

PAPER- 4 – CORPORATE AND ALLIED LAWS

Question No. 1 is compulsory.

Answer any **five** from the rest

Question 1

- (a) GK Associate Public Limited has earned a total profit of ₹ 85 lakhs during the past six years. It has not declared any dividend during these years. Now, the company proposes to appropriate a part of this amount for making payment of dividend for the current year in which it has earned a profit of ₹ 8 lakhs. The Board of Directors proposes a payment of dividend of ₹ 25 lakhs i.e. 25% on paid up capital. Can GK Associate Public Limited declare dividend out of its past accumulated profits and reserves? Explain the provisions of the Companies Act, 2013, in this regard. **(4 Marks)**
- (b) Mr. X, a Director of Sunrise Limited., was appointed on 1st April, 2014, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. The company suffered heavy losses during the financial year ended 31st March, 2018. The company was not in a position to pay any remuneration but he was paid ₹ 50 lakhs for the year, as paid to other directors. The effective capital of the company is ₹ 150 crores. Referring to provisions of the Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X. **(4 Marks)**
- (c) In relation to filing of financial statements of a company in XBRL mode and by using the XBRL taxonomy, decide whether the following companies are required to file the financial statements in the said mode as per the provisions of Section 137 of the Companies Act, 2013 read with rules framed in this regard:
- (i) Luckydhan Ltd., a non-banking financial company.
- (ii) M/s Pine Limited which is required to prepare its financial statements in accordance with Companies (Indian Accounting Standards) Rules, 2015. **(4 Marks)**
- (d) ABC Limited, a listed company, having a paid up equity share capital of ₹ 80 crores and net worth of ₹ 120 crores as on 31st March, 2018 proposes to raise funds to finance its expansion programme by issue of equity shares under the "Qualified Institutions Placement Scheme".

Answer the following with reference to the provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009:

- (i) What are the conditions to be satisfied by the company so that it can make Qualified Institutions Placement?
- (ii) What is the maximum amount that can be raised by the company under the proposed issue of shares? **(4 Marks)**

- (e) Referring to the provisions of the Foreign Exchange Management Act, 1999, in respect of a person not being an individual resident in India, state the period within which the individual should sell the realized foreign exchange to an authorized person under clause (a) of sub-section (1) of regulation 4 in respect of remuneration for services rendered in India. Would your answer change, if the realized foreign exchange is in respect of monetary gifts? **(4 Marks)**

Answer

- (a) According to Section 123(1)(a) of the Companies Act, 2013, no dividend shall be declared or paid by a company for any financial year except out of the profits of the Company for that year arrived at after providing for depreciation in accordance with the provisions of sub section (2), or out of the profits for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub section and remaining undistributed or out of both.

According to Rule 3 of Companies (Declaration and Payment of Dividend) Rules, 2014, in the event of inadequacy or absence of profits in any year, a company may declare dividend out of free reserves subject to the fulfillment of the following conditions, namely:—

- (1) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year:
Provided that this sub-rule shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.
- (2) The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.
- (3) The amount so drawn from reserves shall first be utilised to set off the losses incurred in the financial year for which dividend is declared.
- (4) The balance of reserves after such drawl shall not fall below 15% of its paid up share capital as per the latest audited financial statement.

In the instant case, as GK Associate Public Limited has not declared any dividend during last six years, the total amount to be drawn from such accumulated profits and reserves shall not exceed one-tenth of the sum of its paid up share capital and free reserves as appearing in the latest audited financial statement.

Proposed dividend: ₹ 25 Lakh i.e. 25% of paid up capital

Thus, Paid up capital: ₹ 1 crore

Accumulated Profits & Reserves: ₹ 85 Lakh

Hence, the total amount to be drawn from such accumulated profits: 1/10th of ₹185 Lakh (1 Crore + 85 Lakh): ₹ 18.5 Lakh

The amount to be drawn is ₹ 17 Lakh (₹ 25 Lakh being proposed dividend – ₹ 8 Lakh being current profit) \leq ₹ 18.5 Lakh. Hence, this condition is satisfied.

Further, balance in reserves (as per rules) after such withdrawal \geq 15% of its paid up share capital,

- (i) 15% of paid up share capital = ₹ 15 Lakh
- (ii) Balance in reserves after withdrawal = ₹ 85 Lakh – ₹ 17 Lakh = ₹ 68 Lakh $>$ ₹ 15 Lakh.

Hence, this condition is also satisfied.

So, in the given case, the company can declare dividend by appropriation of past accumulated profits and reserves (whether accumulated profits or reserves) for payment of dividend in the current year and can also utilise current profits of ₹ 8 Lacs for payment of dividend as per Section 123 (1)(a) of the Companies Act, 2013.

- (b) 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. According to section 197(3) of the Companies Act, 2013, 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, without Central Government approval, pay remuneration to the managerial person not exceeding ₹ 120 Lakhs in the year in case the effective capital of the company is between ₹100 crores to ₹ 250 crores. The limit will be doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated.

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

- (c) As per Rule 3 of the *Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015*, some prescribed class of companies shall file their financial statement and other documents under this section with the registrar in e-form AOC-4 XBRL given in Annexure I for the financial years commencing on or after 1st April, 2014 using the XBRL taxonomy.

However, the companies preparing their financial statements under the *Companies (Accounting Standards) Rules, 2006* shall file the statements using the Taxonomy provided in Annexure-II and companies preparing their financial statements under *Companies (Indian Accounting Standards) Rules, 2015*, shall file the statements using the Taxonomy provided in Annexure-IIA of the said Rules.

Also, non-banking financial companies, housing finance companies and companies engaged in the business of banking and insurance sector are exempted from filing of financial statements under these rules.

In the light of above:

- (i) Since Luckydhan Ltd. is a non banking financial company, so there is no need to file its financial statements in XBRL mode.
- (ii) M/s Pine Limited which is required to prepare its financial statements in accordance with companies (Indian Accounting Standards) Rules, 2015 shall file the statements using the Taxonomy provided in Annexure-IIA i.e. XBRL mode.

(d) Conditions for qualified institutions placement [Regulation 82 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009]

A listed issuer may make qualified institutions placement if it satisfies the following conditions:

- (a) a special resolution approving the qualified institutions placement has been passed by its shareholders;
- (b) the equity shares of the same class, which are proposed to be allotted through qualified institutions placement or pursuant to conversion or exchange of eligible securities offered through qualified institutions placement, have been listed on a recognised stock exchange having nation wide trading terminal for a period of at least one year prior to the date of issuance of notice to its shareholders for convening the meeting to pass the special resolution;
- (c) it is in compliance with the requirement of minimum public shareholding specified in the Securities Contracts (Regulation) Rules, 1957;
- (d) In the special resolution, it shall be, among other relevant matters, specified that the allotment is proposed to be made through qualified institutions placement and the relevant date referred to in sub-clause (ii) of clause (c) of regulation 81 shall also be specified.

Restrictions on amount raised [Regulation 89]

The aggregate of the proposed qualified institutions placement and all previous qualified institutions placements made by the issuer in the same financial year shall not exceed five times the net worth of the issuer as per the audited balance sheet of the previous financial year. In the instant case, the net worth of ABC Limited is ₹ 120 Crore. Therefore, the maximum amount that can be raised by the company under the proposed issue of shares is ₹ 600 crore (5*120)

(e) Period for surrender of realised foreign exchange: A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person under clause (a) of sub-regulation (1) of regulation 4, within the period specified below:-

1. foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets

held outside India, or as inheritance, settlement or gift, within seven days from the date of its receipt;

2. in all other cases within a period of ninety days from the date of its receipt.

The answer will remain the same i.e. within seven days if the realized foreign exchange is in respect of monetary gifts.

Question 2

- (a) *The Articles of Association of Amriz Limited provides for a maximum of 15 directors. But the company has only 10 directors and for two of them representing Foreign Collaborators, alternate directors have been appointed. Board meeting held on 1st August, 2018 was attended by four directors including two alternate directors. Examine with reference to the relevant provisions of the Companies Act, 2013 whether quorum was present at the Board Meeting held on 1st August, 2018. Will your answer be different, if the articles provide for a quorum of six directors?* **(4 Marks)**
- (b) *M/s DJ Limited, a listed company, as per the audited financial statements as at March 31, 2018 is having issued and paid-up equity share capital comprising of ₹ 10 Lakhs shares of ₹ 10 each and issued and paid-up preference share capital of ₹ 5 Lakhs shares of ₹ 10 each respectively. The members of the company after complying with the provisions of Section 169 of the Companies Act, 2013 removed one Mr. Satish from the directorship of the company on 1st August 2018 before the completion of his term of office. Mr. Satish is also one of the members of the company holding 110000 fully paid-up equity shares. Mr. Satish has alleged oppression on his removal and has moved the jurisdictional Honourable National Company Law Tribunal (NCLT) under Section 241 read with Section 244 of the Companies Act, 2013. The Board of Directors of the company is of the opinion that the application is not maintainable as per the provisions of Section 244 of the Companies Act, 2013. Decide.*
- Also, state if any other recourse that is available with Mr. Satish under the provisions of the Companies Act, 2013.* **(4 Marks)**
- (c) *M/s OBC Limited at its forthcoming Board meeting decided that it will not provide the directors with the facility of participation in the said meeting through electronic mode; can the directors insist on attending the meeting through such mode? Decide as per the provisions of the Companies Act, 2013. Will your answer differ, if a Director participates in a Board Meeting through electronic mode from his end, even if the company does not provide such facility?* **(4 Marks)**
- (d) *State the Special Provisions related to commodity derivatives inserted in the Finance Act, 2015, with effect from 28.09.2015 in the Securities Contracts (Regulation) Act, 1956.*

(4 Marks)

Answer

- (a) According to section 174 of the Companies Act, 2013, the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength or two directors, whichever is higher.

For the purposes of this section,—

- (i) any fraction of a number shall be rounded off as one;
- (ii) "total strength" shall not include directors whose places are vacant.

In the instant case, out of 10 directors, 4 directors including 2 alternate directors attended the Board Meeting held on 1st August, 2018.

Required quorum: $1/3^{\text{rd}}$ of 10 i.e. 3.33 rounded off to 4.

Alternate directors shall be counted in the quorum as they are holding the office of original director.

Thus, presence of 4 directors (including 2 alternate directors) in the board meeting held on 1st August, 2018 shall be counted as quorum. Thus, quorum was present at the meeting in the given case.

If Articles provide different quorum: The Act specifically mentions in section 174(1) of the Companies Act, 2013 that the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength or two directors, whichever is higher. However, the Act does not provide cap on the higher number of quorum and similar views have been expressed in Secretarial Standards 1 (Para 3.4.1) in terms of Section 118 (10) of the Companies Act, 2013 and various judicial rulings. Hence, if the Articles provide 6 directors as quorum, the meeting held on 1st August, 2018 is not valid as it was attended only by 4 directors and answer will change in the given case study.

- (b) According to section 244(1)(a) of the Companies Act, 2013, the following members of a company shall have the right to apply under section 241, namely:—

- in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

However, the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified above so as to enable the members to apply under section 241.

In the instant case, the equity share capital of the company is ₹ 1 crore (10 lakh shares of ₹ 10 each) and preference share capital is ₹ 50 Lakh (5 lakh shares of ₹ 10 each). The total issued and paid up share capital is ₹ 1.50 crore comprising of 15 lakh shares.

Mr. Satish is holding 110000 fully paid up equity shares. His holding is less than one-tenth of the issued share capital of the company [1/10th of 15 Lakhs i.e. 150000 shares].

Hence, his application is not maintainable as per provisions of section 244 of the Companies Act, 2013 and therefore the opinion of Board of directors is correct.

However, as per proviso to section 244(1), Mr. Satish may make an application to the Tribunal in this behalf for the waiver of the above condition so that he may apply under section 241.

- (c) According to section 173(2) of the Companies Act, 2013, the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

According to Rule 3 of *the Companies (Meetings of Board and its Powers) Rules, 2014*, if the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.

The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.

The above rule is to be complied with only if a company provides the facility of participation through electronic mode but it is not his right. This option may be exercised by the director only when this facility is provided by the company to its directors. If the company has not offered to provide facility of participation through electronic mode and the director insists to attend the meeting through electronic mode, the company may decide whether to provide the same or not. Thus, it is not mandatory for companies to provide their directors with the facility of participation in meetings through electronic mode and therefore, the director cannot insist.

In the absence of any intimation from the director referred above, it shall be assumed that he will attend the meeting in person. So, if the company does not provide the facility of participation through electronic mode and a director participates in a Board Meeting through electronic mode from his end, it is not valid.

- (d) **Special Provisions related to commodity derivatives [Section 30A of the Securities Contracts (Regulation) Act, 1956]**

- (1) Nothing contained in this Act shall apply to non-transferable specific delivery contracts:

Provided that no person shall organise or assist in organising or be a member of any association in any area to which the provisions of section 13 have been made applicable (other than a stock exchange) which provides facilities for the

performance of any non-transferable specific delivery contract by any party thereto without having to make or receive actual delivery to or from the other party to the contract or to or from any other party named in the contract.

- (2) Where in respect of any area, the provisions of section 13 have been made applicable in relation to commodity derivatives for the sale or purchase of any goods or class of goods, the Central Government may, by notification, declare that in the said area or any part thereof as may be specified in the notification all or any of the provisions of this Act shall not apply to transferable specific delivery contracts for the sale or purchase of the said goods or class of goods either generally, or to any class of such contracts in particular.

Notwithstanding anything contained in sub-section (1), if the Central Government is of the opinion that in the interest of the trade or in the public interest it is expedient to regulate and control non-transferable specific delivery contracts in any area, it may, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply to such class or classes of non-transferable specific delivery contracts in such area in respect of such goods or class of goods as may be specified in the notification, and may also specify the manner in which and the extent to which all or any of the said provisions shall so apply.

Question 3

- (a) *Considering the regulatory provisions of the Companies Act, 2013 and the rules thereof regarding the appointment of independent directors on a company's Board, state whether Z Limited, a listed public company is required to appoint Independent Directors. Also state whether appointment of Independent Director is required in the following cases:*
- (i) *The public company has a paid up share capital of ₹ 10 crores*
 - (ii) *What shall be your answer in case the company's paid up share capital is only ₹ 2 crores.*
 - (iii) *Whether a person who holds the position of a Key Managerial Personnel in the same company can be appointed as an Independent Director?*
 - (iv) *In relation to mandatory women directors as required under the Companies Act, 2013 should such directors also be Independent Directors? **(6 Marks)***
- (b) *Best Bank, a financial creditor sent a demand notice for a claim of ₹ 10.2 crores on XYZ Limited, a corporate debtor on 6th February, 2018. When the petition was filed before NCLT under Insolvency and Bankruptcy Code, 2016, Best Bank claimed that the XYZ Limited has defaulted ₹ 29.8 crores instead of original amount of ₹ 10.2 crores. NCLT appointed an interim insolvency resolution professional. XYZ Limited made an appeal with NCLAT demanding that the Best Bank's claim is not maintainable as there is a difference in the amount mentioned in the demand notice and the application filed under the Code. Decide whether the contention of XYZ Limited is correct. Also, state who can file Corporate Insolvency Resolution process under the Code. **(6 Marks)***

- (c) *Super Track Limited, a manufacturer of footwear entered into an agreement with City Traders, for the sale of its products. The agreement includes, among others, the following clauses. Referring to the provisions of the Competition Act, 2002, examine their validity:*
- (i) *That the City Traders shall not deal with goods, products, articles, whatever name called, manufactured by any person other than Super Track Limited.*
 - (ii) *That the City Traders shall not sell the goods manufactured by Super Track Limited outside the municipal limits of the city of Madurai.*
 - (iii) *That the City Traders shall sell the goods manufactured by the Super Track Limited at the price as embossed on the price label of the footwear. However, the City Traders is allowed to sell the footwear at prices lower than those embossed on the price label.*
- (4 Marks)**

Answer

- (a) According to section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors.
- Hence, Z limited, being a listed public company, shall have at least one-third of the total number of directors as independent directors.
- (i) According to the Rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014*, the Public Companies having paid up share capital of 10 crore rupees or more, shall have at least 2 directors as independent directors.

Thus, if the paid- up share capital of the public company is ₹ 10 crore, the company shall have at least 2 directors as independent directors.

 - (ii) If the paid- up share capital of the public company is ₹ 2 crore, the company is not required to have independent directors.
 - (iii) According to section 149(6), a person in order to be appointed as an independent director shall neither himself nor any of his relatives—

hold or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

Thus, a person who holds the position of a Key Managerial Personnel cannot be appointed as an Independent director.

 - (iv) **Women director:** Proviso to section 149(1) read with Rule 3 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* states that the following class of companies shall appoint at least one women director-
 - (1) every listed company;

- (2) every other public company having -
- (A) paid-up share capital of one hundred crore rupees or more; or
 - (B) turnover of three hundred crore rupees or more.

From the above, it can be concluded that provisions make it mandatory to appoint a woman director in the condition prescribed above. However, it does not make it mandatory that the woman director should also be independent.

- (b) As per section 7 of the Insolvency and Bankruptcy Code, 2016, a financial creditor either by itself or jointly with other financial creditors, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. The financial creditor shall, along with the application furnish-
- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
 - (b) the name of the resolution professional proposed to act as an interim resolution professional; and
 - (c) any other information as may be specified by the Board.

The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

Here, in the given instance, Best Bank (Financial creditor) filed a petition against the XYZ Ltd. (Corporate debtor) for the default of ₹ 29.8 crore instead the earlier demanded amount of ₹ 10.2 Crore. As per the above provision, NCLT (Adjudicating Authority) shall, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor. When NCLT is satisfied, it admits the submitted application for initiation of corporate insolvency process. Therefore, contention of XYZ Ltd. as to filing of appeal before NCLAT demanding that the best bank's claim is not maintainable due to difference in the claim amount, is incorrect.

Who can file insolvency resolution process: As per section 6 of the Code, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.

- (c) Provisions of section 3(1) of the Competition Act, 2002 prohibit any agreement for goods and/or services that may have an appreciable adverse effect on competition in India.

Provisions of section 3(2) of the said Act state that any agreement entered into in contravention of provision of section 3(1) of the said Act shall be void.

According to section 3(4) of the said Act, any agreement among enterprises or persons at different stages of the production chain in different markets, in respect of production,

supply, distribution, storage, sale or price of, or trade in goods or provision of services including the following shall be treated as agreements in contravention of the said section 3(1):

- (a) tie-in-arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal
- (e) re-sale price maintenance

The clauses of the agreement given in the question are covered by above mentioned provisions Clause at Sr. No.(i) comes under exclusive supply agreement; Clause at Sr. No.(ii) comes under exclusive distribution agreement and Clause at Sr. No.(iii) is covered by re-sale price maintenance.

Explanations to said section 3(4) explains the above terms.

According to Explanation (b), exclusive supply agreement includes any agreement restricting in any manner, the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

According to Explanation (c), exclusive distribution agreement includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

According to Explanation (e), "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

In view of the above provisions of the Competition Act, 2002, validity of the clauses of the agreement as given in the question can be determined as follows:

Clause (i) restricts the City Traders to deal in the goods of manufacturers other than the Super Track Limited. Hence this is in contravention of the provisions of section 3(1) of the said Act and not a valid clause.

Clause (ii) restricts the City Traders to sell the goods within a specified area. Hence this is in contravention of the provisions of section 3(1) of the said Act and not a valid clause.

Clause (iii) stipulates the resale price, but it allows the City Traders to sell the goods at lower prices than the stipulated prices. Hence this is a valid clause.

But, the law states that any such agreement containing any of the prohibited clause shall be void. Therefore, even if the agreement contains some valid clauses, it shall still be termed as void if it contains even one prohibited clause.

Question 4

- (a) *The Central Government ordered an investigation under Section 216 of the Companies Act, 2013 against M/s Green Wood Limited for determining the true membership of the company. In connection with this investigation a reference was made to the Tribunal. It appears to the Tribunal that there is a good reason to find out the relevant facts about the equity shares with Differential Voting Rights (DVRs) issued by the company and the Tribunal is of the opinion that unless restrictions are imposed on further issue of such equity shares for two years, the purpose cannot be solved.*

Referring to the provisions of the Companies Act, 2013 and Rules framed in this regard, answer:

- (i) *Can the Tribunal put such a restriction on further issue of shares?*
- (ii) *Period for which such a restriction can be imposed by the Tribunal? (4 Marks)*
- (b) *State with reference to the provisions of the Companies Act, 2013 whether the following companies can make donations to political parties and if so the conditions to be complied with in this regard.*
- (i) *ABCD Ltd., a Government company registered in 1991, wants to donate a sum of ₹10 lakhs.*
- (ii) *EFG Ltd., a public company registered in 2013, wishes to contribute a sum of ₹5 lakhs.*
- (iii) *RST Ltd., a company incorporated in the year 2014, decides to contribute a sum of ₹3 lakhs.*
- (iv) *Rama Ltd., wants to make political contribution of ₹2,000 in cash. (4 Marks)*
- (c) *In the context of judicial rulings in the matter of merger, answer the following:*
- (i) *Whether exchange ratio approved by shareholders of merging companies can be questioned by a small group of dissenting shareholders?*
- (ii) *Whether Transferor Company is justified in excluding assets held on lease and license arrangement, from those transferred to the transferee company? (4 Marks)*
- (d) *Rockfort Limited failed to repay the loan borrowed from Nest Bank, 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 Managing Director Mr. Pawn, who has been now removed. Referring to the provisions of the said Act, examine whether Mr. Pawn is entitled to compensation for loss of office. (4 Marks)*

Answer**(a) Imposition of Restrictions upon Securities**

Section 222 of the Companies Act, 2013, deals with the Imposition of Restrictions upon Securities. According to this section:

Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

In the light of the above provisions:

- (i) The Tribunal can put restriction on further issue of shares, in order to determine the true membership of the company.
 - (ii) The Tribunal may impose such restrictions for such period as it may deem fit. However, such period shall not exceed three years.
- (b)** According to section 182(1) of the Companies Act, 2013, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

Thus,

- (i) ABCD Ltd. being a government company cannot contribute to political parties.
- (ii) EFG Ltd., being in existence for more than 3 years (2013 to 2018), may contribute ₹ 5 Lakhs to any political party.
- (iii) RST Ltd. being in existence for more than 3 years (2014 to 2018), may contribute ₹ 3 Lakhs to any political party.
- (iv) According to section 182 (3A), the contribution under section 182 shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

Thus, Rama Ltd. cannot make political contribution of ₹ 2,000 in cash.

- (c)** Compromise, Arrangement and Amalgamation is governed by chapter XV covering sections 230 to 240 of the Companies Act, 2013. Section 232 deals with merger. In accordance with the legal provisions of the section mentioned above:
- (i) **Where the exchange ratio was questioned by small group of dissenting shareholders:** In this case, since the valuation is confirmed by majority of shareholders of merging companies, the objection raised by some shareholders of a small group cannot be sustained. (*Hindustan Lever Employees Union Vs. Hindustan Lever Ltd.*)

- (ii) **Excluding assets held on lease and license arrangement:** As per the decided case law *Hindustan Lever Employees Union Vs. Hindustan Lever Ltd.*, the court said that assets held on lease and license arrangement were neither transferable nor heritable. They are in the nature of a personal privilege and therefore transferor company is justified.
- (d) **Compensation to Managing director (Mr. Pawn) 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.

Question 5

- (a) *The Central Government wants to appoint Mr. Honest as Company Prosecutor. Can it do so? Mention the provisions regarding the power of Central Government to appoint Company Prosecutors along with their powers and privileges under the Companies Act, 2013.* **(4 Marks)**
- (b) *The Board of Directors of M/s ABC Motors Ltd. made the following appointments at its meeting held on 1st January, 2018:*
- (i) *Mr. X, a Director of its subsidiary company, namely, M/s ABC Forgings Ltd., was appointed as Purchase Manager on a consolidated salary of ₹ 1,00,000 per month with effect from 1st January, 2018.*
 - (ii) *Mr. Y was appointed as the Sales Manager on a consolidated salary of ₹ 1,50,000 per month with effect from 1st January, 2018. Answer the following, explaining the relevant provisions of the Companies Act:*
 - (1) *Does the appointment of Mr. X require the approval of the members in a general meeting of the company?*
 - (2) *Mr. P, a relative of Mr. Y was appointed as a Director of M/s ABC Motors Ltd. on 1st August 2018. Does it affect the continuation of Mr. Y as the Sales Manager?* **(4 Marks)**
- (c) *Kisaan Company Limited, a producer company has been established in Chennai, incorporated on May 1, 2018 with 16 individual members having limited liability by its memorandum. Company called for the first annual general meeting on August 16, 2018 by requiring an immediate notice of 10 days to its members, without any agenda. Later on, meeting was not held due to the quorum which was only 3. Explain the provisions related to calling of 1st AGM and quorum in that meeting.* **(4 Marks)**

- (d) *Securities and Exchange Board of India (SEBI) has undertaken inspection of books of accounts and records of MR Ltd., a listed public company. Specify the measures which may be taken by SEBI under the Securities and Exchange Board of India Act, 1992 to protect the interest of investors and securities market, on completion of such inquiry.*

(4 Marks)

Answer

- (a) **Power of Central Government to appoint Company Prosecutors [Section 443 of the Companies Act, 2013]:** The Central Government may appoint generally, or for any case, or in any case, or for any specified class of cases in any local area one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act.

The persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code of Criminal Procedure, on Public Prosecutors appointed under section 24 of the Code.

Accordingly, the Central Government may appoint Mr. Honest as Company Prosecutor for conducting any prosecution, appeal or other proceeding on behalf of the Central Government in the Tribunal/Court.

- (b) Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT) with related party. Here, as per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes, any company which is holding, subsidiary or an associate company of such company. According to this section 188, except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as prescribed under rule 15(1) of *the Companies (Meetings of Board and its Powers) Rules, 2014*, no company shall enter into any contract or arrangement with a related party with respect to the such transaction where there is a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company.

- (1) In the given case, Mr. X, a director of M/s ABC Forgings which is a subsidiary of M/s ABC Motors Ltd. was appointed as purchase manager on salary of 1,00,000 per month.

Accordingly, related party's appointment (i.e. of Mr. X) to an office or place of profit in M/s ABC Motors Ltd. will not require the approval of the members in a general meeting of the company as the monthly remuneration is not exceeding ₹ 2.5 lakh. Such transactions as to a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company shall require consent of the Board of Directors given by a resolution at a meeting of the Board.

- (2) As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes, a director or his relative. So, Mr. P, appointed as a director of M/s ABC Motors Ltd. on 1st of August, 2018, was a relative of Mr. Y who was appointed as sales manager in the M/s ABC Motors Ltd. This falls within the purview

of Section 188 of the Companies Act, 2013 which relates with the related party transactions (RPT) with related party. Yes, the continuation of Mr. Y as a sales manager will lead to interest of conflict and will affect the continuation unless ratified by the board [Section 188 (3)].

(c) (i) **First Annual General Meeting:** The first annual general meeting of a producer company shall be held within 90 days of incorporation i.e. on or before 30th July, 2018 in this case [Section 581 ZA(2)]. Here, in the given instance, first AGM was called on August 16, 2018 which is the non-compliance of the said section.

(ii) **Quorum:** Unless the articles of association of the producer company provide for a larger number, 1/4th of the total number of members of the producer company shall be the quorum for its annual general meeting. In this case, the company has got 16 members. So, the required quorum will be 4. [Section 581ZA(8)]. Here, in the given case, quorum was 3, so meeting cannot be held due to lack of quorum.

(d) **Measures to be taken to protect the interest of the investors & securities market:**

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 recognised 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 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, for a period not exceeding one month.

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.

Question 6

- (a) *The Board of Directors of M/s APCO Limited a listed company, for carrying out the valuation of the immovable properties standing in the name of the company as required under the provisions of the Companies Act, 2013 proposes to appoint Mr. Mehta, an individual as the valuer. Referring to the provisions of the Companies Act, 2013 read with the Companies (Registered Valuers and Valuation) Rules, 2017, the Audit Committee is of the opinion that the Board of Directors does not have the right to appoint the valuer. Decide. (4 Marks)*
- (b) *The Central Government has made an application to the Honourable National Company Law Tribunal (NCLT) on 15th April, 2018 in respect of M/s Sweet Dreams Limited, a listed company to reopen its books of account and to recast its financial statements pertaining to the financial year 2006-07 (April- March) to 2009-10. The reopening and the recasting were on account that the earlier financial statements were prepared in a fraudulent manner. The management of the company has objected to this application and prayed to the Honourable NCLT that the financial years in question are beyond 8 years from the application date; hence the said application needs to be rejected. Advise as per the provisions of the Companies Act, 2013, whether the contention of the management is tenable.*
State whether your answer will change if the Directors of the company voluntarily file an application to the Honourable NCLT for revision of the financial statements in respect of the above mentioned financial years. (4 Marks)
- (c) *Trans Asia Limited is registered as a public company u/s 4 (7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Trans Asia Limited carries on business in India describing itself as a foreign company. Can it do so? State the actions that can be taken against the company for improper use or description as foreign company under the provisions of the Companies Act, 2013. (4 Marks)*
- (d) *Mr. Khan is an insurance agent of Bharat Insurance Limited. He has designed and started selling life insurance through Multilevel marketing scheme. Advise Mr. Khan, considering the provisions of Insurance Laws (Amendment) Act, 2015 regarding the legality of selling insurance through Multilevel marketing scheme. (4 Marks)*

Answer

- (a) **Valuation by Registered Valuers (Section 247):** According to the provisions of the section 247 of the Companies Act, 2013 read with the *Companies (Registered Valuers and Valuation) Rules, 2017*, where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be

prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.

Hence, in the given instance, proposal for appointment of Mr. Mehta as the valuer by the Board of directors of M/s APCL Ltd. is against the said provision. In fact, valuer shall be appointed by the audit committee or in its absence by the Board of Directors of that company.

In view of above, the opinion of the Audit Committee is correct.

- (b) As per section 130(1) of the Companies Act, 2013, a company shall also re-open its books of account and recast its financial statements, on an application made by the Central Government (CG) by an order of court of competent jurisdiction or the Tribunal to the effect that the relevant earlier accounts were prepared in a fraudulent manner.

No order shall be made under sub-section (1) in respect of re-opening of book of accounts relating to a period earlier than eight financial years immediately preceding the current financial year. [Section 130(3)]

However, where a direction has been issued by the Central Government under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period.

In the given instance, CG made an application to Hon. NCLT on 15th April, 2018 in respect of the M/s Sweet Dreams Ltd., a listed company to reopen its book of accounts and recast its financial statements of past 4 financial years (i.e., 2006-2007, 2007-2008, 2008-2009, & 2009-2010) prepared in fraudulent manner. Further, management objected to filing of an application that financial years in question are beyond 8 years from the application date.

As per section 128(5), the books of account of every company relating to a period of not less than eight financial years immediately preceding a financial year, or where the company had been in existence for a period less than eight years, in respect of all the preceding years together with the vouchers relevant to any entry in such books of account shall be kept in good order.

Since in the given case, financial years in question i.e. from 2006-2010, are beyond 8 years from the application date and no direction has been issued by the CG under the proviso to sub-section (5) of section 128 for keeping of books of account for a period longer than eight years, so the contention of the management as to rejection of an application is tenable.

Further, section 131 of the Companies Act, 2013, states that if it appears to the directors of a company that the financial statement of the company do not comply with the provisions of section 129 they may prepare revised financial statement in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an

application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar.

However, Board can recast the financial statements only for any three years out of four years mentioned in the case study.

(c) **Foreign Company [Section 2(42)]:** “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.

In the instant case, Trans Asia Limited is registered as a public company u/s 4(7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Though Trans Asia Limited is a subsidiary of a foreign company but since it is registered in India, it is not a foreign company. Hence, it cannot describe itself as a foreign company.

Action against the improper use/description as foreign co.: As per Rule 12 of *the Companies (Registration of Foreign Co.) Rules, 2014*, if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person.

(d) As per Section 42A of the Insurance Act, 1938, the term "multilevel marketing scheme" means any scheme or programme or arrangement or plan (by whatever name called) for the purpose of soliciting and procuring insurance business through persons not authorised for the said purpose with or without consideration of whole or part of commission or remuneration earned through such solicitation and procurement and includes enrolment of persons into a multilevel chain for the said purpose either directly or indirectly.

According to the said provision, no person shall allow or offer to allow, either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance policy through multilevel marketing scheme. The Authority may, through an officer authorised in this behalf, make a complaint to the appropriate police authorities against the entity or persons involved in the multilevel marketing scheme. Mr. Khan is advised on the above lines.

Question 7

Answer any **Four** questions:

(a) Mr. SP booked office space with Elegant Construction Limited. At the time of booking ₹ 36 lakhs was paid. Remaining amount of ₹ 10 lakhs was paid at the time of taking

delivery. He entered into a Memorandum of Understanding (MoU) with the company having various terms and conditions of the sale/allotment. According to the MoU, Elegant Construction Limited was required to build and deliver the possession of the unit within 2 years from the date of execution of the MoU. It also stipulated payment of an assured return of ₹ 82,000 per month (subject to TDS u/s 194A of IT Act, 1961) till possession of the unit was delivered to Mr. SP. Elegant Construction Limited failed to pay the assured return. Thereafter, Mr. SP filed an application for initiating insolvency resolution process. Decide about the validity of the said application in view of the provisions of Insolvency and Bankruptcy Code, 2016 as regards the definition of a "Financial Creditor" under Section 5(7) read with Section 5(8) of the Code. **(4 Marks)**

- (b) Mr. RG is a practicing Chartered Accountant and having 15 years of professional experience. Can he be appointed as Technical Member of National Company Law Appellate Tribunal as per Section 411 of the Companies Act, 2013? Will your answer be different, if he is appointed as Technical Member of National Company Law Tribunal?

(4 Marks)

- (c) M/s, IJK Limited was wound up with effect from 15th March 2018 by an order of the Court. Mr. A, who ceased to be a member of the company from 1st June 2017, has received a notice from the liquidator that he should deposit a sum of ₹ 5,000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called as a contributory, whether he can be made liable and whether there is any limitation on his liability.

(4 Marks)

- (d) Mr. JJ was found guilty by the authorities under Section 13 of the Prevention of Money Laundering Act, 2002 and monetary penalty was levied on Mr. JJ. But Mr. JJ could not pay the penalty amount. What is the mechanism to recover the fine or monetary penalty imposed on any person by the authorities under Section 13 or Section 63 of the Prevention of Money Laundering Act, 2002?

(4 Marks)

- (e) Explain the rule of "Literal Construction" with an example.

(4 Marks)

Answer

- (a) **Financial creditor** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7) of the IBC]

Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The financial debt besides with other debts, includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing [Section 5(8) of the IBC]

As per the given facts, Mr. SP booked office space with Elegant Construction Limited. He entered into MoU with the condition stating to build and deliver the possession of the unit within 2 years from the date of execution of MoU. MoU also stipulated payment of an

assured return of ₹ 82,000 per month till possession of the unit was delivered. Elegant Construction Limited failed to pay the assured sum. Mr. SP filed an application for initiating insolvency resolution process against the Elegant Construction Limited.

In the light of the stated provisions in the given circumstances, assured returns are regular payment and qualify as financial debt. As to the promise to pay the assured return of ₹ 19,68,000 (i.e. 82,000 x 24 months) by Elegant Construction Limited to Mr. SP makes the Mr. SP (applicant) as Financial creditor.

Initiation of corporate insolvency resolution process by financial creditor

As per section 7 of the Code, a financial creditor by itself, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. A default includes a default in respect of a financial debt owed to the applicant financial creditor of the corporate debtor.

Hence, an application for initiating corporate insolvency resolution process against Elegant Construction Limited is valid.

(b) Qualifications of Chairperson and members of Appellate Tribunal [Section 411]

Section 411 of the Companies Act, 2013 prescribes the qualifications of the chairperson and the members of the Appellate Tribunal.

According to section 411(3), a technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.

Here in the given case, Mr. RG is having professional experience of 15 years. Hence, Mr. RG cannot be appointed as technical member of NCLAT.

However, as per section 409, Mr. RG is eligible to be appointed as technical member of NCLT as he is meeting up the requirement by being into practice as a Chartered Accountant, for fifteen years.

(c) Contributory: According to section 285 of the Companies Act, 2013, as soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories.

While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

Liability of the contributory: A person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up.

In the given case, M/s, IJK Ltd. was wound up on 15th March 2018. Whereas Mr. A ceased to be a member of the company from 1st June, 2017. So, according to the above provision, Mr. A will be a contributory and be liable to contribute as the time period of one year from the commencement of winding up has not elapsed. So, Mr. A is liable to deposit ₹ 5000 (if any unpaid on the shares in respect of which he is liable as member [Section 285 (3) (d)] as his contribution towards the liability on the shares previously held by him.

(d) Recovery of fine or penalty [Section 69 of the Prevention of Money Laundering Act, 2013]

Where any fine or penalty imposed on any person under section 13 or section 63 is not paid within six months from the day of imposition of fine or penalty, the Director or any other officer of the Adjudicating Authority authorised by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

(e) Rule of Literal Construction: It is the cardinal rule of construction that words, sentences and phrases of a statute should be read in their ordinary, natural and grammatical meaning so that they may have effect in their widest amplitude. At the same time, the elementary rule of construction has to be borne in mind that words and phrases of technical nature are '*prima facie*' used in their technical meaning, if they have any, and otherwise in their ordinary popular meaning.

Sometimes, occasions may arise when a choice has to be made between two interpretations – one narrower and the other wider or bolder. In such a situation, if the narrower interpretation would fail to achieve the manifest purpose of the legislation, one should rather adopt the wider one.

For example, disclosure of the nature of concern or interest, financial or otherwise' of a director or the manager of a company in the subject-matter of a proposed motion (as referred to in section 102 of the Companies Act, 2013). It has to be interpreted in its broader sense that any concern or interest containing any information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.