PAPER- 4 – CORPORATE AND ECONOMIC LAWS

*Question No. **1** is compulsory.*

*Answer any **four** from the out of the remaining **five** Questions.*

Question 1

(A) You are a leading Chartered Accountant advising corporates covering various aspects inter alia on Corporate and Economic Laws, Corporate Tax and related matters with excellent articulation skills and is a much sought after professional on the Board of many reputed Companies. Recently, you have been approached by Dash Board Ltd., a loss making company seeking your advice on the validity of the appointment of Mr. 'X', a turnaround specialist, as the Whole Time Director of the Company w.e.f. 01.01.2020 on which date he would be above 70 years of age. You were further informed that at the extra-ordinary general meeting of the Company held on 15.03.2020, the shareholders have not passed a special resolution with regard to the appointment of Mr. 'X' but the votes cast in favour of the motion exceeded the votes cast against the motion. The Company has provided you the following inputs extracted from the latest audited Balance Sheet as at 31st March, 2020.

S. No.		*Amount (₹ In Crores)*
1.	*Authorized Equity Share Capital*	*1,560*
2.	*Paid Up Equity Share Capital*	*860*
3.	*Share Application Money Account (Company is in process of Issue (FPO)) Follow on Public*	*60*
4.	*Reserves and Surplus (including General Reserve - 600 & Revaluation Reserve - 80)*	*680*
5.	*Long Term Borrowings*	*800*
6.	*Investments*	*160*
7.	*Accumulated Losses*	*40*

On the basis of the above facts and figures, Dash Board Ltd. seeks your advice in respect of the following under the provisions of the Companies Act, 2013.

(i) Validity of the appointment of Mr. 'X' as Whole Time Director.

(ii) Compute the effective capital for payment of managerial remuneration.

(iii) As the Company is running in losses, state the maximum amount of remuneration that can be paid on yearly basis to each Managerial person other than a managerial personnel functioning in a professional capacity.

(iv) How is the remuneration payable to a Whole Time Director determined ? ***(8 Marks)***

(B) Apex Ltd. is an unlisted Public Company and having 10 Directors on its Board. At a duly convened meeting of the Board of Directors of the Company held on 14th August, 2020, it was proposed to approve entering into contracts or arrangements with 'E Limited' and 'Q and Associates', a partnership firm. Mr. Y and his spouse hold 2 and 1 shareholding respectively in E Limited. Mrs. Z, spouse of Mr. Z is a partner in Q and Associates. Mr. Y and Mr. Z are the Directors of Apex Limited. The board meeting was attended by five directors including Mr. Y and Mr. Z. All the directors participated in the discussions and voted in favor of the resolution except Mr. Y. The contracts were approved. However, Mr. Y and Mr. Z disclosed their respective interests in the contracts. The earlier Board Meeting was held on 25th May, 2020. In the light of the provisions of the Companies Act, 2013 (the Act), examine the following:

(i) Whether the Board Meeting that was held and the transactions therewith are within the provisions of the Act?

(ii) Under what circumstances any arrangement entered into by the Company in violation of Section 192 of the Companies Act, 2013 dealing with non-cash transactions involving directors shall not be held voidable? ***(6 Marks)***

Answer

(A) (i) As per section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as Managing Director, Whole-Time Director or Manager who is below the age of 21 years or has attained the age of 70 years. However, where a person has attained the age of seventy years, he may still be appointed to such office if a special resolution is passed in this respect. In such a case, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

Further, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

In the given question, the appointment of Mr. X is not valid as special resolution was not passed. However, it could have been regularized (since the votes cast in favour exceeded votes cast against the motion of appointment of Mr. X as Whole Time Director) by seeking approval of the Central Government, which, if satisfied, can accord such approval.

(ii) As per Explanation 1 to Section II of Part II of Schedule V “effective capital” means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital

loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

The effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Calculation of Effective Capital:

Particulars	**Amount (₹ in crores)**
Paid up Capital (excluding share application money)	860
Add: Reserves and surplus excluding revaluation reserve	600
Add: Long term borrowings	800
Less: Investments	160
Less: Accumulated Losses	40
Effective Capital	**2,060**

(iii) Section II of Part II of Schedule V states that where the effective capital is ₹ 250 crore and above, the remuneration payable shall not exceed ₹ 120 lakh plus 0.01% of the effective capital in excess of ₹ 250 crore (i.e., 1.20 cr. + 0.181 cr. = 1.381 crore). Accordingly, the total managerial remuneration payable by Dash Limited to each Managerial person other than a managerial personnel functioning in a professional capacity shall be paid ₹ 1.381 crore remuneration. Provided that the remuneration in excess of the above limits may be paid if the resolution passed by the shareholders is a special resolution. Further, it has been clarified by an explanation that if the managerial personnel is employed for a period less than one year, the remuneration payable to him shall be pro-rated.

(iv) In terms of section 197(4) of the Companies Act, 2013, the remuneration payable to the directors of a company including any Managing or Whole Time Director or Manager, shall be determined in accordance of this section, either:

(i) By the articles of the company

(ii) By a resolution or

(iii) If the articles so require by special resolution, passed by the company in general meeting.

(B) (i) According to section 173 of the Companies Act, 2013, every company shall hold minimum of 4 meetings every year but the gap between two consecutive board meetings shall not be more than 120 days.

In the given question earlier Board Meeting was held on 25th May, 2020. The next board meeting was held on 14th August, 2020. Thus, this provision has been complied as the gap between two meetings is less than 120 days.

As per section 174 of the Companies Act, 2013, the quorum for a Board Meeting shall be 1/3rd of its total strength or two directors whichever is higher. Where at any time, the number of interested director exceeds or is equal to 2/3 of the total strength, the quorum shall be the number of directors who are present and not interested directors.

According to section 184 of the Companies Act, 2013, every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in the manner prescribed in Rule 9 of the Companies (Meetings of Board and its Powers) Rules, 2014.

The section further provides that, a director of a company shall make a specific disclosure of interest whenever he, in any way, whether directly or indirectly, is concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

(a) with a body corporate in which such director or such director in association with any other director holds more than two per cent shareholding of that body corporate; or

(b) with a body corporate in which such director is a Promoter, Manager, Chief Executive Officer; or

(c) with a firm or other entity in which, such director is a partner, owner or member.

According to Section 184 (5) (b), the provisions of Section 184 regarding disclosure by interested director shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the either company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

As in the given case, Mr. Y holds 2% shareholding (his wife shareholding shall not be included) in E Limited. Since, his shareholding is not more than 2%, therefore, provisions of disclosure of interest shall not apply to him.

Similarly, the provisions related to disclosure of interest are not applicable on Mr. Z (as his wife is a partner in Q and Associates and he disclosed his indirect interest).

As per the question five directors including Mr. Y and Mr. Z (all uninterested) attended the board meeting which is more than 1/3rd of the strength. Thus this provision has been complied.

Therefore, the meeting convened on 14-08-2020 is valid.

The provisions of section 184 of the Companies Act, 2013 are also complied with, and so the transactions of the meeting held on 14th August, 2020 are in order. However, in terms of section 188 of the Companies Act, 2013, no contract or arrangement, in case of a company having paid up share capital of not less than such amount or transactions not exceeding such sums, as may be prescribed shall be entered into except with the prior approval of the company by a resolution.

(ii) Where any arrangement entered into by the company in violation of the section 192(3) of the Companies Act, 2013 dealing with non cash transactions involving directors, shall not be voidable:

(a) If the restitution of any money or other consideration which is subject matter of the arrangement is no longer possible and the company has indemnified by any other person for any loss or damage caused to it or

(b) If any rights are acquired bonafide for value and without notice of the contravention of the provisions of this section by any other person.

Question 2

(A) Investigation proceeding under the provisions of the Companies Act, 2013 is being carried out against Fishy Ltd. During the investigation, the Tribunal has a reasonable ground to believe that a removal, transfer or disposal of funds, assets or properties of the Company is likely to take place in a manner that would be prejudicial to the interests of the Company. In this connection, the Tribunal requested the Company's legal advisers and the Bankers respectively to disclose and furnish a copy of the communication made by them to the Company. But they refused to disclose any information. Under the circumstances, the Tribunal wishes to pass an order to:

(i) Freeze the assets of the Company.

(ii) Punish the Company for the contravention, if any of the order of Tribunal.

(iii) Compel the legal advisers and the bankers to provide the required information.

In the light of the provisions of the Companies Act, 2013 analyse whether the Tribunal has the power to do so in respect of the above situations. ***(4 Marks)***

(B) Fifteen members of KUN Limited holding fifteen percent paid-up share capital (who have paid all calls and other sums due on their shares) of the company applied to the Tribunal under Section 241 of the Companies Act, 2013 for relief from oppression on the ground that the affairs of the company are being conducted in a manner prejudicial to their interest. The Tribunal admitted the application and upon enquiry found the allegation to be genuine. There upon the Tribunal on 1st October, 2020, ordered for termination of Mr. BAP, the Managing Director of the company, with immediate effect. Mr. BAP was appointed as the Managing Director of the company for a period of five years with effect from 1st April, 2017 having a clause in his letter of appointment that he would be entitled for compensation for the remaining period; in case his services are terminated by the

company before expiry of his stipulated term of service. Mr. BAP claimed compensation for the remaining term of one and half year. KUN Limited denied to pay the compensation but offered him to re-assume his office again after lapse of a period of three years from 1st October, 2020. Referring to and analyzing the relevant provisions of the Companies Act, 2013, decide, whether the claim of Mr. BAP is tenable and proposal of KUN Limited is valid. ***(4 Marks)***

(C) GOGU Limited, a resident company in India, has achieved a turnover of ₹ 20,000 crore during the financial year 2019-20. The paid-up share capital and Free Reserves of the company as on 31st March, 2020 as per the audited financial statements was ₹ 1500 crore and ₹ 500 crore respectively. The company is planning to make an investment of INR 7800 crore in an Overseas Joint Venture in Singapore. The company approached you whether it can make the desired investment under the terms of automatic route for direct investment during the financial year 2020-21. The equivalent currency in US $ comes to around USD 1.05 billion. Referring to the Foreign Exchange Management (Transfer of Issue of Any Foreign Security) (Amendment) Regulations, 2004 and notifications issued by the Reserve Bank of India, decide whether there is any restriction in the above investment. ***(3 Marks)***

(D) Good Heart Limited had borrowed ₹ 15 crore from XYZ Bank Limited and ₹ 25 crore from AB Bank Limited by providing appropriate security. Good Heart Limited could not pay the dues of the bankers due to recession in business. Consequently, XYZ Bank Limited and AB Bank Limited took over the management of Good Heart Limited. After managing the business for some months, the bankers were successful in realizing their dues from the business of Good Heart Limited. By that time, the bankers had converted part of the debts of Good Heart Limited into equity shares of the company and thereby had acquired controlling interest in Good Heart Limited. Referring to and analyzing the relevant provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, decide whether XYZ Bank Limited and AB Bank Limited are obliged to restore the management of the business to Good Heart Limited. ***(3 Marks)***

Answer

(A) (i) As per Section 221 of the Companies Act, 2013, where it appears to National Company Law Tribunal on reasonable ground to believe that removal or transfer or disposal of funds, assets or properties of company is likely to take place in manner prejudicial to interests of company or its shareholders or creditors or in public interest,

the Tribunal may by order direct that such transfer, removal or disposal shall not take place till three years as may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

Hence, the Tribunal may pass an order to freeze the assets of the company.

(ii) In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal as specified above the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees.

(iii) In requirement with Section 227 of the Companies Act, 2013 even during an investigation, the legal adviser cannot be compelled to provide information of any privileged communication made to him in that capacity, except as respects the name and address of his client, or by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person, to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government.

Hence, the legal advisers and bankers of Fishy Ltd. cannot be compelled to provide required information.

(B) As per the provisions of section 243(1) of the Companies Act, 2013, where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub section (2) of that section:

(a) Such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;

(b) No managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as managing director or other director or manager of the company.

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

In terms of the provisions stated above, the contention of Mr. BAP is not tenable since he will not be eligible to get any compensation.

KUN Limited's proposal offering Mr. BAP to resume his office before the expiry of a period of three years is also not valid since there is a restriction of a period of five years from the date of termination of his service.

But, with the leave of the Tribunal, Mr. BAP can be appointed, or act, as the Managing Director of the company, provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

(C) Automatic route for direct investment or financial commitment outside India: As per Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV) or Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Here, 'Indian Party' includes a company incorporated in India.

As per the facts of the question and provision of law, GOGU Limited (Indian party) will require prior approval of the Reserve Bank of India even though its total financial commitment is within the eligible limit under automatic route [i.e. {400% of (1500+500) = ₹ 8,000 crore}], because financial commitment is more than USD 1 billion.

(D) According to section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, if the borrower fails to discharge his liability in full within the specified period, the secured creditor may for the purpose of recovering his secured debt, 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.

It is also provided 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.

Obligation of 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.

In the given question, XYZ Bank Limited and AB Bank Limited (secured creditor jointly with other secured creditors) had converted part of the debts of Good Heart Limited into equity shares of the company and thereby had acquired controlling interest in Good Heart Limited. Hence, the XYZ Bank Limited and AB Bank Limited are not obliged to restore the management of the business to Good Heart Limited.

Question 3

(A) Analyse under the provisions of the Companies Act, 2013, whether the following Companies can be considered as a Foreign Company:

(i) A Company incorporated outside India and registered in Moscow, Russia has installed its main server in Moscow for maintaining office automation software by cloud computing for its client in India.

(ii) A Company which is incorporated outside India employs agents in India but has no place of business in India.

(iii) A Company incorporated outside India and registered in Australia has authorized Mr. X in India to source customers and subsequently to enter into contracts with them on behalf of the Company.

(iv) A Company incorporated outside India and is registered in Mauritius. All the business models, financial strategy, important decisions are carried and taken out at the Board Meetings held only in India. ***(4 Marks)***

(B) Phil Heath Systems Incorporated (PHSI), is a foreign Company registered in Australia and has established a place of business in India. The financial statements pertaining to the Indian business operations for the year ended 31st March, 2020 were prepared by the Company. Referring to the provisions of the Companies Act, 2013, advise the Company on the following matters:

(i) Whether the accounts of the Company pertaining to Indian business operations shall be audited ? If yes, by whom ?

(ii) What is the due date for filing the audited financial statements with the Registrar of Companies (RoC) ?

(iii) What is the effect of the contracts entered by an Indian Company with PHSI in case PHSI has not filed financial statements with the RoC?

(iv) In which e-forrn and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies? ***(4 Marks)***

(C) By means of an order in writing, the Adjudicating Authority (AA) appointed under the Prevention of Money Laundering Act, 2002, attached certain properties under Section 8 of the Act belonging to Mr. AAA alleged to be involved in money laundering. Aggrieved by the order of the AA, Mr. AAA preferred an appeal before the Appellate Tribunal (AT). Subsequently, after proper hearing, an order was passed by the AT upholding the decision of the AA. Aggrieved by the order of the AT, Mr. AAA preferred a further appeal before the Honorable High Court. During the pendency of the appeal before the High Court, unfortunately, Mr. AAA dies. In the light of the provisions of the Prevention of Money Laundering Act, 2002 :

(i) What is the time limit for preferring an appeal before the High Court against the

order of the AT ?

(ii) By how many days an extension of time can be sought if the appellant was prevented by sufficient cause from filing the appeal within the said period ?

(iii) On the death of Mr. AAA can the appeal be further continued in the High Court? If so, by whom?

(iv) What will be the position if Mr. AAA dies before appeal has been preferred in the Honorable High Court ?

(v) What shall be the jurisdiction of the High Court, if the Central Government is the aggrieved party? ***(6 Marks)***

Answer

(A) (i) As per the facts, a company is registered in Moscow, Russia and has installed its main server in Moscow for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that this company has a place of business in India through electronic mode and is conducting business activity in India. Hence, the above company is a foreign company by taking into account the provisions of Section 2(42) of the Companies Act, 2013 read with the Companies (Registration of Foreign Companies) Rules, 2014.

(ii) In this case, a company is incorporated outside India and employs agents in India but does not have a place of business in India. As per section 2(42) of the Companies Act, 2013, foreign company means any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode. Since, the company though employed agent in India but have no place of business in India, so it cannot be termed as foreign company.

(iii) In the given situation, a company is registered in Australia. It has authorised Mr. X in India to source customers and enter into contract on behalf of the company. Thus, it can be said that this company has both place of business in India through an agent, physically or through electronic mode; and is conducting business activity in India. Hence, this company is a foreign company as per the Companies Act, 2013.

(iv) In the given situation, a company is registered in Mauritius. However, it does not have a place of business in India whether by itself or through an agent, physically or through electronic mode; and does not conduct any business activity in India in any other manner. Mere holding of board meetings and executing business models, financial strategies and important decisions in India cannot be termed as conducting business activity in India. Hence, the above company is not a foreign company as per the Companies Act, 2013.

(B) Phil Health Systems Incorporated (PHSI), a foreign company, is registered outside India and has a place of business in India. As it has prepared financial statements pertaining to the Indian business operations, it reflects conducts of business activity in India. Therefore, provisions related to companies incorporated outside India shall be applicable to it. Following are the answer in line with said nature of the company:

(i) According to the Companies (Registration of Foreign Companies) Rules, 2014, PHSI shall get its accounts, pertaining to the Indian business operations, audited by a practicing Chartered Accountant in India or a Firm or Limited Liability Partnership of practicing Chartered Accountants.

(ii) The audited financial statements of Indian business operations of PHSI shall be delivered to the Registrar within a period of six months of the close of the financial year of the foreign company to which the documents relate i.e., latest by 30th September 2020.

Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months i.e. latest by 31st December 2020.

(iii) According to Section 393 of the Companies Act, 2013, any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013 (chapter XXII deals with 'Companies incorporated Outside India'), shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof.

In the instant case, non-filing of financial statements by PHSI shall not invalidate the contracts entered by Indian companies with PHSI.

However, PHSI shall not be entitled to bring in any suit, claim any set off, make any counter claim or institute any legal proceeding in respect of any such contract until the company has filed the financial statements.

(iv) According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year i.e. by 30th May 2020, to the Registrar containing the particulars as they stood on the close of the financial year.

(C) **(i)** According to Section 42 of the Prevention of Money Laundering Act, 2002, a person aggrieved by any order of the Appellate Tribunal can file an appeal to the High Court within 60 days from the date of communication of the order on question of law/fact.

(ii) The High Court, if satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, it can allow filing of appeal within a further period not exceeding sixty days.

(iii) On the death of Mr. AAA, the appeal filed with High Court can be continued even after the death of Mr. AAA by legal representatives of Mr. AAA. [Section 72(2)]

(iv) In case Mr. AAA dies before filing an appeal with High Court, it shall be lawful for the legal representative of Mr. AAA to prefer an appeal with High Court. [Section 72(2)]

(v) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain shall be the jurisdiction. [Section 42]

Question 4

(A) Securities and Exchange Board of India (SEBI) in the interest of trade has amended the bye-laws of the ROS Stock Exchange, by written order, specifying the reasons there for, ordered for amendment of the bye-laws of ROS Stock Exchange Limited immediately. Aggrieved of the said order of the SEBI, ROS Stock Exchange Limited seeks your advice whether the act of the SEBI is tenable since such amendment was neither published in the Official Gazette of India nor in the Official Gazette of the state in which the Stock Exchange is situated. Referring to and analyzing the relevant provisions of the Securities Contract (Regulation) Act, 1956, advise the Stock Exchange. ***(4 Marks)***

(B) Grow Well Limited, a public company (not a Section 8 Company) has recently been listed. The promoters of the company are individuals only. It has 12 directors in its Board. The company approached you seeking your advice regarding the following as per the circumstances stated below.

(i) What should be the optimum combination of executive and non-executive directors?

(ii) What should be the minimum number of independent directors in case the chairperson of the board of directors is a non-executive director?

(iii) What should be the minimum number of independent directors in case the company does not have a regular non-executive chairperson ?

(iv) What should be the minimum number of independent directors in case where the regular non-executive chairperson is a promoter of Grow Well Limited or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors?

Referring to the relevant regulation of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, advise the company on the above matters. ***(4 Marks)***

(C) Bharat Sevak, an NGO granted a certificate of registration to receive foreign contribution in terms of the provisions of the Foreign Contribution (Regulation) Act, 2010. The organization intends to invest some of the contribution amount in some mutual funds, which is projected to give good results and thereby strengthening the financial position of the organization. Bharat Sevak is also planning to defray around 65% of the amount of

foreign contribution received towards administrative expenses. Advise the organization in the light of the provisions of the Foreign Contribution (Regulation) Act, 2010, whether it can give effect to the above two proposals. ***(3 Marks)***

(D) By virtue of the arbitration agreement between Mr. C and Mr. P, a matter between them which could not be resolved smoothly, was referred to the arbitrator tribunal having three arbitrators. Two among the arbitrators were of the opinion that Mr. C has to pay a compensation of ₹ 2 crore to Mr. P. The third arbitrator was of the opinion that Mr. P is not eligible to get any compensation from Mr. C. The award was then written and signed by the first two arbitrators, while the third arbitrator refused to sign. The fact that the third arbitrator refused to sign and the reason behind that was stated in the award. Mr. C contended that since all the arbitrators did not sign, the award is invalid. In the light of the provisions of the Arbitration and Conciliation Act, 1996, decide, whether the contention of Mr. C is tenable? ***(3 Marks)***

Answer

(A) As per the provisions of section 10(1) of the Securities Contract (Regulation) Act, 1956(SCRA), the Securities and Exchange Board of India(SEBI), may either on a request in writing received by it in this behalf from the governing body of a recognized stock exchange or on its own motion, if it is satisfied after consultation with the governing body of the stock exchange that it is necessary or expedient so to do and after recording its reasons for so doing, make bye laws for all or any of the matters specified in section 9 or amend any bye laws made by such stock exchange under that section.

As per provisions of section 10(2) of SCRA, where in pursuance of this section any bye laws have been made or amended, the bye laws so made or amended shall be published in the Gazette of India and also in the official Gazette of the state in which the principal office of the recognized stock exchange is situate and on the publication thereof in the Gazette of India, the bye laws so made or amended shall have effect as if they had been made or amended by the recognized stock exchange concerned.

As per the provisions of 10(4) of the SCRA, the making or the amendment or revision of any bye laws under this section shall in all cases be subject to the condition of previous publication:

Provided that if the SEBI is satisfied in any case that in the interest of the trade or in the public interest any bye laws should be made, amended or revised immediately, it may by order in writing specifying the reasons therefor, dispense with the condition of previous publication.

In term of the proviso to section 10(4) as stated above, it can be concluded that the act of the SEBI is valid and accordingly it should be advised to the stock exchange.

(B) Regulation 17(1) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

(i) According to said Regulation, company should have optimum combination of executive and non-executive directors, with not less than 50% of directors comprising of non-executive directors. Hence, in Grow Well Limited, there should be not less than 6 non- executive directors.

(ii) According to said Regulation, where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors of Grow Well Limited shall comprise of independent directors i.e. minimum 4.

(iii) Where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors (i.e., 50%) shall comprise of independent directors i.e. minimum 6.

(iv) Where the regular non-executive chairperson is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, at least half of the board of directors of the listed entity shall consist of independent directors i.e. minimum 6.

(C) Restriction to utilize foreign contribution for administrative purpose [Section 8 of Foreign Contribution (Regulation) Act, 2010 read with Rule 4 of FCR, Rule 2011]

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall—

(a) utilise such contribution for the purposes for which the contribution has been received:

Provided that any foreign contribution or any income arising out of it shall not be used for speculative business;

(b) not defray such sum, exceeding fifty per cent of such contribution, received in a financial year, to meet administrative expenses:

Provided that administrative expenses exceeding fifty per cent of such contribution may be defrayed with prior approval of the Central Government.

(i) In the instant case, Bharat Sevak intends to invest some foreign contribution in mutual fund which is a speculative activity under Rule 4 of FCR, Rule 2011. Thus, Bharat Sevak cannot give effect to this proposal.

(ii) Bharat Sevak is planning to defray around 65% of the amount towards administrative expenses. This proposal is also not valid as it is exceeding 50% of contribution. But this proposal can be given effect if prior approval of Central Government has been taken.

(D) According to Section 31(1)(a) of the Arbitration and Conciliation Act, 1996, it requires that an arbitral award to be in writing and having the signature of majority of the members of the arbitral tribunal. It is not an award unless these two conditions are fulfilled. It is quite possible that a particular arbitrator may not agree with the contents of the award. Therefore, the law only requires majority of the arbitrators to sign. The law however requires the award to note why the signature of an arbitrator was missing.

In the instant case, the arbitral award is written and signed by two arbitrators along with the fact and the reason of refusal to sign by third arbitrator. So, this award is valid.

Hence, the contention of Mr. C that since all the arbitrators did not sign, the award is invalid, is not tenable.

Question 5

(A) In the capacity of an Adjudicating officer, the, Registrar passed an order against IDLE Limited, a listed company, for not following some provisions of the Companies Act, 2013. Being aggrieved of the order of the Adjudicating officer, IDLE Limited proceeded to the Tribunal. The Tribunal after giving both the parties an opportunity of being heard upheld the order of the Adjudicating authority in a modified manner. After lapse of a period of one year and five days, the Tribunal with a view to rectify a mistake apparent from the record, amended the order passed by him earlier, when the mistake was brought to his notice by the Adjudicating officer. IDLE Limited approached you and contended that the stipulated period of 3 months within which the order should be passed by the Tribunal is already over, even the delay period has exceeded the maximum allowed condonation period of 90 days and therefore the order passed by the Tribunal cannot be revised. Referring to and analyzing the relevant provisions of the Companies Act, 2013, advise IDLE Limited whether its contention is tenable. Will your answer differ if IDLE Limited has already preferred an appeal against the original order of the Tribunal before the amendment was made by the Tribunal ? ***(4 Marks)***

(B) After discontinuing business operations for two financial years, the directors and other persons in charge of the management of CDR Limited with the intention of evading some liabilities of the company, made an application to the Registrar for removal of its name. The Registrar scrutinised the documents and allowed the name of the company to be removed from the Registrar of Companies. A group of persons, who had supplied goods to the company and were not paid off, incurred loss as a result of removal of the name of the company and were aggrieved of the above action. They approached you for your advice whether they will succeed to claim their dues from anybody and whether the persons in charge of the management of the company shall be considered as guilty by any means. Referring to the provisions of the Companies Act, 2013, advise them.

(4 Marks)

(C) As at 31st March, 2020, XYZ Limited had the following debts:

Creditors Name	*Nature of Debt*	*Amount (INR in Lakhs)*
A	*Financial Debt*	*200*
B	*Financial Debt*	*250*
C	*Financial Debt (Related Party) - Not Regulated by the Financial Sector Regulator.*	*150*
D	*Operational Debt*	*150*
E	*Operational Debt*	*250*
	Total	*1000*

Due to impact of heavy losses and liquidity crunch, XYZ Limited could not pay the above debts. Since the debts were overdue for a long time, creditor A filed an application with the Adjudicating Authority (NCLT) to initiate a Corporate Insolvency Resolution Process against XYZ Limited and the application was accepted. Stating the provisions of the Insolvency and Bankruptcy Code, 2016 answer the following with reference to the above financial data:

(i) Who will all form part of the Committee of Creditors ('CoC') from the above list of Creditors?

(ii) Whether the above Operational Creditors have a right to vote in CoC Meeting?

(iii) What is the compulsory agenda to be discussed in the first meeting of CoC ?

(iv) What shall be the quorum of the CoC meeting if it is conducted through video conferencing ? ***(6 Marks)***

Answer

(A) As per the section 420 of the Companies Act, 2013, the Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit. The Tribunal may, at any time within 2 years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties. Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

In the given case, though mistake was bought to the notice of the Tribunal by Registrar, but the time period for rectifying any mistake apparent from the record was within the prescribed period of 2 years from the date of order, so contention of IDLE Ltd. stating that the order passed by the Tribunal cannot be revised, is not correct.

Where if, IDLE Limited has already preferred an appeal against the original order of the Tribunal before the amendment was made by the Tribunal, no such amendment shall be

made in respect of such order.

(B) Section 251 of the Companies Act, 2013 deals with the fraudulent application for Removal of Name. Where it is found that an application by a company under sub-section (2) of section 248 has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—

(a) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and

(b) be punishable for fraud in the manner as provided in section 447.

Here, in the given case, directors and other persons in charge of the management of the CDR Limited, made an application to the Registrar for removal of its name from Register of Companies on basis of not carrying on any business or operation for a period of two immediately preceding financial years. According to section 248(2), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application to the registrar. From the given facts, CDR Limited without extinguishing its liabilities against a group of creditors, who were not paid off and incurred loss, applied for removal of name. In light of stated provision, it can be concluded that CDR Limited filed an application for removal of names with the object of evading the liabilities of the company and with the intention to deceive the creditors. Accordingly, creditors will succeed to claim their dues from the directors and other persons who are in charge of the management of the CDR Limited.

(C) **(i)** As per section 21 of the Insolvency and Bankruptcy Code, 2016, the Committee of creditors shall comprise of all financial creditors of a corporate debtor. The Resolution Professional shall identify the financial creditors and constitutes a creditors committee. A related party of the corporate debtor cannot form part of the committee of creditors. In the given case, A & B will form CoC.

(ii) The directors, partners and operational creditor or representative of operational creditors do not have right to vote in the meeting of Committee of Creditors, however, they may attend the meetings of Committee of Creditors. D & E, operational creditors will not have a right to vote in CoC meeting.

(iii) As per section 22 of the Insolvency and Bankruptcy Code, 2016, Committee of Creditors in its first Meeting by majority (not less than 66% of voting shares) appoint Interim Resolution Professional or any other Insolvency Professional to act as Resolution Professional.

(iv) Section 21 of the Insolvency and Bankruptcy Code, 2016 provides of quorum for the meeting of committee of creditors. A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means.

Question 6

(A) Mrs. Anjana is a director of Unique Ltd., a professionally managed, profit making, dividend paying Company. The said company is having sufficient liquid funds and are remaining idle as of now. With a view to deploy the idle funds, the Company proposes to provide either loans or invest in the shares of other companies or both. Considering this the Board of Directors delegate the powers to the Managing Director to invest upto 15 of the paid-up capital without passing a special resolution.

In the light of Companies Act, 2013 analyze whether the action of board is correct?

(OR)

Ms. Jai Shvitha is a qualified Chartered Accountant and is known for her in-depth knowledge of Corporate and Economic Laws. She is a Woman Director in PQR Ltd. Due to her tight pre-occupation, she could not attend any Board Meetings of the Company held for a period of 12 months though she has taken leave of absence. Despite the fact that though under Section 167(1)(b) of the Companies Act, 2013 her office of directorship gets vacated, nevertheless, due to her professional competency:

(i) The Board of PQR Ltd. wants to keep Ms. Jai Shvitha's Directorship in the Company and hence proposes to waive the event of absence and/or condone her absence from attending Board meetings.

(ii) Ms. Jai Shvitha also wants to keep the Directorship in PQR Ltd. In the light of the relevant provisions of the Companies Act, 2013, analyse the above situations and advise the Board on the course of action that they can adopt. ***(4 Marks)***

(B) There are 7 directors in BUI Limited. A resolution (relating to opening of a branch office of the company in a place outside the state where the registered office is situated) in draft together with necessary papers were circulated among the directors seeking their approval by circulation. Four directors from among total seven directors approved the proposal. Three directors, who did not approve the proposal, opposed the validity of the proposal on the following grounds:

(i) That the resolution was circulated bye-mail and not by hand delivery or post or courier as per the provisions of sub-section (1) of Section 175 of the Companies Act, 2013; and

(ii) Secondly, that more than l/3rd of the number of directors now require that the resolution must be decided at a meeting of the Board of Directors and not by circulation.

Referring to and analyzing the relevant provisions of the Companies Act, 2013 and Rules made there under, decide, whether the contention of the three directors is tenable.

(4 Marks)

(C) SSG Bank Limited has recently started its operations. The bank approached you for your advice regarding the maintenance of records as a reporting entity in terms of the provisions of the Prevention of Money Laundering Act, 2002. Referring to and analyzing the relevant provisions of the Prevention of Money Laundering Act, 2002, advice the Bank. ***(3 Marks)***

(D) Omega Limited is undergoing a Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 (IBC Code, 2016). Mr. Ravi was appointed as the Resolution Professional. On perusal of the books of accounts of Omega Limited, Mr. Ravi noted a few undervalued transactions had taken place during a period of six months preceding the insolvency commencement date. However, despite having sufficient information, he did not report such transactions to the Adjudicating Authority. Now, the members of Corporate Debtors propose to make an application to the Adjudicating Authority to report the undervalued transactions. Referring to the provisions of IBC Code, 2016, answer the following :-

(i) Whether the members of Corporate Debtors have a legal right to do so?

(ii) What orders the Adjudicating Authority can pass In such a situation? ***(3 Marks)***

Answer

(A) As per section 186(2) of the Companies Act, 2013, no company shall directly or indirectly—

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more.

According to section 186(5) of the Companies Act, 2013, no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where term loan is subsisting, is obtained.

Thus, a unanimous resolution of the board is required. The section 186 does not provide for delegation.

Hence, the proposed delegation of power to the managing director to invest surplus funds of the company in the shares of some other companies is not correct.

OR

Section 167 of the Companies Act, 2013 contains provisions detailing out as to when the office of a director shall become vacant. As soon as, any such event occurs, the director is required to demit the office of director of the company. According to Section 167 (1), the office of a director shall become vacant in case where he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board.

In the light of the stated provision:

(1) Ms. Jai Shvitha is required to vacate the office of director in PQR Limited. The proposal of Board of PQR Limited to waive the event of absence or condone her absence from attending meeting is not permissible.

(2) Ms. Jai Shvitha desires to keep the directorship in PQR Limited is also not tenable. However, the board is advised to co-opt her as an additional director in the subsequent board meeting as there is no prohibition in the Act for such co-option and reappointment.

(B) As per section 175 of the Companies Act, 2013, no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014, provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

Provided that, not less than one-third of the total number of directors of the company for the time being require, that any resolution under circulation must be decided at a meeting of the Board.

In light of the stated provision, following are answers to the proposals on the basis of given ground-

(i) Contention of three directors with respect to opposing of resolution passed by email, is not valid in terms of stated Rule 5.

(ii) Contention of three directors with respect to that resolution must be decided at a meeting of Board of Directors and not by circulation is not valid as per proviso to section 175(1). The claim to decide the matter in the board meeting after it has been approved is not valid. The proviso stated above requires that they should have insisted before the resolution has been passed that the resolution should be decided at a meeting of the board.

(C) Section 12 of the Prevention of Money Laundering Act, 2002, provides for the obligation of Banking Companies, Financial Institutions and Intermediaries i.e. the reporting entity to maintain records of transactions. SSG Bank Limited have been advised to maintain records in the compliance to said section.

Accordingly, every reporting entity shall –

(i) maintain a record of all transactions, including information relating to transactions covered under point (ii) below, in such manner as to enable it to reconstruct individual transactions. Here records shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

(ii) 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;

(iii) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients. The records here 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.

(D) As per section 47 of the Insolvency and Bankruptcy Code, 2016 where an undervalued transaction has taken place with any person within the period of one year preceding the insolvency commencement date under section 46 of the Code, and the liquidator or the resolution professional has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect.

(i) Yes, in terms of above stated provision, members of corporate debtors have a legal right to file an application to the Adjudicating Authority to report the undervalued transactions.

(ii) The Adjudicating Authority, after examination of the application is satisfied that—

(a) undervalued transactions had occurred; and

(b) liquidator or the resolution professional, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority.

Adjudicating Authority shall pass an order—

(a) restoring the position as it existed before such transactions and reversing the effects.

(b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.