

MOCK TEST PAPER 2
FINAL COURSE GROUP I
PAPER 4: CORPORATE AND ECONOMIC LAWS
SUGGESTED ANSWER

Time Allowed: 3 Hours

Maximum Marks: 100

DIVISION A: Answer to multiple choice questions (total of 30 marks)

Case Scenario 1

1. (d)
2. (c)
3. (c)
4. (d)

Case Scenario 2

5. (b)
6. (c)
7. (d)
8. (c)
9. (a)

Independent MCQs (12 Marks)

10. (b)
11. (c)
12. (a)
13. (d)
14. (c)
15. (b)

DIVISION B: Descriptive Answers (70 Marks)

1. (a) In terms of Section 149(3) of the Companies Act, 2013, every company shall have at least one director who has stayed in India for a total period of not less than 182 during the financial year.

In the given case, out of 6 directors, none of the directors could have stayed in India for a minimum period of 182 days in the FY 2020-21.

Therefore, the requirement of said section 149(3), is not met with. Therefore, ATL is liable under section 172 of the Companies Act, 2013.

In case of contravention: Further Section 172 of the Act, provides that if a company is in default in complying with any of the provisions of Chapter XI (i.e. with respect to the appointment and qualifications of directors) and for which no specific penalty or punishment is provided therein, in that case following is the penalties levied on:

- (i) the company, and (ii) every officer of the company who is in default- shall be liable to a penalty of 50,000 rupees.

In case of continuing failure, with a further penalty of 500 rupees for each day during which such failure continues, subject to a maximum of three lakh rupees in case of a company and one lakh rupees in case of an officer who is in default.

- (b) The managerial remuneration shall be computed in accordance with the provisions laid down in section 198 of the Companies Act 2013.

Particulars	Amount
Net profit	13,00,000
Less: Capital profits on sale of building (Note 1)	1,00,000
Salaries & Wages (Note 2)	-
Sundry repairs to fixed Assets (Note 2)	-
Subsidy from the government (Note 3)	-
Compensation from breach of contract (Note 2)	-
Depreciation (Note 2)	-
Loss on Sale of Investments (Note 4)	-
Interest on unsecured loans (Note 2)	-
Interest on debentures (Note 2)	-
Add: Repair expenses to fixed assets (Capital in Nature) (Note 5)	2,00,000
Net profits as per section 198	14,00,000

Therefore, the overall maximum managerial remuneration shall be 11% of the Net profits computed in accordance with section 198 i.e. $11\% \times 14,00,000 = \text{Rs. } 1,54,000$. It is assumed that the net profit given in the question is arrived after giving effect to all the line items given therein.

Notes:

- 1) As per section 198(3), credit shall not be given for profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets; provided that where the amount for which any fixed asset is sold exceeds the written-down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written-down value.

Accordingly, the calculation of capital profit is computed as under:

Profit = Selling Price – Written down value

$5,00,000 = \text{Selling Price} - 6,00,000$. Therefore, Selling Price = 11,00,000. Capital profit = $11,00,000 - 10,00,000$ (original cost) = 1,00,000

- 2) According to section 198 (4), the following sums shall be deducted:
- All the usual working charges – salaries and wages are considered as usual working charges
 - expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature
 - any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract
 - interest on debentures issued by the company
 - interest on unsecured loans and advances

- f) depreciation to the extent specified in section 123

Since all of the above charges are already deducted while arriving at net profit, no effect will be given.

- 3) According to section 198 (1), credit shall be given for bounties and subsidies received from any government, or any public authority constituted or authorised in this behalf, by any government, unless and except in so far as the Central Government otherwise directs.
- 4) According to section 198(5), Loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or any part thereof shall not be deducted. In the given question, in the absence of the specific information about the nature of investments, the said investments are considered as current investments and revenue in nature and accordingly no effect is given as it is already deducted while arriving at net profit.
- 5) According to section 198(4), expenses on repairs, whether to immovable or to movable property is deducted only for repairs which are not capital in nature. Accordingly, we have added back to the net profit.

(c) Notice of Board meeting

- (i) **Interested director:** Section 173(3) of the Companies Act, 2013 makes it mandatory that every director needs to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an interested director, notice must be given to him even though in terms of Section 184 (2) he is precluded from participation i.e. engaging himself in discussion or voting at the meeting on the business in which he is interested.
- (ii) **A Director who has expressed his inability to attend a particular Board Meeting:** In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting, notice must be given to that director also.

Therefore, notice will be served on Mr. X and Mr. Y, in compliance with section 173(3) of the Companies Act, 2013.

- 2. (a) Where the term of the Managing Director has expired and he continues in office without a meeting of the board being held for re-appointment, is considered as mis-management of the affairs of the company.

In such a situation an application to the NCLT for relief in case of Oppression and mis-management can be filed under section 241 read with section 244.

Section 241(1)(a) provides that any member of a company who complains that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company, may apply to the Tribunal.

Section 244(1)(a) provides that in the case of a company having a share capital, not less than 100 members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares, shall have the right to apply under section 241.

A shareholder of the company, in compliance with above procedure, can file an application for relief on mismanagement before the NCLT.

- (b) Section 272(1)(d) of the Companies Act, 2013, states that a petition to the Tribunal for the winding up of a company can be presented by the Registrar. Sub-section (3) provides that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

Section 271 (d) provides that a company may, on a petition under section 272, be wound up by the Tribunal, if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.

A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.

A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

- (c) (i) In terms of Section 2(42) "Foreign Company" means any company or body corporate incorporated outside India which—
- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
 - (b) conducts any business activity in India in any other manner.

Further Rule 2(1)(c)(iv) of the Companies (Registration of Foreign Companies) Rules, 2014 provides that for the purposes of clause (42) of section 2 of the Act, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to online services such as telemarketing, telecommuting, telemedicine, education and information research.

Thus, from the above provisions the company is treated as foreign company irrespective of the fact that its 100% business comes from India.

- (ii) Section 379(2) provides that where **not less than 50%** of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by-
- one or more citizens of India; or
 - one or more companies; or
 - bodies corporate incorporated in India;
 - one or more citizens of India and one or more companies or bodies corporate incorporated in India,

whether singly or in the aggregate, **such company shall comply with the provisions of Chapter XXII** and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if **it were a company incorporated in India**.

Thus, in the given case, if more than 50% of the paid-up share capital is held by Indian Companies / Citizen it shall be treated as a company incorporated in India and such company shall abide by the provisions of Section 380 to 386 (both inclusive) and Section 392 and 393 shall be applicable.

3. (a) (i) In terms of the Companies (Registered Valuers and Valuation) Rules, 2017, Suresh is not eligible to be the Registered Valuer of Securities or Financial Assets, since he is not having the minimum experience of 3 years.
- (ii) In terms of the Companies (Registered Valuers and Valuation) Rules, 2017, Manyata is eligible to be the Registered Valuer of Land & Building, since she is having the minimum experience of 5 years after her graduation in Civil Engineering.
- (iii) Manyata can do the valuation of Land and Building only and not of the Securities or Financial Assets since she is not the Registered Valuer for SFA.

She can do the valuation of SFA only, if she possesses the requisite qualifications and experience, passes the valuation examination of SFA and gets herself registered with IBBI as Register Valuer of SFA.

- (b) (i) **To raise deposits by 20%:** As per Rule 5(1)(d) the ratio of NOF to deposits should not be more than 1:20. As on 31.03.2022 the NOF was 10 crore rupees and deposits was 190 crores. If target of deposit is achieved then the deposit will be 228 crore rupees, which exceed the ratio of 1:20. Thus, either the NOF shall be increased or deposits be restricted up to 200 crores.
- (ii) **To invite the public to deposit with the company:** In terms of Rule 6(f), no Nidhi company can accept **deposits** from or lend to any person, other than its members.
- (iii) **To issue lockers to the depositors:** In terms of proviso attached to Rule 6(e), the Nidhi Companies which adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding 20% of the gross income of the Nidhi at any point of time during a financial year.
- (iv) **To grant loan against Gold Jewellery to any person:** In terms of Rule 6(f), no Nidhi company can accept deposits from or **lend** to any person, other than its members. Hence the gold loan to any person, other than the members is prohibited.
- (c) In terms of Section 7A of the SEBI Act, 1992 any member-
- Who is a director of a company; and
 - Who as such director has any indirect pecuniary interest in any matter coming up for consideration at a meeting of the Board,

shall, disclose (As soon as possible after relevant circumstances have come to his knowledge) the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Board, and the member shall not take any part in any deliberation or decision of the Board with respect to that matter.

4. (a) (i) **Period within which export value of goods/software/ services to be realised**

Regulation 9 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 deals with the matter relating to the period within which export value of good to be realised.

Regulation 9(1) provides that-

The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided that-

- (a) 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 or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of shipment of goods;
- (b) 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 said period.

(ii) **Delay in Receipt of Payment**

Regulation 14 provides that -

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.

(b) Section 7 of the Arbitration and Conciliation Act, 1996 provides that -

- (1) "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in—
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Thus, as per Section 7(2) of the Act, an arbitration agreement may be in the form of an arbitration clause in a contract. Since the JV Agreement contains a clause to refer the matter to the arbitration, in case of dispute, is sufficient the arbitration agreement was arrived at between the companies.

(c) (i) **Purchase of First Flat in UK**

Section 6(4) of the FEMA, 1999 provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India 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.

Ruchika purchased the first flat when she residing in UK and was resident outside India. After returning to India and after becoming the resident in India, she can continue to hold such flat.

(ii) **Purchase of Second Flat**

After returning to India and becoming the resident in India, Ruchika cannot buy another property in UK as mentioned in Section 6(4) of the FEMA.

5. (a) (i) As per the IBC, 2016, that without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under section 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor.

- (ii) In terms of Section 5(22) “personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor. In the given case ‘Sandhya’ is the personal guarantor of the Company.

Section 60(1) of the IBC provides that the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and **personal guarantors thereof shall be the National Company Law Tribunal** having territorial jurisdiction over the place where the registered office of the corporate person is located.

- (b) The basic requirements as to acquisition of shares mentioned in Section 235 of the Companies Act, 2013 are as follows:-

1. The scheme or contract involving the transfer of shares in a company (transferor company) to another company (transferee company) has been approved by the holders of not less than 9/10th(90%) in value of the shares whose transfer is involved.
2. The approval of 9/10th shareholders in value shall be received within 4 months after making of an offer in that behalf by the transferee company.
3. The transferee company shall express his desire to acquire the remaining shares of dissenting shareholder in 2 months after the expiry of the said 4 months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall be entitled as well as bound to acquire the shares of the dissenting shareholders where no application is made by any dissenting shareholders to the tribunal in 1 month of receipt of notice of acquisition of shares or where an application is made by any dissenting shareholder but such application is dismissed by the tribunal.

In the given case since application made by the dissenting shareholders has been dismissed by the tribunal hence A Ltd is entitled and bound to acquire all the shares of the dissenting shareholders i.e. entire 8% shareholding.

Since A Ltd only acquired 5% shareholding of the dissenting shareholders hence this is in contravention of Sec 235 of the Companies Act, 2013. Hence the takeover is invalid.

(c) **Corporate Person**

In terms of Section 3(7) of the IBC “**corporate person**” means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force **but shall not include any financial service provider.**

Who is Financial Service Provider

In term of Section 3(17) “financial service provider” means a person engaged in the **business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator.**

CIRP cannot be initiated against a financial service provider/non-banking financial company as financial service providers are excluded from definition of corporate debtor in terms of section 3(7) of the Insolvency Bankruptcy Code, 2016.

6. (a) **What is Proceeds of Crime**

In terms of Section 2(1)(u) of the Prevention of Money Laundering Act, “proceeds of crime” means **any property derived or obtained, directly or indirectly**, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

Explanation. —For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relating to the scheduled offence.

Ravi purchased the flat by availing bank finance and its repayments was to be made in 20 years. The said housing loan was liquidated by Ravi within a year, this was paid not from the salary income but was paid from the money received from the bribe. As per the definition given above, the bribe amount was indirectly paid in acquiring / paying the loan amount, hence the flat shall be termed as proceeds of crime and hence he is liable to be prosecuted under PMLA, 2002 with in the preview of scheduled offence.

- (b) Section 8(11) of the Companies Act, 2013 provides that if a company makes any default in complying with any of the requirements laid down in Section 8, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than 10 lakh rupees but which may extend to one crore rupees and the Directors and every officer of the company who is in default shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 25 lakh rupees.

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

Any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by-

Offence compoundable by the NCLT: Default by the company in complying with the requirements relating to formation of companies with charitable objects etc.

Offence compoundable by the Regional Director: Default by the officers in complying with the requirements relating to formation of companies with charitable objects etc. where the maximum amount of fine which may be imposed for such offence does not exceed twenty-five lakh rupees.

Any officer authorised by the Central Government.

- (c) **Draft Resolution for Authorising to make application for Compounding of an Offence under Section 8 of the Companies Act, 2013.**

RESOLVED THAT an application be made to the Registrar of Companies pursuant to clause (a) of sub-section (3) of Section 441 of the Companies Act, 2013 for compounding the offence for which prosecution has been filed with the request to forward the same to the Tribunal for necessary action.

RESOLVED FURTHER THAT Mr. Joseph, the Managing Director of the Company, be and is hereby authorised to file/ move/ present/ before the Registrar of Companies, Mumbai, Tribunal, Mumbai, Central Government and / or such other judicial /quasi-judicial and / or administrative authority(es), as may be deemed appropriate and advised to by the legal counsels, such petitions/ application including any application for compounding on behalf of the Company, in connection with the show cause notice issued by the Registrar of Companies, Mumbai for violation of provision of Section 8 of the Companies Act, 2013 and any penal proceedings/ complaint initiated or may be initiated against the Company and / or directors / officials of the Company, and further verify, sign, affirm, submit the said petitions / applications including and other statements forming part of such petitions / applications.