MOCK TEST PAPER 2

FINAL COURSE GROUP I

PAPER 4: CORPORATE AND ECONOMIC LAWS

Suggested Answer/Hints

DIVISION A: MULTIPLE CHOICE QUESTIONS (TOTAL OF 30 MARKS)

1. (a)
2. (b)
3. (b)
4. (b)
5. (b)
6. (b)
7. (d)
8. (b)
9. (b)
10. (d)
11. (c)
12. (b)
13. (b)
14. (c)
15. (d)
16. (a)
17. (c)
18. (c)
19. (c)
20. (d)

DIVISION B: Descriptive questions (70 Marks)

Question no. 1 is compulsory. Attempt any **four** questions out of the remaining f**ive** questions.

1. (a) (i) The second proviso to Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that any intermittent vacancy of a woman director shall be filled-up by the Board **at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later**.

As per the facts, the intermittent vacancy of a woman director was caused on June 30, 2021. The Board meeting of the company was held on 17th September, 2021. Therefore, vacancy of woman director can be filled up latest by 30th September 2021 i.e, three months from the date of such vacancy.

(ii) Section 149(1)(b) of the Companies Act, 2013 provides that every company shall have a Board of Directors consisting of individuals as directors and shall have a maximum of 15 directors.

However, the first proviso to this section further provides that a company may appoint more than 15 directors after passing a special resolution in the general meeting of the shareholders.

Accordingly, it is possible to increase number of directors from 15 to 17 in the Board of Directors of Vikrant Cosmetics Ltd.

(iii) Section 164 of the Companies Act, 2013 deals with the disqualifications for appointment of director. Section 164(1)(d) & (e) provides as under:

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, **and sentenced in respect thereof to imprisonment for not less than six months** and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force.

In the above case, the ACB has only Anusuya who is red handed and charge sheet has been submitted in the court. The matter is sub-judice with the court and **no final order has been passed yet**. So if the provisions of sub-clause (d) and (e) of section 164(1) is interpreted, **Anusuya has not been convicted by the court of any offence**, so she may be treated as eligible for appointment as director.

Further section 178(3) provides that the Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.

Thus, in light of the provisions of section 178(3) the Nomination Committee shall formulate a policy for inducting any person as director in the Board. **If such policy contains that even if a person has been alleged of any offence (although not ordered by any court), he is disqualified for appointment as director, then that person should not be so appointed.**

(iv) The second proviso to Section 149(1) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014 provides that every listed shall have at least one woman director.

Section 149(4) provides that every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Section 149(8) provides that the company and independent directors shall abide by the provisions specified in Schedule IV.

No where in the said provisions, it is mentioned that a woman director cannot be an Independent Director (ID). If a person is fulfilling the criteria of appointment as an Independent director, whether man or woman, he or she can be appointed so. Further, if the ID is a woman and the company is required to appoint at least one woman director, both the purposes are fulfilled.

Here, in this case, Anusuya has been charge sheeted by the ACB and the matter is under trial / sub-judice with the court of law, however if any Policy is framed by the Remuneration Committee not to include any such person, against whom, there is any charge of offence (though not proved by ordered of any court), such person shall not be entitled to be in the Board.

(b) As per section 180(1)(c) of the Companies Act,2013, the Board of Directors of a company with the consent of the company by a special resolution shall borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business.

Temporary loans means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.

In view of the above provision the eligible amount which can be borrowed by the Board is given below:

Paid up share capital	₹ 100 Lakh
Reserve & Surplus	
• General Reserve	₹ 50 Lakh
• Security Premium Account	₹ 25 Lakh
Total	**₹ 175 Lakh**

Re-valuation Reserve is not treated as free reserve as per Section 2(43).

The total borrowing of the company for the purpose of this sub section is -

Long Term Borrowings	₹ 125 Lakh
Temporary Loan for construction of Building	₹ 25 Lakh
Total	**₹ 150 Lakh**

Short Term Borrowings (Cash Credit Loan) of ₹ 50 Lakhs is considered as temporary loan and loan for construction of building in not consider as temporary loan as per the explanation for temporary loan mentioned above.

Therefore, Supreme Limited can borrow a further sum upto ₹ 25 Lakh without seeking the approval from the members. Therefore, the proposal of the Board to borrow a sum of ₹ 50 Lakhs as Long Term Loan without obtaining the consent of the members in general meeting by special resolution, is invalid.

In case of private company the provision of section 180 does not apply vide exemption notification dated 05th June, 2015. If a Supreme Ltd. is a Private Limited Company, the Board can borrow a sum of ₹ 50 Lakhs as Long Term Loan, without approval.

2. (a) (i) As per section 12 of the SEBI Act, 1992, no person shall sponsor or cause to be sponsored or carry on or cause to be carried on the activity of an alternative investment fund or a business trust as defined in clause (13A) of section 2 of the Income-tax Act, 1961, unless a certificate of registration is granted by the Board in accordance with the regulations made under this Act. [Sub-section (1C)]

In the instant case, if the certificate of registration of Vincent Energy Trust is suspended then it will not be able to carry on the activity of a business trust till the suspension period as mentioned in the order of the SEBI.

Further, as per section 12(3) of the SEBI Act, 1992, the Board may, by order, suspend or cancel a certificate of registration in such manner as may be determined by regulations;

Provided that no order under this sub-section shall be made unless the person concerned has been given a reasonable opportunity of being heard.

Accordingly, SEBI can make such suspension order provided a reasonable opportunity of being heard is given to Vincent Energy Trust before passing such order by the SEBI.

(ii) As per section 15JB of the SEBI Act, 1992, any person, against whom any proceedings have been initiated or may be initiated under section 11, section 11B, section 11D, sub-section (3) of section 12 or section 15-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.

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 this Act.

Vincent Energy Trust, being a business trust registered under section 12, against which proceedings had been initiated by SEBI under sub-section (3) of section 12, was having the right to file such an application for settlement of the proceedings initiated for the alleged defaults and;

The SEBI can consider such application after taking into consideration the nature, gravity and impact of defaults, on part of Vincent Energy Trust.

(b) (i) As per section 54A(2)(f) of the Insolvency and Bankruptcy Code, 2016, with respect to filing of an application for initiating pre-packaged insolvency resolution process, the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia, —

a. that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

b. that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and

c. the name of the insolvency professional proposed and approved to be appointed as resolution professional.

In the instant case:-

(i) Four out of seven directors of Tatragat Ltd. have made a declaration on 23rd June, 2021 i.e. majority of directors have made declaration.

The said declaration provides for a definite time period not exceeding ninety days for filing of an application for initiating pre-packaged insolvency resolution process i.e. by 21st September, 2021, which is exactly 90 days from date of declaration i.e. 23rd June, 2021.

Also, name of Mr. Ashok Jawal proposed and approved to be appointed as the resolution professional had been mentioned in the said declaration, as required.

Accordingly, it can be said that the directors of Tatragat Ltd. can be said to have made a valid declaration with respect to filing of an application for initiating pre-packaged insolvency resolution process assuming that the said declaration also states that the pre-packaged insolvency resolution process is not being initiated to defraud any person.

(ii) As per section 54B(2) of the Insolvency and Bankruptcy Code, 2016,the duties of the insolvency professional shall cease, if, —

(a) the corporate debtor fails to file an application for initiating pre-packaged insolvency resolution process within the time period as stated under the declaration referred to in clause (f) of subsection (2) of section 54A; or

(b) the application for initiating pre-packaged insolvency resolution process is admitted or rejected by the Adjudicating Authority, as the case may be.

In the instant case, duties of Mr. Ashok Jawal, the resolution professional, can be considered to have ceased, as Tatragat Ltd. failed to file an application for initiating pre-packaged insolvency resolution process within the time period as stated under the declaration i.e. by 21st September, 2021.

If in case, Tatragat Ltd. was able to file the said application on time but was rejected by the Adjudicating Authority then also the duties of Mr. Ashok Jawal, the resolution professional, can be considered to have ceased.

3. (a) (i) As per the Companies (Registered Valuers and Valuation) Rules, 2017, a person shall be eligible to be a registered valuer if, inter-alia, he has not been levied a penalty under section 271J of Income-tax Act, 1961 and time limit for filing appeal before Commissioner of Income-tax (Appeals) or Income-tax Appellate Tribunal, as the case may be has expired, or such penalty has been confirmed by Income-tax Appellate Tribunal, and 5 years have not elapsed after levy of such penalty.

In the instant case, Mr. Rajil was levied a penalty by the Commissioner (Appeals) for furnishing incorrect information in one report and a certificate issued by him to another company, relating to valuation i.e. under section 271J of the Income Tax Act, 1961.

In the appeal, the ITAT had confirmed the said penalty levied by the Commissioner (Appeals) and passed its order on 20th November, 2018.

Here, 5 years from levy of such penalty had not elapsed and so, Mr. Rajil can be considered to have contravened the law by accepting appointment as a registered valuer of WNDS Ltd. as he was not eligible to be appointed as a registered valuer.

(ii) As per Section 247 of the Companies Act, if a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be liable to a penalty of fifty thousand rupees. However, if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to 1 year and with fine which shall not be less than ₹1 Lakh but which may extend to ₹5 lakhs.

Further, where a valuer has been convicted as aforesaid, he shall be liable to—

(1) refund the remuneration received by him to the company; and

(2) pay for damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report.

Here, since Mr. Rajil have contravened the provisions of Companies (Registered Valuers and Valuation) Rules, 2017 by accepting appointment as a registered valuer of WNDS Ltd., therefore, following consequences could arise on him:-

(1) **Levy of penalty** of ₹ 50,000 and if he intended to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to 1 year and with fine which shall not be less than ₹ 1 Lakh but which may extend to ₹ 5 lakhs.

(2) **Refund** of remuneration of ₹ 88,000 received by him to the company.

(3) **Pay for damages** to the company or to any other person for loss arose due to furnishing of incorrect or misleading statements of particulars, if any, made in his report.

(b) (i) According to section 2(v) of the 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 but does not include a person who has come to or stays in India, for or on taking up employment in India.

As per Schedule III to the Foreign Exchange Management (Current Account Transactions) Rules, 2000-

For a person who is resident but not permanently resident in India and-

(a) is a citizen of a foreign State **other than** Pakistan; or

(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company,

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident.

Fact of the case & Conclusion: Mr. Ashok is a citizen of India working in a company in USA and has been deputed to its branch in India for a duration of 26 months i.e. for not more than 3 years and Mr. Ashok's stay in F.Y. 2020-21 was more than 182 days in India, so, he would be considered as a resident but not permanently resident in India.

Accordingly, he was allowed to remit an amount upto his net salary i.e. $ 270,000 ($ 350,000 - $ 40,000 - $ 40,000) while he has remitted an amount of $ 280,000 to his family in USA.

Thus, the excess amount remitted by him is $ 10,000 ($ 280,000 - $ 270,000).

(ii) As per *Explanation to* **Section 2(1)(g) of the FCRA, 2010,**— a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation,—

(a) has a subsidiary or a branch or a place of business in two or more countries or territories; or

(b) carries on business, or otherwise operates, in two or more countries or territories;

Facts: Mr. Ashok has been working in a company in Chicago, USA since last 8 years and the said company opened its branch in India last year.

So, it appears that the said company had been incorporated in USA and operating in USA since a long time and has also started its operations in India by opening a branch in India.

Conclusion: Thus, the company in USA in which Mr. Ashok is deputed, can be treated as MNC under FCRA, 2010 as it is carrying on business or operating in two countries i.e. USA and India, respectively.

4. (a) (i) The Tribunal had passed an order pursuant to subsection (4A) of section 242 of the Companies Act, 2013, as the case had been referred to it by the Central Government to decide whether Mr. Sujay was fit and proper person or not.

As per sub-sections (1A) and (1B) of the section 243 of the Companies Act, 2013, the person who is not a fit and proper pursuant to subsection (4A) of section 242, shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

Notwithstanding anything contained in any other provisions of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation

for the loss or termination of office.

Conclusion: Here, Mr. Sujay was not entitled for such compensation for early termination of his office, despite of the terms of the contract, as his termination was pursuant to order of Tribunal passed under subsection (4A) of section 242 of the Companies Act, 2013.

(ii) As discussed aforesaid, as per sub-section (1A) to the Companies Act, 2013, Mr. Sujay was not entitled to hold the office of a director or any other office connected with the conduct and management of the affairs of **any company** for a period of five years from the date of the said decision.

The decision was given by the Tribunal on 20th June, 2021 and so till 20th June, 2026, Mr. Sujay was not entitled to hold such office except with the permission of the Central Government accorded by the leave of Tribunal.

Conclusion: If Mr. Sujay had been appointed as a non-executive director in other company without the permission of the Central Government, then he and every other director of such other company who is knowingly a party to such contravention, shall be liable to punishment as per the provisions of sub-section (3) to Section 243, as follows:-

Any person (i.e. Mr. Sujay) who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1) or sub-section (1A), and every other director of the company who is knowingly a party to such contravention, shall be punishable **with fine which may extend to five lakh rupees**.

(b) (i) Mr. Shubh (the resolution professional) will have to consider the following factors while examining the resolution plan before taking it to the Committee of Creditors for approval:

a. Whether the resolution plan provides for the **payment of insolvency resolution process costs** in a manner specified by the Board in priority to the payment of other debts of the corporate debtor

b. Whether the resolution plan provides for the **payment of debts of operational creditors** in such manner as may be specified by the Board which shall not be less than higher of:

   1. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or

   2. the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

c. Whether the resolution plan provides for **the management of the affairs of the Corporate debtor** after approval of the resolution plan;

d. Whether the resolution plan provides for the i**mplementation and supervision of the resolution plan**

e. Whether the **resolution plan contravene any of the provisions** of the law for the time being in force

f. Whether the **resolution plan confirms to such other requirements** as may be specified by the Board.

(ii) As per section 63 of the Prevention of Money Laundering Act, 2002, any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act, shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

Accordingly, Mr. Ram, here in the said instance, willfully and maliciously gives false information in order to take revenge, shall be liable for imprisonment for a term which may

extend to two years or with fine extending to ₹ 50,000 or both.

5. (a) (i) As per the explanation given under section 186 of the Companies Act, 2013, an investment company means a company whose principal business is the acquisition of shares, debentures or other securities and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent of its total assets, or if its income derived from investment business constitutes not less than fifty per cent as a proportion of its gross income.

Facts: In light of the above explanation, the assets of XYZ Ltd. in form of investment in shares or debentures **is less than fifty percent** of the total assets of the company and also the income derived from the investment business is less than fifty percent of the total income of the company. Hence, either of the two conditions need to be satisfied to make an investment company and, in this case, neither of this condition is satisfied. So, XYZ Ltd. cannot be an investment company for the purpose of Section 186.

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

So, in this case the Board of Directors of XYZ Ltd. while considering the proposal for making the investment in ABC Ltd. has not complied with the provision of section 186(5) of the Companies Act, 2013, where the consent of all the directors present at the meeting is required. The resolution of the Board of Directors therefore is not valid and has no legal effect.

(b) According to section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer (not below the rank of Deputy Director authorised by the Director), has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime; and

(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.

Provided further that, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Computation of period of attachment: Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted.

No effect on the right to enjoy the property: This section shall not prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.

Here, "**person interested**", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

In the given case, Mr. Jigar, son of Mr. Bhai can occupy the flat during the period of provisional attachment if he claims to have any interest in the said property.

6. (a) (i) Regulation 17A(1) of the SEBI (LODR) Regulations, 2015 provides that a person shall not be a director in more than **eight listed entities** with effect from April 1, 2019 and in not **more than seven listed entities with effect from April 1, 2020.**

Ava can continue of having directorship in 8 listed entities up to 31st March 2020 only, but from 1st April, 2020 the number of directorships in listed entities have been reduced to 7 from 8. Therefore, Ava cannot join the listed entity beyond 7, as a director with effect from April, 2020

(ii) Regulation 17A(2) of the SEBI (LODR) Regulations, 2015 provides that any person who is serving as a WTD / MD in any listed entity shall serve as an independent director in not more than 3 listed entities.

Hence Ava, besides holding the position of WTD, can serve as an Independent Director maximum up to 3 listed companies only.

(iii) Regulation 18(1)(d) of the SEBI(LODR) Regulations, 2015 provides that the chairperson of the audit committee shall be an independent director and he /she shall be present at Annual general meeting to answer shareholder queries.

Since, Ava is an independent director with a CA qualification (i.e., financially literate), hence she can be the Chairperson of Audit Committee of Board.

(b) The provisions of the Arbitration and Conciliation Act, 1996 outlines the requirements of a valid arbitration agreement. One of such requirements is clarity of consent i.e. the intention to go to arbitration must be clear in other words there must be consensus ad idem. Utilization of vague words cannot be considered as adequate.

Further the Arbitration and Conciliation Act, 1996 envisages the possibility of an arbitration agreement coming into being through incorporation i.e. arbitration agreement through reference. In other words, parties to an agreement could agree to arbitrate by referring to another contract, containing an arbitration agreement.

In the given scenario, it was an arbitration agreement through reference, but the terms and conditions of the said agreement were not clear and vague and therefore the said agreement is not a valid arbitration agreement as the italicized portion in the agreement clearly highlights the need for further agreement between the parties.

Accordingly in the given instance, the parties will not be able to refer the disputes, if any, to arbitration since the terms and conditions of arbitration agreement through reference are vague and not clear and thus the arbitration agreement is not valid in law.