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# SUGGESTED SOLUTION

## CA FINAL

**SUBJECT- LAW**

## Test Code – FNJ 7355

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

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## ANSWER -1

## ANSWER –A

**Conditions for appointment of an alternate director**

- The Board may appoint an alternate director to act in place of a director during the absence of the original director from India for a period of 3 months or more.
- The board may make appointment either at Board meeting or by resolution by circulation.
- A person cannot not be appointed as an alternate director, if he already holds any alternate directorship for any other director in that company or if he holds any directorship in that company.
- Person can be appointed as an alternate director for an independent director only if he is qualified to be appointed as an independent director as per Section 149(6).
- The Board may appoint an alternate director only if it is authorized by the articles or by an ordinary resolution passed at a general meeting, The power is vested only with the Board, and cannot be exercised by the GM. The members by ordinary resolution can only authorize the Board to appoint, if articles does not authorize.

**Tenure of office of an alternate director**

- An alternate director shall not hold office longer than that permissible to the original director.
- If the original director ceases due to death/ resignation/ removal or vacation of office, the alternate director shall immediately cease to hold his office.
- The alternate director shall vacate, when the original director returns to India.

**Applicability**

Section 161 (2) applies to all companies

**(4 MARKS)**

Conclusion

1. A person can be alternate director for maximum 1 director in one company. In other words a person cannot become alternate director for two directors in the same company. An alternate director will be having one vote in the board meeting.

2. When original director attend the meeting through video conferencing then alternate director can attend the meeting but vote of original director will be counted.

3. If original director does not return to India then alternate director will hold place for 12 months after that there will be vacation in place of original director and alternate director need to vacate office accordingly.

4. Power to appoint alternate director is with board of directors and hence executive director or whole time director or Managing Director cannot appoint alternate director.

**(4*1 = 4 MARKS)**

## ANSWER –B

**(i)** All offences which are punishable in this Act with imprisonment of 2 years or more, shall be triable only by the special court established for the area in which the registered office of the company in relation to which the offence is committed. According to section 436 where there are more special courts than one for such area, by such one of them as may be specified in this

behalf by the high court concerned.

Accordingly, in the given case, there are more than one special court in Bundi district where registered office of Excel Ltd. is situated. The jurisdiction for trail in special court will be specified by H.C of the State (i.e. Rajasthan).

(ii) In terms of the definition of a foreign company under section 2 (42) of the Companies Act, 2013 a "foreign company" means any company or body corporate incorporated outside India which:

(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) Conducts any business activity in India in any other manner

According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), "Place of business" includes a share transfer or registration office.

From the above definition, the status of XYZ Ltd. will be that of a foreign company as it is incorporated outside India, has a place of business in India and it may be presumed that it carries on a business activity in India.

**(3*2 = 6 MARKS)**

## ANSWER -2

## ANSWER –A

**Right to apply for oppression and mismanagement:** As per the provisions of Section 244 of the Companies Act, 2013, in the case of a company having share capital, members eligible to apply for oppression and mismanagement shall be lowest of the following:

100 members; or

1/10th of the total number of members; or holding not less than 1/10th of the issued share capital of the company.

The share holding pattern of MNC Limited is given as follows:

Rs. 5,00,00,000 equity share capital held by 500 members

The petition alleging oppression and mismanagement has been made by some members as follows:

1. No. of members making the petition – 80
2. Amount of share capital held by members making the petition – Rs. 10,00,000

The petition shall be valid if it has been made by the lowest of the following:

100 members; or

50 members (being $1/10^{th}$ of 500); or

Members holding Rs. 50,00,000 share capital (being $1/10^{th}$ of Rs. 5,00,00,000)

As it is evident, the petition made by 80 members meets the eligibility criteria specified under section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 50 members in this case. Therefore, the petition is maintainable.

The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [*Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R.*].

**(4 MARKS)**

## ANSWER –B

**Section 230(7)-Order of the Tribunal shall provide for certain matters**

An order made by the Tribunal shall provide for all or any of the following matters:

(a) Where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable.

(b) The protection of any class of creditors.

(c) If the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48.

(d) If the compromise or arrangement is agreed to by the creditors, any proceedings pending before the Board for Industrial and Financial Reconstruction established under the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate.

(e) Such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the Accounting Standards prescribed under section 133.

**(4 MARKS)**

## ANSWER –C

Apex Limited failed to repay the amount borrowed from the bankers, ACE Bank Limited, which is holding a charge on all the assets of the company. The bank took over management of the company in accordance with the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by appointing four persons as directors. The company is managed by a Managing Director, Mr. X.

Here, Apex Limited is a borrower and ACE Bank Limited is a secured creditor. Compensation to

Managing director (Mr. X) for loss of office:

According to section 16 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, irrespective of anything contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office or for the premature termination under this Act. However any such managing director or any other director or manager or any such

person in charge of management has the right to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

**Effect of takeover on rights of the shareholders:**

Where the management of the business of a borrower, being a company as defined in the Companies Act is taken over by the secured creditor, then, notwithstanding anything contained, such borrower- in the said Act or in the memorandum or articles of association of such company.

(1) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(2) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;

(3) no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

The secured creditor is under an obligation to restore the management of the business of the borrower, on realisation of his debt in full, in case of takeover of the management of the business of a borrower by such secured creditor.

"Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower."

**(6 MARKS)**

## ANSWER -3

## ANSWER –A

**Powers of Board:** In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations m ade by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180(1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a company which can be exercised only with the consent of the company by passing of a special resolution. Clause (a) of Section 180(1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution.

Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members, is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

**(8 MARKS)**

## ANSWER –B

**Order for attachment/retention of property etc**.: As per section 8 of the PMLA, 2002, where the Adjudicating Authority decides that any property is involved in money- laundering, he shall, by an order in writing, confirm the attachment of the property or retention of property or record seized or frozen under section 17 or section 18 and record a finding to that effect.

**Period for attachment, retention, or freezing of the seized or frozen property or record:** Whereupon such attachment, retention, or freezing of the seized or frozen property or record, AA shall—

(a) continue during investigation, for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and

(b) become final after an order of confiscation is passed under section 8(7) or section 8(5) or section 58B or section 60(2A) by the Special Court .

For the purposes of computing the period of three hundred and sixty-five days under clause (a), the period during which the investigation is stayed by any court under any law for the time being in force shall be excluded.

Accordingly, the attachment of the property of Mr. X to be continued by 31st January 2020 is valid as it is within 365 days from the date of order of the investigation by the Adjudicating Authority.

**(6 MARKS)**

## ANSWER -4

## ANSWER –A

**Withdrawal of Recognition (Section 5)**

Section 5(1) states that if the Central Government/ SEBI is of the opinion that the recognition granted to a stock exchange under the provisions of this Act, should, in the interest of the trade or in the public interest, be withdrawn, the Central Government or SEBI may serve on the governing body of the stock exchange, a written notice that the Central Government is considering the withdrawal of the recognition for the reasons stated in the notice and after giving an opportunity to the governing body to be heard in the matter, the Central Government may withdraw by notification in the Official Gazette, the recognition granted to the stock exchange.

**(2 MARKS)**

1. Central Government or SEBI have power to recognized stock exchange and also supersede the governing body of stock exchange in case of fraud or negligence.

2. A person cannot be member of a unrecognized stock exchange as an unrecognized Stock exchange cannot do trading. Though unrecognized stock exchange if formed with CG approval then it is eligible for recognition from SEBI.

**(2*1 = 2 MARKS)**

## ANSWER –B

As per section 11(4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely :-

1. Suspend the trading of any security in a recognized stock exchange ;
2. Restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
3. Suspend any office – bearer of any stock exchange or self – regulatory organization from holding such position;
4. Impound and retain the proceeds or securities in respect of any transaction which is under investigation;
5. Attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder :
   However only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached ;

6. Direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation.

**(4 MARKS)**

## ANSWER –C

Yes X can transfer the Foreign Contribution received by it to another organization as per section 7 of FCRA, 2010. According to the provision no person who –

- is registered and granted a certificate or has obtained prior permission under this Act; and
- receives any foreign contribution,

shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under this Act:

Provided that such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under this Act in accordance with the rules made by the Central Government."

**Restrictions on transfer:** *Rule 24 of FCRR, 2011,* prescribes the procedure for transferring foreign contribution to any unregistered person as under:

(1) A person who has been granted a certificate of registration or prior permission under section 11 and intends to transfer part of the foreign contribution received by him to a person who has not been granted a certificate of registration or prior permission under the Act, may transfer such foreign contribution to an extent not exceeding ten per cent of the total value thereof and for this purpose, make an application to the Central Government in the prescribed Form.

(2) Every application made under sub-rule (1) shall be accompanied by a declaration to the effect that-

(a) the amount proposed to be transferred during the financial year is less than ten per cent of the total value of the foreign contribution received by him during the financial year;

(b) the transferor shall not transfer any amount of foreign contribution until the Central Government approves such transfer.

(3) A person who has been granted a certificate of registration or prior permission under section 11 shall not be required to seek the prior approval of the Central Government for transferring the foreign contribution received by him to another person who has been granted a certificate of registration or prior permission under the Act provided that the recipient has not been proceeded against under any of the provisions of the Act.

(4) Both the transferor and the recipient shall be responsible for ensuring proper utilisation of the foreign contribution so transferred and such transfer of foreign contribution shall be reflected in the returns in Form to be submitted by

both the transferor and the recipient."

**(6 MARKS)**

## ANSWER -5

## ANSWER –A

### Board Resolution of disclosure of Interest U/s 184

Resolved that pursuant to section 184(1) of the Companies Act, 2013 read with Rule 9(1) of the *Companies (Meetings of Board and its powers) Rules, 2014* , and other applicable provisions of the Companies Act, 2013, the general notice of disclosure of interest or concern in Form MBP-1 received from Mr. J, Director of the company, as placed before the meeting, be and hereby noted and taken on record by the Board.

Resolved further that Mr. J, Director of the company, and Mr_____Company Secretary of the company be and hereby severally authorised to make necessary entries in the register maintained for the purpose.

Further resolved that Mr ---------- Company secretary and Mr. J director of the company, be and are severally authorised to affix his/ her DSC and file e-form MGT-14 with the Registrar of Company. ---------- **(4 MARKS)**

## ANSWER –B

Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board provided that the amount of such fees shall not exceed the prescribed amount. As per Rule 4 of the *Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014* the amount of sitting fees payable for attending meetings of the Board or Committees thereof may be decided by the Board but such sitting fees shall not exceed Rs. 1 lakh per meeting. Further, the sitting fee payable to an independent director shall not be less than that payable to other directors.

From the above, it is clear that sitting fees can be increased from Rs. 30,000 to Rs. 45,000 per meeting by passing a resolution in the Board Meeting and altering the Articles of Association by passing a Special Resolution. When sitting fees stands increased for other directors, it shall automatically be increased in case of independent directors because the latter cannot be paid less than that payable to former.

**(4 MARKS)**

## ANSWER –C

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 in the last three financial years.

(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. Mediator 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. Mediator is partner.

Since, Mr. R is the partner in Insolvency Professional Entity in which Mr. Mediator is also a partner, so, Mr. Mediator is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor, because Mr. R is relative of Director of BMR Ltd. (Corporate Debtors). **(6 MARKS)**

## ANSWER -6

## ANSWER –A

The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

**(4 MARKS)**

## ANSWER –B

(i) As per the stated facts, Rudraksh Ltd. is an inactive company as per the provision given under the Companies Act, 2013. According to the section 455 of the Companies Act, 2013, where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company (which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;) may make an application to the Registrar for obtaining the status of a dormant company. Since in the given case, Rudraksh Ltd. has not filed financial statements or annual returns for 2 financial years consecutively, the Registrar shall issue a notice to that effect and enter the name in the register maintained for dormant companies.

(ii) As per section 149(6) read with Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the public companies of prescribed class shall require to appoint minimum 2 Independent directors. However, vide Notification number G.S.R. 839 (E) dated 5$^{th}$ July, 2017, an amendment was issued through the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017 inter – alia amending rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014. It is provided that an unlisted public company which is a joint venture, a wholly owned subsidiary or a dormant company will not be required to appoint Independent

Directors. So, the proposal for appointment of Independent Director (Mr. Ram & Mr. Rahim) is not necessitated.

**(2*2 = 4 MARKS)**

## ANSWER –C

**Arbitration agreement through reference:** The Arbitration and Conciliation Act, 1996 envisages a possibility of an arbitration agreement coming into being through incorporation. In other words, parties to an agreement could agree to arbitrate by referring to another contract containing an arbitration agreement. The requirement is that the reference must leave no doubt in the mind of the reader that the parties indeed wanted to incorporate the arbitration agreement into the agreement between them.[Section 7(5)]

Accordingly, as per the said provision, yes this a valid reference for an arbitration agreement to come into existence. It was held by the Supreme Court of India in *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corpn Ltd 2006 (2) ArbLR 435 (SC)* that for a reference to constitute an arbitration agreement the contract should be in writing and reference should be such as to make that arbitration clause a part of the contract. Both the conditions were held to be fulfilled in the present instance.

**(3 MARKS)**

## ANSWER –D

1. **An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.**

   **Answer:** As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], "short-term banking and credit facilities in the ordinary course of business" are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

2. **An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.**

   **Answer:** Under accounts and income-tax law, gift is a "capital receipt". However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

**(3 MARKS)**

## ANSWER –7

**1. D**
**2. D**
**3. C**
**4. A**
**5. A**
**6. D**
**7. A**
**8. C**
**9. C**

**10. D**
**11. B**
**12. B**
**13. C**
**14. B**
**15. B**
**16. C**
**17. C**
**18. D**
**19. A**
**20. C**
**21. D**
**22. C**