 2016.]

b. Persons not entitled to make application.

The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process – **(3 marks)**

a. a corporate debtor undergoing a corporate insolvency resolution process; or

b. a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

c. a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

d. a corporate debtor in respect of whom a liquidation order has been made.

In this section, a corporate debtor includes a corporate applicant in respect of such corporate debtor**. [Section 11]**

As per the facts corporate applicant Mr. X seems to be a separate individual and not a corporate applicant in respect of such corporate debtor who is undergoing a corporate insolvency resolution process. So he shall be entitled to make an application to initiate corporate insolvency resolution process. **(1 mark)**

c.

1. The Common Sense Rule: The words of a statute must be so construed as to give a sensible meaning to them, if at all possible. They ought to be construed 'utres magis valeat quampereat' meaning thereby that it is better for a thing to have effect than to be made void.		1.33
2. Conjunctive and Disjunctive Words 'or' 'and': The word 'or' is normally disjunctive and 'and' is normally conjunctive. This would be so where the literal reading of the words produces an unintelligible or absurd result: in such a case 'and' may by read for 'or' and 'or' for 'and' even though the result of so modifying the words is less favourable to the subject, provided that the intention of the legislature is otherwise quite clear.		1.33

3. May', 'must' and 'shall': The distinction between a provision which is 'mandatory' and one which is 'directory' is that when it is mandatory, it must be strictly observed; when it is 'directory' it would be sufficient that it is substantially complied with. However, we have to look to the substance and not merely the form: an enactment in mandatory form might substantially be directory and, conversely, a statute in directory form may in substance be mandatory.		1.33

Question 7 : *Attempt any **four** of the following:*

a.

Sub-section (4) of section 13 of SARFAESI Act, 2002, provides that if the borrower fails to discharge his liability in full within the 60 days, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:

- take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; **(1 mark)**
- take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. **(1 mark)**
- Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower i s held as security for the debt. **(1/2 mark)**
- Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt; **(1/2 mark)**
- appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor; **(1/2 mark)**
- require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt. **(1/2 mark)**

3. b. **Resignation of Director (Section 168 of the Companies Act, 2013)**

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in *Form DIR -12* and post the information on its website, if any.

Such director shall also forward a copy of his resignation along with detailed reasons for the resignationto the Registrar within 30 days from the date of resignation in FORM *DIR-11* along with the prescribed fee. The resignation of a

director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

In the present case, Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

If the company fails to intimate about the resignation of Mr. Arthav to RoC, even then the resignation of Mr. Arthav shall take effect from the date on which the notice is received by the company or the date, if any, specified by Mr. Arthav in the notice, whichever is later.

According to section 161 (3) of the Companies Act, 2013, subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

In the given case, the Articles of Association of Superwood Limited do not confer upon the Board of Directors any such power. Hence, the Board cannot appoint Mr. Ramakant as a nominee director even on the request of a bank which has extended a long term financial assistance to the company.

a. As per provision given under section 380 of the Companies Act, 2013, every foreign company shall be required to deliver requisite documents to Registrar for registration within 30 days of the establishment of its place of business in India. Further section 392 of the Companies Act, 2013 states that if a foreign company fails to deliver documents to the Registrar of Companies as required under section 380 of the Companies Act, 2013, the foreign company shall be punishable with a fine which shall be not less than ` 1,00,000 but which may extend to ` 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to ` 50,000 for every day after the first during which the contravention continues. **(2 marks)**

Also, every officer of the foreign company who is in default shall be punishable with an imprisonment for a term which may extend to six months or with a fine which shall not be less than ` 25,000 but which my extend to ` 5,00,000 or with both. **(1 mark)**

Thus accordingly, Thortten Ltd., the company and the Mr. X the officer in default are liable for considerable fines as state above for the contravention of section 380 of the Act. **(1 mark)**

b. Section 2(e) of Foreign Exchange Management Act, 1999 states that 'capital account transactions' means (a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India (b) a transaction which alters assets or liabilities in India of persons resident outside India and includes transactions referred to in section 6(3). According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

Purchase of immovable property by Mr. R in India is a capital account transaction. It has also been specifically provided in section 6(3)(i) as a capital account transaction.

Guarantee will be considered as a capital account transaction in the following cases:

(1) Guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India.

(2) Guarantee in respect of any liability, debt or other obligation incurred by a person resident outside India. **(2 marks)**

In this case, Mr. R, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India. Hence, it would appear that guarantee by Mr. R cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

All capital account transactions are prohibited unless specifically permitted. RBI is empowered to issue regulations in this regard [Section 6(3)]. Permissible capital account transactions by person's resident outside India are given in Schedule II to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. According to the said regulations both the purchase of immovable property by Mr. R and guarantee by Mr. R are permissible. **(2 marks)**

c.

Section 7 prohibits use of certain words by any person not being a banking company as explained below :		1
1. As per Section 7(1),no company other than a banking company shall use as part of its name or in connection with its business any of the words 'bank ,'banker' or 'banking' and no company shall carry on the business of banking in India unless it uses as part of its name at least one of such words.		2
2. Although the company is carrying out the function of a land bank but it cannot include the above mentioned words as part of its name.		1

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