### Securities Law

<table>
<thead>
<tr>
<th>Ch No.</th>
<th>Chapter Name</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Securities Contracts (Regulation) Act, 1956</td>
<td>1</td>
</tr>
<tr>
<td>2A</td>
<td>The Securities and Exchange Board of India Act, 1992</td>
<td>21</td>
</tr>
<tr>
<td>2B</td>
<td>ICDR - (Issue of Capital and Disclosure Requirement), Regulations, 2009</td>
<td>30</td>
</tr>
</tbody>
</table>

### Economic Law

<table>
<thead>
<tr>
<th>Ch No.</th>
<th>Chapter Name</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Foreign Exchange Management Act, 1999</td>
<td>52</td>
</tr>
<tr>
<td>2</td>
<td>The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002</td>
<td>80</td>
</tr>
<tr>
<td>3</td>
<td>Prevention of Money Laundering Act, 2002</td>
<td>88</td>
</tr>
<tr>
<td>4</td>
<td>The Foreign Contribution (Regulation) Act, 2010</td>
<td>95</td>
</tr>
<tr>
<td>5</td>
<td>The Arbitration And Conciliation Act, 1996</td>
<td>98</td>
</tr>
<tr>
<td>6</td>
<td>Overview of Insolvency and Bankruptcy code 2016</td>
<td>100</td>
</tr>
</tbody>
</table>

**Nov 2018 Question Paper**
Question 1

A company Cookies Private Limited has two shareholders, Mr. Rock and Mr. Salt. Mr. Rock decides to sell his part of shares in Cookies Private Limited to another company, Crispy Private Limited for a specified monetary consideration. State how should Mr. Rock proceed to document the transaction so as to make it legally binding on both the parties under the Securities Contract (Regulation) Act, 1956?

Answer

As per the stated facts, Mr. Rock decides to sell his part of the share in other company. So, such an understanding of transfer of the shares of Cookies Private Limited held by Mr. Rock to Crispy Private Limited shall be recorded in Share Purchase Agreement (SPA), which is a legally binding contract, and lists down all the terms and conditions which are relevant to the sale of shares, such as –

i) the exact description of shares, i.e. the number of shares, price per share, premium amount, if any;

ii) the conditions that must be satisfied before the sale takes place;

iii) the date on which the sale will be completed;

iv) the manner in which the transfer will be made;

v) any indemnities or protections available to the parties;

vi) the representations and warranties made by either party; and

vii) the conditions upon which the agreement will terminate.

Question 2

Mr. Vivaan is having 400 shares of Travel Everywhere Limited and the current price of these shares in the market is ₹100. Vivaan’s goal is to sell these shares in 6 months’ time. However, he is worried that the price of these shares could fall considerably, by then. At the same time, Vivaan doesn’t want to sell off these shares today, as he conjectured that the share price might appreciate in the near future. Determine how should Mr. Vivaan protect his security and reduce the risk of loss on the share price under the Securities Contract (Regulation) Act, 1956?

Answer

In this case, Mr. Vivaan may opt for ‘Option’ derivative contract, which is an agreement to buy or sell a set of assets at a specified time in the future for a specified amount. However, it is not obligatory for him to hold the terms of the agreement, since he has an ‘option’ to exercise the contract. For example, if the current market price of the share is ₹100 and he buy an option to sell the shares to Mr. X at ₹200 after three-month, so Vivaan bought a put option.

Now, if after three months, the current price of the shares is ₹210, Mr. Vivaan may opt not to sell the shares to Mr. X and instead sell them in the market, thus making a profit of ₹110. Had the market price of the shares after three months would have been ₹90, Mr. Vivaan would have obliged the option contract and sold those shares to Mr. X, thus making a profit, even though the...
current market price was below the contracted price. Thus, here, the shares of Travel Everywhere Limited is the underlying asset and the option contract is a form of derivative.

**Question 3** *(May 2017)*

Mr. Veer a newly entered investor in the field of securities business seeks your advice on the investments to be made in securities of large Companies for long term purposes. With this object in view, he wants to know the meaning of the following terms commonly used in any stock exchange.

a) Derivative
b) Option in securities
c) Spot delivery contract. Advise suitably.

**Answer**

Mr. Veer, a new investor, desirous of entering investments business in any Stock Exchange, can be advised on different terms commonly used in any Stock Exchange.

a) **Derivative:** Derivative includes—
   i) a security derived from a debt instrument, share, loan whether secured or unsecured risk instrument or contract for differences or any other form of security.
   ii) a contract, which derives its value from the prices or index of prices, of underlying securities.
   iii) Commodity derivatives
   iv) Such other instruments as may be declared by the Central Government to be derivatives

b) **Option in Securities:**

   Option in Securities means a contract for the purchase or sale of a right to buy or sell or a right to buy and sell, securities in future, and includes a teji, a mandi, a tejimandi, a galli, a put, a call or a put and call securities.

c) **Spot Delivery Contract**

   Spot delivery contract means a contract which provides for:
   i) Actual delivery of securities and the payment of a price therefore either on the same day as the Chapter date of the contract or on the next day, the actual period taken for the dispatch of the securities or the remittance of money therefore through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality.
   ii) Transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository.

**Question 4** *(May 2018)*

Explain the meaning of the term "Demutualization" used under the Securities Contracts (Regulation) Act, 1956.

**Answer**

**Meaning of “Demutualisation”**

According to Section 2(ab) of the Securities Contracts (Regulation) Act, 1956, “Demutualisation” means the segregation of ownership and management from the trading rights of the members of
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a recognised stock exchange in accordance with a scheme approved by the Securities and Exchange Board of India.

In simple words, it is a term used to describe the transition from mutual association of exchange members operating on a not-for-profit basis to a limited liability, for-profit company, accountable to shareholders. Essentially, demutualisation separates ownership (and voting right) from the right of access to trading.

**Recognition of Stock Exchange (Section 3-5, Rules 3-7)**

**Question 5**
Rampur Stock Exchange wants to get itself recognized. Explain:

a) Who enjoys the power to recognize stock exchange?

b) What information will have to be provided with the application for recognition?

**Answer**

a) Power to recognize Stock Exchange vests with Central Government. However, Central Government has delegated the powers to SEBI vide its notification No.F.No.1/57/SE/93 dated 13.9.94. (Section 3 of Securities Contracts (Regulation) Act, 1956).

b) Application for recognition must be accompanied with Bye-Laws, Rules, Regulations which must contain specific details on:

1. **Constitution, powers of management and manner of transacting business** by the Governing Body of the Stock Exchange.

2. **Power’s and duties** of the offer bearers of Stock Exchange.

3. **Various classes of Members, qualification of membership and the exclusion, suspension, expulsion and re-admission of members.**

4. The **procedure for registration of Partnerships** as members to stock exchange and rules of nomination of authorized representatives.

   Membership provisions, composition of Board, Powers of Governing Board are defined in the Articles of the Exchange. Rules governing Listing, Trading and Settlement, Penalties and Prohibitions, Disciplinary Actions and Defaults are defined in Bye-Laws of the Exchange.

**Question 6**
Referring to the provisions of the Securities Contracts (Regulation) Act, 1956:

a) Examine the extent to which the Central Government is empowered to suspend business of a recognized Stock Exchange.

b) The Central Government has granted recognition to a Stock Exchange. To what conditions may such a recognition be subject to?

**Answer**

a) **Power of the Central Government to suspend business at a Stock Exchange**: Section 12, Securities Contracts (Regulations) Act, 1956.

If in the opinion of the **Central Government an emergency has arisen and for the purpose of meeting of the emergency the Central Government considers it expedient so to do**, it may,
by Notification in the Official Gazette, for reasons to be set out therein, direct a recognized stock exchange to suspend such of its business for such period **not exceeding 7 days** and subject to such conditions as may be specified in the notification, and if in the opinion of the Central Government the:

i) **interest of the trade** or

ii) **the public interest requires that the period should be extended, may, by like notification extend the said period from time to time.**

Provided that where the period of suspension is to be extended beyond the first period, no notification extending the period of suspension shall be issued unless the Governing Body of the recognized Stock Exchange has been given an opportunity of being head in the matter.

b) **Grant of recognition to stock exchanges** - Conditions: Section 4(2), SCRA, 1956.

The conditions may include, condition relating to:

i) Qualification for Membership of the Stock Exchange.

ii) Manner in which contracts shall be entered into and enforced as between members.

iii) Representation of the Central Government on the Stock Exchange (not exceeding 3 nominated by the Central Government.)

iv) Maintenance of Accounts of members and their audit by Chartered Accountants wherever audit is required by the Central Government.

**Question 7**

Working of City Stock Exchange Association Ltd. is not being carried on by its Governing Board in public interest. On receipt of representations from various Investors and Investors’ Association, the Central Government is thinking to withdraw the recognition granted to the said Stock Exchange. You are required to state the circumstances and procedure for withdrawal of such recognition as per the provisions of Securities Contracts (Regulation) Act, 1956 in this regard. Also state the effect of such withdrawal on the contracts outstanding on the date of withdrawal.

**Answer**

a) The Central Government by virtue of powers as conferred upon it under Section 5 of the Securities Contracts (Regulation) Act, 1956, **may withdraw the recognition after serving due notice on the governing Board of the Stock Exchange.**

b) **Withdrawal however will not affect the validity of contracts enter into before the date of withdrawal of notification** (sub-section 1).

c) Sub-section (2) provides that where the recognized stock exchange has not been corporatized or demutualized or it fails to submit the scheme referred to in sub-section (1) of Section 4B within the specified time therefore or the scheme has been rejected by the Securities Exchange Board of India under sub-section (5) of section 4B, **the recognition granted to such stock exchange** under Section 4, shall, notwithstanding anything to the contrary contained in this Act, **stand withdrawn and the Central Government shall publish by notification in the Official Gazette, such withdrawal of recognition.**

d) Provided **that no such withdrawal shall the affect the validity of any contract entered into or**
made before the date of the notification, and the Securities Exchange Board of India may, after consultation with the stock exchange, make such provisions as it deems fit in the order rejecting the scheme published in the Official Gazette under sub-section (5) of Section 4B.

**Question 8**

*(Nov 2010)*

A stock exchange desirous of taking over another stock exchange, seeks your advice on corporatization. Examining the provisions of the Securities Contracts (Regulation) Act, 1956 and the meaning of the terms ‘corporatization’ and ‘demutualization.’ Advise the stock exchange about the steps to be taken to give effect to the scheme of corporatization.

**Answer**

**Corporatization & Demutualization of Stock Exchanges:**

*Corporatization* means the succession of a recognized stock exchange, being a body of individuals or a society registered under the Societies Registration Act, 1860, by another stock exchange, being a company incorporated for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities carried on by such individuals or society.

*‘Demutualization’ means the segregation of ownership and management from the trading rights of the members* of a recognized stock exchange in accordance with a scheme approved by the SEBI.

**Steps for Corporatization and Demutualization** [Section 4B - Securities Contracts (Regulations) Act, 1956]

1. In accordance with the provisions of the Securities Contracts (Regulation) Act, 1956, as contained in section 4B:

2. All recognized stock exchanges referred to in section 4A shall, within such time as may be specified by the SEBI submit a scheme for corporatization and demutualization for its approval.

3. On receipt of the scheme, the SEBI may, after making such enquiry as may be necessary in this behalf and obtaining such further information, if any, as it may require and if it is satisfied that it would be in the interest of the trade and also in the public interest, approve the scheme with or without modification.

No scheme shall be approved by the SEBI if the issue of shares for a lawful consideration or provision of trading rights in lieu of membership card of the members of a recognized stock exchange or payment of dividends to members has been proposed out of any reserves or assets of that stock exchange.

4. **Where the scheme is approved, the** scheme so approved shall be published immediately by-
   a) The SEBI in the Official Gazette
   b) The recognized Stock Exchange in such two daily newspapers circulating in India, as may be specified by the SEBI, and upon such publication, notwithstanding anything to the contrary contained in this Act or any other law for the time being in force or any agreement, award, judgment, decree or other instrument for the time being in force, the scheme shall have effect and be binding on all persons and authorities including all members, creditors, depositors and employees of the recognized stock exchange and on all persons having any contract, right, power, obligation or liability with, against, over, to, or in connection with, the recognized stock exchange or its members.
5. **Where the SEBI is satisfied that it would** not be in the interest of the trade and also in the public interest to approve the scheme, it may, **by an order**, reject the scheme and **such order of rejection shall be published by it in the Official Gazette. SEBI shall give a reasonable opportunity of being heard to all the persons concerned and the recognized stock exchange concerned before passing an order rejecting the scheme.**

6. **SEBI may, while approving the scheme by an order in writing, restrict** -
   a) The **voting rights of the shareholders** who are stock brokers of the recognized stock exchange.
   b) The **right of shareholders or a stock broker of the recognized stock exchange** to appoint the representatives on the governing board or the stock exchange.

7. The order made by SEBI shall be published in the Official Gazette and on the publication thereof, the order, notwithstanding anything to the contrary contained in: the Companies Act, 1956. Or any other law for the time being in force, have full effect.

8. Every recognized stock exchange, in respect of which the scheme for corporatization or demutualization has been approved shall either by fresh issue of equity shares to the public or in any other manner as may be specified by the regulations made by SEBI, **ensure that at least 51% of its equity share capital is held, within 12 months** from the date of publication of the order by the public other than shareholders having trading rights. The SEBI may, on sufficient cause being shown to it and in the public interest, **extend the said period by another 12 months.**

**Question 9**

Explain the powers, which can be exercised by the Securities and Exchange Board of India under the Securities Contracts (Regulation) Act, 1956, while approving the schemes for corporatization and demutualization submitted by recognized stock exchanges, so that there is segregation of ownership and management from the trading rights of members of such stock exchanges.

**Answer**

**Corporatization and Demutualization – Power of SEBI under SCRA, 1956**

SEBI has been empowered under sub-section (2) of section 4B of Securities Contracts (Regulation) Act, 1956 to approve the scheme of corporatization and demutualization with or without modification. **SEBI can reject the proposed scheme if it is satisfied that it would not be in the interest of the trade and also in the public interest to approve the scheme.** Besides these general powers, **SEBI has got certain specific powers** under section 4B (6). SEBI, while approving the scheme, may, by an order in writing.

**Restrict:**

a) The **voting rights of the shareholders** who are also stock-brokers of the recognized stock exchange.

b) The **right of shareholders** in a stockbroker of the recognized stock exchange **to appoint the representatives** on the governing board of the stock exchange.

c) The **maximum number of representatives** of the stock-broker of the recognized stock exchange to be appointed on the governing board of the stock exchange shall not exceed **1/4th of the total strength** of the governing body.

On receipt of approval of scheme, stock exchange will issue shares to public within 12 months so
that at least 51% equity shares are with public other than shareholders having trading rights. SEBI can extend the period up to another 12 months [Section 4B (8)].

**Question 10**  
*(Nov 2011)*

The Securities and Exchange Board of India, for the purpose of corporatization and demutualization of a recognized stock exchange issued an order that at least fifty one percent of its equity share capital shall be held, within twelve months, by the public other than shareholders having trading rights. Decide whether the said order of the Securities and Exchange Board of India is valid under the provisions of the Securities Contracts (Regulation) Act, 1956 including the time limit of twelve months as stated in the order.

**Answer:**

**Corporatisation and demutualization:**

- According to sub section (8) of Section 4B of the Securities Contracts (Regulation) Act, 1956, every recognised stock exchange, in respect of which the scheme for corporatisation or demutualisation has been approved shall, either by fresh issue of equity shares to the public or in any other manner as may be specified by the regulations made by the Securities and Exchange Board of India, ensure that at least fifty-one per cent of its equity share capital is held, within twelve months from the date of publication of the order under sub-section (7) of the said section by the public other than shareholders having trading rights.

- However the Securities and Exchange Board of India may, on sufficient cause being shown to it and in the public interest, extend the said period by another twelve months.

**Power of CG to call for periodical returns or direct enquiries to be made (Sec. 6)**

**Question 11**  
*(May 2013)*

The Securities and Exchange Board of India received serious complaints against Mr. Satyanarayan, a member of Mavli Stock Exchange. State as to what powers can be exercised by the Securities and Exchange Board of India to make enquiries and to take action in this matter, under the provisions of the Securities Contracts (Regulation) Act, 1956?

**Answer:**

**Disciplinary action against members of Stock Exchange:** SEBI can exercise the following powers under Securities Contracts (Regulation) Act, 1956 on receipt of serious complaints against the affairs of Mr. Satyanarayan, a member of Mavli Stock Exchange.

- SEBI may, if it is satisfied that it is in the interest of the trade or in the public interest, by order in writing call upon the member of the stock exchange to furnish in writing information or explanation in respect of the matter under inquiry [Section 6(3)(a)].

- SEBI instead of calling for information, may either appoint one or more persons to make an enquiry or direct the governing body of stock exchange to make inquiry and submit its report to SEBI [Section 6(3)(b)].

In case of adverse findings, SEBI can direct Mavli Stock Exchange to take disciplinary action against Mr. Satyanarayan, such as: fine, expulsion from membership, suspension from membership for a specified period and any other penalty of a like nature not involving the payment of money. Bye-laws of the stock exchange usually provide for such punishment [Section 9(3)(b)]. Mavli Stock Exchange is under obligation to take the action as directed.
**Question 12**

In Public interest, HEM Stock Exchange Limited was issued an order by the Stock Exchange Board of India to produce certain information and explanation relating to its operation in writing. The management of the Stock exchange were reluctant to part with such information with SEBI and approached you to seek your advice in the following matters:

i) Duty of HEM Stock Exchange Limited to furnish periodic returns to SEBI;

ii) Power of SEBI to ask for the information asked as stated above, over and above the periodic returns;

iii) Period for which Stock Exchange is required to maintain the books of account which may be inspected by SEBI;

iv) Duty of Stock Exchange and persons dealing with the Stock Exchange with regard to the information sought for by SEBI.

Advice them referring to the relevant provisions of the Securities Contracts (Regulation) Act, 1956.

**Answer:**

**Powers of SEBI to call for periodical returns, etc.**

i) As per Sec 6(1) of the Securities Contracts (Regulation) Act, 1956, every recognized stock exchange shall furnish to the SEBI such periodical return relating to its affairs as may be prescribed. These Returns contain information on current affairs of the Exchange including Volume and Value of transactions, short deliveries, important decisions taken by Board etc.

ii) As per Sec 6(3) of the Securities Contracts (Regulation) Act, 1956, SEBI may call for information and explanation from member.

iii) As per Sec 6(2) of the Securities Contract (Regulation) Act, 1956, every recognized stock exchange and every member thereof shall maintain and preserve for such periods not exceeding 5 years such books of account as prescribed and these books may be inspected by SEBI at any point of time.

iv) As per Sec 6(4) of the Securities contracts (Regulation) Act, 1956, every Director, Manager, Secretary or Officer of Exchange; every member of such Stock Exchange; if the member of Stock Exchange is a firm, every partner, manager, secretary or other officer of the firm and every other person or body of persons who has had dealings in the course of business with any of the persons mentioned above whether directly or indirectly, is bound to provide information to Enquiry officer or SEBI representative who are looking into the affairs of the Exchange.

**Question 13**

PQR Ltd. is holding 33% of the paid up equity capital of Koya Stock Exchange. The company appoints MNL Ltd. as its proxy who is not a member of the Koya Stock Exchange, to attend and vote at the meeting of the stock exchange. Examine whether the Koya Stock Exchange can restrict the appointment of MNL Ltd. as proxy for PQR Ltd. and further restrict, the voting rights of PQR Ltd. in the Koya Stock Exchange.

**Answer:**

**Miscellaneous Powers of Stock exchanges, C.G. and SEBI (Sec 7A – Sec 12A)**
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Provision:
Section 7(a) of the Securities (Contracts) Regulation Act, 1956 provides that a recognized stock exchange is empowered to amend rules to provide for all or any of the following matters:

a) **Restriction of voting right to members only.**

b) **Regulation of voting rights** by specifying that each member is entitled to one vote only irrespective of number of shares held.

c) **Restriction on right of members to appoint proxy.**

Conclusion:

i) As such Koya Stock Exchange can restrict the appointment of MNL Ltd., as proxy, if rules of the exchange so provide. If it is not so provided, rules may be amended and after getting approval of the Central Government regarding amendment, it can restrict appointment of proxies.

ii) Koya Stock Exchange can also restrict the voting rights of PQR Ltd. if rules of the exchange so provide. If it is not so provided, rules maybe amended and after getting approval of Central Government regarding amendment, it can restrict the voting rights of PQR Ltd appointment of proxies.

**Question 14**

The management of Rampur Stock Exchange desires to transfer its duties and functions to a clearing corporation. Advise the management of the said stock exchange about the extent of control which may be exercised by the clearing corporation under the Securities Contracts (Regulation) Act, 1956.

**Answer:**

1) A recognized stock exchange may, with the prior approval of the Securities and Exchange Board of India, transfer the duties and functions of a clearing house to a clearing corporation being a company incorporated under the Companies Act, 1956, for the purpose of -

   a) the periodical settlement of contracts and differences there under;

   b) the delivery of, and payment for, securities;

   c) any other matter incidental to, or connected with, such transfer

2) Every clearing corporation shall, for the purpose of transfer of the duties and functions of a clearing house to a clearing corporation referred to in sub-section (1) make by-laws and submit the same to the Securities and Exchange Board of India for its approval.

3) The securities and Exchange Board of India may, on being satisfied that it is in the interest of the trade and also in the public interest to transfer the duties and functions of a clearing house to a clearing corporation, grant approval to the by-laws submitted to it under sub-section (2) and approve transfer of the duties and functions of a clearing house to a clearing corporation referred to in sub-section (1).

4) The provision of section 4, 5, 6, 7, 8, 9, 10, 11 and 12 shall, as far as may be, apply to a clearing corporation referred to in sub-section (1) as they apply in relation to a recognized stock exchange.
A recognized stock exchange proposes to make bye-laws for the regulation and control of contracts relating to the purchase and sale of securities. State the legal requirements under the Securities Contracts (Regulation) Act, 1956 to give effect to the proposal. Explain the powers of the Securities and Exchange Board of India to amend the bye-laws of a recognized stock exchange.

**Answer:**

**Power of Stock Exchange to make bye-laws:** Any recognized stock exchange may make bye-laws for the regulation and control of contracts relating to the purchase and sale of securities by complying with the requirements under section 9(1) of the Securities Contracts (Regulation) Act, 1956.

The bye-laws made by the stock exchange are subject to the previous approval of the Securities and Exchange Board of India.

**The bye-laws made under this section may**

Specify the bye-laws, the contravention of which shall make a contract void under sub-section of section 14 of the said Act and provide that the contravention of any of the bye-laws shall render the member concerned liable to

i) punishments, namely, fine or expulsion from membership or

ii) suspension from membership or

iii) any other penalty of a like nature not involving the payment of money [Sub-section (3)].

Any bye-laws made under this section shall be subject to such conditions in regard to previous publication as may be prescribed, and, when approved by the SEBI, 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 situated, and shall have effect as from the date of its publication in the Gazette of India [Sub-section (4)].

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 immediately, it may, by order in writing specifying the reasons therefore, dispense with the condition of previous publication.

**Power of SEBI to amend bye-laws:**

a) Section 10 of the Securities Contracts (Regulation) Act, 1956 empowers the SEBI to amend bye-laws of a recognized stock exchange.

b) 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 amend any bye-laws made by such stock exchange.

c) SEBI will have to be satisfied, after consultation with the governing body of the stock exchange that it is necessary or expedient to amend the bye-laws and record its reasons also. Amended bye-laws should be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the stock exchange is situate.

d) If the stock exchange has any objection to the amendments made by the SEBI, it may, within 2 months apply to the SEBI for revision.
**Question 16**

SEBI is of the opinion that in the interest of investors, it is desirable to amend the rules of RSP Stock Exchange prohibiting the appointment of the broker-member as President of the Stock Exchange. Explain briefly with reference to the provisions of Securities Contracts (Regulation) Act, 1956, whether it is possible for SEBI to amend the rules of the Stock Exchange, if the Stock Exchange does not change the rules.

**Answer:**

a) In accordance with the provisions of section 8 of Securities Contracts (Regulation) Act, 1956, the Central Government is empowered to issue:

b) written order directing all or any of the recognized stock exchange to make any rules or to amend any rules already made within 2 months from the date of the order in respect of matters specified in section 3(2) of the said Act.

c) One of the matters specified in the said section 3(2) is the governing body of stock exchange, its constitution and powers of management and the manner in which its business is to be transacted.

d) Hence, the Central Government is empowered to direct the stock exchange in respect of prohibition on broker-member being appointed as President of the stock exchange. According to notification issued by Central Government under section 29A of the said Act, this power is also exercisable by SEBI.

e) If any recognized stock exchange (SE) fails or neglects to comply with any order made by SEBI within 2 months, SEBI may itself make the rules or amend the rules made by stock exchange

   i) Either in the form proposed in the order or

   ii) With such modification thereof as may be agreed to between SEBI and the stock exchange.

The amended rules are required to be notified in the Gazette of India and in the Gazette of the State where the principal office of the stock exchange is situated. After such publication, the rules shall be valid as if the same were made or amended by the recognized stock exchange itself.

Accordingly, of the above provisions of Securities Contracts (Regulation) Act, 1956, SEBI can issue directions to RSP Stock Exchange to amend the rules and if the said stock exchange does not comply with the above, SEBI can amend the rules on its own.

**Question 17**

Describe the provisions of the Securities Contracts (Regulation) Act, 1956 regarding the powers of the Central Government to supersede the Governing Body of a recognized Stock Exchange and the consequences of such supersession.

**Answer:**

a) According to the provisions of section 11 of the Securities Contracts (Regulation) Act, 1956, where the Central Government is of opinion that the governing body of any recognized stock exchange should be superseded, then notwithstanding anything contained in any other law for the time being in force,
b) The **Central Government may serve on the governing body a written notice** that the Central Government is considering the supersession of the governing body for the reasons specified in the notice.

c) **After giving an opportunity to the governing body** of such Stock Exchange to be heard in the matter, the Central Government may, **by notification in the Official Gazette, declare the governing body of such Stock Exchange to be superseded.**

d) The Central Government **may appoint any person or persons to exercise and perform all the powers and duties** of the governing body.

e) If more than one person is so appointed, one of them may be the Chairman and another as the Vice-Chairman.

f) **Such person or persons shall hold office for such period as may be specified in the Notification** and the Central Government may vary such period by way of another Notification.

On the publication of the notification in the Official Gazette, **following are the consequences:**

i) **The members** of the governing body of such Stock Exchange **cease to hold office** as such members on and from the date of notification.

ii) The **person or persons appointed by the Central Government may exercise and perform all the powers and duties** of the governing body which has been so superseded.

The **property of the Stock Exchange** as deemed necessary and so specified in writing by such person or persons to carry on the business of the Stock Exchange **shall vest in such person or persons.**

**Question 18**

Complaints of unethical practices have been received against members of the Governing Body of a Recognized Stock Exchange. Examine whether the Government has any power to take action against the Governing Body of the said exchange.

**Answer:**

**Section 11**, of the Securities Contracts (Regulation) Act, 1956 deals with the powers of the Central Government to **supersede the Governing body of a recognized Stock Exchange.**

The Central Government may serve on a governing body a written notice **specifying the reasons and after giving an opportunity to the governing body to be heard**, may, by notification in the Official Gazette, declare the governing body as superseded. The Central Government after superseding the governing body may appoint any person or persons to exercise and perform all the powers and duties of governing body. **It may also appoint one of such nominees as Chairman.**

**Question 19** *(Nov 2014)*

Complaints of unethical practices have been received against members of a recognized Stock Exchange by the Government. Examine whether the government has any power to suspend the business of such a recognized Stock Exchange.

**Answer:**
Section 12 of the Securities Contracts (Regulation) Act, 1956 deals with the powers of the Central Government to suspend business of recognized Stock Exchange. Central Government, if it deems fit, is vested with power to suspend business for a period not exceeding 7 days by notification in Gazette. Central Government also have power to extend this period by a like notification. However, such power can be exercised by the Central Government, if it is of opinion that an emergency has arisen and it is expedient so to do.

Question 20

RES Stock Exchange Limited, a recognized stock exchange is involved in training of shares of Son Limited. The SEBI on receiving complaint from a group of investors enquired and found that trading of shares of Son Limited is being conducted in manner detrimental to the interest of the general investors. In order to curb the same, the SEBI wants to issue some directions to RSE stock Exchange Limited. Referring to the provisions of the Securities Contract (Regulation), Act, 1956, discuss whether the SEBI has power to issue such directions. Can such directions be given to an individual who made some profit in any transaction in contravention of any provision of the Securities Contracts (Regulation) Act, 1956, or regulations made thereunder?

Answer:

Powers to issue direction

As per Sec.12A of the Securities Contract (Regulation) Act, 1956, where the SEBI is satisfied after an enquiry, that it is necessary-

a) in the interest of investors, or orderly development of securities market; or

b) to prevent the affairs of any recognized stock exchange, or, clearing corporation, or such other agency or person, providing trading or clearing or settlement facility in respect of securities, being conducted in a manner detrimental to the interests of investors or securities market; or

c) to secure the proper management of any such stock exchange or clearing corporation or agency or person, referred to in clause (b),

It may issue such directions,-

i) to any stock exchange or clearing corporation or agency or person referred to in clause (b) or any person or class of persons associated with the securities market.

ii) to any company whose securities are listed or proposed to be listed in a recognized stock exchange,

as may be appropriate in the interest of investors in securities and the securities market.

Conclusion: SEBI may issue such direction to RSE Stock Exchange Ltd.

Explanation given in the section clarifies that power to issue directions under Sec.12A shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or less averted by such contravention.

So, accordingly the direction can be given to an individual who had made some profit in any transaction in contravention of any provision of the Securities Contract (Regulation) Act, 1956.
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Question 21

Delhi Stock Exchange wants to establish additional Trading Floor. Explain briefly the meaning of and procedure for establishing additional Trading Floor.

Answer:

According to section 13A of Securities Contracts (Regulation) Act 1956, a Stock Exchange may establish additional trading floor with the prior approval of the Securities Exchange Board of India in accordance with the terms and conditions stipulated by the said Board.

For the purpose of this section 'Additional Trading Floor' means a trading ring or trading facility offered by a recognized stock exchange outside its area of operation to enable the investor to buy and sell securities through such trading floor under the regulatory framework of that Stock Exchange.

Question 22

(May 2011)

M/s AB & Company, a member of a recognized stock exchange proposes to buy and sell shares of a particular company on behalf of investors as well as on their own account. They seek your advice as to restrictions, if any, under Securities Contracts (Regulation) Act, 1956 for dealing in securities on their own account. Advise.

Answer:

Members not to act as principals in certain circumstances: Members of stock exchange normally carry out transactions on behalf of investors and hence principal agent relationship exists.

A Member can enter into transaction as principal with another member of the Exchange only. If he desires to enter into contract as principal with a non-member, then he has to get written consent from such person to act as principal.

Contract note should indicate that he is acting as principal [Section 15, Securities Contracts (Regulation) Act, 1956].

Where the member has secured the consent of such person otherwise than in writing he shall secure written confirmation by such person or such consent within 3 days from the date of the contract [Proviso to Section 15].

Spot delivery contracts are outside the preview of section 15 (Section 18).

M/s A & Co., stock broker must bear in mind the above restrictions while entering into any transaction as principal with an on-member.

Question 23

The shares of MLM Ltd. were listed in Cochin Stock Exchange. The stock exchange delists the shares of the company. The aggrieved company approaches you to know the remedy available to the company. Give your suggestion to the company keeping in view the provision of the Securities Contracts (Regulation) Act, 1956.
Answer:

Section 21A of Securities Contracts (Regulation) Act, 1956 contains the provision relating to delisting of securities. As per this section:

a) A recognized Stock Exchange (SE) may delist the securities after recording reasons therefore from any recognized stock exchange on any ground or grounds as may be prescribed under this Act.

b) The Securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

c) A listed company may file an appeal before the Securities Appellate Tribunal (SAT) against the decision of the recognized stock exchange delisting the securities within 15 days from the date of the decision of recognized stock exchange delisting the securities.

d) Securities Appellate Tribunal may, if it is satisfied that the company was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period of not exceeding 1 month.

Conclusion:
So here, the company may make an appeal to the Securities Appellate Tribunal against the delisting within 15 days or such extended period not exceeding 1 month after showing sufficient cause of not filing within 15 days.

Question 24

DVJ Ltd., a company incorporated under Companies Act, 1956 applies to Bombay Stock Exchange for listing of its shares. The Stock Exchange refuses to grant listing without assigning any reasons for refusal. Company seeks your advice on the options available to it against the Stock Exchange and wants to move the Court. Examining the provisions of the Securities Contract (Regulation) Act, Advise the company.

Answer:

Right to appeal to Securities Appellate Tribunal (SAT) against refusal of stock exchange to list securities of public companies:

As per Sec.22A of the Securities Contracts (Regulation) Act,1956, where a recognized stock exchange, acting in pursuance of any power given to it by its bye-laws, refuses to list the securities of any company, the company shall been entitled to be furnished with reasons for such refusal, and may:

a) Within 15 days from date on which the reasons for such refusal are furnished to it, or

b) Where the Stock Exchange has omitted or failed to dispose of, within the time specified, the application for permission for the shares or debentures to be dealt with on the Stock Exchange, within 15 days from the date of expiry of the specified time or within such further period, not exceeding 1 month, as the SAT may, on sufficient cause being shown, allow, appeal to SAT having jurisdiction in the matter against such refusal, omission and failure.

Conclusion: DVJ Ltd. May lodged an appeal with Securities Appellate Tribunal within 15 days.
Securities of Herbal Products Limited were listed in Madras Stock Exchange, which is recognized Stock Exchange. The company has incurred losses during the preceding three consecutive years and it has also negative net worth. On having such information, Madras Stock Exchange decided to delist the Securities of the company.

Decide the validity of the decision and explain the provisions of Securities Contract (Regulation) Act, 1956 along with the grounds made under the Securities Contract (Regulation) Rules regarding delisting of securities.

Answer:

Delisting of securities

- As per Sec 21A of Securities Contracts (Regulation) Act, 1956, a recognized stock exchange may delist the securities, after recording the reasons thereof, on any of the grounds as may be prescribed. However, securities shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

- As per Rule 21 of Securities Contracts (Regulation) Rules, 1957, a recognized stock exchange may delist any securities listed thereon on any of the following grounds.
  
  a) the company has incurred losses during the preceding 3 consecutive years and it has negative net worth

  b) trading in the securities of the company has remained suspended for a period of more than 6 months;

  c) the securities of the company has remained infrequently traded during the preceding 3 years;

  d) the company or any of its promoter or any of its directors has been convicted for failure to comply with any of the provisions of the Act, or SEBI Act, 1992 or the Depositories Act, 1996 or rules, regulations, agreements made thereunder, as the case may be and awarded a penalty of not less than 1 crore or imprisonment of not less than 3 years;

  e) the addresses of the company or any of its promoter or any of its directors, are not known or false addresses have been furnished or the company has changed its registered office in contravention of provisions of the Companies Act, or

  f) Shareholding of the company held by the public has come below the minimum level applicable to the company as per the listing agreement under the Act and the company has failed to raise public holding to the required level within the time specified by the recognized stock exchange

- In the present case, Madras Stock Exchange decided to list the securities of Herbal Products Limited on the ground that the company has incurred losses during the preceding three consecutive years and it has also negative net worth.

Conclusion: Madras Stock Exchange can delist the securities after providing a reasonable opportunity of being heard to the company.

Penalties & Procedures (Sec 23 – Sec 26E)

Question 26

RPS Ltd. got its shares listed with a Stock Exchange. It has been regularly paying the listing fees.
Certain information about share holding pattern etc. was asked by the Stock Exchange, which the company could not supply in the prescribed time. It was then given a further opportunity to furnish the desired information along with supporting document, but in vain, as the company did not maintain any record. What are the penalties leviable against the company under the Securities Contracts (Regulation) Act, 1956 for the failure to furnish the information?

**Answer:**

According to section 23 A of the Securities Contracts (Regulation) Act, 1956, any person who is required under this Act or any rules made thereunder;

- to furnish any information, document, books, returns or report to a recognized stock exchange, fails to furnish the same within the time specified therefore in the listing agreement or conditions or bye-laws of the recognized stock exchange, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less for each such failure;

- to maintain books of account or records, as per the listing agreement or conditions, or bye-laws of a recognized stock exchange and if there is failure to maintain the same, shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.

Therefore, in the given case, RPS Ltd. is liable under section 23A of the Securities Contracts (Regulation) Act, 1956 as it could not supply the certain information asked by the stock exchange and also did not maintain any record.

**Question 27**

(May 2016)

XYZ, a recognized stock exchange fails to comply with certain directions issued by the Securities and Exchange Board of India and the adjudicating officer initiated proceedings for the purpose of imposing penalty. The stock exchange seeks your advice whether it is possible to go for settlement of the proceedings. Advise explaining the relevant provisions of the Securities Contracts (Regulation) Act, 1956?

**Answer:**

Settlement of administrative and civil proceedings [Section 23JA of the Securities Contracts (Regulation) Act, 1956]-

- **Filing of application to the Board** - Notwithstanding anything contained in any other law for the time being in force, any person, against whom any proceedings have been initiated or may be initiated under section 12A or section 23-I, may file an application in writing to the Board proposing for settlement of the proceedings initiated or to be initiated for the alleged defaults.

- **Board may consider for the settlement** - The Board may, after taking into consideration the nature, gravity and impact of defaults, agree to the proposal for settlement, on payment of such sum by the defaulter or on such other terms as may be determined by the Board in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992.
c) Procedure to be followed as prescribed under the SEBI Act- For the purposes of settlement under this section, the procedure as specified by the Board under the Securities and Exchange Board of India Act, 1992 shall apply.

No appeal to an order- No appeal shall lie under section 23L against any order passed by the Board or the adjudicating officer, as the case may be, under this section.

So according to the above provision of the Securities Contracts (Regulation) Act, 1956, XYZ, stock exchange may propose for the settlement of the proceedings.

**Question 28** *(Nov 2012)*

The Securities and Exchange Board of India issued an order against a stock broker to redress the grievances of the investors within the stipulated time. The stock broker failed to do so, which is an offence under the provisions of the Securities Contracts (Regulation) Act, 1956. Decide:

a) Whether the offence committed by the stock broker is compoundable? If so, by whom?

b) Whether this offence can be compounded after institution of proceedings against the stock broker?

**Answer:**

According to Section 23C of the Securities Contracts (Regulation) Act, 1956, if any stock broker or sub-broker or a company whose securities are listed or proposed to be listed in a recognized stock exchange, after having been called upon by the Securities and Exchange Board of India or a recognized stock exchange in writing, to redress the grievances of the investors, fails to redress such grievances within the time stipulated by the Securities and Exchange Board of India or a recognized stock exchange, he or it shall be liable to a penalty:

i) 1 lakh rupees for each day during which such failure continues or

ii) 1 crore rupees,

iii) whichever is less.

**a) Composition of certain offences:**

According to Section 23N of the Act, notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under Securities Contracts (Regulation) Act, 1956,

i) not being an offence punishable with imprisonment only, or

ii) with imprisonment and also with fine,

iii) may either before or after the institution of any proceeding,

**b) Yes this offence can be compounded by a Securities Appellate Tribunal (SAT) or a Court before which such proceedings are pending.**

**Conclusion:**

Thus, in the instant case, offence committed by the stock broker is compoundable as he is punishable with fine only as provided under section 23C.

**Yes, this offence can be compounded** after institution of proceedings against the stockbroker as it is clearly stated under Section 23N.
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Question 29  
(May 2015)

Mr. Gupta has transferred his shares in a listed company in his name to Mr. Patel. Due to his busy schedule, Mr. Patel has failed to get the shares registered in his name before the company declared and paid dividend on those shares.
Examine with reference to the provisions of the Securities Contracts (Regulation) Act, 1956, whether Mr. Gupta is entitled to receive and retain the dividend even though he has transferred his shares before declaration of dividend.

Answer:

Title to dividends: Section 27(1) of the Securities Contracts (Regulation) Act, 1956 provides that a holder of security can legally receive and retain any dividend declared by the company even if he has transferred the security for valuable consideration. However, he (i.e. holder of security who is a transferor) cannot receive or retain the dividend if the transfer deed with all other documents required for transfer is lodged with the company within 15 days of the date on which the dividend became due. The period of 15 days shall be extended as follows:

a) In case of death of the transferee by the actual period taken by his legal representative to establish his claim to the dividend.

b) In the case of loss of the transfer deed by theft or any other cause beyond the control of the transferee, by the actual period taken for the replacement thereof and

c) In case of delay in the lodging of any security and other documents relating to the transfer due to causes connected with the post, by the actual period of delay (Explanation to Section 27(1) of SCRA).

In view of the above, Mr. Gupta is entitled to receive and retain the dividend received by him if the transferee, Mr. Patel has not lodged the transfer deed with the company within 15 days of the date on which dividend became due or the extended period as per explanation to section 27(1). However, section 27(1) will not affect the right of the transferee to enforce his rights, if any against the transferor or any other person, if the company refuses to register the transfer of security in the name of the transferee.

Question 30  
(May 2009)

Industrial Finance Corporation of India, established under the Industrial Finance Corporation Act, 1948 having its registered office at Mumbai issued 8% Redeemable Bonds redeemable after 7 years. These bonds were issued directly to the members of the public and not through mechanism of Stock exchanges.
You are required to state with reference to the provisions of Securities Contracts (Regulation) Act, 1956, whether such direct issue of bonds by the Industrial Finance Corporation of India is not violating the provisions of the said Act.

Answer:

In order to prevent undesirable transactions in securities and to promote healthy stock market, the Securities Contracts (Regulation) Act, 1956 was enacted and all the Stock Exchanges in the country are registered under this Act. Section 73 of the Companies Act, 1956/section 40 of the Companies Act, 2013 states that offer of shares or debentures to public for subscription shall be
made only after the permission of a Stock exchange.

**Section 28(1)** of the Securities Contracts (Regulation) Act, 1956 states that the provisions of this Act shall not apply to the Government, the Reserve Bank of India, any local authority, or corporation set up by a special law or any person who has effected any transaction with or through the agency of any such authority as stated earlier.

As stated in the question Industrial Finance Corporation of India is a corporation set up under the Industrial Finance Corporation Act, 1948. i.e. under a special statute enacted by the Parliament Therefore, this Corporation does not need any permission from a Stock Exchange to issue any Bond or other securities. Accordingly, it has not violated the provisions of the Securities Contracts (Regulation) Act, 1956. The nature and tenure of the Bonds are immaterial.
Ch. 2A – The Securities and Exchange Board of India Act, 1992

**Basics of SEBI Act, 1992**

**Question 1**

Explain briefly the purpose of establishing SEBI.

**Answer:**

The purpose of the SEBI Act is to provide for the establishment of a Board called Securities and Exchange Board of India (SEBI).

The **Preamble to the Act provides for the establishment of a Board to:**

a) **Protect the interests** of investors in securities,

b) **Promote the development** of the securities market,

c) **To regulate the securities market**, and

d) **For matters connected therewith or incidental thereto.**

The Securities and Exchange Board of India (SEBI) was **set up to achieve the following objectives:**

i) **To promote fair dealings** by the issuers of securities and ensure a market place where they can raise funds at a relatively low cost.

ii) To **provide a degree of protection** to the investors and safeguard their rights and interests so that there is a steady flow of savings into the market.

To **regulate and develop a code of conduct and fair practices** by intermediaries like brokers, merchant bankers, etc., with a view to making them competitive and professional.

**Establishment of SEBI**

**Question 2**

On Completion of 60 years of age as on 31st March 2017, Mr. Jain retired as a professor from a University. From 1st April 2017, he was appointed as chairman of the SEBI for a period of 3 years. Under the provisions of the SEBI Act, 1992. Decide whether he can be re-appointed on the same post after expiry of original tenure? Also state whether it could be possible for him to relinquish the office before expiry of his tenure?

**Answer:**

**Appointment of Chairman**

- As per Sec.5 of the SEBI Act, 1992 read with Rule 3 of SEBI (Terms and Condition of Chairman mad Members) Rules, 1992, the Chairman may hold office for period of 3 years subject to the maximum age limit of 65 years and can be re-appointed by the C.G

- In the present case, Mr. Jain retired as professor from university on completion of 60 years of age as on 31st March, 2017 and appointed as Chairman of SEBI from 1st April, 2017 for a period of 3 years.

**Conclusion:** Mr. Jain can be reappointed after expiry of the original tenure of 3 years, but only up to 65 years of age i.e. up to 31st March, 2022 (i.e. only for 2 years)
Right to Relinquish the office: The Chairman shall have the right to relinquish office at any time before the expiry of their tenure by giving a notice of 3 months in writing to the C.G

Question 3

A group of complainants have alleged that Mr. Z, a Member of the Securities and Exchange Board of India (SEBI) has pecuniary interest in some of the cases that came up before the Board and that he misused his position and therefore, he should be removed from his office. The complainants seek your advice. Advise.

Answer:

Provision: Removal of Member of the SEBI (Section 6 of the Securities and Exchange Board of India Act, 1992)

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

a) Is, or at any time has been adjudicated as insolvent;

b) Is of unsound mind and stands so declared by a competent court;

c) Has been convicted of an offence which, in the opinion of the Central Government, involves a moral turpitude has, in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest. Before removing a member, he will be given a reasonable opportunity of being heard in the matter.

Conclusion:

In the present case, a group of complainants have alleged that Mr. Z, a member of the SEBI has pecuniary interest in some of the cases that came up before the Board and he misused his position and therefore, he should be removed from his office.

Here, above complainants may approach the Central Government for removal of Mr. Z, a member of the SEBI and if the Central Government is of the opinion that Mr. Z has so abused his position as to render his continuance in office detrimental to the public interest, the Central Government may remove Mr. Z from his office after giving him a reasonable opportunity of being heard in the matter.

Powers and Functions of SEBI (Sec 11 – Sec 11D)

Question 4

(May 2016)

Securities and Exchange Board of India (SEBI) has undertaken inspection of books of accounts and records of LR 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.

Answer:

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:

a) Suspend the trading of any security in a recognised stock exchange;

b) Restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
c) Suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;

d) Impound and retain the proceeds or securities in respect of any transaction which is under investigation;

Attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

a) 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

b) The rules or the regulations made thereunder shall be allowed to be attached;

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 5**

(May 2011)

Point out the circumstances where under the following powers may be exercised by the Securities and Exchange Board of India:

a) Prohibiting a company from issuing or publishing any document or advertisement soliciting money from public for issue of securities.

b) Pass cease and desist order in relation to any listed company.

What remedies are available to the companies against such orders under the SEBI Act, 1992?

**Answer:**

Orders of SEBI and Remedies: Under sec 11 of the SEBI Act, 1992 the basic duty of the SEBI is to

a) **Protect the interests of investors** in securities

b) **regulate** the securities market.

Section 11A (1)(b) specifically empowers SEBI to prohibit any company from issuing prospectus, any offer document or advertisement soliciting money from the public for the issue of securities by general or special order if such prohibition is necessary for the purpose of protection of investors.

According to section 11D, **SEBI can issue, cease and desist order in respect of any listed company only if SEBI has reasonable grounds** to believe that such company has

a) **Indulged in insider trading** or

b) **Market manipulation.**

Aggrieved companies may appeal against orders of SEBI made under SEBI Act, 1992, rules or regulations to the Securities Appellate Tribunal (SAT) under section 15T of the said Act. Such appeal should be filed **within 45 days from the date on which a copy of the order of SEBI** is received by the company.

If the company is aggrieved by the order of SAT, further appeal against the order of SAT can be made to the **Supreme Court within 60 days** from the date of communication of the order of SAT.
on any question of law arising out of such order.

The appeal lies only on question of law. As far as facts are concerned, decision of the SAT is final. Further section 20A of the said Act bars jurisdiction of Civil Court in respect of orders issued by the SEBI.

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**Question 6**

Mr. Raman, an investor is not satisfied with the dealings of his stock broker who is registered with Delhi Stock Exchange. Mr. Raman approaches you to guide him regarding the avenues available to him for making a complaint against the stock broker under Securities and Exchange Board of India Act, 1992 and also the grounds on which such complaint can be made. You are required to briefly explain the answer to his queries.

**Answer:**

Securities and Exchange Board of India (SEBI) was established for regulating the various aspects of stock market. One of its functions is to register and regulate the stock brokers. In the light of this, Mr. Raman is advised that the complaint against the erring stock broker may be submitted to SEBI.

The grounds on which or the defaults for which complaints may be made to SEBI are as follows:

a) Any failure on the part of the **stock broker to issue contract notes in the form and manner specified by the stock exchange of which the stock broker is a member.**

b) Any failure to deliver any security or any **failure to make payment of the amount due to the investor in the manner within the period specified in the regulations.**

Any collection of charges by way of brokerage which is in excess of the brokerage specified in the regulations.

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**Question 7**

On the complaint of Mr. Kamlesh Gupta, after enquiry SEBI finds that Mr. P. Mehta a Chief Executive Officer of the Company, on the basis of unpublished price sensitive information, has indulged in the trading of the securities of that company. Explain, on the basis of the said finding, what action SEBI can take against Mr. P. Mehra under the Securities and Exchange Board of India Act, 1992.

**Answer:**

Section 15G of the Securities and Exchange Board of India (SEBI) Act, 1992 deals with **penalty for Insider Trading.** According to this, if any insider

a) **either on his own behalf or on behalf of any other person, deals in securities of a body corporate** on any stock exchange on the basis of any unpublished price sensitive information; or

b) **communicates any unpublished price sensitive information** to any person, with or without his request for such information except as required in the ordinary cause of business or under any law, or

c) **counsels or procures for, any other person to deal in any securities** of anybody corporate on the basis of unpublished price sensitive information, shall be liable to a **penalty:**
i) 25 crore rupees
ii) 3 times amount of profits made out of insider trading,
iii) whichever is higher.

As such SEBI can, after following the prescribed procedure, impose a penalty on Mr. P. Mehra.

**Question 8**

What are the defaults for which a stock-broker may be penalized under the provisions of Securities and Exchange Board of India Act, 1992 in respect of his dealings with the investors? State the factors that must be taken into account by the adjudicating officer while determining the quantum of penalty in such cases.

**Answer:**

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

a) **fails to issue contract notes** in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be liable to a penalty not exceeding 5 times the amount for which the contract note was required to be issued by that broker;

b) **fails to deliver any security or fails to make payment of the amount due to the investor** in the manner or within the period specified in the regulations, he shall be liable to a penalty:
   i) 1 lakh rupees for each day during which such failure continues or
   ii) 1 crore rupees,
   iii) whichever is less;

c) **charges an amount of brokerage which is in excess of the brokerage specified** in the regulations, he shall be liable to a penalty:
   i) 1 lakh rupees or
   ii) 5 times amount of brokerage charged in excess of the specified brokerage,
   iii) Whichever is higher.

**Factors for taking into account while action While adjudging quantum of penalty** under section 15J, the adjudicating officer shall have due regard to the following factors:

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

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

iii) The repetitive nature of the default.

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

**Question 9**

SEBI received complaints from some investors alleging that ABC Ltd. and some brokers are indulging in price manipulation in the shares of ABC Ltd. Explain the powers that can be exercised by SEBI under the Securities and Exchange Board of India Act, 1992 in case the allegations are found to be correct.

**Answer:**
Price manipulation in the shares of ABC Ltd. can be considered as fraudulent and unfair trade practices relating to securities market. In this case SEBI may exercise the following powers under section 11(4) of securities and Exchange Board of India Act, 1992.

a) **Suspend the trading** of any security (in this case the securities of ABC Ltd.) in a recognized stock exchange.

b) **Restrain persons** (in this case ABC Ltd.) from accessing the securities market.

It can also **prohibit any person associated with securities market** (i.e. brokers who have indulged in price manipulation) to buy, sell or deal in securities market.

SEBI may issue the above orders for reasons to be recorded in writing. SEBI shall, either before or after passing such orders give an opportunity of hearing to company and brokers concerned (proviso 2 to Section 11(4)) SEBI may also appoint an adjudicating officer who may levy penalty under section 15 HA after holding an enquiry in the prescribed manner. According to section 15HA if any person indulges in fraudulent and unfair trade practices relating to securities, he shall be leviable to a penalty of 25 crores or 3 times the amount of profits made out of such practices, whichever is higher.

**Prohibition on manipulation and deceptive practices:** Further according to section 12A, no person shall directly or indirectly indulge in following (i.e.)

a) **using in manipulative or deceptive device** in connection with purchase, sale or securities listed

b) **Employ any scheme or device to defraud** in connection with dealing in securities which are listed

c) Engage in an act which would operate as **fraud or deceit upon any person** in connection with dealing in securities which are listed.

**Penalty Amount:** SEBI may impose penalty up to 1 crore on any person who fails to comply with any provisions of SEBI Act (Section 15 HB).

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**Establishment, Jurisdiction, Authority and Procedure of SAT (Sec 15K – 15Z)**

**Question 10**

Mr. Clever who is registered as an Intermediary fails to enter into an agreement with his client and hence penalized by SEBI under section 15B of the SEBI Act. Advise Mr. Clever as to what remedies are available to him against the order of SEBI.

**Answer:**

Remedies against SEBI order: Section 15B of the Securities and Exchange Board of India Act, 1992 lays down that if any person, who is registered as an intermediary and is required under this Act or any rules or regulations made there under, to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty:

a) **1 lakh rupees for each day during which such failure continues or**

b) **1 crore rupees, whichever is less.**

Mr. Clever has been penalized under the above mentioned provision.

**Two remedies are available** to Mr. Clever in this matter: -
a) **Appeal to the Securities Appellate Tribunal (SAT):**

Section 15T of the SEBI Act, 1992 provides that **any person aggrieved by an order of the Board** made, on and after the commencement of the Security Laws (Second Amendment) Act, 1999, under this Act or the rules or regulations made there under may **prefer an appeal to a Securities Appellate Tribunal** having jurisdiction in the matter.

Such appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Board is received and it shall be in such form and be accompanied by such fee as may be prescribed.

**What if delay happens?**

The Tribunal may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within the said period.

The Tribunal may, after giving the parties an opportunity of being heard, pass such orders as it thinks fit, confirming, modifying or setting aside the order appealed against.

b) **Appeal to the Supreme Court (SC):**

Section 15Z of the SEBI Act, 1992 provides that any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order to him on any question or fact or law arising out of such order.

**What if delay happens?**

The Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

**Question 11**

Mr. DB is a member of RPA Ltd. He obtains an order against the company for redressal of his grievances against the company. But the company fails to redress the grievances of DB within the time fixed by the SEBI. The Board thereafter imposed penalty upon the company u/s 15C of the SEBI Act. RPL Ltd. seeks your advice whether it has any remedy against the order of SEBI.

**Advise**

**Answer:**

**Remedy against order of SEBI:**

ABC Limited was penalized by the SEBI. The following remedies are available to the Company:

a) **Appeal to the Securities Appellate Tribunal:** Section 15T of the SEBI Act, 1992 provides that any person aggrieved by an order of the Board may prefer an appeal to the Securities Appellate Tribunal. Such appeal shall be filed within 45 days from the date on which a copy of the order of the Board was received. However, the Tribunal may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within the said period of limitation.

b) **Appeal to the Supreme Court:** Section 15Z of the SEBI Act, 1992 provides that any person aggrieved by the decision or order of the SAT may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order on any question of law arising out of such order. The Supreme Court may entertain such appeal even after the
expiry of said period of limitation for a future period not exceeding sixty days, if there was reasonable cause for such delay.

**Question 12**

*(May 2015)*

What is the required qualification for the appointment of:

a) The Presiding Officer  
b) Member of the Securities Appellate Tribunal as per the provisions of the Securities and Exchange Board of India (SEBI) Act, 1992?

**Answer:**

Qualification for appointment as Presiding Officer or Member of Securities Appellate Tribunal: As per the provisions of Section 15M of the Securities and Exchange Board of India (SEBI) Act, 1992, a person shall not be qualified for appointment as the Presiding Officer or Member of Securities Appellate Tribunal unless he -

a) is a sitting or retired judge of the Supreme Court or a sitting or retired Chief Justice of a High Court  
b) is a sitting or retired judge of a High Court who has completed not less than seven years of service as a Judge in a High Court.

The Presiding Officer of the Security Appellate Tribunal shall be appointed by the Government in consultation with the Chief Justice of India or his nominee.

A person shall not be qualified for appointment as member of a Securities Appellate Tribunal unless he is a person of *ability, integrity and standing who has shown capacity in dealing with problems relating to securities market and has qualification and experience of corporate law, securities laws, finance, economics or accountancy*. A member of the Board or any person holding a post at senior management level equivalent to Executive Director in the Board shall not be appointed as Presiding Officer or Member of a Securities Appellate Tribunal during his service or tenure as such with the Board or within two years from the date on which he ceases to hold office as such in the Board.

**Question 13**

*(Nov 2015)*

Mr. S, a member of MN Ltd., obtained an order from the Securities and Exchange Board of India (SEBI) against the company. But the company failed to redress the grievance of Mr. S within the time fixed. Consequently, SEBI imposed penalty on the company. The company, however, did not pay the penalty also. State how the penalty can be recovered from the company?

**Answer:**

According to *Section 28A* of the Securities and Exchange Board of India Act, 1992, *if a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B* or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement/certificate in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:

a) attachment and sale of the person’s movable property;  
b) attachment of the person’s bank accounts;
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c) attachment and sale of the person’s immovable property;

d) arrest of the person and his detention in prison;

e) appointing a receiver for the management of the person’s movable and immovable properties.

The expression ‘Recovery Officer’ means any officer of the Board who may be authorized by general or special order in writing, to exercise the powers of a Recovery Officer. The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers.
Ch. 2B – Securities and Exchange Board of India (Issue of Capital & Disclosure Requirements) Regulation, 2009

**Common Conditions for Public Issues and Right Issues**

**Question 1**

What are the common restrictions for issuers in case of public and rights issues?

**Answer:**

No issuer shall make a public issue or rights issue of specified securities:

a) if the issuer, any of its promoters, promoter group or directors or persons in control of the issuer are **debarred from accessing the capital market** by the Board;

b) if any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by the Board;

c) if the issuer of convertible debt instruments:
   
i) is in the list of **willful defaulters** published by the Reserve Bank of India or
   
ii) it is in **default of payment of interest** or
   
iii) **repayment of principal amount** in respect of debt instruments issued by it to the public, if any, for a period of **more than 6 months**;

d) unless it has made an **application to one or more recognized stock exchanges** for listing of specified securities on such stock exchanges and has chosen one of them as the designated stock exchange:

e) Provided that in case of an initial public offer, the issuer shall make an application for listing of the specified securities in at least one recognized stock exchange having nationwide trading terminals;

f) unless it has entered into an agreement with a depository for dematerialization of specified securities already issued or proposed to be issued;

g) unless all existing partly paid-up equity shares of the issuer have either been fully paid up or forfeited;

**unless firm arrangements of finance through verifiable means towards 75% of the stated means of finance, excluding the amount to be raised through the proposed public issue or rights issue or through existing identifiable internal accruals, have been made.**

**Question 2**

(May 2017)

A company "issuer" was in the process of making an offer of Right issue of the specified securities. All the process was completed and the arrangement was complete. Mr. M, a director of the company was categorized as a 'Wilful Defaulter' by a Bank in accordance with the guidelines issued by the RBI. Advise the "Issuer" whether it can proceed to offer the securities through the right issue.

Will your answer differ, had it been a public issue?

**Answer:**

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

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

However, no issuer shall make,

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

b) a public issue of convertible debt instruments if,
   i) the issuer or any of its promoters or directors is a wilful defaulter, or
   ii) it is in default of payment of interest or repayment of principal amount in respect of debt instruments issued by it to the public, if any, for a period of more than six months.

So, accordingly issuer can proceed to offer the securities though right issue of specified securities. Yes the answer will differ in the case of public issue of equity securities if the issuer or any of its promoters or directors is a wilful defaulter. Accordingly, the issuer cannot proceed with the public issue.

Question 3

Following information is available from the Records of Star Chemicals & Engineering Ltd.:
The company is a closely held unlisted company.

a) The paid up share capital of the company since 1st April, 1999 is 3.00 crores and its net worth as at 31st March, 2008 was 5.00 crores as per audited Balance Sheet.

b) The Net Tangible Assets of the company as per last 3 (three) audited Balance Sheets as at 31st March, 2005, 2006 and 2007 were 4.00 cr, 4.50 cr and 5.00 cr respectively, out of which monetary assets were less than 50 lacs in each of the three years.

c) The company was incorporated in 1996 and commenced its business on 1st April, 1996 and since then it has earned good profits and it has not incurred any loss in any year in past.

d) The name of the company was changed from Star Engineering Ltd. to its present name with effect from 1st January, 2007

e) The company’s turnover in the years ended 31st March, 2006, 2007 and 2008 was 20 crores, 30 crores and 35 crores respectively.

The company wants to make a public issue of shares to raise 20.00 crores by issuing equity shares at premium. For the purpose of including the information in the prospectus, the Company has prepared its accounts for 12 months ended 31st December, 2007 showing segment wise revenue which reveals that revenue from chemical segment is more than the revenue from Engineering segment.
You are required to state the relevant guidelines issued by SEBI and your conclusion whether the Company can make the desired issue of equity shares based on the facts stated above.

**Answer:**

**Provision:**

Regulation 26 of the SEBI (ICDR) Regulations, 2009 prescribes the conditions to be fulfilled for issue of shares. As per the said regulation, an issuer may make an initial public offer, if:

a) **Tangible Assets:**
   i) It has net **tangible assets of at least 3 crore rupees in each of the preceding 3 full years** (of twelve months each), of **which not more than 50% are held in monetary assets**.
   
   ii) Further that if more than fifty per cent of the net tangible assets are held in monetary assets, the issuer has made firm commitments to utilize such excess monetary assets in its business or project.
   
   iii) The limit of 50% on monetary assets shall not be applicable in case the public offer is made entirely through an offer for sale.

b) **Pre-Tax operating profit:**
   It has a **minimum average pre-tax operating profit of rupees 15 crore**, calculated on a restated and consolidated basis, during the **3 most profitable years out of the immediately preceding 5 years**.

c) **Net worth:**
   It has a **net worth of at least 1 crore rupees** in each of the preceding three full years (of twelve months each).

d) **Total Issue:**
   The aggregate of the **proposed issue and all previous issues** made in the same financial year in terms of issue size **does not exceed 5 times its pre-issue net worth** as per the audited balance sheet of the preceding financial year.

e) **Change of name:**
   If it has **changed its name** within the last one year, **at least 50%** of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

**Conclusion:**

In the given case,

a) The **net tangible assets** of the company as per the last three audited balance sheets as on 31st March, 2005, 2006 and 2007 were 4.00 crores, 4.50 crores, and 5.00 crores respectively. It satisfies the requirements of clause (a) as above as during each of the preceding three full years, it has net tangible assets, more than 3 crores and out of which the monetary assets are not more than 50% of the net tangible assets. (In this case it has monetary assets less than 50 lacs).

b) The **net worth** of the company during the three preceding years was at least 1 crore in the preceding three full years. (paid-up capital since 1st April, 1999 is 3 crores and net worth as at 31st March, 2005 was 5.00 crores).

c) The **aggregate of the proposed issue and all previous issues** made in the same financial
years does not exceed 5 times its pre-issue net worth. (20 crores is the proposed issue and pre-issue net worth is 5 crores as on 31st March, 2007.)

d) It is stated in the problem that the revenue earned by the company under its activity (chemical) the new name is more than from the old activity (engineering, it satisfied the condition (e) as stated above.

Hence Star Chemicals & Engineering Ltd. can proceed to make a public issue of shares to raise 20.00 crores by issuing equity shares at premium.

Question 4

Modern Technologies Limited, an unlisted company, proposes 40 crores to finance its expansion programme by issuing equity shares to public. The company has been making good profits every year from the commencement of business on 1st April, 2003. The company was started with initial equity share capital of Rs. 3 crores in January, 2003. The paid-up equity share capital and free reserves as per the latest audited Balance Sheet as at 31st March, 2010 amounted to Rs. 5 crores and Rs. 10 crores respectively.

State the conditions which are required to be fulfilled by an unlisted company under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 in order to be eligible to make an initial public offer and also examine whether Modern Technologies Limited is eligible to make the proposed public issue.

Answer:

Initial Public offer by Unlisted Company: An unlisted company can make an Initial Public Offer (IPO) of equity shares, or any other security convertible into equity shares, only if it meets all the conditions listed in Regulation 26 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. The conditions are given below:

a) The Company has net tangible assets of at least Rs. 3 crores in each of the preceding 3 full years (of 12 months each), of which not more than 50% is held in monetary assets. If more than 50% is so held in monetary assets, the company should have made firm commitments to deploy such monetary assets in its business/project. The limit of 50% on monetary assets shall not be applicable in case the public offer is made entirely through an offer for sale.

b) It has a minimum average pre-tax operating profit of rupees fifteen crore, calculated on a restated and consolidated basis, during the three most profitable years out of the immediately preceding five years.

c) The Company has a net worth of at least Rs. 1 crore in each of the preceding 3 full years (of 12 months each).

d) If the Company has changed its name within the last one year, at least 50% of the revenue for the preceding 1 full year is earned by the company from the activity suggested by the new name.

The aggregate of proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed 5 times its pre-issue net worth as per the audited balance sheet of the preceding financial year. (Regulation 26(1))

An unlisted Company not complying with any of the conditions listed in Regulation 26(1) explained above may make I.P.O. of equity shares by complying with alternative conditions.
specified in Regulation 26(2).

As the Company had initial capital of Rs. 3 crores and continuously made good profits, condition No. 3 relating to minimum net worth of Rs. 1 crore is also satisfied.

The Company has not changed its name. Hence the conditions No. 4 is not applicable.

As the Company was started with initial capital of Rs. 3 crores and it was making good profits every year, it is presumed that condition No. 1 relating to net tangible asset of Rs. 3 crores in each of 3 preceding financial year is also satisfied.

The net worth as per latest audited balance sheet is Rs. 15 crores. Hence the proposed issue of Rs. 40 crores does not exceed 5 times the pre-issue net worth. Hence condition No. 5 is also satisfied.

Hence all the conditions listed in regulation 26(1) have been fulfilled. But the company is also required to obtain grading for the initial public offer from at least one credit relating agency registered with SEBI (Regulation 26(7) before making the proposed I.P.O of Rs. 40 crores.

**Conditions for further public offer (Regulation 27)**

An issuer may make a further public offer if it satisfies the conditions specified in clauses (d) and (e) of sub-regulation (1) of regulation 26 and if it does not satisfy those conditions, it may make a further public offer if it satisfies the conditions specified in sub-regulation (2) of regulation 26.

**Question 5**

M/s Herbal Pharma Limited, a listed company, decides to make a public issue of equity shares. Explain briefly the eligibility norms prescribed by SEBI Regulations to be complied with by the company.

OR

AVD Limited was incorporated on 1st April, 2006. The Company got its shares listed at Bombay Stock Exchange on 30th September, 2007. The Company at an Extra-Ordinary General Meeting held on 31st October, 2009, decided to go for public issue of equity shares to an extent of 300 crores. The net worth of the Company as per the audited Balance sheets in the financial years 2007-08 and 2008-09 was 50 crores and 60 crores respectively. During the financial year 2009-10 the Company had already issued equity shares amounting to 20 crores.

There is no change in the name of the Company or its business activities during the financial year 2009 - 10. Referring to the guidelines issued by Securities and Exchange Board of India, advise the Company on the following:

a) Whether the Company can go ahead with the public issue of equity shares as stated above.

b) What would be your advice in case the net worth of the Company as per audited balance sheets in the financial years 2007-08 and 2008-09 was 20 crores and 30 crores respectively?

c) What would be the position in case the Company in question changed its name to AJD Limited during the year 2009-10, three months before filing the offer document and the revenue due to change of business activity suggested by the new name during the financial year 2009-10 was 40% less than the total revenue for the financial year 2008-09 reckoned from the date of filing the offer document?
Answer:

Provision:

As per the SEBI (ICDR) Regulations 2009, vide regulation 26 (d) & (e), a listed company shall be eligible to make a public issue of equity shares or any other security which may be converted into or exchanged with equity shares at a later date provided

a) the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed 5 times its pre-issue net worth as per the audited balance sheet of the preceding financial year;

b) if it has changed its name within the last one year, at least 50% of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

Conclusion:

Applying the above regulations, the questions as asked in the problem can be answered as under:

a) There are two conditions in the guidelines as stated above viz
   i) that the aggregate issue i.e. proposed + all the previous issues made in the same financial year should not exceed 5 times the net worth of the Company;
   ii) there is no change in the name of the issuer Company within the last 1 year. In the question the proposed issue of 300 crores + Previous issue in the same financial year is 20 crores, making an aggregate of 320. Since the aggregate of the issue is more than 5 times of Net Worth, i.e. more than 300 crores, the proposed offer is not within the limit, company cannot proceed ahead with the proposed issue of 300 crores.

b) In the second case the net worth is only 30 crores. 5 times of the net worth comes to 150 crores only. Since the aggregate of the proposed issue and the previous issue during the same financial year is 320 crores, which is exceeding the limits of 150 crores, as calculated above, the Company cannot proceed with the public issue of shares as proposed in the second case.

In the third case the offer cannot be made since the current year revenue is less than 50% of the total revenue of the previous year.

Question 6

What are the SEBI’s important guidelines regarding pricing of first issue of Equity shares of new companies?

Answer:

Pricing of public issue of equity shares are contained in SEBI (ICDR) Regulations, 2009 - Regulations 28 to 31, Part II of Chapter III

Pricing

a) An issuer may determine the price of specified securities in
   i) consultation with the lead merchant banker or
   ii) through the book building process.

b) An issuer may determine:
i) the coupon rate and  
ii) conversion price of convertible debt instruments in consultation with the lead merchant banker or through the book building process.

c) The issuer shall undertake the book building process in a manner specified in Schedule XI.

**Differential pricing**

An issuer may offer specified securities at different prices, subject to the following:

a) retail individual investors or retail individual shareholders or employees of the issuer entitled for reservation made under regulation 42 making an application for specified securities of value not more than 2 lakh rupees, may be offered specified securities at a price lower than the price at which net offer is made to other categories of applicants:

b) Provided that such difference shall not be more than 10% of the price at which specified securities are offered to other categories of applicants;

c) In case of a book built issue, the price of the specified securities offered to an anchor investor shall not be lower than the price offered to other applicants;

d) In case of a composite issue, the price of the specified securities offered in the public issue may be different from the price offered in rights issue and justification for such price difference shall be given in the offer document.

In case the issuer opts for the alternate method of book building in terms of Part D of Schedule XI, the issuer may offer specified securities to its employees at a price lower than the floor price:

Provided that the difference between the floor price and the price at which specified securities are offered to employees shall not be more than 10% of the floor price.

**Price and price band**

a) The issuer may mention a price or price band in the draft prospectus (in case of a fixed price issue) and floor price or price band in the red herring prospectus (in case of a book built issue) and determine the price at a later date before registering the prospectus with the Registrar of Companies: Provided that the prospectus registered with the Registrar of Companies shall contain only one price or the specific coupon rate, as the case may be.

b) If the floor price or price band is not mentioned in the red herring prospectus, the issuer shall announce the floor price or price band at least two working days before the opening of the bid (in case of an initial public offer) and at least one working day before the opening of the bid (in case of a further public offer), in all the newspapers in which the pre issue advertisement was released.

c) The announcement referred to in sub-regulation (2) shall contain relevant financial ratios computed for both upper and lower end of the price band and also a statement drawing attention of the investors to the section titled “basis of issue price” in the prospectus.

d) The cap on the price band shall be less than or equal to one hundred and twenty per cent of the floor price.

e) The floor price or the final price shall not be less than the face value of the specified securities. Explanation: For the purposes of sub-regulation (4), the “cap on the price band” includes cap on the coupon rate in case of convertible debt instruments.
**Face value of equity shares.**

a) Subject to the provisions of the Companies Act, 1956, the Act and these regulations, an issuer making an initial public offer may determine the face value of the equity shares in the following manner:

i) If the *issue price per equity share is Rs 500 or more*, the issuer shall have the option to determine the face value at less than Rs.10 per equity share: Provided that the face value shall not be less than one rupee per equity share;

ii) if the *issue price per equity share is less than Rs.500*, the face value of the equity shares shall be Rs.10 per equity share: Provided that nothing contained in this sub-regulation shall apply to initial public offer made by any government company, statutory authority or corporation or any special purpose vehicle set up by any of them, which is engaged in infrastructure sector.

b) The disclosure about the face value of equity shares (including the statement about the issue price being “X” times of the face value) shall be made in the advertisements, offer documents and application forms in identical font size as that of issue price or price band.

  **Explanation:** For the purposes of this regulation, the term “infrastructure sector” includes the facilities or services as specified in Schedule X.

**Question 7**

CB Ltd., an unlisted company, having a paid up equity share capital of ₹ 6 crore consisting of 60 lakh equity shares of ₹ 10 each, proposes to reduce the denomination of equity shares to ₹ 2 per share and make an initial public offer at a premium of ₹ 98 per share.

Examine whether it is possible for the company to go ahead with these proposals under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements), Regulations, 2009?

**Answer:**

As per the Regulation 31 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, an issuer making an initial public offer, subject to the provisions of the Companies Act, may determine the face value of the equity shares in the following manner:

a) If the issue price per equity share is five hundred rupees or more, the issuer shall have the option to determine the face value at less than ten rupees per equity share; Provided that the face value shall not be less than one rupee per equity share;

b) if the issue price per equity share is less than five hundred rupees, the face value of the equity shares shall be ten rupees per equity share:

Here, the issue price is Rs. 100 (Rs. 2 + Rs. 98) and face value is Rs. 2. It is not possible for the company to issue shares having a face value of less than Rs.10 per share if the issue price is Rs. 100 because as per the SEBI (ICDR) Regulations, 2009, if the issue price is less than Rs. 500 per share, the face value shall be Rs. 10 per share.

Hence, it is not possible for CB Ltd., to go ahead with the above proposal.
Question 8

An unlisted Company, having paid-up Share Capital of Rs. 3 crores consisting of 30,00,000 Equity Shares of Rs. 10 each fully paid-up, proposes to make an initial Public offer of 90,000 Equity Shares of Rs. 10 each at a premium of Rs. 5 per share, in July, 2004. The promoters acquired 10,00,000 shares on 1st January, 2000 and another 10,00,000 shares on 1st January, 2004 at face value:

a) What should be the minimum contribution that should be made by the promoters of the above company in order to comply with the guidelines issued by SEBI?

b) State also the period for which the promoters are required to hold these shares and also the shares, if any acquired by the promoters in excess of the required minimum contribution.

Answer:

a) Provision:

i) The minimum contribution that should be made by the promoters should be in accordance with the Regulation 32 (1) of the SEBI (ICDR) Regulations, 2009. According to the said regulations the promoters of the issuer shall contribute in the public issue in case of an initial public offer, not less than 20% of the post issue capital.

ii) In the above case, pre-issued capital is 3 crores and proposed issue is 9 crores (90,000 equity shares of 10 each) Of the total post issue capital i.e. 12 crores (3 crores + 9 crores), the promoters have to contribute minimum of 2.4 crores (20% of 12 crores). For the purpose of promoters’ contribution, the following securities shall be considered as ineligible as per Regulation 33 (i) (b).

iii) Specified securities acquired by promoters during the preceding 1 year at a price lower than the price at which specified securities are being offered to public in the initial public offer: Provided that nothing contained in this clause shall apply:

iv) If promoters pay to the issuer, the difference between the price at which specified securities are offered in the initial public offer and the price at which the specified securities had been acquired.

Conclusion:

i) In the above case, shares acquired by the promoters on 1st January, 2004 shall not be taken into account for the computation of promoter’s contribution, as the allotment was made in the preceding one year.

ii) However, shares acquired during the 1st January, 2000 shall be taken into account for promoter’s contribution.

iii) Further, it is to be noted that there is a difference in price (shares which were earlier acquired at 10 each as on 1st January, 2000 and the issue price in July, 2004 (15 per share).

v) In view of the proviso in the said Regulation, the difference in price 15 including premium of 5 per share for issue in July, 2004 and acquisition @ 10 per share = 5 per share for 10 lakh equity shares (50 lakhs) acquired in 1st January, 2004 need to be brought in by the promoters.

vi) In view of the proviso to the said Regulation, the acquisition of shares in July, 2004 of 10 lakh shares will also be taken into consideration for calculating promoters’ contribution.

vii) Of the total 2.4 crores issue of shares, if 2 crores issue already acquired by the promoters are taken into account, then the promoters are eligible to subscribe only for the balance of 4 lakh...
shares (i.e. 2.4 crores – 2 crores = 0.4 crores or 4 lakh equity shares).

b) **Provision:**

**Lock-in of specified securities held by promoters:**

As per regulation 36 of the SEBI (ICDR) Regulations, 2009, In a public issue, the specified securities held by promoters shall be locked-in for the period stipulated hereunder:

i) **Minimum promoters’ contribution shall be locked-in for a period of**

- 3 years from the date of commencement of commercial production or
- date of allotment in the public issue,
- whichever is later;

ii) **Promoters’ holding in excess of minimum promoters’ contribution shall be locked-in for a period of 1 year:** Provided that excess promoters’ contribution as provided in proviso to clause (b) of regulation 34 shall not be subject to lock-in.

**Explanation:** For the purposes of this clause, the expression "date of commencement of commercial production" means the last date of the month in which commercial production in a manufacturing company is expected to commence as stated in the offer document.

Accordingly, in the above case, promoters are required to hold the shares for a lock-in-period of 3 years. However, any excess of minimum promoter’s contribution shall be locked in for a period of 1 year.

**Question 9**

What securities are not eligible for the computation of minimum promoters’ contribution in case of public issue of shares by a company according to SEBI (Issue of Capital and Disclosure Requirements) Regulation, 2009? State the cases in which the requirements of minimum promoters’ contribution to an issue is not applicable.

**Answer:**

Public issue of shares [Regulations 33 and 34 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009]

Securities ineligible for minimum promoters' contribution - As per the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, for the computation of minimum promoters' contribution, the following specified securities shall not be eligible:

a) **Specified securities acquired during the preceding three years, if they are:**

i) acquired for consideration other than cash and revaluation of assets or capitalization of intangible assets is involved in such transaction; or

ii) resulting from a bonus issue by utilization of revaluation reserves or unrealized profits of the issuer or

iii) from bonus issue against equity shares which are ineligible for minimum promoters’ contribution;

b) specified securities acquired by promoters and alternative investment funds during the preceding one year at a price lower than the price at which specified securities are being offered to public in the initial public offer:

Provided that nothing contained in this clause shall apply:
i) If promoters/alternative investment funds pay to the issuer, the difference between the price at which specified securities are offered in the initial public offer and the price at which the specified securities had been acquired;

ii) if such specified securities are acquired in terms of the scheme under sections 391-394 of the Companies Act, 1956, as approved by a High Court, by promoters in lieu of business and invested capital that had been in existence for a period of more than one year prior to such approval;

iii) to an initial public offer by a government company, statutory authority or corporation or any special purpose vehicle set up by any of them, which is engaged in infrastructure sector;

c) specified securities allotted to promoters and alternative investment funds during the preceding one year at a price less than the issue price, against funds brought in by them during that period, in case of an issuer formed by conversion of one or more partnership firms, where the partners of the erstwhile partnership firms are the promoters of the issuer and there is no change in the management:

Provided that specified securities, allotted to promoters against capital existing in such firms for a period of more than one year on a continuous basis, shall be eligible;

d) Specified securities pledged with any creditor.

Specified securities referred above in clauses (a) and (c) of sub-regulation (1) of Regulation 33, shall be eligible for the computation of promoters' contribution, if such securities are acquired pursuant to a scheme which has been approved under sections 391-394 of the Companies Act, 1956.

Cases in which requirement of minimum promoters' contribution to an issue is not applicable

According to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 the requirements of minimum promoters' contribution shall not apply in case of:

i) an issuer which does not have any identifiable promoter;

ii) a further public offer, where the equity shares of the issuer and are not infrequently traded in a recognised stock exchange for a period of at least three years and the issuer has a track record of dividend payment for at least immediately preceding three years:

iii) Provided that where promoters propose to subscribe to the specified securities offered to the extent greater than higher of the two options available in clause (b) of sub-regulation (1) of regulation 32, the subscription in excess of such percentage shall be made at a price determined in terms of the provisions of regulation 76 or the issue price, whichever is higher.

iv) rights issues.

**Question 10**

XYZ Ltd. wants to make an initial offer of its securities. Advise the company on the following issues under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009:

1) Extent of promoters contribution;
2) Lock in period of securities held by promoters;
3) Lock in period of securities held by persons other than promoters;
4) Lock in period of securities allotted to employees of the company under Employee stock option.

Answer:

1) Extent of promoters contribution- As per the regulation 32 of the SEBI (ICDR) Regulations, 2009, the promoters of the issuer shall contribute in the case of an initial public offer, not less than twenty per cent of the post issue capital:

Provided that in case the post issue shareholding of the promoters is less than twenty per cent, alternative investment funds may contribute for the purpose of meeting the shortfall in minimum contribution as specified for promoters, subject to a maximum of ten per cent of the post issue capital.

2) Lock-in period of specified securities held by promoters- As per the regulation 36 of the SEBI (ICDR) Regulations, 2009, in an initial public offer, the specified securities held by promoters shall be locked-in for the period as stipulated hereunder:

a) minimum promoters’ contribution including contribution made by alternative investment funds shall be locked-in for a period of three years from the date of commencement of commercial production or date of allotment in the public issue, whichever is later;

b) promoters’ holding in excess of minimum promoters’ contribution shall be locked-in for a period of one year:

The expression "date of commencement of commercial production" means the last date of the month in which commercial production in a manufacturing company is expected to commence as stated in the offer document.

3) Lock-in period of specified securities held by persons other than promoters- As per the regulation 37 of the SEBI (ICDR) Regulations, 2009, in case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year.

4) Lock in period of securities allotted to employees of the company under employees stock option- As per the regulation 37 of the SEBI (ICDR) Regulations, 2009, in case of an initial public offer, the entire pre-issue capital held by persons other than promoters shall be locked-in for a period of one year:

Provided that nothing contained in this regulation shall apply to equity shares allotted to employees under an employee stock option or employee stock purchase scheme of the issuer prior to the initial public offer, if the issuer has made full disclosures with respect to such options or scheme in accordance with Part A of Schedule VIII.

**Conditions and Manner of providing exit opportunity to dissenting shareholders**

**Question 11**

(May 2017)

ResLab Ltd. With an object to expand its production capacity, offered a public issue of Rs.200 crore to the public which was fully subscribed. Out of the said amount, a sum of Rs 170 crore was
spent in a project “A” and the balance of Rs. 30 crore earlier envisaged for buying a machinery
could not be materialized and as such the said amount of Rs. 30 crore remained unutilized. In the
meanwhile a team of consultants suggested the company to go for establishing Research Labs at
different part of the country which would be more beneficial to the company. The chairman of
the company approach you to advice the company as to whether the unutilized amount of Rs. 30
crore collected from public issue can be diverted in the manner as suggested by the consultants
with reference to the provision of the Companies Act or SEBI Act.

Answer:

Variation of terms of the prospectus and exit offer:

• In case of change in objects or variation in terms of contract referred to you in prospectus, an
exit offer by the promoters or shareholders in control of an issuer to the dissenting
shareholders is to be given in terms of Sec.27(2) of the Companies Act, 2013.

• As per regulation 69C of SEBI (ICDR) Regulations, 2009, the promoters or shareholders in
control shall make the exit offer, to the dissenting shareholders, if the amount to be utilized
for the objects for which the prospectus was issued is less than 75% of the amount raised.

• In the present case, the dissenting shareholder cannot be provided with exit offer as Rs 170
crores i.e more than 75% of the amount raised (200 x 75% = 150 crore) has been spent on
project ‘A’.

• As per Sec.27 of the Companies Act, 2013, ResLab Ltd. cannot vary the terms of contract
referred to in the prospectus or objects for which the prospectus was issued, except subject
to the approval of, or except subject to an authority given by the company in general meeting
by way of special resolution and following other formalities as provided in the Companies Act,
2013.

Conclusion: ResLab Ltd. need to comply with the provisions of sec.27 if they want to utilize
the unutilized amount of Rs. 30 crore in the manner as suggested by the consultants.

Question 12

The promoters of M/s Star Steels Limited, during the month of June, 2017, have raised money
from public through issue of prospectus and still have 20 un-utilised amount out the total
money so raised. The promoters in control of the company have passed a resolution in the
general meeting for effecting change in the objects and/or variations in terms of a contract
referred to in the prospectus for utilization of this un-utilised amount in respect of which
around 15% of the shareholders have voted against the proposal. The company has decided to
give these dissenting shareholders an exit offer as per the Securities Exchange Board of India
(Issue of Capital and Disclosure Requirements) Regulations, 2009. The company seeks your
advice regarding the conditions and eligibility under these regulations.

Answer:

Star Steels Limited wants to utilize the 20% of the unutilized money collected from subscription
to shares for other capital works. 15% of the shareholders objected to the proposal and were
given an option to exit.
Conditions for exit offer [Regulation 69C of the SEBI (ICDR) Regulations, 2009 - Chapter VI-A]

The promoters or shareholders in control shall make the exit offer in accordance with the provisions of Chapter VI-A, to the dissenting shareholders, if:

a) the public issue has opened after April 1, 2014; and
b) the proposal for change in objects or variation in terms of a contract, referred to in the prospectus is dissent by at least ten per cent of the shareholders who voted in the general meeting; and

the amount to be utilized for the objects for which the prospectus was issued is less than seventy five per cent of the amount raised (including the amount earmarked for general corporate purposes as disclosed in the offer document)

Eligibility of shareholders for availing the exit offer [Regulation 69D of the SEBI (ICDR) Regulations, 2009- Chapter VI-A]

Only those dissenting shareholders of the issuer who are holding shares as on the relevant date shall be eligible to avail the exit offer made under Chapter VI-A.

In the instant case, the first condition regarding public offer after 1st April, 2014 is being fulfilled as the company has raised money from public through issue of prospectus in June, 2017.

The second condition regarding minimum 10% dissenting shareholders is also fulfilled as in the question, 15% of the shareholders have voted against the proposal of changing the objects and/or variations in terms of contract referred to in the prospectus.

However, the third condition regarding the amount to be utilized for the objects for which the prospectus was issued is less than 75% of the amount raised is not fulfilled as in the present case, the utilized amount was 80%.

As the third condition is not being fulfilled, the promoters or shareholders in control cannot make the exit offer.

Question 13

Modern Chemicals Limited, a listed company, propose to make a preferential issue of equity shares to the promoters of the Company. You are required to answer the following with reference to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009: -

a) What are the conditions to be complied with by the Company to give effect to the proposed preferential issue?
b) What is the price at which the proposed issue can be made?
c) What is the lock-in period in respect of shares allotted on preferential basis to promoters?

Answer:

a) Conditions for preferential issue:
A Modern Chemicals Limited may make a preferential issue of specified securities, if:

i) a special resolution has been passed by its shareholders; all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialized form;

ii) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognized stock exchange where the equity shares of the issuer are listed;

iii) the issuer has obtained the Permanent Account Number (PAN) of the proposed allottees.

**Explanation:** Where any person belonging to promoter(s) or the promoter group has sold his equity shares in the issuer during the 6 months preceding the relevant date, the promoter(s) and promoter group shall be ineligible for allotment of specified securities on preferential basis.

**Where** any person belonging to promoter(s) or the promoter group has previously subscribed to warrants of an issuer but failed to exercise the warrants, the promoter(s) and promoter group shall be ineligible for issue of specified securities of such issuer on preferential basis for a period of 1 year from:

- the date of expiry of the tenure of the warrants due to non-exercise of the option to convert; or
- the date of cancellation of the warrants as the case may be.

**b) Pricing of equity shares:**

If the equity shares of the Modern Chemicals Ltd. have been listed on a recognized stock exchange for a period of twenty-six weeks or more as on the relevant date, the equity shares shall be allotted at a price not less than higher of the following:

- The average of the weekly high and low of the closing prices of the related equity shares quoted on the recognized stock exchange during the 26 weeks preceding the relevant date; or
- The average of the weekly high and low of the closing prices of the related equity shares quoted on a recognized stock exchange during the 2 weeks preceding the relevant date.

If the equity shares of the issuer have been listed on a recognized stock exchange for a period of less than 26 weeks as on the relevant date, the equity shares shall be allotted at a price not less than the higher of the following:

i) The price at which equity shares were issued by the issuer in its initial public offer or the value per share arrived at in a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956, pursuant to which the equity shares of the issuer were listed, as the case may be; or

ii) The average of the weekly high and low of the closing prices of the related equity shares quoted on the recognized stock exchange during the period shares have been listed preceding the relevant date; or

iii) The average of the weekly high and low of the closing prices of the related equity shares quoted on a recognized stock exchange during the two weeks preceding the relevant date.

Where the price of the equity shares is determined in terms of sub-regulation (2), such price shall be recomputed by the issuer on completion of 26 weeks from the date of listing on a recognized stock exchange with reference to the average of the weekly high and low of the closing prices of the related equity shares quoted on the recognized stock exchange during these twenty six weeks.
and if such recomputed price is higher than the price paid on allotment, the difference shall be paid by the allottees to the issuer.

**Explanation:** For the purpose of this regulation, ‘stock exchange’ means any of the recognized stock exchanges in which the equity shares are listed and in which the highest trading volume in respect of the equity shares of the issuer has been recorded during the preceding twenty-six weeks prior to the relevant date.

c) **Lock-in of specified securities**

The specified securities allotted on preferential basis to promoter or promoter group and the equity shares allotted pursuant to exercise of options attached to warrants issued on preferential basis to promoter or promoter group, shall be locked-in for a period of three years from the date of allotment of the specified securities or equity shares allotted pursuant to exercise of the option attached to warrant, as the case may be:

**Provided that not more than 20% of the total capital of the issuer shall be locked-in for 3 years from the date of allotment:**

Provided further that equity shares allotted in excess of the twenty per cent shall be locked-in for 1 year from the date of their allotment pursuant to exercise of options or otherwise, as the case may be.

**Question 14** *(Nov 2017)*

Excel Ltd., a public limited company listed with The Stock Exchange, Mumbai, wants to make issue of equity shares on preferential basis pursuant to a scheme approved under Corporate Debt Restructuring framework specified by Reserve Bank of India to various persons as may be selected by the Board of director of the company.

Following information relevant to the preferential issue is available:

Total No. of equity shares to be issued: 50 Lac equity shares of 10 each out of which 30 lac equity shares will be allotted on 30th June, 2005 as fully paid up and balance 20 lac equity shares shall be allotted on the same date but paid up to 5 each and balance 5 shall be called upon at a later date and shall be paid up on 30th November, 2005.

a) Out of the proposed allottees some persons are holding their shares in Excel Ltd. in physical form and not in dematerialized form and some persons had sold their entire shareholding in Excel Ltd. in January, 2005.

b) The meeting of general body of shareholders for approving the preferential issue was held on 15th March, 2005.

Based on the above information you are required to answer the following queries with reference to the SEBI (ICDR) Regulations:

i) What would be the lock-in period for the shares allotted on preferential basis?

ii) Who are the persons not entitled for allotment of shares on preferential basis?

**Answer:**

a) **Lock-in period for the shares allotted on preferential basis:** Regulation 78(4), SEBI, (ICDR)

i) As per the aforesaid regulation, the equity shares issued on preferential basis pursuant to a scheme of corporate debt restructuring as per the Corporate Debt Restructuring framework specified by the Reserve Bank of India shall be locked-in for a period of 1 year from the date of allotment:

ii) Provided that partly paid up equity shares, if any, shall be locked-in from the date of allotment and the lock-in shall end on the expiry of 1 year from the date when such equity shares become fully paid up.

iii) Accordingly, the first lot of 30 lac full paid equity shares issued on 30th June, 2005 will have a lock-in period of 1 year from the date of allotment.

iv) i.e. till 30th June, 2006. In respect of the second lot, of partly paid 20 lac equity shares, the lock-in period will be till 30th November, 2006 being the date on which the calls shall be paid up on 30th November, 2005.

b) Persons not entitled for allotment of shares on preferential basis (Regulation 72)

i) A listed issuer may make a preferential issue of specified securities, if:
   - a special resolution has been passed by its shareholders;
   - all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialized form;
   - the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognized stock exchange where the equity shares of the issuer are listed;
   - the issuer has obtained the Permanent Account Number (PAN) of the proposed allottees.

ii) The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date: Provided that in respect of the preferential issue of equity shares and compulsorily convertible debt instruments, whether fully or partly, the Board may grant relaxation from the requirements of this sub-regulation, if the Board has granted relaxation in terms of regulation 29A of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 to such preferential allotment.

Accordingly, as given in the problem, persons are holding their shares in Excel Ltd. in physical form and not in dematerialized form and persons who had sold their entire shareholding in Excel Ltd. in January, 2005 shall not be eligible for preferential allotment of shares.

**Qualified Institutions Placement (QIP)**

**Question 15**

Gauri Chemicals Limited, a listed company, having a paid-up equity share capital of 80 crore and net worth of 120 crores as on 31st March, 2015 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:

a) What are the conditions to be satisfied by the company so that it can make Qualified
Institutions Placement?
b) What is the maximum amount that can be raised by the company under the proposed issue of shares?
c) What are the restrictions, if any, with regard to pricing of issue and transferability of shares by qualified institution buyers?

Answer:

a) **Conditions for qualified institutions placement** [Chapter VIII of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009]:

Gauri Chemicals Limited, a listed company may make qualified institutions placement if it satisfies the following conditions:

i) a **special resolution** approving the qualified institutions placement has been passed by its shareholders;

ii) 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 recognized stock exchange having nationwide 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:

iii) it is in **compliance with the requirement of minimum public shareholding** specified in the Securities Contracts (Regulation) Rules, 1957;

iv) 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 in the regulations shall also be specified.

b) **Restrictions on amount raised:**

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 Gauri Chemicals Limited is Rs. 120 crore. Therefore, the maximum amount that can be raised by the company under the proposed issue of shares is 600 crores (5*120).

c) **Restrictions on Pricing of issue and transferability of shares:**

i) **Pricing of issue**: The qualified institutions placement shall be made at a price not less than the average of the weekly high and low of the closing prices of the equity shares of the same class quoted on the stock exchange during the two weeks preceding the relevant date.

ii) **Transferability of shares**: The eligible securities allotted under qualified institutions placement shall not be sold by the allottee for a period of one year from the date of allotment, except on a recognized stock exchange.
**Question 16**

As on 31st December, 2004, following information and figures are noticed from the Annual Accounts for the year ended 31st March, 2004 of SKP Ltd., a Company listed with The Stock Exchange, Mumbai:

a) Authorized Share Capital 20.00 Crores comprising of 2 Crore Equity Shares of 10 each.

b) Paid up Share Capital 9.00 Crores comprising of 80 lac Equity Shares of 10 each fully paid up and 20 lac Equity Shares of 10 each called and paid up to 5 each. The total paid up capital is paid up in cash.

c) Securities Premium Account 20.00 Crores.

d) 5 lac Fully Convertible Debentures of 100 each. These debentures are due for conversion on 31st March, 2005 in full into fully paid Equity Shares of Rs. 10 each in the ratio of one Debenture: two Equity Shares.

e) General Reserve 30.00 Crores.

f) Fixed Assets Revaluation Reserve 10.00 Crores.

g) Outstanding Liabilities in respect of Bonus to Employees and Workers rs. 25.00 lacs.

h) Outstanding Liabilities in respect of Interest payable on Public Deposits comprising of Fixed Deposits from general public 15.00 lacs.

Following other information is gathered from the books of account and other records of the said Company for the period up to 31st December, 2004:

- The partly paid shares were made fully paid prior to 30th September, 2004.
- Bonus to employees and workers was paid on 15th September, 2004.
- Interest on Public Deposits was outstanding on 31st December, 2004.
- The Directors of SKP Ltd. wants to issue Bonus Shares on or after 1st April, 2005 in the ratio of 1:1. Advise the Directors on the matter with reference to the guidelines issued by SEBI.

**Answer:**

Chapter IX of the SEBI (ICDR) Regulations, 2009 deal with the issue of Bonus Shares. They are contained in regulations 92 to 95 of the said regulations. Applying the said Regulations, the above stated problem can be solved as follows:

Whether there is any need for increase of authorized capital because of bonus issue?

<table>
<thead>
<tr>
<th>Fully Paid up share capital</th>
<th>80,00,000 x 10</th>
<th>8 crores</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partly paid-up capital (5 each) converted into fully paid-up of 10 each</td>
<td>20,00,000 x 10</td>
<td>2 crores</td>
</tr>
<tr>
<td>Total paid up capital after conversion partly paid up are converted into fully paid-up</td>
<td>1,00,00,000 x 10</td>
<td>10 crores</td>
</tr>
<tr>
<td>5 lac Fully Convertible Debentures of 100 each. (These debentures are due for conversion on 31st March, 2005 in full into fully paid Equity Shares of 10 each in the ratio of one Debenture: two Equity Shares)</td>
<td>10,00,00,000 x 10</td>
<td>1 crore</td>
</tr>
</tbody>
</table>

Capital before bonus issue: 11 crores
Bonus issue 1:1 | 11 crores  
---|---  
Capital after bonus issue | 22 crores  
Current authorized capital | 20 crores

In view of the increase in authorized capital because of bonus issue, the company **has to pass a special resolution.**

**Bonus shares only against reserves, etc. if capitalized in cash**

**Provision:**
As per regulation 94 (1), the **bonus issue shall be made out of free reserves built out of the genuine profits or securities premium collected in cash only.**

a) reserves created by **revaluation of fixed assets shall not be capitalized** for the purpose of issuing bonus shares.

b) In the given case, the bonus issue amounts to 11 crores which can be paid out of Securities premium account (20 crores) and General Reserves (30 crores).

c) As per the Conditions for bonus issue stated in Regulation 92, bonus issue cannot be made if the company has defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;

d) it has sufficient reason to believe that it has not defaulted in respect of the payment of statutory dues of the employees such as contribution to provident fund, gratuity and bonus and

e) the partly paid shares, if any outstanding on the date of allotment, are made fully paid up.

**Conclusion:**
In the present case, SKP Ltd, proposed date of bonus issue is on or after 1st April, 2005 and since partly paid-up shares were made fully paid-up prior to 30th June, 2004, bonus to employees and workers were paid on 15th September, 2004 and interest on public deposits was still outstanding on 31st December, 2004, it is advised that the company shall make good the interest on public deposits before proceeding for its bonus issue.

**Question 17**

The Balance Sheet of Royal Ltd. as at 31-03-2013 disclosed the following details:

a) Authorized share capital - 400 crores  
b) Paid up share - 150 Crores  
c) Reserve and surplus - 750 crores

The company has issued in the year 2008, Fully Convertible Debentures of Rs. 100 crores which are due for conversion in the year 2013. The company proposes, after the conversion of Debentures to issue Bonus shares in the ratio of 1: 1. Explain briefly the requirements of the Securities and Exchange Board of India (SEBI) Regulations to be followed by the company in this regard.

**Answer:**

Bonus Issue (Chapter IX of SEBI (Issue of Capital and Disclosure Requirements) Regulations,
2009) Chapter IX of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 contains the regulations (Regulations 92 to 95) for issue of bonus shares. Royal Ltd. can issue bonus shares in the ratio of 1:1 as follows:

A) The Articles of Royal Ltd. must authorize it to issue the bonus shares and capitalization of reserve. If there is no provision in the Articles authorizing the company, firstly, the Articles shall be amended by passing a special resolution.

B) Steps for determining whether any increase in authorized share capital is required:
   a) Paid up share capital as on 31st March, 2013: 150 crores.
   b) Paid up capital (after conversion of 100 crores fully convertible debentures, assuming that these debentures shall be converted into share capital of 100 crores) 250 crores (150+100).
   c) Proposed bonus issue - 1 share for every 1 share held.
   d) Post bonus issue capital: 500 crores (250+250).

Since the Authorized share capital of the company is only 400 crores, it has to take steps to increase the amount to 500 crores or beyond by complying with the provisions laid down in sections 94 and 97 of the Companies Act, 1956.

C) Sources of bonus shares:
   Reserves and surplus (free reserves built out of the genuine profits can be used for issue of bonus issue): Rs. 750 Crores
   Since the source of issue of bonus shares (Rs. 750 crores) is sufficient to issue bonus shares (Rs. 250 crores), the proposed issue can be made.

D) Other legal requirements for issue of Bonus shares are as under.
   a) A resolution shall be passed by the Board in a duly convened Board meeting.
   b) The bonus issue shall be made within 15 days of passing the Board resolution.

The bonus issue can be made if there is no default in payment of interest or principal in respect of fixed deposits and interest on existing debentures or principal on redemption thereof; and payment of statutory dues of the employees such as contribution to provident fund, gratuity, bonus, etc.

Question 18

XYZ Limited is a listed company. The Board of Directors of the company at their meeting held on 1st November, 2017 approved the proposal to issue bonus shares in the ratio of 1:1. Such bonus issue is authorized by its Articles of Association for issue of bonus shares and capitalization of reserves. The company implemented the bonus issue on 15th November, 2017. Whether the company has contravened the provisions of Securities Exchange Board of India (Issue of capital and Disclosure Requirements) Regulation 2009?

What is the time limit in case there is no provisions in the Articles for capitalization of reserve?

Answer:

Bonus Issue: According to the provisions of Chapter IX of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, a listed issuer may issue bonus shares to its
members if it is authorised by its articles of association for issue of bonus shares, capitalisation of reserves, etc.

An issuer, announcing a bonus issue after the approval of its board of directors and not requiring shareholders’ approval for capitalisation of profits or reserves for making the bonus issue, shall implement the bonus issue within fifteen days from the date of approval of the issue by its board of directors.

According to the stated facts, Board of Directors of XYZ Limited, approved the proposal to issue of bonus shares in the meeting held on 1st November 2017. This issue of bonus shares, is without requiring shareholders’ approval.

Accordingly, XYZ Limited, implemented the bonus issue within fifteen days from the date of approval of the issue by its board of directors (i.e. on 15th November, 2017). So, XYZ Limited is in compliance with the SEBI (ICDR) Regulation, 2009 and thus has not contravened.

**Time limit in case no provisions in the Articles:** However, if there is no such provision in the articles of association, the issuer shall pass a resolution at its general body meeting making provisions in the articles of associations for capitalisation of reserve. Here, an issuer is required to seek shareholders’ approval for capitalisation of profits or reserves for making the bonus issue. Such bonus issue shall be implemented within two months from the date of the meeting of its board of directors wherein the decision to announce the bonus issue was taken subject to shareholders’ approval.
Ch. 1 – Foreign Exchange Management Act, 1999

Question 1

Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2002. Mr. Ram purchased a flat at New Delhi for ₹ 15 lakhs in September, 2003. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2003 for ₹ 15 lakhs. Mr. Gopal’s flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram.

Examine with reference to the provisions of Foreign Exchange Management Act, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible.

Answer:

Section 2(e) of Foreign Exchange Management Act, 1999 states that ‘capital account transactions’ means

a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India

b) a transaction which alters assets or liabilities in India of person resident outside India and includes transactions referred to in section 6(3).

According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

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

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

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

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

Conclusion:

In this case, Mr. Ram, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India.

Hence, it would appear that guarantee by Mr. Ram cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

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

**Question 2**

A Company incorporated in United Kingdom established a branch at Chennai. What is the residential status of the Chennai branch? The Chennai branch proposes the purchase of some immovable property at Chennai for the purpose of its business. Is it a ‘Capital Account Transaction’ within the meaning of section 2(e) of the Foreign Exchange Management Act, 1999? Are there any restrictions under the Foreign Exchange Management Act, 1999 in respect of such acquisition?

**Answer:**

According to section 2(v)(iii) of the FEMA, 1999, person resident in India inter alia means an office, branch, or agency in India owned or controlled by a person resident outside India. The company incorporated in U.K is a person resident outside India [Section 2(v)(ii) read with section 2(w) of the FEMA] as it is not a body corporate registered or incorporated in India. As the Chennai branch is branch in India is owned and controlled by the U.K Company is resident outside India, the Chennai branch is resident is India under section 2(v) (iii) stated above.

**Capital account transaction.**

In the case of a resident in India, capital account transaction means a transaction which alters the assets or liabilities including contingent liabilities, outside India. The Chennai branch (is resident in India) acquires immovable property at Chennai (is in India). Hence this acquisition is not a capital account transaction within the meaning of section (2(e) of FEMA. Section 6(3) empowers RBI to restrict or regulate the acquisition of immovable property in India by a person resident outside India. Hence there is no restriction in acquisition of immovable property in India by Chennai branch.

**Question 3**

Examine whether the following branches can be considered as a 'Person resident in India' under Foreign Exchange Management Act, 1999:

i) ABC Limited, a company incorporated in India established a branch at London on 1st January, 2003.

ii) M/s XYZ, a foreign company, established a branch at New Delhi on 1st January, 2003. The branch at New Delhi controls a branch at Colombo.

**Answer:**

**Person resident in India (Foreign Exchange Management Act, 1999):**

i) Any person or body corporate registered or incorporated in India is a resident in India [section 2(v)(ii)]. ‘Person’ includes a company [section 2(u)]. An office, branches or agency outside India owned or controlled by a person resident in India is a person resident in India. [Section 2(v)(iv)].

In view of the above provisions in FEMA, 1999 London branch established by ABC Ltd, a company incorporated in India, is a ‘person resident in India’ under the Act from the date of establishment i.e. 1st January, 2003.

ii) According to Section 2(v)(iii) of FEMA, 1999 an office, branch or agency in India owned or
controlled by a person resident outside India is a person resident in India'. Only a body corporate registered or incorporated in India is a ‘person resident in India’. According to section 2(w), ‘person resident outside India’ means a person who is not resident in India. Hence M/s XYZ, foreign company is a ‘resident outside India. But the branch at New Delhi owned by M/s XYZ is a ‘resident in India’ within the meaning of section 2(v) (iii) from the date of establishment i.e. 1st January, 2003. The branch at Colombo controlled by the branch at New Delhi referred to in the question is a person ‘resident in India’ within the meaning of section 2(v)(iii) read with section 2(v)(iv).

**Question 4**

‘Printex Computer’ is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under FEMA, 1999 of printer units in Pune and that of Dubai branch?

**Answer:**

a) Printex Computer being a Singapore based company would be person resident outside India 

b) The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly printex unit in Pune, being a branch of a company would be a ‘person’.

c) Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India.

d) Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a ‘person resident in India.’

e) However, Dubai Branch though not owned is controlled by Print unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

**Question 5**

How will you determine whether a particular business unit like a factory or office is a ‘person resident in India’ under Foreign Exchange Management Act, 1999?

**Answer:**

**Person resident in India**

Section 2 of FEMA, 1999 defines the term “person resident in India”. According to Section 2 (iii), all business units in India will be “resident in India” even though these units are owned or controlled by a person resident outside India.

Similarly, all business units outside India will be ‘resident in India’ provided the business units are either owned or controlled by a person resident in India [Section 2(v) (iv)]. It is necessary to determine the residential status of the person who owns or controls the business unit.
**Question 6**

Mr. Ram had resided in India during the Financial Year 1999-2000 for less than 183 days. He again came to India on 1st May, 2000 for higher studies and business and stayed upto 15th July, 2001. State under the Foreign Exchange Management Act, 1999.

i) If Mr. Ram can be considered ‘person Resident in India’ during the Financial year 2000-2001 and

ii) Is citizenship relevant for determining such a status?

**Answer:**

i) No. Mr. Ram cannot be considered 'Person resident in India' during the financial year 2000-2001 notwithstanding the purpose or duration of his stay in India during 2000-2001. An individual has to be present in India for more than 182 days in the preceding financial year. Mr. Ram does not satisfy this condition for the financial year 2000-2001.

ii) No. Citizenship is no more relevant for determining the status.

**Question 7**

Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated of ‘base’, which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

**Answer:**

Miss Alia stayed in India at Mumbai ‘base’ for more than 182 days in the preceding financial year. The issue here is whether staying can be considered ‘residing’. FEMA emphasises ‘residing’. ‘Stay’ is a physical attribute, while ‘residing’ denotes permanency. Thus, while Miss Alia may have stayed in India for more than 182 days, it is doubtful whether she can be said to have ‘resided’ in India for more than 182 days.

Further under section 2(v)(a), she would become resident only if she has come to or stayed in India for employment. It would be doubtful and debatable, whether by staying at Mumbai base during the break, Miss Alia can be said to have come to stay in India for or on taking up employment. Hence, Miss Alia would continue to be non-resident.

**Question 8**

During the financial year 2010-11 Mr. Bhattacharyya resided in India for a period of 180 days and thereafter went abroad. On 1st April, 2011 Mr. Bhattacharyya came back to India as an employee of a business organization. Decide the residential status of Mr. Bhattacharyya during the financial year 2010-11 under the provisions of the Foreign Exchange management Act, 1999.

**Answer:**

Residential Status under Section 2(v) of Foreign Exchange Management Act, 1999: In accordance with the provisions of the Foreign Exchange Management Act, 1999, as contained in section 2(v), a person in order to qualify for the purpose of being treated as a ‘Person Resident in
India” in any financial year, must reside in India for a period of more than 182 days during the preceding financial year.

Mr. Bhattacharyya did not reside in India during the year 2010-2011 for more than 182 days and his residential status during the next year, i.e. 2011-2012 is non-resident even though he stayed in India from 1st April, 2011 as an employee. His residential status in 2010-2011 cannot be ascertained as his stay in India during the previous year 2009-2010 is not known.

Question 9

Mr. Kishore resided in India during the Financial Year 2009-2010 for less than 182 days. He came to India on 1 April, 2010 for business. He closed down his business on 30th April, 2011 and left India on 30th June, 2011 for the purpose of employment outside India. Decide the residential status of Mr. Kishore during the Financial Years 2010-2011 and 2011-2012 under the provisions of the Foreign Exchange Management Act, 1999.

Answer:

According to the section 2(v) of the Foreign Exchange Management Act, 1999, a person in order to qualify for the purpose of being treated as a “Person Resident in India” in any financial year, must reside in India for a period of more than 182 days during the preceding financial year.

Conclusion:

• In the given case, Mr. Kishore resided in India for less than 182 days during the financial year 2009-10. Hence, he cannot be considered as a “Person Resident in India” during the financial year 2010-11.

• During the financial year 2010-11, Mr. Kishore resided in India for more than 182 days. Normally, he would have been resident in India during the financial year 2011-2012 but as he left India on 30th June, 2011 for the purpose of taking up employment outside India, he would cease to be resident in India from the date of his departure from India i.e. 30th June, 2011.

• Therefore, Kishore cannot be called a person resident in India during the entire financial year 2011-2012.

Question 10

Explain the meaning of the term “Current Account Transaction” and the right of a citizen to obtain Foreign Exchange under the Foreign Exchange Management Act, 1999.

Answer:

The term “current account transaction” is defined in section 2(j) of Foreign Exchange Management Act, 1999. It means a transaction other than a capital account transaction and includes:

a) payments due in connection with foreign trade, other current business, services, and short – term banking and credit facilities in the ordinary course of business.

b) payments due as interest on loans and as net income from investments.

c) remittances for living expenses of parents, spouse and children residing abroad and

• expenses in connection with foreign travel education and medical care of parents, spouse and children.
According to Section 5 of FEMA, 1999 any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction.

a) Provided that the Central Government may in public interest and in consultation with the Reserve Bank,

b) Impose such reasonable restrictions for current account transactions as may be prescribed.

c) Further, any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction subject to the provisions of section 6(2).

**Question 11**

Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw Foreign Exchange. Specify.

i) What are the purposes for which Foreign Exchange drawal is not allowed for Current Account Transaction?

**Answer:**

i) Following are the transactions (current account) for which drawal of foreign exchange is prohibited.

a) Remittance out of lottery winnings.

b) Remittance of income from racing/riding, etc., or any other hobby.

c) Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.

d) Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.

e) Remittance of dividend by any company to which the requirement of dividend balancing is applicable.

f) Payment of commission on exports under Rupee State Credit Route, except commission up to 10% of invoice value of exports of tea and tobacco.

g) Payment related to “Call Back Services” of telephones.

h) Remittance of interest income on funds held in Non-resident Special Rupee Scheme a/c.

**Question 12**

Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:

i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.

ii) US Dollar 1,00,000 for sending a cultural troupe on a tour of U.S.A.

**Answer:**

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

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

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

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

**Question 13**

State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:

i) X, a Film Star, wants to perform along with associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.

ii) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?

iii) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.

**Answer:**

**Approval to the following transactions under FEMA, 1999:**

i) Foreign Exchange withdrawals for cultural tours require prior permission/approval of the Government of India irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the Government of India.

ii) Remittance in foreign exchange for medical treatment abroad requires prior permission/approval of RBI when the expenditure in foreign currency exceeds the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment. Therefore, R can draw foreign exchange up to the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment and prior permission/approval of RBI is required.

iii) Release of foreign exchange for education abroad is permitted up to US$ 1,00,000 on self-declaration basis. Therefore, L can draw foreign exchange on self-declaration basis for pursuing a course in fashion design in Paris.

**Question 14**

Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:
i) M requires U.S. $5,000 for remittance towards hire charges of transponders.

ii) P requires U.S. $2,000 for payment related to call back services of telephones.

**Answer:**

Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are free transactions and some others are prohibited transactions. Accordingly,

a) It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.

b) Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P will not succeed in acquiring US $2,000 for the said purpose.

**Question 15**

Mr. Suresh resided in India during the Financial Year 2008-09. He left India on 15th July, 2009 for Switzerland for pursuing higher studies in Biotechnology for 2 years. What would be his residential status under the Foreign Exchange Management Act, 1999 during the Financial Years 2009-10 and 2010-11?

Mr. Suresh requires every year USD 25,000 towards tuition fees and USD 30,000 for incidental and stay expenses for studying abroad. Is it possible for Mr. Suresh to get the required Foreign Exchange and, if so, under what conditions?

**Answer:**

**Residential Status:**

According to section 2(v) of Foreign Exchange Management Act, 1999, ‘Person resident in India’ means a person residing in India for more than 182 days during the course of preceding financial year [Section 2(v)(i)].

However, it does not include a person who has gone out of India or who stays outside India for employment outside India or for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Generally, a student goes out of India for a certain period. In this case, Mr. Suresh who resided in India during the financial year 2008-09 left on 15.7.2009 for Switzerland for pursuing higher studies in Biotechnology for 2 years, he will be resident for 2009-10,

as he has gone to stay outside India for a ‘certain period’ (If he goes abroad with intention to stay outside India for an ‘uncertain period’ he will not be resident with effect from 15-7-2009.

**Conclusion:**

Mr. Suresh will not be resident during the Financial Year 2010-2011 as he did not stay in India during the relevant previous financial year i.e. 2009-10.

**Foreign Exchange for studies abroad:**

According to Schedule III read with Rule 5 of Foreign Exchange Management (Current Account Transactions) Rules, 2000 release of foreign exchange for studies abroad exceeding the
estimates from the institution abroad or USD 1,00,000 per academic year, whichever is higher requires prior approval of Reserve Bank of India. In this case the foreign exchange required is only USD 55,000 per academic year and hence approval of RBI is not required.

**Question 16**

Mr. G., an Indian national desires to obtain Foreign Exchange on current account transactions for the following purposes:

a) Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company.

b) Remittance of hiring charges of transponder by TV channels

Advise G whether he can obtain Foreign Exchange and, if so, under what conditions?

**Answer:**

Under Section 5 of Foreign Exchange Management Act, 1999, certain rules have been framed for drawal of foreign exchange on current account. According to the said rules, drawal of foreign exchange for certain transactions are prohibited. In respect of certain transactions drawal of foreign exchange is permissible with the prior approval of Central Government. In respect of some of the transaction, prior permission of RBI is sufficient for drawal of foreign exchange.

a) In respect of item No.1 i.e. **Payment of Commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited.**

b) **Drawal of foreign exchange for remittance of hiring charges of transponder by TV Channels** can be made with the prior approval of the Central Government.

In the case of (ii) above, approval of concerned authority is not required if the payment is made out of **funds held in Resident Foreign Currency (RFC) Account or Exchange Earner’s Foreign Currency (EEFC) Account of the remitter.** Further foreign exchange can be drawn only from an authorized person.

**Question 17**

Examine under the Foreign Exchange Management Act, 1999 whether "Payment of remuneration to foreign technicians" is a permissible transaction under the provisions of the said Act.

**Answer:**

**Foreign Technician: Salary payable to a foreign technician is a current account transaction.**

a) According to section 5 of the Foreign Exchange Management Act, 1999 any person can sell or draw foreign exchange to or from authorized person if such sale or drawal is a current account transaction.

b) Reasonable restrictions on current account transactions can be imposed by the Central Government.

c) Basically all current account transactions are free unless specifically restricted by the Central Government.

d) Hiring of foreign nations as technicians is permissible without restriction. There is no ceiling on salary which can be paid as per contract. Their salary can be remitted abroad after tax deducted at source.
Question 18

Mr. F, an Indian National desires to obtain foreign exchange for the following purposes:

i) Payment of US $10,000 as commission on exports under Rupee State Credit Route.

ii) US $30,000 for a business trip to U.K.

iii) Remittance of US $2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.

Advise him, if he can get the Foreign Exchange and under what condition

Answer:

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

i) In respect of item No. (i), i.e., payment of commission on exports under Rupee State Credit Route, such payment is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

ii) Foreign Exchange for business trip up to US$ 25,000 can be obtained by any person. If a person wants to exceed this limit, then prior permission of Reserve Bank of India is required as per Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. In respect of item (ii), since the amount involved is more than US $25,000, Mr. F can obtain the foreign exchange after getting the permission of Reserve Bank of India.

iii) The type of payment as envisaged in item No.(iii) is covered under Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for remitting of prize money exceeding US$ 1,00,000 for sports activity abroad other than International, National or State level body will require the prior permission of the Central Government. (Ministry of Human Resource Development – Department of Youth Affairs and Sports). Since the amount involved in item No. (iii) of the question is more than US$ 1,00,000 and Mr. F is not an International, National or State level body, he has to obtain the permission of the Central Government before remitting the prize money of US$ 2,00,000.

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

Question 19

Examine with reference to the Provisions of the Foreign Exchange Management Act, 1999 and the rules made thereunder whether foreign exchange can be drawn for the following purposes:

Mr. Gopal, a cine artist in India proposes to organize a cultural programme at Dubai and requires to draw foreign exchange US $1,00,000 for this purpose.

Answer:
Drawal of Foreign Exchange

Cultural programme: Foreign exchange for meeting expenses of cultural tour can be withdrawn by a person after obtaining permission from the Government of India, Ministry of Human Resources Development (Department of Education and Culture) as prescribed in second schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Gopal can withdraw US $ 1,00,000 after obtaining permission from the Government of India.

Question 20

Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

a) US$ 1, 20,000 for studies abroad on the basis of estimates given by the foreign university.

b) Gift Remittance amounting US$ 10,000.

Advise him whether he can get Foreign Exchange and if so, under what condition(s)?

Answer:

a) Remittance of Foreign Exchange for studies abroad: Foreign exchange may be released for studies abroad up to a limit of US $ 2,50,000 for the studies abroad without any permission from the RBI. Above this limit, RBI’s prior approval is required. Further proviso to Para I of Schedule III states that individual may be allowed remittances (without seeking prior approval of the RBI) exceeding USD 2,50,000 based on the estimate received from the institution abroad. In this case since US $ 1,20,000 is the drawal of foreign exchange, so permission of the RBI is not required.

b) Gift remittance exceeding US $ 10,000: Under the provisions of Section 5 of FEMA 1999, certain Rules have been made for drawal of foreign exchange for current account transactions. Gift remittance is a current account transaction. Gift remittance exceeding US $ 2,50,000 can be made after obtaining prior approval of the RBI. In the present case, since the amount to be gifted by an individual, Mr. Rohan is USD 10,000, so there is no need for any permission from the RBI.

Question 21

Lifesys Limited, a billion dollar, Indian company wishes to create a chair in a reputed university in the U.S. This chair is for the department of computer science. The company wishes to obtain your advise in regard to the following with reference to the FEMA, 1999.

a) Is such “chair” creation permissible?

b) What is the maximum amount that can be denoted for such chair?

c) Any formalities to be complied with?

Answer:

As per Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, read with section 5 of the Foreign Exchange Management Act, 1999 donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, can be remitted by persons other than individuals for creation of Chairs in reputed educational institutes with the prior approval of the Reserve Bank of India. As per Schedule III of the Foreign Exchange Management (Current Account
Transactions) Rules, 2000, read with section 5 of the Foreign Exchange Management Act, 1999 donations exceeding one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less, can be remitted by persons other than individuals for creation of Chairs in reputed educational institutes with the prior approval of the Reserve Bank of India.

Considering the above provision-

i) In the first case, “chair” creation for the department of computer science in reputed university in the U.S. is permissible.

ii) Maximum amount that can be donated for such chair will be one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, whichever is less without prior approval of the Reserve Bank of India.

iii) In case where donations exceeds one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, it shall require prior approval of Reserve Bank of India.

**Question 22**

Mr. T. Raghava has secured admission in a reputed and recognized university in Germany, for the study of higher and technical education, outside India. After arrival in Germany, he has gone ill and wants medical treatment facility in a reputed German hospital. He desires to apply to the Government of India for availing the additional remittance beyond the limit approved for foreign currency exchange facility. He has already enjoyed the permitted facility of foreign exchange for studies abroad, for the said financial year. Decide the following as to the facts given in the question as per the provisions of the Foreign Exchange Management Act, 1999:

i) As an individual, to what extent Mr. T. Raghava may avail foreign exchange facilities for higher and technical study in Germany.

ii) Can Mr. T. Raghava avail the facility of additional remittance in foreign exchange, beyond the limit, for the medical treatment.

**Answer:**

According to the Schedule III of the FEM (current account transactions) Rules, 2000, following shall be the limit for the remittance of Foreign Exchange in the given situations:

i) **Remittance of Foreign Exchange for Studies Abroad:** Foreign exchange may be released for studies abroad up to a limit of US $ 2,50,000 without any permission from the RBI. Above this limit, RBI’s prior approval is required.

ii) **Remittance for Medical Treatment:** Remittance of foreign exchange for medical treatment abroad requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 2,50,000. The Schedule also prescribes that for the purpose of expenses in connection with medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by a medical institute offering treatment. Such amount shall be reduced from USD 2,50,000 by the amount so remitted.

Therefore, Mr. T. Raghava can draw foreign exchange exceeding USD 2,50,000 by taking prior
Capital Account Transactions

Question 23

Explain the meaning of “Capital Account Transactions” under the Foreign Exchange Management Act, 1999. State its categories and also examine whether the following transactions are permissible or not under the above Act as Capital Account transactions:

a) Investment by person resident in India in Foreign Securities.

b) Foreign currency loans raised in India and abroad by a person resident in India.

c) Export, import and holding of currency / currency notes.

d) Investment in a Nidhi Company.

e) Trading in transferable development rights

Answer:

Meaning of Capital Account Transaction: It means a transaction which alters the assets or liabilities including contingent liabilities, outside India of person resident in India or assets or liabilities in India of a person resident outside India, and includes transactions referred to in sub-section (3) of section 6 of FEMA Act, 1999.

The Reserve Bank of India has formed Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The provisions of these regulations are as under:

Categories of Capital Account Transactions: As per these regulations, capital account transactions may be classified under the following heads.

a) Permissible capital account transaction of person resident in India (schedule 1)

b) Permissible Capital transactions of person resident outside India (schedule II).

c) Prohibited capital account transactions.

A person resident in India may enter into any of the following capital account transactions provided the regulations specified by the Reserve Bank of India in respect of such capital account transactions are complied with.

Conclusion:

In view of the above provisions: among five capital account transaction of question first three i.e. (i), (ii) and (iii) are permissible capital account transactions and rest two i.e., (iv) and v are prohibited capital transactions.

Question 24

Examine with reference to the provisions of the Foreign Exchange Management Act, 1999 whether there are any restrictions in respect of the following:-

i) Drawal of Foreign Exchange for payments due on account of Amortization of loans in the ordinary course of business.

ii) A person, who is resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by the companies in U.S.A.?
iii) A person resident outside India proposes to invest in the shares of an Indian company engaged in plantation activities.

**Answer:**

**Capital Account Transactions:** All the transactions referred to in the question are capital account transactions.

Section 6(2) of FEMA, 1999 provides that the Reserve Bank may in consultation with the Central Government specify the permissible capital account transactions and the limit upto which foreign exchange will be allowed for such transactions.

i) **Amortization of Loan:** According to proviso to section 6(2), the Reserve bank shall not impose any restriction on the drawal of foreign exchange for certain transactions. One such transaction is drawal of foreign exchange for payment due on account of amortization of loans in the ordinary course of business. Hence this transaction is permissible without any restrictions.

ii) **Person resident in USA returning permanently to India:** When the person returns to India permanently, he becomes a resident in India. Section 6(4) provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security, etc. if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India. In view of this, the person who returned to India permanently can continue to hold the foreign security acquired by him when he was resident in U.S.A.

iii) **Investment in shares of Indian company by non-resident:** Reserve Bank issued Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. Regulation 4(6) of the said Regulations prohibits a person resident outside India from making investment in India, in any form, in any Company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in agricultural or plantation activities. Hence it is not possible for a person resident outside India to invest in the shares of a plantation company as such investment is prohibited.

**Question 25** *(Nov 2012)*

Mrs. Chandra, a resident outside India, is likely to inherit from her father some immovable property in India. Are there any restrictions under the provisions of the Foreign Exchange Management Act, 1999 in acquiring or holding such property? State whether Mrs. Chandra can sell the property and repatriate outside India the sale proceeds.

**Answer:**

As per sub-section 5 of section 6 of the FEMA, 1999, a person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Accordingly, in the problem, Mrs. Chandra, a resident outside India, may acquire or hold any immovable property of his father in India by way of inheritance in both the conditions,
firstly, where her father, a resident outside India, had acquired the property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or as per the provisions of these Regulations or secondly, where her father, a resident in India.

**Repatriation of sale proceeds:** A person referred to in sub-section (5) of section 6 of the Act, or his successor shall not, except with the prior permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property.

**Conclusion:**
Thus, accordingly Mrs. Chandra can sell the property and repatriate outside India the sale proceeds only with the prior permission of the RBI.

**Question 26** *(May 2014)*

Mr. V, a person of Indian origin and resident of USA desires to acquire two immovable properties in India comprising

i) a residential flat in Mumbai and

ii) a farm house on the outskirts of Mumbai.

Explain the steps he has to take in this matter having regard to the provisions of FEMA, 1999

**Answer:**

**Permissible Transactions:** Acquisition and transfer of immovable property in India by a person resident outside India is a permissible transaction under the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

**Acquisition and transfer of property in India by a person of Indian origin:**
A person of Indian origin resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.
However, in case of acquisition of immovable property, payment of purchase price, if any, shall be made out of:

a) funds received in India through normal banking channels by way of inward remittance from any place outside India, or

b) funds held in any non-resident account maintained in accordance with the provisions of the Foreign Exchange Management Act, 1999, and the regulations made by the Reserve Bank of India.

Further, no payment of purchase price for acquisition of immovable property shall be made either by traveller’s cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

**Conclusion:**
Thus, by following the above steps as mentioned in the provisions of the Foreign Exchange Management Act, 1999, and the Regulations made thereunder, Mr. V, a person of Indian origin and resident of USA (i.e. resident outside India):

i) can acquire a residential flat in Mumbai and

ii) cannot acquire a farmhouse on the outskirts of Mumbai

**Question 27** *(May 2018)*
In terms of the provisions of the Foreign Exchange Management Act, 1999, Mr. SAM is a person of Indian origin resident outside India. He wants to acquire some immovable properties in India not being agricultural property, plantation or a farm house.

Referring to the provisions of the Foreign Exchange Management Act, 1999, state the permitted sources, means and restrictions imposed in this regard,
Also state the provisions where the acquisition will be in the form of gift or inheritance by Mr. SAM.

**Answer:**

**Acquisition of immovable properties in India by a person of Indian origin resident outside India:**
A person of Indian origin resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.

**Sources:** In case of acquisition of immovable property, payment of purchase price, if any, shall be made out of
i) funds received in India through normal banking channels by way of inward remittance from any place outside India or
ii) funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.

**Restriction:** It is also provided that no payment of purchase price for acquisition of immovable property shall be made either by traveller’s cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

**Acquisition in the form of gift**
A person of Indian origin resident outside India may acquire any immovable property in India other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India.

**Acquisition in the form of inheritance**
A person of Indian origin resident outside India may acquire any immovable property, in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India.

**Export of Goods and Services (Section 7)**

**Question 28**
Referring to the provisions of the Foreign Exchange Management Act, 1999, examine whether V, an exporter is bound to make declaration of the following goods exported from India to United Kingdom:

a) Exports software valuing 50,000.
b) V gifts certain items of jewellery valued at Rs.20,000 to his friend in Australia.
c) V exports certain goods valuing US $ 5,000 to Myanmar under Barter Trade Agreement.

**Answer:**
In accordance with provisions of the FEMA, 1999 as contained in section 7 read with section 8, it imposes on an exporter to make appropriate declaration of the value of the goods being exported and he is also required to repatriate the foreign exchange due to India in respect of such exports to India in the manner within the time as may be prescribed. Under section 8, the exporter is under an obligation to realize and repatriate to India such foreign. However, if there is a delay in the receipt of export, it will not be a violation which shall be punishable. Section 8 applies to a resident who shall take all the reasonable steps, depending upon the individual case.

There are certain categories of export for which declaration need not be made. These are:
   a) Export of goods/software not exceeding 25,000 in value.
   b) Export by way of gift not exceeding 1 lac in value.
   c) Export of goods not exceeding US $1000 or its equivalent per transaction to Myanmar under Barter Trade Agreement.

Taking into consideration the above, answer to the question are:
   a) In the first case since the value is exceeding 25,000 in value, therefore, declaration has to be completed.
   b) In the second case since the value of gift of jewellery to V’s friend in Australia is less than 1 lac in value, the gift does not need any declaration to be completed.
   c) In the third case since the value is more than U.S.$1,000, therefore, the declaration has to be completed.

**Question 29**

(May 2016)

Indian Software Ltd. seeks to export software to its client in Indonesia. In this regard -

i) Explain the procedure to be adopted for export of software under the Foreign Exchange Management Act, 1999 and also state the period within which export value is to be realised.

ii) Explain the position in case of delay in receipt of payment from its client.

**Answer:**

i) Procedure for the export of the software under the FEMA, 1999

1. Furnishing of declaration- In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing-
   a) the full export value of the goods or software; or
   b) if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

2. Execution of declaration- Declarations shall be executed in sets of such number as specified.
3. Export of services without furnishing any declaration- In respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

4. Realization of export proceeds- Realization of export proceeds in respect of export of goods / software from third party should be duly declared by the exporter in the appropriate declaration form.

Period within which export value of goods/software to be realised.

a) The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within 9 months from the date of export, provided

• that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months from the date of shipment of goods;

• further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months or fifteen months, as the case may be.

b) Where the export of goods / software / services has been made by Units in Special Economic Zones (SEZ) / Status Holder exporter / Export Oriented Units (EOUs) and units in Electronics Hardware Technology Parks (EHTPs), Software Technology Parks (STPs) and Bio-Technology Parks (BTPs) as defined in the Foreign Trade Policy in force, then notwithstanding anything contained in sub-regulation (1), the amount representing the full export value of goods or software shall be realised and repatriated to India within nine months from the date of export.

Provided further that the Reserve Bank, or subject to the directions issued by the Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the period of nine months.

• The Reserve Bank may for reasonable and sufficient cause direct that the said exporter/s shall cease to be governed by sub-regulation (2);

Provided that no such direction shall be given unless the unit has been given a reasonable opportunity to make a representation in the matter.

• On such direction, the said exporter/s shall be governed by the provisions of sub-regulation (1), until directed otherwise by the Reserve Bank.

ii) Delay in Receipt of Payment –

Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,
a) the payment therefor if the goods or software has been sold and
b) the sale of goods and payment thereof, if goods or software has not been sold or
reimport thereof into India as the circumstances permit, within such period as the
Reserve Bank may specify in this behalf;

Provided that omission of the Reserve Bank to give directions shall not have the effect of
absolving the person committing the contravention from the consequences thereof.

**Question 30**

(May 2017 & RTP May 2018)

Ms. Ashima daughter of Mr. Mittal (an exporter), is residing in Australia since long. She wants to
buy a flat in Australia. Since she is unmarried, she wants to make her father Mr. Mittal a joint
holder in that flat, for which entire proceeds are to be paid by her.

i) State the provisions of FEMA governing such type of transaction?

ii) On applying the relevant provisions, can Mr. Mittal join her daughter in acquiring such a
flat in Australia?

iii) Mr. Mittal, wants to receive advance payments against his exports from a buyer outside
India. Explain the relevant provisions?

**Answer:**

i) **The provisions governing the acquisition and transfer of immovable property outside
India.**

1. A person resident in India may acquire immovable property outside India:
   a) By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the
      FEMA or referred to in clause (b) of regulation 4 acquired by a person resident in India on
      or before 8th July, 1947 and continued to be held by him with the permission of Reserve
      Bank.
   b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account
      maintained in accordance with the foreign exchange management (Foreign Currency
      accounts by a person resident in India) Regulations 2015.
   c) Jointly with a relative who is a person resident outside India, provided there is no outflow
      of funds from India.

2. A person resident in India may acquire immovable property outside India, by way of
   Inheritance or gift from a person resident in India who has acquired such property in
   accordance with the foreign exchange provision in force at the time of such acquisition.

3. A Company incorporated in India having overseas offices, may acquire immovable
   property outside India for its business and for residential purposes of its staff, in
   accordance with the direction issued by the Reserve Bank of India from time to time.

ii) In the light of above discussions in 1(c), it is quite clear that Mr. Mittal, a resident in India,
can join his daughter who is a resident outside India, in acquiring a Flat at Australia.

iii) **Advance payment against export:**

The following are the provisions governing the advance payments against exports:

1. Where an exporter receives advance payments (with or without interest) from a buyer/
third party named in the export declaration made by the Exporter, outside India, the
exporter shall be under the obligation to ensure that:

a) The shipment of goods is made within one year from the date of receipt of advance payment. 

The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and

b) The documents covering the shipment are routed through the authorised dealer through whom advance payment is received.

Provided that in the event of the exporter’s inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment or towards, no remittance towards refund of un-utilised portions of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve bank of India.

2. Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

**Question 31**

Mr. Ramesh is an exporter of goods and services. Explain briefly his duties under Foreign Exchange Management Act, 1999 with regard to the following:

a) Furnishing of information relating to such exports.

b) Realization and repatriation of foreign exchange on such exports.

**Answer:**

**Duty of every exporter of goods and services under FEMA, 1999:**

**A. Furnishing of Information :-**

a) Every exporter of goods is required to furnish to RBI or other prescribed authority a declaration containing true and correct material particulars, including the amount representing full export value.

b) If full exportable value is not ascertainable at the time of export due to prevailing market conditions, the exporter shall indicate the amount he expects to receive on sale of goods in a market outside India.

c) The exporter of goods shall also furnish to RBI such other information as may be required by RBI for the purpose of ensuring realization of export proceeds by such exporter [section 7(i)].

d) RBI can direct any exporter to comply with prescribed requirements to ensure that full export value of the goods or such reduced value of the goods as RBI determines, is received without delay [section 7(2)].

e) Every exporter of services shall furnish to RBI or other prescribed authority a declaration containing true and correct material particulars in relation to payment of such services [section 7(3)].
B. Realization and repatriation of foreign exchange:

a) Where any amount of foreign exchange is due or has accrued to any resident in India,

b) such person shall take all reasonable steps to realize and repatriate to India the foreign exchange within such period and in such manner as may be specified by RBI (section 8).

c) Mr. Ramesh as an exporter of goods and services must comply with the requirements of section 7 and 8 of FEMA, 1999 and also with the requirements under Foreign Exchange Management (Export of Goods and Services) Regulations, 2015

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**Question 32**

According to Foreign Exchange Management Act, 1999, a person resident in India shall take all reasonable steps to repatriate to India any amount of foreign exchange earned and accrued to him. What is meant by the expression ‘Repatriate to India’? State the cases where foreign exchange can be held or need not be repatriated to India by a resident in India.

**Answer:**

The word “repatriate to India” is defined in section 2(y) of the FEMA, Act 1999. ‘Repatriate to India’ means the realized foreign exchange should be sold to an authorised person in India in exchange for rupees. It also includes the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank and includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange.

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**Exemption from Realisation and repatriation in certain cases (Sec 9)**

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**Question 33**

Exemption from Realisation and repatriation in certain cases (Sec 9)

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Mr. Raman is a software engineer of Armtek Ltd. The company sent him to Japan to develop a software programme there on deputation for 2 years. He earned a sum of US $ 3,000 as a honorarium there. On his return to India he wants to hold this foreign currency with him. Whether Mr. Raman will be allowed to keep the foreign currency with him.

**Answer:**

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

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

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

a) Any person may possess foreign coins without any restriction to the amount.

b) Any person resident in India is permitted to retain in aggregate foreign currency not exceeding USD 2,000 or its equivalent in the form of currency notes/bank notes or traveler's cheques acquired by him;

c) Any person resident in India but not permanently resident therein is permitted to hold the foreign currency without limit, if the foreign currency was acquired when he was resident outside India and was brought into India and declared to the custom authorities.

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

**Question 34**

The Reserve Bank of India issued certain directions to Dream Construction Limited, an authorised person under the Foreign Exchange Management Act, 1999 to file certain returns. The Company failed to file the said returns. Decide, as to what penal provisions are applicable against the said authorised person under the said Act.

**Answer:**

**Penal provisions:** Section 11(3) of the Foreign Exchange Management Act, 1999 states that where any authorized person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard impose a penalty which may extend to ₹ 10,000/- and in the case continuing contraventions with an additional penalty which may extend to ₹ 2,000/- for every day during which such contravention continues.

**Question 35**
The Reserve Bank of India receives a complaint that an authorized person has submitted incorrect statements and information to the Reserve Bank of India in respect of receipt and utilization of Foreign Exchange. Explain the powers of the Reserve Bank of India with regard to inspection of records of the above authorized person in respect of the above complaint.

Referring to the provisions of Foreign Exchange Management Act, 1999, state the duties of the above authorized person.

**Answer:**

**As per section 12 of the Foreign Exchange Management Act, 1999:** The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorized in writing by the Reserve Bank in this behalf, of the business of any authorized person as may appear to it to be necessary or expedient for the purpose of:

a) **verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;**

b) **obtaining any information or particulars** which such authorized person has failed to furnish on being called upon to do so;

c) **securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.**

It shall be the duty of every authorized person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under section 12 (1) such books, accounts and other documents in his custody or power and to furnish any statement or information relating to the affairs of such persons, company or firm as the said officer may require within such time and in such manner as the said officer may direct.

**Question 36**

Explain the meaning of the term “Adjudicating Authority” under the Foreign Exchange Management Act, 1999, the powers available with the said authority to pass orders imposing penalty and enforce the same in relation to violation of any provision of FEMA by Mr. Dubious, a resident in India.

**Answer:**

**Adjudicating authority:** According to Section 2(a) of FEMA, 1999, ‘Adjudicating Authority’ means an officer authorized under section 16(i)

**Power of adjudicating authority:**

Persons committing an **offence under FEMA are liable to penalty.**

An adjudicating authority appointed by the Central Government under FEMA can impose any penalty for violation of any provision of FEMA or contravention of any rule, regulation, directions or orders issued under the powers conferred by the Act.

Their jurisdiction will be prescribed by the Central Government (section 16(1) & (2)).
The **Adjudicating Authority** can hold inquiry only on receiving a complaint from an authorized officer (Section 16(3)). They have to **follow principles of natural justice by giving opportunity** to Mr. Dubious of making representation. The adjudicating authority should endeavor to dispose off the complaint within 1 year (Section 16(6)).

**Penalty Amount:**

a) **Amount is quantifiable:**
   - The adjudicating authority can impose penalty up to 3* sum involved in such contravention where the amount is quantifiable.

b) **Amount is not quantifiable:**
   - If the amount is not quantifiable, **penalty up to 2 lakhs can be imposed**. If contravention is of continuing nature, **further penalty up to Rs 5,000 per day** during which the default continues can be imposed [Section 13(i)].

The Adjudicating Authority adjudicating the contravention can also order **confiscation of any currency, security or any other money or property** in respect of which the contravention has taken place.

He can also direct that **foreign exchange holdings of any person committing the contravention shall be brought back to India or retained outside as per directions** (Section 13(2)).

**Enforcement of orders of adjudicating authority.**

a) Person on whom penalty is imposed is required to make payment within 90 days of receipt of notice. If such payment is not made, he is liable to civil imprisonment [Section 14(i)].

b) Such civil imprisonment can be up to 6 months, if demand is for less than 1 crore. If demand exceeds 1 crore, civil imprisonment can be up to 3 years.

c) If he pays the amount, he shall be released.

d) Order for arrest and detention cannot be made unless a show because notice is issued to the defaulter.

e) However, arrest can be made without show cause notice, if adjudicating authority is satisfied
   - i) that the defaulter has dishonesty transferred, concealed or removed his property or he is refusing or neglecting to pay even if he has means to pay [Section 14(2) (b)] and
   - ii) he is likely to abscond the local limits [Section 14(3)].

**If a person to whom show because notice is issued does not appear before Adjudicating authority, warrant of arrest can be issued** [Section 14 (4)].

**Question 37**

Mr. X, an Indian national has failed to realize and repatriate foreign exchange worth more than 2 crores. Mr. X having realized that he had committed a contravention of the provisions of the Foreign Exchange Management Act, 1999, desires to compound the said offence. Advise Mr. X.

**Answer:**

a) Because of his **failure to realize and repatriate foreign exchange**, Mr. X has contravened the provisions of section 8 of FEMA and he is liable to the penalties leviable under section 13, followed by adjudication proceedings.
b) Section 15 of FEMA permits the offending party to compound the contravention within 180 days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank of India as may be authorized in this behalf by the Central Government in such manner as may be prescribed.

c) No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Where a contravention has been compounded, no proceeding can continue or be initiated against the person in respect of the contravention so compounded.

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**Question 38**

A person aggrieved by an order made by the Special Director (Appeals) desires to file an appeal against the said order to the Appellate Tribunal but the period of limitation of 45 days as prescribed in Section 19(2) of the Foreign Exchange Management Act, 1999 has expired. Advise.

**Answer:**

Any person aggrieved by an order made by the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal under Section 19 (1) of the Foreign Exchange Management Act, 1999. Every appeal under sub-section (1) shall be **filed within a period of 45 days from the date on which a copy of the order made by the Special Director (Appeals) is received** by the aggrieved person shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed.

Provided that **the Appellate Tribunal may entertain an appeal after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing it within that period.**

**Question 39**

India Exports Limited engaged in the export of software products to U.S. One party in U.S. to whom the company exported certain products failed to pay the amount due for these exports resulting into non repatriation of amount to India. The Adjudicating Authority on coming to know about this, levied a penalty on India Exports Limited under the provisions of the Foreign Exchange Management Act, 1999. The company seeks your advice as to which authority, to whom it can make an appeal against the decision of Adjudicating Authority. State also, the time limit within which the appeal can be lodged.

**Answer:**

In accordance with the provisions of the Foreign Exchange Management Act, 1999, as contained under Sections 17 and 19 appeals against orders of Adjudicating Authority can be made by India Exports Ltd., If the Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for Foreign Exchange against the order of Adjudicating Authority and the Special Director (Appeals). However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.
Appeal to Special Director (Appeals):

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under section 17 within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there was sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass the order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal:

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange, 1999 within 45 days from the date on which the copy of the order was made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the applicant has to deposit the amount of such penalty with the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass the order.

Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal. Therefore, India Exports Ltd., can go for appeals as stated above.

Question 39

Mr. Bandha, a software Engineer, Indian Origin took employment in USA. He is a resident of USA for a long time. He desires
a) to acquire a farm house in Munnar (Kerala).
b) to make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.
c) to make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township.

Mr. Unsatisfactory, brother of Mr. Bandha residing at Chennai is aggrieved by an order made by Appellate Tribunal established under Foreign Exchange Management Act, 1999, desires to file further appeal.

With references to the provisions of Foreign Exchange Management Act, 1999, analyse whether there are any restrictions in respect of the transactions desired by Mr. Bandha. Also determine the appeal procedure to Mr. Unsatisfactory on the order of Appellate Tribunal under the said Act.

Answer:

a) Acquisition of a Farm House

Mr. Bandha, cannot acquire a farm house in Munnar (Kerala) because a person resident outside India who is a citizen of India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.
b) Making Investments in KLJ Nidhi Limited

Mr. Bandha cannot make investment in KLJ (Nidhi) Ltd., as a person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage as Nidhi Company.

c) Making Investments in Rose Real Estate Limited

The person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farm houses. However, development of townships shall not be included in the real estate business.

Thus, Mr. Bandha can make investment in Rose Real Estate Ltd.

Appeal to High Court (Section 35)

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such Order.

However, the High Court may, if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Mr. Unsatisfactory can file an appeal to the High Court, as per the above procedure.

Question 40

A French Manufacturing Company desirous of setting up its branch office at Pune seeks your advice on the objects for which the company may be allowed to set up the desired branch office. Advise the company about the procedure as required under the Foreign Exchange Management Act, 1999 to be followed in this regards

Answer:

Setting up a branch office at Pune by a French company –

Objects and the procedure under the FEMA, 1999: Since setting up a branch office by a foreign company in India involves foreign exchange, permission of RBI is required.

Following are the objects for which RBI permits companies engaged in manufacturing and trading activities abroad to set up Branch Office in India:

a) To represent the parent company/other foreign companies in various matters in India e.g. acting as buying/selling agents in India.

b) To conduct research work in the area in which the parent company is engaged.

c) To undertake export and import trading activities.

d) To promote possible technical and financial collaborations between the Indian companies and overseas companies.

e) Rendering professional or consultancy services

f) Rendering services in information technology and development of software in India.

g) Rendering technical support to the products supplied by the partner/group companies.
Steps / procedure:

i) Foreign company can set up Branch Offices in India after obtaining approval from RBI.

ii) The office can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office abroad.

iii) Permission to set up such office is initially granted for a period of 3 years and this may be extended from time to time by the Regional Office in whose jurisdiction the office is set up.

iv) The representative office will have to file an annual activity certificate etc. from a Chartered Accountant to the concerned Regional Office of the RBI.

Application is required to be made in Form FNC-1.
**Ch. 2 – Securitisation And Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002**

### Definitions

**Question 1**

*(Nov 2010)*


**Answer:**

**Asset Reconstruction:** 'Asset Reconstruction' means acquisition by any securitization company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance. (Section 2(b) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.)

**Financial Assets:** Financial Assets' means debt or receivables and includes:

a) a claim to any debt or receivables or part thereof, whether secured or unsecured; or any debt or receivables secured by mortgage of, or charge on, immovable property; or a mortgage, charge, hypothecation or pledge of movable property; or

b) any right or interest in the security, whether full or part underlying such debt or receivables; or

c) any beneficial interest in property, whether movable or immovable or in such debt, receivables, whether such interest is existing, future accruing, conditional or contingent; or any financial assistance. (Section 2(1)).

**Question 2**

*(May 2013)*


**Answer:**

a) The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came into force in June, 2002. The preamble of the Act says that this Act has been enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.

b) The legal framework for securitization in India emerged to promote the setting up of asset reconstruction/securitization companies, which are supposed to take over the Non-Performing Assets (NPA) accumulated with the banks and public financial institutions.

c) The Act provides special powers to lenders and securitization/asset reconstruction companies, to enable them to take over assets of borrowers without first resorting to courts.

d) **Note:** The concept of securitization may also be explained by following two approaches:
Approach 1. Securitization:

Securitization means acquisition of financial assets by any securitization company or reconstruction company from any originator,

a) whether by raising of funds by such securitization company or
b) reconstruction company from qualified institutional buyers

By issue of security receipts representing undivided interest in such financial assets or otherwise (Section 2(z)).

Banks/Financial Institution (known as originators) give loans secured by properties to original borrowers. These loans or receivables are known as financial assets (Sec. 2(i)). These financial assets are acquired by Securitization Company or reconstruction company (known as special purpose vehicles-SPV). The SPV issues security receipts which are distributed to investors (i.e. Qualified Institutional Buyers). The SPV pays the bank/financial institution for the assets purchased with the proceeds from the sale of securities.

In short: Securitization is a method adopted by banks/financial institutions for raising funds by way of selling receivables for money. These receivables are illiquid because these are non-performing assets.

Question 3

What are non-performing asset?

Answer:

"Non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank.
**Question 4**

RST Ltd. is a securitization and reconstruction company under SARFAESI Act, 2002. The certificate of registration granted to it was cancelled. State the authority which can cancel the registration and the right of RST Ltd. against such cancellation.

**Answer:**

*Cancellation of Certificate of Registration under SARFAESI Act, 2002:*

a) The Reserve Bank of India (RBI) may cancel a certificate of registration granted to a securitization and reconstruction company for the reasons stated in Section 4 of SARFAESI Act, 2002.

b) RST Ltd., can prefer an appeal to the Central Government (Secretary, Ministry of Finance, Government of India) within a period of 30 days from the date on which order of cancellation was communicated to it.

c) The Central Government must also give such company a reasonable opportunity of being heard before rejecting the appeal.

If RST Ltd., is holding investments of qualified institutional buyers at the time of cancellation of certificate of registration, it shall be deemed to be a securitization and reconstruction company until it repays the entire investments held by it, together with interest if any, within such period as may be specified by the Reserve Bank.

**Question 5**

(Dec 2014)

Referring to the provisions of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 state the circumstances under which the Reserve Bank of India may cancel the certificate of registration granted to a Securitisation Company.

**Answer:**

*Cancellation of Certificate of Registration (Sections 3 and 4 of the securitization & reconstruction of financial assets & enforcement of Security Interest Act, 2002)*

As per the section 4 of the Securitisation & Reconstruction of Financial Assets & Enforcement of security Interest Act, 2002, the Reserve Bank may cancel a certificate of registration granted to a securitization company or a reconstruction company, if such company-

a) ceases to carry on the business of securitization or asset reconstruction; or ceases to receive or hold any investment from a qualified institutional buyer; or

b) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or

c) at any time fails to fulfill any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or

d) fails to-

i) Comply with any direction issued by the Reserve Bank under the provisions of this Act; or
ii) Maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or 

iii) Submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or 

iv) Obtain prior approval of the Reserve Bank required under sub-section (6) of section 3.

**Enforcement of Security Interest (Sec 13, 14)**

**Question 6**

(No. 2011)

Explain briefly the procedure relating to enforcement of security interest under SARFAESI Act, 2002.

**Answer:**

Procedure relating to enforcement of security interest (Section 13 of SARFAESI Act, 2002): Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favor of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

a) Where any borrower, who is under a liability to a secured creditor under a security agreement,

b) makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then,

c) the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of section 13.

Provided that—

i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;"

This notice shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

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

a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured asset;
c) **appoint any person** (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

d) **require at any time by notice in writing**, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

[Note: Answer is revised as per the amendment made by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 notified on 16th August 2016]

**Question 7** *(May 2017)*

Popular Limited defaulted in the repayment of term loan taken from a Bank against security created as a first charge on some of its assets. The bank issued notice pursuant to Section 13 of the SARFAESI Act, 2002 to the Company to discharge its liabilities within a period of 60 days from the date of the notice. The company failed to discharge its liabilities within the time limit specified.

Explain the measures to be taken by the Bank to enforce its security interest under the said Act.

**Answer:**

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

i) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

ii) 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:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

iii) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

**Question 8** *(May 2018)*

Beta Ltd. failed to repay the amount borrowed from KMP Bank Ltd. in accordance with the terms of lending. The loan was granted against the mortgage of its Building. The Bank issued notice as required under Section 13 of the SARFAESI Act, 2002. It was decided by the bank to take possession of the Building after getting necessary assistance from the judicial authority. State the provisions enumerated under Section 14 of the SARFAESI Act, 2002 in this regard.

**Answer:**

Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking
possession of secured asset (Section 14)

The secured creditor may, for the purpose of taking possession or control of secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him

a) take possession of such asset and documents relating thereto; and
b) forward such asset and documents to the secured creditor.

within a period of thirty days from the date of application.

Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

Question 9

Apex Limited failed to repay the amount borrowed from the bankers, ACE Bank Limited, which is holding a charge on all the assets of the company. The Bank took over management of the company in accordance with the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by appointing four persons as directors. The company is managed by a Managing Director, Mr. X. Referring to the provisions of the said Act, examine whether Mr. X is entitled to compensation for loss of office and also explain the effect of such takeover on certain rights of the shareholders of the company.

Answer:

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

Here, Apex Limited is a borrower and ACE Bank Limited is a secured creditor. Compensation to Managing director (Mr. X) for loss of office:

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

Effect of takeover on rights of the shareholders:

Where the management of the business of a borrower, being a company as defined in the
Companies Act is taken over by the secured creditor, then, notwithstanding anything contained, such borrower- in the said Act or in the memorandum or articles of association of such company -
a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;
c) no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

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

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

**Borrower’s rights in case of enforcement of security interest by secured creditors**  
(Sec 17, 17A, 18, 18B and 19)

**Question 10**  
*(Nov 2017)*

Sharp Health Clinic Limited had availed the credit facilities from the United Bank Limited. The company made repayment of loan to some extent but not entirely and accordingly the Bank took recourse under the provisions of Section 13(2) the SARFAESI Act, 2002. Consequently, possession of the mortgaged property was taken up and it was duly advertised. The company also filed an application under Section 17(1) of the SARFAESI Act, 2002 before the Debts Recovery Tribunal, which was dismissed by the impugned order. Being aggrieved, the company approached court. Will the company succeed in its petition referring to in the SARFAESI Act, 2002?

**Answer:**

According to Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with prescribed fees to the Appellate Tribunal within 30 days from the date of receipt of the order of Debts Recovery Tribunal.

Further, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than 25% of debt.

Thus, in the given situation Sharp Health Clinic Limited can appeal to the Appellate Tribunal (Now to NCLAT) by following the above provisions.
Question 11

Under Section 31 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, certain situations have been specified in which the provisions of this Act are not applicable. You are required to mention any four of such situations.

Answer:

Under Section 31 of the SARFAESI Act, 2002, the situations in which the provisions of this Act do not apply are as follows:

a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;

b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;

c) Creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;

d) Creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;

e) Omitted

f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930

g) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act or sale under the first proviso to sub section (1) section 60 of the Code of Civil Procedure, 1908;

h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;

i) any security interest created in agricultural land;

j) any case in which the amount due is less than twenty percent of the principal amount and interest thereon.

Question 12

Mr. AA, a farmer mortgaged his agriculture land and obtained a term loan for cultivation purpose from a Nationalized Bank. Due to continuous drought, Mr. AA could not honour the repayment schedule. Identify whether the Bank can initiate action invoking the provisions of the SARFAESI Act, 2002.

Answer:

According to Section 31 of the SARFAESI Act, 2002, the provisions of the Act do not apply to any security interest created in agricultural land.

Hence, the Bank cannot initiate action against Mr. AA who could not honour repayment schedule for a bank loan obtained against his mortgaged agricultural land.
Ch. 3 – Prevention of Money Laundering Act, 2002

Basics of PMLA

Question 1 (May 2013)

"Money Laundering" does not mean just siphoning of fund." Comment on this statement explaining the significance and aim of the Prevention of Money Laundering Act, 2002.

Answer:

“Money laundering” does not mean just siphoning of fund: Money Laundering is a moving of illegally acquired cash through financial systems so that it appears to be legally acquired. Thus, money laundering is not just the siphoning of fund but it is the conversion of money which is illegally obtained.

Prevention of Money Laundering Act, 2002 has been enacted with aim for combating channelizing of money into illegal activities.

Significance and Aim of Prevention of Money Laundering Act, 2002:

a) The preamble to the Act provides that it aims to prevent money–laundering and to provide for confiscation of property derived from, or involved in, money–laundering and for matters connected therewith or incidental thereto.

b) In order to further strengthen the existing legal framework and to effectively combat money laundering, terror financing and cross-border economic offences, an Amendment Act, 2009 was passed.

c) The new law seeks to check use of black money for financing terror activities. Financial intermediaries like full- fledged money changers, money transfer service providers and credit card operators have also been brought under the ambit of The Prevention of Money-Laundering Act. Consequently, these intermediaries, as also casinos, have been brought under the reporting regime of the enforcement authorities.

d) It also checks the misuse of promissory notes by FIIs, who would now be required to furnish all details of their source. The new law would check misuse of “proceeds of crime” be it from sale of banned narcotic substances or breach of the Unlawful Activities (Prevention)Act.

The passage of the Prevention of Money Laundering (Amendment), 2009 have enabled India’s entry into Financial Action Task Force (FATF), an inter-governmental body that has the mandate to combat money laundering and terrorist financing.

Definitions

Question 2 (May 2018)

Explain the meaning of the term "Property" under the Prevention of Money Laundering Act, 2002.

Answer:

According to clause (v) of sub – Section (1) of Section 2 of the Prevention of Money Laundering
Act, 2002, "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Explanation.— For the removal of doubts, it is hereby clarified that the term “property” includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

**Question 3** *(May 2018)*

What is Payment System? Under the provisions of Prevention of Money Laundering Act, 2002

**Answer:**

In terms of clause (rb) of section 2 "payment system" means a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them. It includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations.

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**Offence for Money Laundering (Sec 3 – Sec 4)**

**Question 4** *(May 2012)*

Explain the term "Offence of Money Laundering" within the meaning of the Prevention of Money Laundering Act, 2002. State the punishment for the offence of money laundering.

or

Explain the meaning of the term “Money Laundering”. Z, a known smuggler was caught in transfer of funds illegally exporting narcotic drugs from India to some countries in Africa. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

**Answer:**

**Money Laundering:** Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering. [Section 3 of the Prevention of Money Laundering Act, 2002]

Paragraph 2 of Part A of the Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. Illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances (section 23) is covered under paragraph 2 of Part A.

**Punishment:** Section 4 of the said Act provides for the punishment for Money-Laundering. Whoever commits the offence of money-laundering shall be *punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine*. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the *maximum punishment may extend to 10 years instead of 7 years*. 
Question 5

Mr. Honest, a notorious, was caught in possession of Counterfeit Currency Notes, an offence specified under Part A - Paragraph 1 of the Schedule of the Prevention of Money Laundering Act, 2002. State the Punishment that can be awarded to him under the above Act. Also identify the punishment for the offence specified under Part A - paragraph 2 of the Schedule of the Prevention of Money Laundering Act, 2002.

Answer:

Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering. According to the Section, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.

Since, counterfeiting of currency notes is a predicate offence, specified under paragraph 1 of Part A of the Schedule (and not under paragraph 2 of Part A of the Schedule), Mr. Honest can be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Where the offence specified falls under Part A- Paragraph 2 of the Schedule of PMLA, maximum punishment may extend to 10 years.

Question 6

Enumerate the obligations of banking companies under the Prevention of Money Laundering Act, 2002.

Answer:

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

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

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

c) verify the identity of its clients in such manner and subject to such conditions, as may be prescribed;

d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;

e) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.
Every information maintained, furnished or verified, save as otherwise provided under any law for the time being in force shall be kept confidential.

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

The records referred to in clause (e) of sub-section (1) 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.

The Central Government may, by notification, exempt any reporting entity or class of reporting entities from any obligation under this chapter.

**Question 7**  
**Answer:**

**Obligation of Banking Companies:**

Sec. 12 of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries of securities market. Such Obligations are;

1) **Maintenance of records:** Every reporting entity shall-
   a) maintain a record of all transactions, including information relating to transaction covered under clause (b), in such a manner as to enable it to reconstruct individual transactions;
   b) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and the value of which prescribed,
   c) verify the identity of its clients in such manner and subject to such condition, as may be prescribed;
   d) identify the beneficial owner, if any, of such of its clients, as may be prescribed;
   e) maintain records of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

2) **Maintain of records:** The records referred to in clause (a) shall be maintained for a period of 5 years from the date of transaction between a client and reporting entity. The records referred to in clause (e) shall be maintained for a period of 5 years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

In the given case, PMT Limited, a banking company maintained the record of all transaction for a period of 5 years from the date of cessation of the transactions between the clients and the company.

**Conclusion:** The Company has fulfilled its obligation as record are maintained for 5 years as required by law.
Question 8

Manav Kalyan, a charitable organization, opened a current account with M/s ABZ Bank on 1st July, 2012. This account was closed on 30th June, 2016. Referring to the obligations of banking companies under the Prevention of Money Laundering Act, 2002, specify the period upto which the said bank has to maintain records relating to the account of "Manav Kalyan".

Answer:

Obligation of Banking Companies, Financial Institutions and Intermediaries: Section 12 of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Financial Institutions and Intermediaries. According to sub-section (1), every Banking Companies, Financial Institutions and Intermediaries shall maintain the records referred to in clause (a) of sub-section (1) for a period of five years from the date of transaction between a client and the reporting entity. For the records referred to in clause (e) of sub-section (1), it 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.

As per the facts given in the questions, Manav Kalyan, a charitable organization opened current account with ABZ Bank on 1st July, 2012 and closed the account on 30th June 2016.

As per the above provisions, ABZ Bank shall maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients 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.

So, accordingly the ABZ Bank has to maintain the records relating to the account of “Manav Kalyan” till 30th June, 2021.

Appellate Tribunal (Sec 25 - Sec 42)

Question 9

The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching certain properties of XYZ Limited alleged to be involved in money laundering for a specified period. The company aggrieved by the order of the Adjudicating Authority seeks your advice about the remedy that is available under the Act. Advise explaining the relevant provisions of the Prevention of Money Laundering Act, 2002.

Answer:

Section 25 of Prevention of Money Laundering Act, 2002 empowers the Central Government to establish an Appellate Tribunal to hear appeal against order of the Adjudicating Authority and other authorities under the Act.

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal. Any person aggrieved by an order made by the Adjudicating Authority may prefer an appeal to the Appellate Tribunal within a period of 45 days from the date on which a copy of the order is received by him. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.
The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Act also provides further appeal. According to Section 42 any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the provisions of the Act explained above the company is advised to prefer an appeal to Appellate Tribunal in the first instance.

**Question 10**

(May 2015)

How a trial under the Prevention of Money Laundering Act, 2002 is conducted in Special Courts?

**Answer:**

Sections 43 to 47 deal with provisions relating to Special Courts. Section 43 empowers the Central Government (in consultation with the Chief Justice of the High Court) for trial of offence of money laundering, to notify one or more Courts of Sessions as Special Court or Special Courts for such area or areas or for such cases or class or group of cases as may be specified in the notification to this effect. Section 44 clearly provides for the offences triable by Special Courts. It overrides the provisions of the Code of Criminal Procedure, 1973 and provides that –

a) The scheduled offence and the offence punishable under section 4 shall be triable only by the Special Court constituted for the area in which the offence has been committed.

b) A Special Court may, upon a complaint made by an authority authorized in this behalf under this Act take cognizance of the offence for which the accused is committed to it for trial. The requirement of police report of the facts which constitute an offence under this Act is no more applicable.

**Question 11**

(Nov 2012 & 2015)

Mr. Gambler has been arrested for a cognizable and non-bailable offence punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advise as to how can he be released on bail. Advise him.

**Answer:**

In accordance with the provisions of the Money Laundering Act, 2002, as contained under Section 45, the offences under the Act shall be cognizable and non-bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule shall be released on bail or on his own bond unless:

The public Prosecutor has been given an opportunity to oppose the application for such release and Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm person, the Special Court can direct the release of such person on bail.

Mr. Gambler may refer the above section 45 so that he can be released on bail.
Ch. 4 – The Foreign Contribution (Regulation) Act, 2010

Question 1

State under what circumstances Government can cancel the certificate of registration granted to a person under FCRA?

Answer:

Yes. As per section 14 of the FCRA, Central Government may cancel the certificate, after carrying out an inquiry, on the following grounds –

a) the holder of the certificate has made an incorrect/false statement in the application for the grant of registration or renewal

b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof

c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate

d) the holder of the certificate has violated any of the provisions of this Act or rules or order made thereunder.

e) if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

In any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

Question 2

X, is an association having registration to transfer the Foreign Contribution received by it to another organization? Is the valid act of X? If yes, then what is the process to do so? Is there any restriction on transfer of funds to other organizations?

Answer:

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

a) is registered and granted a certificate or has obtained prior permission under this Act; and

b) receives any foreign contribution,

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

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

Restrictions on transfer: Rule 24 of FCRR, 2011, prescribes the procedure for transferring foreign contribution to any unregistered person as under:
A person who has been granted a certificate of registration or prior permission under section 11 and intends to transfer part of the foreign contribution received by him to a person who has not been granted a certificate of registration or prior permission under the Act, may transfer such foreign contribution to an extent not exceeding ten per cent of the total value thereof and for this purpose, make an application to the Central Government in the prescribed Form.

1) Every application made under sub-rule (1) shall be accompanied by a declaration to the effect that-
   a) the amount proposed to be transferred during the financial year is less than ten per cent of the total value of the foreign contribution received by him during the financial year;
   b) the transferor shall not transfer any amount of foreign contribution until the Central Government approves such transfer.

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

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

**Question 3**

*RTP May 2018*

Can foreign contribution be received in and utilised from multiple Bank Accounts?

**Answer:**

The foreign contribution should be received only in the exclusive single foreign contribution account of a Bank (also called designated FC account), as mentioned in the order for registration or prior permission granted and should be separately maintained by the associations. However, one or more accounts (called Utilization Account) in one or more banks may be opened by the association for ‘utilising’ the foreign contribution after it has been received in the designated FCRA bank account, provided that no funds other than that foreign contribution shall be received or deposited in such account or accounts and in all such cases, intimation is to be given online within 15 days of opening of such account.

**Question 4**

Can capital assets purchased with the help of foreign contributions be acquired in the name of the Mr Ram, an office bearer of the association?

**Answer:**

No. Every asset purchased with foreign contribution should be acquired and possessed in the name of the association since an association has a separate legal entity distinct from its members.
Question 5

Whether foreign remittances received from a relative are to be treated as foreign contribution as per FCRA 2010?

Answer:

Foreign remittances received from a relative

- AS per Sec 4(e) of the Foreign Regulation Act 2010 and Rules of Foreign Contribution Regulation Rules 2011, even the persons prohibited u/s 3 i.e., person not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives.

- However, in terms of Rule 6 of Foreign Contribution Regulation Rules 2011 any person receiving foreign contribution in excess of ₹1 lakh or equivalent thereto in financial year from any of his relatives shall inform the C.G in prescribed Form within 30 days from the date of receipt of such contribution.

Conclusion: Foreign remittance received from a relative is not treated as foreign contribution.

Question 6

Mr. Satish, General Secretary of a political party received an invitation from the American Labour Party. He wants to avail foreign hospitality. Define the term "foreign hospitality". In the light of the provisions of the Foreign Contribution (Regulation) Act, 2010, decide whether he can avail it. Discuss also the exception, if any, under which the provisions of the said Act may be relaxed.

Answer:

Definition of “Foreign Hospitality”

“Foreign hospitality” means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with free boarding, lodging, transport or medical treatment. [Section 2(i) of the Foreign Contribution (Regulation) Act, 2010]

Whether Mr. Satish can avail foreign Hospitality?

As per Section 6 of the Act, Office bearers of political parties require prior approval from Ministry of Home Affairs before accepting Foreign Hospitality. In the instant case, Mr. Satish, General Secretary of a political party, before availing foreign hospitality shall require prior approval from Ministry of Home Affairs.

Exceptions

It shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India. But, where such foreign hospitality has been received, the person receiving such hospitality shall give an intimation to the Central Government as to the receipt of such hospitality within one month from the date of receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received.
Ch. 5 – The Arbitration And Conciliation Act, 1996

**Question 1**

In 2016, Company Amar, food processor manufacturing unit entered into a joint venture agreement with Company USHA, the largest manufacturer of Food processors for supply of parts of mixer & grinder for manufacturing its latest model. Both the companies are registered under the Companies Act 2013. Agreement carries the term that all disputes shall be arbitrated in Mumbai. State the type of arbitration agreement made between them.

What will happen if the agreement does not have any clause relating to arbitration? Disputes arose between them concerning quality of material supplied in 2017.

**Answer:**

There are two basic types of arbitration agreement are:

a) **Arbitration clause** - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.

b) **Submission agreement** - an agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

In first case, the agreement already carries the term that all disputes shall be arbitrated in Mumbai at the time of entering into joint venture agreement. This would be an arbitration clause as it is contained in the principal contract (JVA) and no disputes have arisen till yet. It concerns future disputes that may arise.

In the second case, the Principal contract (JVA) does not have any term relating to arbitration. Disputes arose between the parties concerning quality of supplied goods in 2017. To resolve this dispute, parties later entered into an agreement “That all disputes including quality of goods supplied by Company USHA to Company Amar shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator.” Such an agreement that is made after the disputes have arisen would be called a submission agreement.

**Question 2**

How important are the ideas of independence and impartiality in arbitration?

a) Is the arbitrator required to disclose anything to the parties?

b) Is membership of the same sports club as one of the parties problematic?

**Answer:**

a) The arbitrator are under a duty of disclose any relations with parties or their lawyer that might give rise to justifiable doubts as to their independence and impartiality.

b) Such an association is too remote to count as a relation that might lead to doubts of bias.

**Question 3**

Can an arbitrator resign on their own account? Do they have to give reasons for their resignation? Could an award be challenged on the ground that the arbitrator had resigned without giving any proper justifications?
Answer:
An arbitrator can resign when they want, without giving reasons for their resignation. This action does not affect the validity either of the arbitration proceedings or the arbitral award.

Question 4
Mr. X wants to start a bakery and so he contacts Mr. Y Confectioners & Bakers for supply of cakes and biscuits. The communication between the parties were over email. On e-mail, there was a term of service between the parties containing that “any disputes regarding quality or delivery shall be submitted to arbitration conducted under the guidance of Indian Confectionary Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you.” X placed an order. State the legal position as the validity of the arbitration agreement.

Answer:
As per the arbitration and Conciliation Act, an agreement must be in writing. There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement. The communication over email of the term of services is a proper valid agreement and the same have been stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

Question 5
Smart Automobiles Limited and Apex Four wheelers Limited entered into an agreement regarding annual maintenance services to be provided by Smart Automobiles for all vehicles within the state of Uttar Pradesh for five years. The agreement was containing a clause that in the event of a dispute between the parties the matter would be submitted to arbitration. At the end of the fifth year, the service agreement was not renewed.

Decide whether the arbitration agreement should not be treated as terminated. Also describe the other grounds of termination of an arbitration agreement.

Answer:
Termination of an arbitration agreement
Just the way parties can enter into an arbitration agreement, they can also terminate an arbitration agreement. Thus, an arbitration agreement could be put to an end by:

1. Mutual consent: like any contract, the parties involved can jointly agree to put an end to a particular arbitration agreement.

2. Termination of principal contract: an arbitration agreement always operates in relation to a principal contract. If the principal contract is terminated through discharge or novation, the arbitration agreement terminates with the contract. However, if the principal contract is breached, then the arbitration agreement survives because of the operation of the doctrine of separability.

In the given instance, at the end of the fifth year, the Service Agreement was not renewed. Hence, the contract terminates, and along with it, the arbitration agreement.
Question 1

When will the provisions of insolvency and liquidation of corporate persons be applicable on a corporate person?

Answer:

The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when the amount of the default is one lakh rupees or more. However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

Question 2

Who may initiate corporate insolvency process against a corporate person?

Answer:

The corporate insolvency process may be initiated against any defaulting corporate debtor by -

a) Financial creditor,
b) Operational creditor
c) Corporate debtor

Question 3

What is the procedure of Insolvency Resolution Process for a Corporate Applicant?

Answer:

Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

The corporate applicant shall furnish the information relating to books of account and other documents and a resolution professional shall be appointed as interim resolution professional.

The Adjudicating Authority may either accept or reject the application within fourteen days of receipt of application. However, applicant should be allowed to rectify the defect within seven days of receipt of notice of such rejection.

Question 4

Is there any time limit for completion of the Insolvency Resolution Process?

Answer:

Section 12 of the Code states that any Insolvency Resolution Process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate the process.

However the National Company Law Tribunal (NCLT) may on an application made by the resolution professional, under a resolution passed by the Committee of Creditors, by a vote of 75% of voting shares, after consideration provide one extension which shall not extend more
Question 5

Wisdom Ltd. commits a default against the debts taken from the financial creditors. Mr. F, a financial creditor initiated the corporate insolvency resolution process against the Wisdom Ltd. Mr. X, another financial creditor, thereof files an application for initiating corporate insolvency resolution process with an Adjudicating Authority. State the validity as to the filing of an application by Mr. X for initiation of corporate insolvency resolution process?

Answer:

In the given problem, on commission of default by the Wisdom Ltd., Mr. F filed an application for initiating corporate insolvency resolution process before adjudicating authority. Further, Mr. X another financial creditor moved an application for initiation of insolvency resolution process against the Wisdom Ltd.

According to the section 6 of the Code, where any corporate debtor commits a default, a financial creditor, Operational creditor or the Corporate debtor itself may initiate insolvency resolution process against such corporate debtor.

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

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

Question 6

What is the effect of order of moratorium?

Answer:

Moratorium has been explained in Section 14 of the Code, during the moratorium period the following acts shall be prohibited:

a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002

The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
Nature India Limited filed a petition under the Insolvency and Bankruptcy Code, 2016 with National Company Law Tribunal (NCLT) against Tulip Limited and the petition was admitted. After that, Nature India Limited wanted to withdraw the petition based on a settlement arrived between the parties. Whether it is permissible to withdraw the petition after it has been admitted? Decide.

Also explain the rules relating to the admission and rejection of application by an adjudicating authority under the Insolvency and Bankruptcy Code, 2016.

**Answer:**

**Withdrawal of Application/ Petition:** As per the facts given in the question, Nature India Limited filed a petition under the Insolvency and Bankruptcy Code, 2016 with NCLT against the Tulip Limited and the petition was admitted. After that Nature India Limited wanted to withdraw the same due to settlement between the parties.

As per Rule 8 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, the Adjudicating Authority may permit withdrawal of the application made under rules 4 (Application by financial creditor), 6 (Application by operational creditor) or 7 (Application by corporate applicant), as the case may be, on a request made by the applicant before its admission.

Since in the given instance, Nature India Limited wanted to withdraw the petition after it was admitted by the adjudication authority. So it was not permissible to withdraw the petition after been admitted.

**Provisions related to admission or rejection of application by an adjudicating authority in the Insolvency and Bankruptcy Code, 2016—**

The Adjudicating Authority shall, on the receipt of the application within the given time period under the relevant provisions, ascertain the existence of a default and pass the order [under Section 9(5) of the IBC, 2016].

Where the Adjudicating Authority is satisfied, either

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<th>Admit application when -</th>
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<td>• a default has occurred and,</td>
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<td>• and the application is complete</td>
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<td>• no disciplinary proceedings pending against the proposed resolution professional</td>
<td>• any disciplinary proceeding is pending against the proposed resolution professional</td>
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<td>• Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect</td>
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Further, the Adjudicating Authority shall communicate order of admission or rejection of such application within given time, as the case may be.
Question 8

Standard International Ltd. who is a foreign trade creditor having its office in Hong Kong wanted to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of the debtor in India. It moved a petition u/s 9 of the Code seeking commencement of insolvency process. The foreign company was not having any office or bank account in India. Because of this, it could not submit a "Certificate from a financial institution" as required under the Code. Whether the petition is permissible under the Insolvency and Bankruptcy Code, 2016? Decide.

Answer:

As per the definition of the Creditor given in Section 3(10) of the Insolvency and Bankruptcy Code, 2016, it means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor, and a decree holder. So, Standard International Ltd. is a creditor under the purview of the Code.

As per the facts given in question, Standard International Ltd., is a foreign trade creditor. He wanted to file a petition under the under Section 9 of the Insolvency and Bankruptcy Code, 2016 for commencement of Insolvency process against the defaulter in India. Standard International Ltd. was not having any office or bank account in India.

As per the requirement of section 9 of the Code, along with application certain documents were needed to be furnished by the creditor to the Adjudicating authority. Being a foreign trade creditor, Standard International Ltd was also required to provide a copy of certificate from the financial institutions maintaining accounts of the creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor. Since, Standard International Ltd. was not having any office or bank account in India, it cannot furnish certificate from financial institution. So, Petition under Section 9 of the Code is not permissible.

Question 9

M/s TAS Constructions Private Limited, an operational creditor on 2nd April, 2018 being the default date issued a demand notice through speed post to M/s Dheeraj Constructions Private Limited, an unpaid operational/corporate debtor demanding payment of its invoice dated 19th March, 2018 for ₹ 5,60,000 (15 days payment terms) towards supply of certain works contract services as per the provisions of section 8(1) of the Insolvency and Bankruptcy Code, 2016 and rules framed there under/s.

Dheeraj Constructions Private Limited on receipt of the demand notice informed the operational creditor, that vide their e-mail dated 30th March, 2018, addressed to the company and all its directors, they have disputed the invoice on the quality of the services rendered and were withholding payment till the dispute is settled but without initiating any legal proceedings under any law for the time being in force. The operational creditor on expiry of the period of 10 days from the date of delivery of the demand notice and non-payment of its dues approached the Adjudicating Authority for the initiation of the corporate insolvency resolution process under section 9(1) of the Insolvency and Bankruptcy Code, 2016. Will the application of the operational creditor filed under section 9(1) read with section 8(2) (a) of the Insolvency and Bankruptcy Code, 2016 be permitted?

Answer:
The given problem is based on Section 9(1) of the Insolvency and Bankruptcy Code, 2016. According to the provision, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute, the operational creditor may file an application before the Adjudicating Authority for initiating corporate insolvency resolution process.

However, as per Section 8(2)(a) of the Code, the corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice bring to the notice of the operational creditor about existence of dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

Facts given states that the Dheeraj Constructions Private Limited on receipt of the demand notice, informed M/s TAS Construction Private Limited (Operational Creditor) that through email dated 30th March, 2018, addressed the company and all its directors, of the dispute on the invoice and withholding of the payment till the settlement of the dispute.

The provision of Section 8(2)(a) envisages existence of dispute, if any and record of the pendency of the suit or arbitration proceedings filed by the Corporate Debtor before receipt of such notice or invoice in relation to such disputes: thus existence of disputes and record of pendency of the suit or arbitration proceedings both are to be filed. Whereas, Section 5 (6) defines ‘disputes” as disputes includes a suit or an arbitration proceedings relating to:

a) The existence of the amount of the debt
b) The quality of goods or service or
c) The breach of the representation or the warranties.

The Supreme Court has settled the position in the case of Mobilox Innovations Private Limited Vs. Kirusa Soft Ware Private Limited and Innoventive Industries Vs ICICI Bank by deciding that “and” used in Section 8(2)(a) has to be read as disjunctively and “and” to be read as “or” else, the purpose of the IBC will be defeated.

Hence, the requirement of Section 8, to bring to the notice of the operational creditor about an existence of dispute only and not along with the record of the pendency of the suit or arbitration proceedings as settled by the Supreme Court in the cases referred above filed before the receipt of such notice or invoice in relation to such dispute have been complied with and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute, have been complied with.

So, the application of M/s TAS Constructions Private Limited (Operational Creditor) shall not be permitted under Section 9 of the Insolvency and Bankruptcy Code, 2016 as Dheeraj Construction Private Limited has complied the provisions of Section 8(2)(a) of the IBC, 2016.

**Question 10**

(May 2018)

Rose Garden Ltd. was incurring continuous losses and its financial position went bad to worse. Black Stone (Private) Ltd., a trade creditor, issued notice under Section 271 of the Companies Act, 2013 for winding up of Rose Garden Ltd. on the ground that Rose Garden Ltd. was unable to pay its debts. After some time, Black Stone (Private) Ltd. being an operational creditor filed a petition
before the Adjudicating Authority to initiate insolvency process under the Insolvency and Bankruptcy Code, 2016. Demand Notice and copy of invoice were not served to Rose Garden Ltd. since a notice was earlier issued for winding up. All other formalities were complied with. The Adjudicating Authority initiated Insolvency Resolution Process by admitting the application and appointed Resolution Professional. After complying required formalities, the Adjudicating Authority issued orders for moratorium and other relief within the stipulated time. Being aggrieved by the order of Adjudicating Authority, Rose Garden Ltd. (Corporate debtor) filed an appeal before NCLAT under the Insolvency and Bankruptcy Code, 2016. Determine will the Company succeed in its appeal?

**Answer:**

As per Section 8 of the Insolvency and Bankruptcy Code, 2016, once a default has occurred, the operational creditor has to deliver a demand notice or a copy of invoice demanding payment of debt in default to the corporate debtor.

Since in the given case, demand notice and copy of invoice was not served to the Rose Garden Ltd., so the requirement for the initiation of the corporate insolvency resolution process by operational creditor under section 9 of the Code, was not in compliance. So, the admission of application in line with the compliance of other required formality as to issue of order of moratorium and other relief, given by the NCLT was against the law.

As Rose Garden Ltd. (Corporate debtor) was aggrieved by the Order of the Adjudicating Authority on the non-compliance of requirement of Section 8, Rose Garden Ltd. will succeed in its appeal filed before the National Company Law Appellate Tribunal.

**Question 11**

(May 2018)

M/s Systemtek India Private Limited (Appellant-Corporate Debtor) has challenged the order dated 3rd July, 2017 passed by the Adjudicating Authority (National Company Law Tribunal) Mumbai Bench, Mumbai, in the National Company Law Appellate Tribunal (NCLAT).

NCLT had admitted the application preferred by appellant under Section 10 of the Insolvency and Bankruptcy Code, 2016 and an order of Moratorium was passed and Insolvency Resolution Professional was ordered to be appointed by the Ld. Adjudicating Authority (NCLT).

The only grievance of the appellant in its challenge is that the movable and immovable property of Guarantor (promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under section 10 against the Appellant by the Ltd. Adjudicating Authority (NCLT) which is violative of section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 though the Code prescribes a Moratorium for certain types of transactions. Decide.

**Answer:**

As per the given facts in the question, Appellant, M/S Systemtek India Private Limited, challenged the order passed by the NCLT on the ground stating that the movable and immovable property of guarantor (Promoter) has been attached pursuant to a Corporate Insolvency Resolution Process initiated under section 10 against the Appellant by the Ltd. Adjudicating Authority (NCLT) which is violative of section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 though the Code prescribes a Moratorium for certain types of transactions. Decide.

As per Section 14(1) of the Insolvency and Bankruptcy Code, 2016, on the Insolvency commencement date, the NCLT shall by order declare moratorium prohibiting certain acts by /against the Corporate Debtor. According to clause (c) of the said provision, the order prohibits
any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process.

The word ‘its’ used in clause (c) of sub-Section (1) of Section 14 of IBC, 2016, refers to corporate debtor and not the guarantors.

In view of this, the Order of NCLT under Section 14(1)(c) of IBC 2016 is not violative. However M/s Systemtek India Private Limited can challenge the Order of the NCLT on the ground that until the liability of the Company is decisively crystallize, the guarantor cannot be held liable.

**Question 12**

(May 2018)

You are appointed as Interim Resolution Professional in XYZ Company Ltd. under the Insolvency and Bankruptcy Code, 2016. State the time limit to make Public Announcement? Also state the protocol for issuance of public notice. Who shall bear the expenses of public announcement?

**Answer:**

1) **Time Limit for making Public Announcement**
   Interim Resolution Professional shall make the Public Announcement immediately after his appointment. “Immediately” here means not more than three days from the date of appointment of the Interim Resolution Professional. Hence, the time limit to make Public Announcement is within 3 days from the date of appointment of the Interim Resolution Professional.

2) **Protocol for issuance of Public Notice**
   As per Section 15 of the Insolvency and Bankruptcy Code, 2016, public announcement shall include the following:-
   a) Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
   b) Name of the authority with which the corporate debtor is incorporated or registered.
   c) Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
   d) Penalties for false or misleading Claims.
   e) The last date for the submission of the claims.
   f) The date on which the Corporate Insolvency Resolution Process ends.

3) **Expenses of Public Announcement**
   The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

**Question 13**

(May 2018)

BDLK Limited decided to go for voluntary winding up and accordingly the Board of Directors at a meeting of the Board are about to take the necessary steps to initiate the winding up proceedings. The Board of Directors of the company approached you for guidance in this regard. Please list out the steps required under the Insolvency & Bankruptcy Code 2016 before approval of such liquidation proposal with specific reference to meetings and actions of relevant stakeholders.
Voluntary Winding Up: As per Section 59 of the Insolvency and Bankruptcy Code, 2016, the voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by the Board (IBBI).

Conditions of initiation of voluntary liquidation proceedings: Voluntary liquidation proceedings of a corporate person registered as a company shall meet the following conditions, namely:—

a) a declaration from majority of the directors of the company verified by an affidavit stating that -
   i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
   ii) the company is not being liquidated to defraud any person;

b) the declaration given above shall be accompanied with the following documents namely:
   i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
   ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;

c) within four weeks of a declaration under sub-clause (a) above, there shall be—
   i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or
   ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles, or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

Provided that the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

Notification to Registrar of company and the Board: The Company shall notify the Registrar of Companies and the Board about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Question 14

What are the eligibility criteria for appointment of an Insolvency Professional as a Resolution Professional for a corporate insolvency resolution process?

Answer:

As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a CIRP if he & all partners & directors of the insolvency professional entity of which he is partner or
director are independent of the corporate debtor i.e.,

a) He is eligible to be appointed as an independent director on the board of the corporate debtor **u/s 149 of the Companies Act, 2013**, where the corporate debtor is a company.

b) He is **not a related party of the corporate debtor**.

c) He is **not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years**.

d) He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to ten per cent or more of the gross turnover of such firm in the last three financial years.

**Question 15**

When can a corporate person initiate voluntary liquidation process?

**Answer:**

Section 59 of the Code empowers a corporate person intending to liquidate itself voluntarily if it has not committed any default to initiate voluntary liquidation proceedings under the provisions of this Code.

Any corporate person registered as a company shall meet the following conditions to initiate a voluntary liquidation process:

a) **A declaration from majority of the directors of the company verified by an affidavit stating**
   i) That they have made a full inquiry into the affairs of the company and have formed an opinion that either the company has no debts or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
   ii) That the company is not being liquidated to defraud any person.

b) **The declaration shall be accompanied with the following documents, namely:**
   i) Audited financial statements and a record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
   ii) A report of the valuation of the assets of the company, if any, prepared by a registered valuer.

c) **After making the declaration the corporate debtor shall within four weeks -**
   i) Pass a special resolution at a general meeting stating that the company should be liquidated voluntarily and insolvency professional to act as the liquidator may be appointed.
   ii) Pass a resolution at a general meeting stating that the company be liquidated voluntarily as a result of expiry of the period of its duration (fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, if any) and appointing an insolvency professional to act as the liquidator.

**Question 16**

What is the Insolvency Resolution Process for financial creditors?
A financial creditor either itself or along with other financial creditors may **lodge an application before the Adjudicating Authority** (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.

The financial creditor shall along with the application give evidence in support of the default committed by the corporate debtor. **He shall also give the name of the interim resolution professional.**

Where the Adjudicating Authority is satisfied that a default has occurred and the application by the financial creditor is complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may **admit such application made by the financial creditor.** Otherwise, the application may be rejected. However, the **applicant may rectify the defect within seven days of receipt of notice of rejection from the Adjudicating Authority.**

**Question 17**

What is the Insolvency Resolution Process for financial creditors?

**Answer:**

A financial creditor either itself or along with other financial creditors may **lodge an application before the Adjudicating Authority** (National Company Law Tribunal) for initiating corporate insolvency resolution process against a corporate debtor who commits a default in payment of its dues.

The financial creditor shall along with the application give evidence in support of the default committed by the corporate debtor. **He shall also give the name of the interim resolution professional.**

Where the Adjudicating Authority is satisfied that a default has occurred and the application by the financial creditor is complete and there is no disciplinary proceedings pending against the proposed resolution professional, it may **admit such application made by the financial creditor.** Otherwise, the application may be rejected. However, the **applicant may rectify the defect within seven days of receipt of notice of rejection from the Adjudicating Authority.**