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Further, in the Elective Papers which are Case Study based, the solutions have been worked out on the basis of certain assumptions/views derived from the facts given in the question or language used in the question. It may be possible to work out the solution to the case studies in a different manner based on the assumption made or view taken.

## PAPER 6D: ECONOMIC LAWS

The solutions to case studies have been worked out on the basis of certain assumptions/views derived from the facts given in the question or language used in the question. It may be possible to work out different solutions based on the assumption made or view taken. Further, there should be no negative marking for wrong answers in MCQ based questions.

**NOTE: There are five case study questions in the question paper. Candidates are required to answer all the questions of any four case study questions.**

**Citation of case laws, sections, subsections, rules may not form part of the answer.**

**CASE STUDY 1**

1. *Delta Corporation, a government corporation purchases Aluminium Phosphide Tablets (APT) on bulk basis through a formal tender process for the past several years. The main market of APT in India was that of the institutional sales and a majority of buyers were Government agencies. The number of private buyers was insignificant.*

*APT is manufactured only by 4 companies in the country, namely M/s. Easy, M/s. Samurai, M/s. Multicrop and, M/s. Agro Chemicals. Sometime during the year 2018, Mr. Rohit the Chairman and Managing Director of Delta Corporation, as part of his review of the operations, analysed the purchase of APT over the last several years, and noted a trend that the four manufacturers of APT had formed a cartel by entering into an anticompetitive agreement amongst themselves and on that basis they had been submitting their bids for last eight years by quoting identical rates in the tenders invited by the Delta Corporation for the purchase of APT. Based on the above, Mr. Rohit wrote a complaint to the Competition Commission of India (CCI) on February 4, 2018 and the CCI assigned the complaint to the Director General (DG) for investigation.*

*Based on the investigation carried out, the DG noted the following:*

- *Right from the year 2009, upto the year 2016, all the four parties used to quote identical rates, excepting for the year 2014. In 2009, ₹ 245 was the rate quoted by these four parties and in the year 2012 it was ₹ 310 (though the tender was scrapped in this year). In November, 2012, though the tenders were invited, all the parties had abstained from quoting. In 2014, M/s. Samurai had quoted the price which was much below the price of other competitors. In 2015, all the parties abstained from quoting, while in 2016 only the three appellants, barring Agro Chemicals, participated and quoted uniform rate of 388, which was ultimately brought down to ₹ 386 after negotiations.*

- It was also found that the tender documents were usually submitted in-person and the rates were normally filled with hand;
- In respect of the tender floated in March, 2016, the three appellants had quoted identical rates of ₹ 388.
- The DG also analysed the bidding pattern for tenders issued by other corporations during the period from 2014 to 2018 and concluded that the pricing pattern was similar between the parties in such tenders as well, as indicated below :

Corporations	Year	Price Quoted			
		Easy	Samurai	Multicrop	Agro Chemical
A	2014	225	225	-	-
B	2015	260	260	-	-
C	2015	450	-	450	-
C	2016	414	414	-	-
Delta	2016	388	388	388	-
B	2016	399	-	-	399
D	2016	-	-	399	399
B	2017	419	-	-	410
C	2017	421	421	421	-
B	2018	-	415	-	415

Based on the investigation carried out above, the DG concluded that:

- The pricing pattern definitely showed the practice of quoting identical pricing by all the parties.
- The explanation given by the parties (rise in price was mostly attributed to increase in price by China) for the common pricing was unconvincing since it was noticed that even during the period when the Phosphorours prices had fallen, no reflection thereof was seen in the high prices quoted by the parties.
- Examination of the cost structure of each company reflected that there was nothing common between the parties as far as the said cost structure was concerned and, therefore, quoting of identical prices by all the parties was unnatural.
- Joint boycotting by the parties, at times, showed their concerted action, which happened again in March, 2018 when the Delta Corporation had issued e-tender, which was closed on July 25, 2018.

*On the basis of the aforesaid findings, the DG framed an opinion that the appellants had contravened the provisions of Sections 3(3)(a), 3(3)(b) and 3(3)(d) read with Section 3(1) of the Competition Act, 2002.*

*The CCI called for the responses of the parties for the above observations of the DG and the responses of the parties are as under:*

- In so far as tender of 2018 is concerned, it was contended that inquiry in respect of boycotting the said tender by the appellants was without jurisdiction in as much as the Delta Corporation in its complaint dated February 04, 2018 did not mention about the said tender.*
- On the merits, increase in the price over a period of time, particularly between years 2016 and 2018, was sought to be justified on the ground that the "price of yellow phosphorous, which was to be procured from China, had increased". It was further submitted that merely because there was identical prices quoted by the parties, it would not mean that there was any bid rigging or formation of cartel by the parties. Submission in this behalf was that the market forces brought the situation where the prices became so competitive and it had led to the aforesaid trend.*
- It was further submitted that, notwithstanding the same price quoted by the parties, each time the tender was evaluated by a Committee of Officers of the Delta Corporation and no such suspicion was raised by the Committee. On the contrary, this aspect was specifically gone into and the Committee was satisfied that quoting of identical price was not due to any cartelisation.*

*The CCI rejected each of the responses provided by the parties and concluded 'that the parties had entered into an agreement or understanding, and indulged in anti-competitive activities while submitting their bids in response to the tenders issued by the Delta Corporation.*

*Prosper Extractors Limited (PEL) is one of the key operational creditors of Multicrop and was the sole supplier of Phosphorous to Multicrop for the manufacture of the APT. The arrangement between PEL and Multicrop was formally documented through a blanket Purchase Order on an annual basis with weekly supply schedule and a 30 days credit period. Due to the financial issues including losses of Multicrop, there was a significant backlog in the payment by Multicrop and in line with the terms of the purchase order, the matter was referred to an Arbitral Tribunal with claims and counter claims by both parties. The Arbitral Tribunal delivered its award in favour PEL for the entire balance payable (including receivables assigned to the bank without recourse basis) by Multicrop and rejected the cross claims of Multicrop. Multicrop proceeded to file a petition under the Arbitration and Conciliation Act, 1996 challenging the award of the Arbitral Tribunal. Based on the opinion of CFO that the object of IBC, 2016 is also to hold promoters personally financially liable for default of the firms they control, an application was then filed by PEL under Section 9 of the IBC, 2016 as the sole operational creditor of Multicrop. The NCLT, based on the application; admitted the*

same since there is a clear evidence of a demand and the appropriate notice has been submitted by PEL as per the IBC, 2016.

Answer the following questions :

1.1 Which of the following is not part of the objectives for introduction of the IBC, 2016?

- (A) Avoiding destruction of value.
- (B) Hold Promoters personally financially liable for default of the firms that they control as opined by CFO in the case study.
- (C) Improve handling of conflicts between creditors and debtor through process of negotiation.
- (D) Clear allocation of losses during downturn. **(2 Marks)**

1.2 Which of the following is not covered under the definition of a financial debt under IBC, 2016?

- (A) Interest on Unsecured debentures issued by a corporate debtor.
- (B) Market value of a derivative taken to hedge foreign currency fluctuations of an ECB loan.
- (C) Amount raised from an allottee of an apartment under a real estate project.
- (D) Receivables assigned to a Bank on without recourse basis. **(2 Marks)**

1.3 The IRP appointed for Multicrop is seeking your views on the constitution of the Committee of Creditors of Multicrop. Multicrop does not have any financial debt other than a loan obtained from Mr. Ajay Jhawar, son of the Mr. Vijay Jhawar, the Managing Director of Multicrop. Considering the above, identify the appropriate constitution of the Committee of Creditors out of the following :

- (A) Mr. Ajay Jhawar, 18 largest operational creditors, and 1 representative of all workmen.
- (B) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees.
- (C) Only Mr. Ajay Jhawar since he is the only financial creditor.
- (D) 18 largest operational creditors, 1 representative of workmen and 1 representative of employees and the resolution professional. **(2 Marks)**

1.4 Which of the following are not factors which need to be considered for determining the relevant product market under the Competition Act, 2002 ?

- (A) Existence of specialised producers

- (B) *Market structure and size of market*
- (C) *Consumer preferences*
- (D) *Actual end use of the products* **(2 Marks)**
- 1.5 *When evaluating whether the arrangement between the parties involved shall be presumed to be anti-competitive and likely to have an appreciable adverse effect on competition, which of the following are not factors to be considered by the Director General ?*
- (A) *Limit and control the use of technology used by all parties in manufacturing APT.*
- (B) *Allocate the supply of APT in India between the parties and limit new entrants.*
- (C) *Collectively determine the purchase price of the key raw material (phosphorous) from the vendors.*
- (D) *Joint venture between the parties to share distribution channels and logistics services to reduce cost.* **(2 Marks)**
- 1.6 *Answer the following questions in the context of the provisions relating to Competition Act, 2002.*
- (i) *Analyse whether the CCI can consider the tender called for in March, 2009 and negotiations finalised in July, 2009 for examination under Section 3, which became operational only on 20th May, 2009.* **(3 Marks)**
- (ii) *Whether CCI was barred from investigating the matter pertaining to the tender floated by Delta Corporation in March, 2018 on the basis that this was not a subject matter contained in the complaint submitted by Delta Corporation on 4 February, 2018.* **(3 Marks)**
- (iii) *Analyse based on the facts of the case, regarding the conclusion of CCI that the appellants had entered into an agreement to indulge in collusive bidding by forming a cartel, resulting into contravention of Section 3 of the Act.* **(5 Marks)**
- 1.7 *Examine/advise regarding the below questions relating to the Insolvency and Bankruptcy Code, 2016:*
- What is your view with regard to the stand taken by NCLT in admitting the application of PEL for initiating insolvency proceedings against Multicorp?* **(4 Marks)**

### **ANSWER TO CASE STUDY 1**

1.1 (B)

1.2 (D)

1.3 (B)

1.4 (B)

1.5 (D)

**Descriptive Answers**

1.6 (i) According to **Section 36** of the **Competition Act, 2002**, the Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavit;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning, subject to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872, any public record or document or copy of such of record or document from any office.

The Commission may also direct any person:

- (a) to produce before the Director General or the Secretary or an Officer authorized by it, such books, or other documents in the custody or under the control of such person so directed as may be specified or described in the direction, being documents relating to any trade, the examination of which may be required for the purposes of this Act;
- (b) to furnish to the Director General or the Secretary or any other Officer authorized by it, as respects the trade or such other information as may be in his possession in relation to the trade carried on by such person, as may be required for the purposes of this Act.

Hence, CCI can also consider the tender called for in March, 2009.

**Alternate Solution**

The bid was called in March 2009 and negotiations finalized in July, 2009 by which date, Section 3 of the Competition Act, 2002 had already been activated. Therefore, the principle of retro-activity shall become applicable as the process of finalization of the tender was still on. Therefore, the inquiry into the tender of March, 2009 by the CCI is covered by Section 3 of the Act in as much as the tender process, though initiated prior to the date when Section 3 became operational, continued much

beyond May 20, 2009, the date on which the provisions of Section 3 of the Act were enforced.

In the light of the above, it can be concluded that CCI can consider the tender called for.

(ii) **According to Section 19 of the Competition Act, 2002**, the Commission is empowered to inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) either on its own motion or on:—

- (a) receipt of any information in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
- (b) a reference made to it by the Central Government or a State Government or a Statutory Authority.

As per the situation given and provisions of the Act, CCI is empowered to inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) on its own motion also. **Hence, CCI can also investigate the matter pertaining to the tender floated by Delta Corporation in March, 2018** (though it was not the subject matter contained in the complaint submitted by Delta Corporation on 4<sup>th</sup> February, 2018).

(iii) **"Bid Rigging"** means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

As per the facts of the case study, there seems to be collusive bid rigging by forming cartel due to the following reasons:

1. All the parties (namely M/s Easy, M/s Samurai, M/s Multicrop and M/s Agro Chemicals) quoted identical rates from 2009 to 2014.
2. In tender floated in March 2016, the three applicants quoted identical prices.
3. If we see the bidding patterns for other corporations also (i.e. A, B, C and D) we see that participating applicants quoted identical prices always.

Further, the response given by the parties (namely M/s Easy, M/s Samurai, M/s Multicrop and M/s Agro Chemicals) did not support that there was no cartelization, on the following grounds:

1. CCI is empowered to inquire into any alleged contravention of the provisions contained in Section 3(1) or Section 4(1) on its own motion also. Hence, **CCI can also investigate the matter pertaining to the tender floated by Delta**

**Corporation in March, 2018** (though it was not the subject matter contained in the complaint submitted by Delta Corporation on 4<sup>th</sup> February, 2018).

2. The said parties pleaded that the price rise of APT was due to increase of price of yellow phosphorous, which was to be procured from China, had increased. However, all the parties quoted identical prices which has resulted in adversely affecting/ manipulating the process of bidding.

### 1.7 Initiation of Insolvency resolution by PEL (operational creditor) against Multicrop.

According to Section 8 of the IBC, 2016, following requirements are to be met for initiation of corporate insolvency resolution process by operational creditor, i.e. by PEL against the corporate debtor, Multicrop:

- (1) On the occurrence of default, an operational creditor shall first **send a demand notice and a copy of invoice** to the corporate debtor.
- (2) 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 a dispute about debt**, if any, record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute; Where corporate debtor might have already paid the unpaid operational debt, there in such situation, corporate debtor will inform within 10 days send an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or sends an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor. **[Section 8]**

According to **Section 9** of the IBC, an application for initiation of corporate insolvency resolution process by operational creditor may be filed, if no reply is received or payment or notice of the dispute under Section 8(2) from the corporate debtor within ten days from the date of delivery of the notice or invoice demanding payment, operational creditor can file application before Adjudicating Authority (NCLT) for initiating a corporate insolvency resolution process.

As per the facts stated in the case study, PEL had not served demand notice and a copy of invoice to the Multicrop. In fact it directly went to the Arbitral tribunal, for settlement of the claim as per the term of agreement. Award was passed in the favour of PEL. However, the award of the Arbitral Tribunal was challenged by the Multicrop. Whereas PEL also filed an application before the NCLT for initiation of CIRP against Multicrop.

According to the above provision, due to prima facie non-compliance of serving of demand notice and a copy of invoice to the Multicrop by the operational creditor

(PEL) and of further no notice of dispute about debt regarding the pendency of the suit in appeal before Appellate Arbitration by the Corporate Debtor (Multicrop). **Therefore NCLT stand as regard the admission of application of PEL on initiation of CIRP against Multicrop, is not appropriate.**

## CASE STUDY - 2

*Teddy Bear Technology Private Limited (TBTPL), is one of India's fastest growing start-up companies. TBTPL was incorporated in the year 2015 by two promoters Mr. Sudhir Shankar and Mr. Ajay Vinod, who were college mates at IIT Bombay and completed their masters in the United States of America (USA). Both Mr. Sudhir Shankar and Mr. Ajay Vinod worked in the USA for more than 10 years.*

*Post that they came back to India in 2015 (and continue to stay in India) to serve the country and established TBTPL to develop technology and software relating to aviation technology and machine learning. TBTPL has around 300 employees in India and has several clientele in US and the company is also looking at rapid expansion over the next 3 years. The Company is registered with the Software Technology Parks but is not a status holder exporter.*

*The details of export sales and realization of export proceeds by TBTPL during the last 3 financial years is as under :*

Particulars	2015-16	2016-17	2017-18	Average
Export Turnover (USO)	500,000	2,500,000	4,500,000	2,500,000
Realisation of Export Proceeds (USD)	300,000	2,000,000	3,000,000	1,600,000

*One of the export invoices amounting to USD 200,000 raised by TBTPL in the financial year 2016-17 was outstanding for more than one year as of 31<sup>st</sup> March, 2018 and the Company's auditors insisted on the Company taking action for recovery. However, even after the best efforts, no amounts could be recovered and therefore, during the financial year 2018-19, the Company wrote off the entire amount of USD 200,000 without obtaining the approval from the Authorised Dealer (AD). Out of the export proceeds received by TBTPL, the Company lent an amount of USD 500,000 in foreign currency to one of its key Indian vendors to enable them to create / maintain core working capital. The Management convinced the Board of Directors to approve the loan since the vendor was providing, critical services for business continuity of TBTPL. Further, this loan has been guaranteed by the holding company of the vendor, which is located in Mauritius.*

*In order to expand its operations, TBTPL was intending to lease a commercial property in India in Mumbai for a period of 5 years at an upfront lease premium of ₹ 5 crores, TBTPL was in great urgency to complete the transaction soonest in view of the great demand for the property and therefore, M/s. DoCorrect Consultants, the agency assisting TBTPL used a counterfeit government stamp paper for the purpose of registering the lease deed and this was informed by the agency to Mr. Ajay Vinod at the time of transaction to minimise the cost of*

stamp duty. The funds for acquiring the stamp papers was paid by the agency and was in-turn billed by the agency on TBTPL as part of its invoice for agency fee / commission. The invoice was settled by TBTPL to the agency in cash without deduction of tax, even though the CFO of TBTPL was of the view that the same is not in accordance with the applicable statutory requirements.

For the purpose of enhancing its capabilities, TBTPL engaged the services of two reputed organizations to train the employees of TBTPL. For this purpose, TBTPL paid an amount of USD 500,000 to one company and USD 1,500,000 to the second company. For the purpose of investing money into the business, TBTPL sold a commercial plot owned by it in India to a friend of Mr. Ajay Vinod who was a Non-resident Indian in the USA, through an agent based in Chicago, USA for an amount of USD 500,000. In accordance with the terms of the agreement with the agent, TBTPL paid an amount of USD 30,000 as commission to the agent. TBTPL also published an advertisement costing USD 100,000 in the New York Times weekend edition calling for employees to join its proposed office in New York.

Mr. Siddarth Shankar, brother of Sudhir Shankar who works as a CFO in a listed entity in India, provided certain price sensitive information to Mr. Sudhir Shankar about his employer based on which Mr. Sudhir Shankar purchased equity shares of the entity and made a profit of ₹ 2 crores. With these proceeds, he sent ₹ 1 crore to his wife Ms. Anne Shankar (as part of the liberalised remittance scheme) to purchase a small apartment in the USA. He also purchased a very old statue of an Indian king in an amount of ₹ 0.20 crores and sent it to his wife for display in his home in USA. He invested the balance amount of ₹ 0.80 crores in TBTPL as an equity investment.

During one of the discussions with the customers in USA, Mr. Ajay Vinod indicated to the customer that TBTPL has capabilities to develop new robotic technology on aviation and accordingly, entered into a contract for an amount of USD 2,000,000. TBTPL developed the robotic platform in 2 months and delivered to the customer, although the patent and copyright was owned by another competitor of TBTPL. TBTPL is of the view that the company rightfully owns the patent for the same, although it has not applied / registered for the same.

The Enforcement Directorate (ED) got wind of the transactions carried out by TBTPL and the Directors, through one of the employees of the Company and have issued a notice to the Company and the Directors.

**Answer the following questions:**

- 2.1 Which of the following are not actions that could be taken by the ED on TBTPL or its employees, for not complying with its orders under PMLA, 2002?
- (A) Issue a warning in writing.
  - (B) Direct the entity or its employees to directly send reports.
  - (C) Direct the relevant courts to take civil or criminal proceedings against TBTPL or its employees.

- (D) *Impose a monetary penalty on TBTPPL or its employees.* **(2 Marks)**
- 2.2 *In order to obtain more information from Mr. Sudhir Shankar, the ED wanted to detain Mr. Sudhir Shankar for a period of 3 days to make enquiries and get the relevant information from him. Evaluate if this is appropriate under PMLA, 2002.*
- (A) *Yes, the Director is well within his powers to detain Sudhir until all informations are collected.*
- (B) *No, maximum period of detention under PMLA is 24 hours before which Sudhir should be presented before the superior ranking office or the magistrate.*
- (C) *Yes, however, the Director is required to take the prior approval of his superior ranking officer.*
- (D) *No, the Director is not within his rights to detain Sudhir.* **(2 Marks)**
- 2.3 *The Appellate Tribunal has concluded that the Director who searched Mr. Sudhir Shankar and his property indulged in a vexatious search without recording proper reasons in writing and has sought your views on the next course of action :*
- (A) *Suspension / Dismissal from service, as may be decided by the central government.*
- (B) *Fine which may extend to ₹ 2 lakhs.*
- (C) *Imprisonment for a term which may extend to four years and fine which may extend to ₹ 2 lakhs.*
- (D) *Imprisonment for a term which may extend to two years or fine which may extend to ₹ 50,000 or both.* **(2 Marks)**
- 2.4 *What is the maximum amount of export receivables which can be written off by TBTPPL during the financial year 2018-19?*
- (A) *With approval of AD - USD 450,000; Without approval of AD – USD 225,000*
- (B) *With approval of AD - USD 250,000; Without approval of AD – USD 125,000*
- (C) *With approval of AD - USD 300,000; Without approval of AD – USD 150,000*
- (D) *With approval of AD - USD 160,000; Without approval of AD – USD 80,000*
- (2 Marks)**
- 2.5 *Under FEMA, 1999, what is the amount that can be paid by TBTPPL for publishing an advertisement in New York Times ?*
- (A) *USD 10,000*
- (B) *USD 100,000*

- (C) USD 250,000, subject to the approval of the Reserve Bank of India.
- (D) None, all such transactions require approval of the government of India. **(2 Marks)**
- 2.6 Advise the Board of Directors of TBTPPL on the compliance with FEMA, 1999 with regard to the below transactions :
- Payments made by TBTPPL for consultancy services
  - Payment of commission
  - Loan provided in foreign currency to vendor in India and the validity of the guarantee provided by the vendor's holding company. **(7 Marks)**
- 2.7 Examine / advise regarding the below questions relating to the Prevention of Money Laundering Act, 2002 :
- The Enforcement Directorate has sought your advice on identifying all the offences committed by the parties under the PMLA, 2002 described in the case study. Identify :
    - the offences along with explanations,
    - the parties involved, and
    - the proceeds of crime. **(5 Marks)**
  - The Enforcement Directorate is proposing to perform a search of M/s. DoCorrect Consultants premises in connection with the investigation of TBTPPL's transactions. This has been challenged by M/s DoCorrect consultants. Evaluate the appropriateness of the position taken by M/s. DoCorrect Consultants. **(3 Marks)**

### **ANSWER TO CASE STUDY 2**

2.1 (C)

2.2 (B)

2.3 (D)

2.4 (C)

2.5 (D)

### **Descriptive Answers**

- 2.6 As per Schedule III, the following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:

- (i) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
- (ii) Remittances exceeding USD 1,00,00,000 per project for any consultancy services in respect of infrastructure projects and USD 10,00,000 per project, for other consultancy services procured from outside India.
  - a. TBTPL made a payment of USD 500,000 to one Company and USD 1,500,000 to another Company for training the employees of TBTPL. Thus, in total, made a payment of USD 2,000,000.

As per the provision of law and facts of case study, **TBTPL require prior approval** of the Reserve Bank of India to make a payment of USD 200,000 as it exceeds the limit of USD 1,000,000 given under law.

#### **Alternate Solution**

- a. As per **Schedule III**, the following remittances by persons other than individuals shall require prior approval of the Reserve Bank of India:
  - (i) Commission, per transaction, to agents abroad for sale of residential flats or commercial plots in India exceeding USD 25,000 or five percent of the inward remittance whichever is more.
  - (ii) Remittances exceeding USD 10,000,000 per project for any consultancy services in respect of infrastructure projects and USD 1,000,000 per project, for other consultancy services procured from outside India.

TBTPL made a payment of USD 500,000 to one Company and USD 1,500,000 to another Company for training the employees of TBTPL.

Therefore, the prior approval of the RBI is required for the payment of USD 1,500,000 to the second Company. No specific approval of the RBI is required for the payment of USD 500,000 to the first Company.

- b. TBTPL made a payment of USD 30,000 as commission to agent abroad for selling a commercial plot owned by it in India to a Non- resident Indian in USA.

As per facts of case and provision of law, TBTPL can make a remittance of USD 25,000 or five percent of the inward remittance from sale of commercial plot, without RBI approval.

Thus, **TBTPL have to take prior approval of RBI** to make a payment of USD 30,000 as commission to agent abroad (as it exceeds the limit of USD 25,000 or 5% of USD 500,000, whichever is higher).

- c. As per FEMA provisions, a resident cannot lend to another resident in foreign currency. However, Loan and guarantee can be extended to an overseas

entity only if there is already an existing equity / CCPS ( Compulsorily Convertible Preference Shares) participation by way of direct investment.

In the given case study, TBTPL lent an amount of USD 500,000 in foreign currency to one of its vendor. This loan was guaranteed by the holding Company of the vendor, which is located in Mauritius.

As per the facts of the case study and the provision enumerated above, **TBTPL cannot give loan to its vendor.**

2.7 (i) In the given case study, Enforcement Directorate identified following offences committed by the parties under the PMLA, 2002-

(a) **Offences with Explanation:** (1) Use of counterfeit government stamp paper for the purpose of registering the lease deed to minimise the cost of stamp duty- offence under Part A of the Schedule , (2) invoice for agency fees /commission for acquiring the stamp papers, settled in cash without deduction of tax by TBTPL- Offence under Part C of the Schedule (3) Use of patent and copyright owned by another competitor of TBTPL -- offence under Part A of the Schedule (4) Providing of price sensitive information to Mr. Sudhir Shankar of an employee on the basis of which he purchased equity shares of the entity- offence under Part A of the Schedule (5) sending to ₹ 1 Crore out of proceeds from purchase of an equity shares to Ms Anne Shankar- offence under Part A of the Schedule.

(b) **Parties Involved:** Offence pertaining to use of counterfeit government stamp paper- TBTPL, Mr. Ajay Vinod, Agency M/s DoCorrect Consultants, CFO of TBTPL.

Invoice for agency fees /commission for acquiring the stamp papers- Agency M/s DoCorrect Consultants, TBTPL, CFO of TBTPL.

Use of patent and copyright owned by another competitor by TBTPL: TBTPL, Mr. Ajay Vinod.

Purchase of equity shares of an entity on the price sensitive information: Mr. Siddarth Shanker & Mr. Sudhir Shankar

Out of proceeds obtained above, sent certain amount to Ms. Anne- Mr. Siddarth Shanker, Mr. Sudhir Shankar, Ms. Anne Shanker.

(c) **Proceeds of Crime:** ₹ 5 Crore (Lease premium), USD 2,000,000 (for development of Robotic Platform under the patent & copyright owned by another), & ₹ 2 Crore (obtained by the purchase of equity shares).

(ii) According to **Section 17** of the Prevention of Money Laundering Act, 2002, where the Director or any other officer not below the rank of Deputy Director authorised by him for the purposes of this Section, on the basis of information in his possession,

has reason to believe (the reason for such belief to be recorded in writing) that any person—

- (i) has committed any act which constitutes money-laundering, or
- (ii) is in possession of any proceeds of crime involved in money-laundering, or
- (iii) is in possession of any records relating to money-laundering, or
- (iv) is in possession of any property related to crime,

then, subject to the rules made in this behalf, he may authorise any officer subordinate to him to—

enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;

Thus, the **Enforcement Directorate can perform a search** of M/s DoCorrect Consultants' premises in connection with the investigation of TBTP's connection.

Hence, the **position taken by M/s DoCorrect Consultants is not appropriate** based on the above legal provisions.

### CASE STUDY: 3

*The Indian pharmaceutical manufacturing industry comprises of 3 large companies, LPPL, SMCL and HLL. The above 3 companies, in total supply more than 90% of the across the counter medicine market in India and their products were available across India through the sale of medicines to registered agencies / stockists, who in turn supplied to the local chemists and drugstores. In addition to the business of manufacturing across the counter medicines, all the 3 entities were also engaged in the manufacture of 'Active Product Ingredients' (API), which were supplied to global pharmaceutical companies for production of medicines. The entire API manufacturing in India is performed only by the 3 companies.*

*During one of the discussions between LPPL and its overseas customer based in Canada, the overseas customer requested LPPL to supply API for manufacturing diabetes medicines and also stated that as per the latest research carried out by them, coca leaves have a lot of medicinal properties and have tremendous potential to suppress diabetes and other ailments. LPPL stated that they could supply coca leaves from India and pursuant to a purchase order from the customer, LPPL sold coca leaves for an amount of Rs. 5 crores and the CFO of LPPL ensured that the proceeds was received from the customer into LPPL's EEFC account in compliance with FEMA, 1999. For the purpose of increasing their operations in Canada, LPPL wanted to set up its branch office in Canada and accordingly, used the consideration received for acquiring Land and Building in Toronto, Canada for an amount of ₹ 4 crores. The CFO of LPPL was informed by the internal auditor that the above acquisition of immovable property in Canada was in accordance with the provisions of FEMA, 1999.*

*During the year 2017, the Pharmaceutical Agents Association of Uttar Pradesh filed a complaint against the 3 companies with the Director General that the companies were*

engaging in anti-competitive market activities by forcing stockists to obtain a Non-Objection Certificate from the local chemists and druggists association and the companies were denying the supply of medicines to the stockists solely because they were not able to obtain the NOC.

LPPL, SMCL and HLL responded to the DG that sub-clause (a) of Clause 28 of the Drugs (Price Control) Order, 2013 creates an obligation on a pharmaceutical company/distributor to sell drugs/medicines unless there is a 'good and sufficient reason' to refuse sale. Based on their evaluation of the facts and circumstances, the non-availability of NOC from the local chemists association tantamount to 'good and sufficient reason'.

Based on the investigation carried out by the DG and analysis of all the documents and information provided by the Pharmaceutical manufacturing companies, the stockists etc. and notwithstanding the above views of the pharmaceutical manufacturers, the DG concluded that the 3 companies, LPPL, SMCL and HLL contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act, 2002. For indulging in anti-competitive practices in violation of the provisions of Section 3 of the Act, the CCI imposed penalties upon all the three appellants at 9% of average 3 years' total turnover of these appellants under the Act.

LPPL, SMCL and HLL accepted the order of the DG in principle and accepted to remove, the condition of obtaining NOC for supply to the stockists. However, they contested the manner in which the DG had computed the penalty by considering the total turnover of the entities (as per the Statement of Profit and Loss) without considering that the turnover includes incomes from the API business, which is not forming part of the investigation of the DG. They filed an appeal before the Appellate Tribunal that the penalty could be calculated only based on the turnover relating to the "Across the Counter" operations of the pharmaceutical companies.

In the meantime during the year 2018, LPPL entered into an agreement with HLL to acquire the API business of HLL for a consideration of ₹ 200 Crores. The latest available financial information relating to the entities are as under:

Particulars	₹ in Crores			
	LPPL		HLL	
	Total entity	API business	Total Entity	API business
Assets	900	800	500	300
Turnover	2800	2400	1000	800

Note: The entities do not have any business / operations outside India.

SMCL is of the view that the above arrangement will cause an appreciable adverse effect on competition in the API manufacturing market in India and requires the approval of the Competition Commission.

The Authorised dealer, when reviewing the export invoices raised by LPPL noted the sale of coca leaves and informed the income tax authorities regarding the same. The authorities, after review of the documents and other information, concluded that the transactions was in

violation of the Prevention of Money Laundering Act, 2002 and have sent a notice to LPPL, who is not a willful defaulter.

**Answer the following questions:**

- 3.1 Which of the following terms and conditions as per the agreement between LPPL and HLL is not likely to cause an appreciable adverse effect on competition under the Competition Act, 2002?
- (A) All purchase of raw materials by HLL should be made from SMCL or from LPPL only.
  - (B) The API manufactured by HLL should be sold to the customers as mandated by LPPL.
  - (C) Any purchase of API by HLL should be along with purchase of the packing material and preservatives.
  - (D) A maximum price ceiling on the resale price that may be charged by HLL for ultimate sale of the goods purchased by it from LPPL. **(2 Marks)**
- 3.2 Considering the nature of the operations of LPPL and HLL, what is the requirement of giving notice regarding the proposed combination as per Form II as specified in the Schedule II to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ?
- (A) Mandatory, if the combined market share after such combination is more than 15 % of the market.
  - (B) Optional, if the combined market share after such combination is more than 25% of the market.
  - (C) Optional, if the combined market share after such combination is more than 15% of the market.
  - (D) Mandatory, if the combined market share after such combination is more than 25% of the market. **(2 Marks)**
- 3.3 Which of the following are not included within arrangements entered into by central government with another country, in relation to reciprocal arrangements under PMLA, 2002?
- (A) Enforcement of the provisions of PMLA, 2002.
  - (B) Prevention of offence in India under the corresponding PMLA law in force in the other country.
  - (C) Exchange the history of LPPL if it is wilful offenders under the PMLA on annual basis.
  - (D) Exchange information to prevent any offence under PMLA, 2002. **(2 Marks)**

- 3.4 The composition of an Adjudicating Authority (AO) under the PMLA, 2002 referred in the case study is :
- (A) One Chairperson, appointed by central government and two other members.
  - (B) Three members, one of whom will be a Chairperson, as per seniority.
  - (C) Four members, each of whom will be a Chairperson on rotation.
  - (D) Five members, appointed by central government and four other members. **(2 Marks)**
- 3.5 On the basis that the transactions entered into by LPPL is considered to be in contravention of the PMLA, 2002, what is the punishment that the CFO of LPPL would be liable under the PMLA, 2002 ?
- (A) Minimum 3 years and maximum 10 years with fine.
  - (B) No punishment since he is not a director of LPPL and therefore cannot be held liable under PMLA, 2002.
  - (C) Minimum 3 years and maximum 7 years with fine.
  - (D) No punishment since he was not aware that the transaction was indeed a non-compliance under PMLA, 2002. **(2 Marks)**
- 3.6 Answer the following questions in the context of the provision relating to Competition Act, 2002 with reasons and explanations:
- (i) SMCL has reached out to you to seek your advice on their views regarding the impact of the provisions of the Competition Act on the proposed combination between LPPL and HLL. **(4 Marks)**
  - (ii) Whether penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending company or it can be only on "relevant turnover", i.e., relating to the product in question. **(3 Marks)**
- 3.7 Answer the following questions in the context of the provisions relating to PMLA, 2002 with reasons and explanations:
- (i) LPPL has challenged the notice and without admitting to any of the offences, is of the view that only immovable property held within India is to be considered for identifying proceeds of crime under PMLA. Evaluate. **(4 Marks)**
  - (ii) In the above case study, what is the mechanism to be followed by the Enforcement Directorate for attachment of property situated in Canada? **(4 Marks)**

**ANSWER TO CASE STUDY 3****3.1 (D)****3.2 (C)****3.3 (C)**

3.4 (A)

3.5 (A)

**Descriptive answers**

- 3.6 (i) The given proposed combination between LPPL & HLL in terms of **Section 5** of the Competition Act, 2002, is a combination of the enterprises by acquisition where the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores.

**Pursuant to Notification No. S.O. 675 (E) dated March 4, 2016** the value of assets and the value of turnover has been enhanced by the Central Government **by 100%** for the purposes of Section 5 of the Act.

So, the revised value of assets and turnover is presently more than ₹ 2000 crore and ₹ 6000 Crore.

Since, here the proposed combination between LPPL and HLL was to acquire the API business of HLL only, **therefore, it will not be valid** as they have not met with the requirement of assets of the value of more than ₹ 2000 crore [i.e., total value of asset of LPPL (900+800) + value of asset of API business of HLL (300)] and turnover of ₹ 6000 crore [i.e., total turnover of LPPL (2800+2400) + turnover of API business of HLL (800)]

- (ii) As per **Section 27** of the Competition Act, 2002, where after inquiry the Commission finds that any agreement referred to in Section 3 or action of an enterprise in a dominant position, is in contravention of Section 3 or Section 4, as the case may be, it may impose such penalty, as it may deem fit, which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

In case any agreement referred to in Section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher.

**Accordingly, the penalty under Section 27(b) of the Act has to be on total/entire turnover of the offending Company.**

- 3.7 (i) In the light of Section 2(1)(u) of the Prevention of Money Laundering Act, 2002, "**proceeds of crime**" means as 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/held outside the country, then the property equivalent in value held within the country or abroad.

In the said case, LPPL challenged the notice and not admitting to any of the offences on the ground that only immovable property held within India is to consider for identifying proceeds of Crime under PMLA. According to the above stated provision, LPPL challenge to the notice and not admitting to any of the offences pertaining to the immovable property held outside India, is not valid and therefore the **notice served on LPPL cannot be challenged**.

(ii) Following are the ways for attachment of property situated in Canada in the given case study in the light of **Section 60** of the PMLA, 2002 -

1. **Issue of letter of request:** Where the Director has made an order for attachment of any property under Section 5 or for freezing under sub-Section (1A) of Section 17 or where an Adjudicating Authority has made an order relating to a property under Section 8 or where a Special Court has made an order of confiscation relating to a property under sub-Section (5) or sub-Section (6) of Section 8, and **such property is suspected to be in a contracting State**,
  - the **Special Court**, on an application by the Director or the Administrator appointed under sub-Section 10(1), as the case may be, may issue a letter of request to a court or an authority in the contracting State for execution of such order.
2. **Forwarding of letter of request for execution on its receipt by CG :** Where a letter of request is received by the Central Government from a Court or an Authority in a Contracting State requesting attachment, seizure, freezing or confiscation of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence under a corresponding law committed in that Contracting State, the Central Government may forward such letter of request to the Director, as it thinks fit, for execution in accordance with the provisions of this Act.
3. **Issue of Order of confiscation:** Where on closure of the criminal case or conclusion of trial in a criminal court outside India under the corresponding law of any other country, such court finds that the offence of money-laundering under the corresponding law of that country has been committed, the Special Court shall, on receipt of an application from the Director for execution of confiscation under sub-Section (2), order, after giving notice to the affected persons, that such property involved in money-laundering or which has been used for commission of the offence of money-laundering stand confiscated to

the Central Government.

4. The provisions of this Act relating to attachment, adjudication, confiscation and vesting of property in the Central Government shall apply to the property in respect of which letter of request is received from a court or contracting State for attachment or confiscation of property.

#### **CASE STUDY - 4**

*Highcity Partners LLP (Highcity), is a recently established limited liability partnership between Seaview Constructions Private Limited, a real estate development company owned by Mr. Vyas Chakraborty (Seaview constructions) and Mr. Ved Chakraborty. Highcity was established for the purpose of acquiring an existing apartment complex "Riverview Bliss" (comprising of 12 luxury apartments) in Kolkata and redevelopment of the same. Seaview Constructions is a very successful real estate company and has completed more than 20 apartment complexes and is known for quality constructions, adherence to timelines and profitable growth.*

*6 of the 12 apartments in Riverview Bliss is currently owned by SPZ Private Limited (SPZ) and the balance 6 are owned by the senior employees of SPZ. Due to the strategic location of the property and the quality of construction, Highcity and the current owners have agreed for a price of ₹ 3 crores for each of the 12 apartments and therefore the total consideration to be paid by Highcity is ₹ 36 crores.*

*SPZ is an associate Company of True & Fair Finance Company Limited (TFFC), a listed company in the business of providing loans for large corporate projects. Both SPZ Private Limited and TFFC have common promoters and senior employees and operate out of the same registered office.*

*In the past, Seaview Constructions has obtained loans from TFFC for many of their projects and has established a strong professional relationship with them on account of the mutual benefit realised by both the entities from the transactions between them. Therefore, considering the size of the transaction to be entered into by Highcity, Mr. Vyas Chakraborty had discussions with TFFC and based on the business case submitted by Highcity, TFFC approved a secured loan of ₹ 30 crores to Highcity to enable purchase of the apartments in Riverview Bliss from its owners. The loan was fully utilised by Highcity to acquire the apartments and a charge was created against the property for the secured loan obtained from TFFC. Highcity obtained further loans amounting to ₹ 10 crores from SPZ for the purpose of the redevelopment of the property.*

*During the scrutiny assessment of Highcity, the Income tax authorities noted the details of the transactions and concluded that the entire transaction is a benami transaction where Highcity is the Benamidar and SPZ / TFFC are the beneficial owners. The Initiating Officer sent a show cause notice under Section 24(1) of the Prohibition of Benami Property Transactions Act, 1988 (PBPT Act, 1988) and on the same day, an order was passed by the Dy. Commissioner of Income Tax for provisional attachment of the Riverview Bliss property based on the following averments :*

- *Highcity did not have any business or operations prior to the acquisition of the benami property.*
- *Mere approvals in the name of benamidar do not prove in any way that the benefits from the property are actually enjoyed by it and not by the beneficial owner.*
- *Highcity received huge amounts of money from SPZ which it used for the development of property, thereby establishing that SPZ is directly involved in the development of project in order to derive future benefits arising out of the same.*
- *The entire transaction is only for the benefit of TFFC and SPZ, who are owned by common promoters since the person providing the consideration i.e. TFFC and person reaping the benefits of such transaction i.e. SPZ are same as they are linked to each by means of common directors and promoters.*
- *The benefits to the beneficial owner arising out of property held in the name of the benamidar need not be direct and immediate and that indirect and future benefits are also covered under the definition of a benami transaction under section 2(9)(A) of the PBPT Act, 1988.*

*The Initiating Officer further stated in his show cause notice seeking response and proof from Highcity and SPZ that the above transactions are not benami transactions. Highcity is of the strong view that the above averments are incorrect and that the entire transaction is a genuine business transaction and the loan from TFFC was obtained in the ordinary course of business (similar to the other loans taken by Seaview Constructions).*

*Seaview Constructions was operating as a profit making company until 2016 and whilst it was having debt, the entity was able to service the debt promptly from its business cash flows. However, due to the downturn of the real estate industry and commencement of additional businesses, Seaview Construction's profits and operations started to deteriorate and it had to obtain significant borrowings during 2017 from a consortium of banks for working capital purposes. However, due to the difficulties in the business operations and the economic slowdown, Seaview Constructions could not repay its borrowings and the entire net worth got eroded due to significant operating losses. This led to Seaview Constructions filing a petition under the Insolvency and Bankruptcy Code, 2016. The petition was accepted by the National Company Law Tribunal (NCLT) and an Interim Resolution Professional (IRP) was appointed, who was later approved as the Resolution Professional (RP). The Committee of Creditors, comprising of the financial creditors was formed with the following vote share:*

<i>Particulars</i>	<i>Voting Share (%)</i>
<i>A Bank</i>	<i>22.33%</i>
<i>B Bank</i>	<i>14.39%</i>
<i>C Bank</i>	<i>15.15%</i>

D Bank	26.36%
E Bank	10.94%
F Bank	10.83%

The resolution plan submitted by the RP was placed before the Committee of Creditors at its meeting held on 4<sup>th</sup> December, 2018 wherein, the resolution plan was approved by A Bank, B Bank and C Bank. D Bank rejected the resolution plan and provided its reasons in writing to the RP. E Bank and F Bank did not approve or reject the proposal and abstained from voting at the meeting. Seaview Constructions (the Corporate Debtor) is of the view that the resolution plan has been approved by the Committee of Creditors since the resolution plan has been approved by more than the prescribed percentage of creditors who actually voted in the meeting (i.e. after excluding the percentage relating to the creditors who abstained). The RP did not agree to this view since more than 25% of the creditors present in the meeting had out rightly rejected the resolution plan and therefore, proceeded for liquidation under the IBC since no resolution plan was approved within the prescribed time limit under the Code.

M/s. Sunflower Estates Private Limited (Sunflower Estates), a Company under the common control of the promoter of Seaview Constructions had also subscribed to the secured debentures of Seaview Constructions to the extent of ₹ 50 Crores (representing 15% of the total financial debts of Seaview Constructions). The IRP rejected the request received from Sunflower Estates for inclusion into the Committee of Creditors.

**Answer the following questions:**

4.1 The owner (one of the employees of SPZ) of one of the apartments in Riverview Bliss is not aware of his ownership of the apartment. He is seeking your advice on the impact on the same under PBPT Act, 1988.

- (A) No impact, since the property has already been sold off to Highcity.
- (B) The property is not a benami property since the employee had continuous possession of the property through the period he was the owner.
- (C) The property is not a benami property since the sale agreement was registered appropriately and stamp duty was also paid.
- (D) The property is a benami property since the owner of the property is not aware of such ownership. **(2 Marks)**

4.2 Mr. Vyas Chakraborty is of the view that the Initiating Authority does not have the right to send the notice for attachment of the property and those powers are vested with the adjudicating authority, as per PBPT, 1988 and seeks your advice :

- (A) Yes. Initiating Authority has only powers to summon and conduct inquiries.

- (B) No. The adjudicating authority's function is to confiscate and vest the property. The Initiating Officer has powers to send the notice for attachment of property.
- (C) No. The approving authority has to send the notice for attachment of property and the adjudicating authority is required to confiscate and vest the property.
- (D) Yes. The initiating authority can provisionally attach properties only with the prior approval of the adjudicating authority. **(2 Marks)**
- 4.3 Assuming that the Riverview Bliss property is considered as a benami property, the Initiating Officer seeks your views on whether the rental income earned by Highcity from the lease of the apartment (pending commencement of redevelopment) is also a benami transaction.
- (A) No, the rental income is an independent transaction between a landlord and a tenant for legitimate use of the property.
- (B) No, as long as Highcity remits Income tax on the rental income earned.
- (C) Yes, benami transaction includes any income or proceeds received or earned out of a benami property,
- (D) Yes, if the proceeds from the rental income are used by Highcity for making interest payment or loan repayment to TFFC or SPZ. **(2 Marks)**
- 4.4 How should the voting share of each of the Banks who have lent to Seaview Constructions be determined under IBC, 2016 ?
- (A) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total debt (financial + operational) owed by Seaview Constructions.
- (B) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt owed by Seaview Constructions to third parties (i.e. other than related parties).
- (C) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt owed by Seaview Constructions.
- (D) Based on the financial debt owed by Seaview Constructions to each bank as a proportion to the total financial debt and statutory dues owed by Seaview Constructions. **(2 Marks)**
- 4.5 Which of the following operational creditors of Seaview Constructions are eligible to initiate corporate insolvency process against Seaview Constructions ?
- (A) G Limited, completed a corporate insolvency resolution process 15 months prior to the date of making the application.

- (B) *H Limited, who is currently undergoing a insolvency resolution process.*
- (C) *I Limited, who could not meet its resolution plan under a insolvency resolution process.*
- (D) *J Limited, who supplied goods to ACL one month prior to the date of making the application and the invoice demanding payment is in transit. (2 Marks)*

4.6 Answer the following questions in the context of the provision relating to PBPT Act, 1988 with reasons and explanations :

- (i) *Analyse based on the facts of the case provided above, whether the Initiating Officer's actions were appropriate in concluding that the transaction was a benami transaction. (3 Marks)*
- (ii) *What are the factors that will need to be considered for the purpose of determining whether a. transaction is a benami transaction ? (4 Marks)*

4.7 Answer the following questions in the context of the provision relating to IBC, 2016 with reasons and explanations :

- (i) *Examine the appropriateness of the approval or otherwise of the resolution plan of Seaview Constructions and whether the view taken by the RP is appropriate. (5 Marks)*
- (ii) *Advise Sunflower Estates with regard to the rejection of the request for inclusion into the Committee of Creditors of Seaview Constructions. (3 Marks)*

#### **ANSWER TO CASE STUDY 4**

4.1 (D)

4.2 (B)

4.3 (C)

4.4 (B)

4.5 (A) [In order to drive the answer for initiation of CIRP against Seaview constructions, word "Operational Creditor" is to be assumed as corporate person].

#### **Descriptive Answers**

4.6 (i) **Course of action taken by Initiating Officer under Section 24 of the PBPT Act, 2016:** Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within

such time as may be specified in the notice why the property should not be treated as benami property.

Where the notice specifies any property as being held by a benamidar, a copy of the notice shall also be issued to the beneficial owner if his identity is known. Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as prescribed in **Rule 4 of the Benami Transactions Prohibition Rules, 2016, for a period not exceeding ninety days from the date of issue of notice.**

The Initiating Officer, after making such inquiries and calling for such reports or evidence as he deems fit and taking into account all relevant materials, shall, within a period of ninety days from the date of issue of notice —

- (a) where the provisional attachment has been made —
  - (i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
  - (ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;
- (b) where provisional attachment has not been made—
  - (i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority; or
  - (ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

Where the Initiating Officer passes an order continuing the provisional attachment of the property or passes an order provisionally attaching the property, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority under Section 26 of the PBPT Act, 2016.

Yes, the actions taken by the initiating officer, were appropriate in the compliance of the above stated provisions.

#### **Alternate Solution**

For a transaction to be covered under **Section 2 (9)(A) of PBPT Act, 1988** the following two conditions are to be met.

- (i) The consideration for the property has been provided or paid by another person and
- (ii) The property is held for immediate or future benefit direct or indirect of the person who provided the consideration

In order to ascertain whether a particular sale is Benami and the apparent purchaser is not the real owner, the burden lies on the person who sets up the case and such burden has to be strictly discharged based on legal evidence of definite nature. Therefore, the Initiating Officer (IO) cannot show cause High Court and seek proof as to why the transaction cannot be treated as a Benami transaction. Therefore, the onus is on the IO to prove, if at all the transaction is a Benami transaction. Moreover, if it is shown by the parties to the alleged Benami transaction that such transaction is done through a registered sale deed and valid loan agreements, the burden of proof would be shifted upon the IO to prove the transaction as a Benami transaction.

Merely because the source of consideration paid by the alleged benamidar is funded by way of loan received from a party related with the alleged beneficial owner, it cannot be ipso facto held that the consideration has been provided by the alleged beneficial owner and more so when evidences has been brought on record to show that the aforesaid loan was a genuine transaction and was done at arms length in the normal course of business. Therefore the **IO's action is not appropriate** in concluding that the transaction was a Benami transaction.

**(ii) Factors that will need to be considered for the purpose of determining of a benami transaction:**

As per Section 2(9) of the PBPT Act, 2016 in order to be a "Benami Transaction" such transaction /arrangement w.r.t a property is to be considered as a benami—

- (i) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and
- (ii) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,
- (iii) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or
- (iv) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;
- (v) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

**4.7 (i) Procedure of seeking approval of the Resolution plan in the light of Section 30 of the Insolvency and Bankruptcy Code:**

- (i) **Seeking approval of CoC:** The resolution professional shall present such resolution plans to the committee of creditors for its approval by a vote of not less than sixty-six per cent of voting share of the financial creditors.
- (ii) **Submission of the Resolution Plan:** The resolution professional shall submit the resolution plan as approved by the committee of creditors to the Adjudicating Authority. [Section 30]
- (iii) **Approval of Resolution Plan:** If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors meets the requirements as per Section 30(2), it shall by order approve the resolution plan.
- (iv) **Rejection of the Resolution Plan:** Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the above requirements, it may, by an order, reject the resolution plan.

The resolution applicant shall obtain the necessary approval pursuant to the resolution plan approved, within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority or within such period as provided for in such law, whichever is later.

In the given instance, the resolution plan of Seaview Constructions will not be passed as it was not approved by a vote of sixty-six per cent of voting share of the financial creditors. Out of Total six financial creditors, four financial creditors voted on the resolution plan and two abstained from voting. Further out of 4 Financial creditors, 3 Financial creditors with the voting share (22.33% + 14.39%+15.15% = 51.87%) approved the Resolution plan. However, 1 Financial creditor with voting share 26.36% voted against the resolution plan. **Resolution professional stand was correct** as regarding the filing of liquidation as the resolution plan was not approved by the CoC with the requisite majority of 66% of voting share.

**(ii) When Financial Creditor /authorized representative is not entitled to participate in the CoC:**

As per **Section 21** of the IBC, for the Financial Creditor or the authorised representative of the financial creditor referred to in Section 24(6), 24(6A), or 24(5), related to the conduct of meetings of creditors, if it is **a related party** of the corporate debtor, **shall not have any right** of representation, participation or voting in a meeting of the committee of creditors.

Here the rejection of the request to Sunflower Estates, for inclusion into the committee of creditors of Seaview constructions, is valid.

**CASE STUDY - 5**

*Decor Design Constructions Private Limited (Decor Constructions) is a reputed construction company based in Pune, India and specialises in construction mid-sized apartments (approximately 20 apartments in each project). Decor Constructions was founded by 2 brothers, Mr. Ravi Rao and Mr. Giri Rao, and are the Directors of Decor Constructions. Mr. Ravi Rao studied civil engineering in the UK and worked extensively in the UK in various infrastructure and construction companies before moving back to India to establish Decor Constructions. During the year 2014, Decor Constructions commenced a new project called as Decor Dream Home, which comprises of 30 apartments, each having a super built-up area of 1,800 square feet and carpet area of 1,500 square feet. All the 30 apartments were sold by Decor Constructions within a period of 3 months and they entered into a sale agreement with the allottees in the month of November, 2014. The following were the key features of the sale agreement:*

- *The apartments were sold to the allottees at a square feet rate of ₹ 5,000 per square feet and the total consideration for each of the apartments were calculated based on the super built-up area.*
- *The application fee to be paid prior to entering into the sale agreement was fixed as 8% of the total consideration.*
- *The entire amount of consideration should be paid by the allottee within 6 months from the sale agreement, irrespective of the date / stage of completion of the construction. This is to facilitate the speedy completion of construction. Decor Constructions has already factored in a discount in the per square feet rate to compensate the allottees for the upfront payment.*
- *Free open car parking to the allottees who pay the entire consideration at the time of sale agreement. For other allottees, the open car parking will be allotted on payment of ₹ 200,000.*
- *The apartment will be handed over to the allottees within 30 months from the date of the agreement i.e. by 31<sup>st</sup> May, 2017.*

*All the 30 allottees made the payment to Decor Constructions in accordance with the agreement (10 of the allottees paid the full amount on the date of the sale agreement thereby getting a free open car park) and an amount of ₹ 2,700 lakhs was received by Decor Constructions. During the month of August 2016, Decor Constructions sent an e-mail to all the 30 allottees that the Promoter has filed the required forms for approval from the Municipal Corporation for water, sewerage and electricity connections and this is taking substantial time to complete, which is not in the control of the Promoter and therefore, the date of handing over will get slightly delayed to 31<sup>st</sup> December, 2017. None of the allottees responded to the communication. In the meanwhile, with the introduction of Maharashtra Real, Estate (Regulation and Development) Act with effect from 1<sup>st</sup> May, 2017, Decor Constructions*

registered the project under the RERA and as part of the registration stated the expected date of completion as 30th June, 2018.

Although Mr. Ravi Rao has been in India for more than three years, his ultimate aim is to settle down in Switzerland, which is the home country of his spouse, Ms. Anne Rao. Therefore, Ravi wanted to buy a colonial villa in Switzerland for an amount of EUR 2 million. Mr. Giri Rao is of the view that the FEMA rules does not allow Mr. Ravi Rao to invest in immovable property outside India when he is resident in India.

Ms. Anne Rao (spouse of Mr. Ravi Rao) who is a citizen of USA, wants to purchase an immovable property (apartment) in India jointly along with Mr. Ravi Rao. For this purpose, Ms. Anne Rao is proposing to take a housing loan in her personal name from Bank of Bengaluru, a bank operating in India. However, considering the fact that she is a citizen of USA, the Bank has included a pre-condition that the loan be guaranteed by Decor Constructions. Based on such request, Decor Constructions has provided the required guarantee in favour of Bank of Bengaluru. Ms. Anne Rao is also interested in investing USD 200,000 in a Special Purpose Vehicle (in the form of an unincorporated joint venture) which is engaging in the business of providing managed farm to its investees and provide the land after a period of 20 years. Ms. Anne Rao before attempting further transactions approached the consultant to advise on the transactions which are not capital account transactions.

In the month of June 2017, Decor Constructions sent another e-mail to the 30 allottees that the construction of the super structure of Decor Dream Home is almost complete and what is left is only to complete the interior plastering, flooring, plumbing etc. and this will get completed by 31<sup>st</sup> March, 2018 and the slight extension of the timeline is only on account of labour shortage at Pune due to the extensive construction spree happening in the city. Decor Dream Home also suggested to the allottees that they were ready to handover the apartment in the month of December, 2017 (before receiving the occupancy certificate) to the allottees for them to get the interior/furnishing work done so that the allottees can occupy the apartments in March/April, 2018 as soon as occupancy certificate is received.

All the 30 allottees were not happy on account of the further delay in completion and filed a complaint against Decor Constructions under the Maharashtra RERA provisions. Out of the 30 allottees, 25 allottees sought cancellation of the sale agreement and refund of the amounts paid by the allottees along with interest at 21% p.a. The balance 5 allottees wanted to be compensated by Decor Constructions for the delay in completion-but do not want to cancel the sale agreement.

Decor Constructions has submitted before the RERA authorities the following:

- Notwithstanding the registration of the project under RERA as per the requirements of Section 3 of the RERA, the sections relating to compensation for delay etc. do not apply to the project since the date of commencement of project / date of sale agreement is prior to the date when RERA came into effect.

- *Even otherwise, the date of completion stated in the RERA registration is 30th June 2018 and therefore, the date of handover finally indicated allottees is 31<sup>st</sup> March 2018, which is well within the timelines and therefore, there is no non-compliance with the RERA requirements.*
- *The Company had already informed the reasons for the delay of the project upto 31<sup>st</sup> December, 2017 in August, 2016 itself and there was no response / issue raised by the allottees at that time. Further, Decor Constructions has also agreed to provide the apartments for interior work during December, 2017 and therefore, it is effectively agreed to handover the apartment as per the revised timelines communicated in August, 2016.*
- *Even presuming the applicability of the RERA provisions, there is no unanimity in the decisions of the allottees on the way forward (since 25 have opted for cancellation and 5 have opted for compensation) and therefore, this cannot be anyway given effect to under RERA.*

*Accordingly, Decor Constructions has submitted that they are not liable for any compensation to be paid under RERA and have re-iterated that they will handover the apartments to the allottees by the revised timelines indicated in the e-mail sent in June, 2017.*

**Answer the following questions:**

- 5.1 *What is your view regarding the terms of the agreement relating to the open car parking arrangement with the allottees ?*
- (A) *Decor Constructions is free to stipulate any terms and conditions in this regard, since this is a transaction between a willing buyer and a willing seller.*
  - (B) *Decor Constructions is required to provide open car parking for all allottees on equitable terms and there cannot be a discrimination based on payment schedule.*
  - (C) *Open parking areas cannot be sold for consideration since they are to be considered as common area of the Project.*
  - (D) *Open parking is part of internal development works and is part of overall project costs which can be charged by the Promoter equally to all allottees. (2 Marks)*
- 5.2 *One of the allottees of Decor Dream Home have-reached out to you for your advice on whether the 'collection of the entire consideration by Decor Constructions without regard to the stage of constructions is appropriate.*
- (A) *Appropriate. The terms/timing of payment are governed by the sale agreement between the promoter and allottee.*
  - (B) *Not appropriate. The timing of payment should be in line with the stage wise completion / construction schedule.*

- (C) *Appropriate, since the necessary discount has already been factored into the consideration by Decor Constructions.*
- (D) *Appropriate, provided Decor Constructions has obtained the approval of the terms at the time of registration of the Project under RERA. (2 Marks)*
- 5.3 *Advice of the consultant to Ms. Anne Rao for the transaction which do not fall under the definition of a capital account transaction under FEMA, 2002 will be:*
- (A) *Transactions which alter the assets and liabilities of non-residents in India.*
- (B) *Transactions which alter the assets and liabilities (including contingent liabilities) of residents outside India.*
- (C) *Transactions relating to transfer of a security by a branch in India of a company resident outside India.*
- (D) *Transactions which alter the assets and liabilities (including contingent liabilities) of non-residents in India. (2 Marks)*
- 5.4 *Mr. Vishy Rao, brother of Mr. Ravi Rao, is a resident of Singapore and he owns an immovable property in Chennai which he inherited from his father, who was a resident of India. Can Mr. Vishy Rao continue to hold the property?*
- (A) *No, he cannot hold transfer or invest in India, since he is resident outside India.*
- (B) *Yes, he can continue to hold in India, since he is a person of Indian Origin and the property is located in India.*
- (C) *Yes, he can continue to hold the property, since this was inherited from a person who was resident in India.*
- (D) *Yes, he can continue to hold the property, since his brother (Mr. Ravi Rao) uses the property whenever he travels to Chennai. (2 Marks)*
- 5.5 *Decor Constructions is in the process of entering into certain business transactions with international agencies and in this context Mr. Girl Rao seeks your views on the maximum amount that can be paid by Decor Constructions under the Liberalised Remittance Scheme and how much he can pay in his own individual capacity under the Scheme, per year ?*
- (A) *Decor Constructions - USD 250,000; Individually - USD 250,000.*
- (B) *Decor Constructions - USD Nil; Individually - USD 250,000.*
- (C) *Decor Constructions - No limit for specified objects; Individually - USD 200,000.*

- (D) Decor Constructions - USD 500,000 (USD 250,000 for each director); Individually - USD Nil, since the same is considered under Decor Constructions' limit. **(2 Marks)**
- 5.6 Answer the following questions in the context of the provisions relating to Real Estate Regulation Act, 2016 (RERA):
- (i) Analyse whether the provisions of RERA (which came into effect from 1<sup>st</sup> May, 2017) are applicable to the Decor Dream Home project and if Decor Constructions is liable for obligations under RERA. **(3 Marks)**
- (ii) Analyse based on the facts of the case, regarding each of the averments of Decor Constructions with regard to its obligations under RERA for the alleged delay in handover of the apartments to the allottees and whether it is liable for payment of compensation under RERA. **(6 Marks)**
- 5.7 Examine / advise regarding the below questions relating to the Foreign Exchange Management Act, 1999 :
- (i) How would you advise Mr. Ravi Rao with regard to his aim of acquiring a colonial villa in Switzerland when he is a resident in India. **(2 Marks)**
- (ii) Evaluate the implications of the transactions proposed to be entered into by Ms. Anne Rao, including the consequential / related transactions. **(4 Marks)**

#### **ANSWER TO CASE STUDY 5**

- 5.1 (C)  
5.2 (A)  
5.3 (D)  
5.4 (C)  
5.5 (B)

#### **Descriptive Answers**

- 5.6 (i) The project was commenced in November, 2014 and was in progress on the effective date of coming into force of RERA, 2016 i.e. on 1<sup>st</sup> May, 2017. As per Section 3(1) of RERA, 2016, the promoter shall make an application to the Authority for registration of the project that is ongoing on the date of commencement of this Act and for which completion certificate has not been issued within a period of three months from the date of commencement of this Act.

Accordingly, **the provisions of RERA are said to be applicable** to the Décor Dream Home Project as no completion certificate has been issued within a period of three months from the date of commencement of this Act i.e., uptill July end 2017.

**(ii) Return of amount and compensation (Section 18)**

This Section provides for the return of amount and compensation.

If the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

However, where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

If the Promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

According to the relevant provisions, Décor Constructions will not be liable under RERA for handover of the apartments to the allottees as it was within the expected date of completion i.e., 30<sup>th</sup> June, 2018. Therefore, **Décor Constructions shall not be liable for payment of compensation.**

**Alternate Solution**

**Analysis of each of Averments of Décor Constructions with regard to its obligations under RERA for the alleged delay in handing over the apartments to the allottees:**

**AVERTMENT (1):** Even though, the date of completion stated in RERA registration is 30<sup>th</sup> June, 2018 and therefore, the date of handover finally indicated to the allottees is 31<sup>st</sup> March, 2018 which is well within the timelines and therefore, there is no non-compliance with the RERA requirements

As per **Section 18**, if the promoter fails to complete or is unable to give possession of an apartment, plot or building, in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

On a plain reading of this provision, it becomes clear that date of completion referred to in this provision is the date specified in the agreement. The word “therein” refers to the “agreement” and not the date of completion revised by the Promoters unilaterally while registering the project. Hence, the submission of Décor Constructions that as till the date of completion mentioned in the registration certificate is not crossed, **there is no delay in not valid.**

**AVERTMENT – 2:** The Company had already informed the reasons for the delay of the project upto 31<sup>st</sup> December, 2017 in August, 2016 itself and there was no response / issues raised by the Allottees at that time. Further, Décor Constructions has also agreed to provide the apartments for interior work during December, 2017 and therefore, it is effectively agreed to handover the apartment as per the revised timelines communicated in August, 2016.

From the facts of the case, it appears that Décor Constructions is of the view that since the complainants did not object to the extended time, hence, the complainants by their conduct agreed to extend the period of delivery of the possession of the flats. This is not acceptable because a party cannot take unilateral decision and impose it upon the other party. The parties have decided to withdraw from the project since the flats were not delivered on time and no where have they agreed to the new dates as unilaterally declared by the Company. The handover of the apartments prior to obtaining the occupancy certificate is mere paper possession and possession without such certificate is illegal and cannot be permitted in law. **Therefore, this offer has been rejected by the complainants and have exercised their right to claim back their money.**

**AVERTMENT – 3:** Even presuming the applicability of the RERA provisions, there is no unanimity in the decisions of the allottees on the way forward (since 25 have opted for cancellation and 5 have opted for compensation) and therefore, this cannot be anyway given effect to under RERA.

Section 18 offers two options to the allottees – one is for return of the amounts, or compensation, if the allottees decide not to withdraw from the project. **It is not necessary for unanimity in the decision of the allottees and the promoter is liable to refund / compensate the allottees based on the option that they choose.**

- 5.7 (i) As per FEMA, 1999 under **Section 6(4)**, 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.

The **RBI vide A.P. (DIR Series) Circular No. 90 dated 9<sup>th</sup> January, 2014** has issued a clarification on Section 6(4) of the Act. According to which a person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for

making any payments or to make any fresh investments abroad without approval of Reserve Bank, provided the cost of such investments and/or any subsequent payments received therefor are met exclusively out of funds forming part of eligible assets held by them and the transactions is not in contravention to extant FEMA provisions.

**Accordingly, Mr. Ravi Rao aim of acquiring a colonial villa in Switzerland when he is resident in India is possible and in compliance with the above provision.**

- (ii) In the given case, Ms. Anne Rao proposed for two types of investments in India:
- (i) Purchase of immovable property in India Jointly with Mr. Ravi Rao
  - (ii) Investing USD 2,00,000 in special purpose vehicle

**W.r.t. part (i)** of the transaction proposed by Ms Anne Rao, according to **Section 6(3)**, the Reserve Bank may, by regulations, prohibit, restrict or **regulate the giving of a guarantee** or surety in respect of any debt, obligation or other liability incurred by a person resident outside India.

Therefore, proposed transaction as to purchase of immovable property to be entered by Ms. Anne Rao, is valid on the guarantee of Décor Construction.

**W.r.t. part (ii)** of the transaction proposed, investments (or financial commitment) in JV/WOS abroad by Indian parties through the medium of a Special Purpose Vehicle (SPV) **are also permitted** under the Automatic Route if the Indian party is not appearing in the Reserve Bank's caution list or is under investigation by the Directorate of Enforcement or included in the list of defaulters to the banking system circulated by the Reserve Bank/any other Credit Information Company as approved by the Reserve Bank.

As in the given case, investment in a Special Purpose Vehicle in the form of an unincorporated joint venture, is invalid in line with the above provision.

#### **Alternate Solution to Part (ii)**

As per the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, 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 agricultural or plantation activities.**

**Accordingly, Ms. Anne Rao cannot invest in the aforesaid business since managed farm business is included under prescribed business of agricultural and plantation activities.**