

# Companies Amendment Bill 2016 North Ex Study Circle

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- **AMENDMENT IN DEFINITIONS**

# Associate company sec 2(6)

## Definition as per **CA 2013**

Section 2 (6) of the Companies Act, 2013 defines the term “**associate company**”, in relation to another company, to mean a company in which the **other company has** a **significant influence**, but is not a subsidiary company of the company having such influence, and also **includes** a **joint venture** company.

The Explanation to Section 2(6) defines the phrase “significant influence” to mean **control of** **at least twenty per cent** of the **total share capital**, or of business decisions under an agreement.

The term “total share capital” has been defined in Rule 2(1) (r) of the Companies (Specification of Definitions Details) Rules, 2014, to mean the aggregate of (a) paid-up **equity** share capital; and (b) **convertible preference share** capital.

# Associate company sec 2(6)

## Comments:

The lacuna in 'one half of the total share capital' :

**How to compute “One-half of total share capital” ?** – The 2013 Act makes an important departure from the 1956 Act in defining a 'subsidiary'. In the 1956 Act, one company was a subsidiary of another if the latter company held more than 'half in nominal value of equity capital'. While the 2013 Act speaks of more than one half of total share capital.

# Associate company sec 2(6)

## Comments:

Suppose the paid-up share capital of company is Rs. 100 Crores of which Rs. 51 Crores is preference capital and Rs. 49 Crores is equity capital. If company A holds entire Rs. 51 Crores preference capital and holds no equity shares at all in company B.

- Position under the 1956 Act – Under the 1956 Act, company B will not be subsidiary of company A.
- Position under the 2013 Act – Under the 2013 Act, company B will be subsidiary of Company A if the preference share capital is convertible preference share capital. If the preference shares in question are non convertible, then company B shall not be a subsidiary of Company A.

# Associate company sec 2(6)

## Comments:

### Substituting “total voting power” for “total share capital”

- By virtue of the present definition, a company in which the **convertible preference share capital was greater** than its equity share capital, could become a subsidiary of an entity that holds such preference shares, even though it **might not have control**, or **any voting rights** in such a company.
- Further, inclusion of the convertible preference share capital in the total share capital could create **confusion about ownership** of the company.
- Such companies could be shown as subsidiaries, **but would not be considered for consolidation purposes**, as per the applicable Accounting Standards because in **AS the norms are w.r.t. Voting powers**.

Also, it is problematic to treat preference shares on par with equity shares, and this could also affect raising of funds for several industries, especially infrastructures and allied sectors.

In order to address the practical problems, the committee recommended that the term “total share capital” be replaced with the term “total voting power”, as equity share capital should be the basis for determining holding/subsidiary status.

# Associate company

## AMENDMENT 2

Further, even though the Act makes references to the term “joint venture” as an inclusive part in the definition of the term “associate company”, it would be appropriate to define the term. Definition of ‘joint venture’ as contained in the Indian Accounting Standard (Ind AS) 28 was considered as a comprehensive definition for the purpose.

# Associate company sec 2(6)

## Amendment as per CA Bill 2016

Explanation: For the purpose of this clause:-

- a) the expression "**significant influence**" means control of at least twenty per cent. of **total voting power**, or control of or **participation** in business decisions under an agreement;
- b) the expression "**joint venture**" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement. (just clarificatory in nature)



# Cost Accountant sec 2(1)

## Amendment as per CA Bill 2016

"Cost Accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 and who holds a valid certificate of practice under sub-section (1) of section 6 of that Act.

# Debenture sec 2(30)

## Definition as per CA 2013

Section 2(30) defines the term "debenture to include debenture stock, bonds "or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not.

## Comment

The phrase any other instrument of a company evidencing a debt" in the definition made it very broad and included, by implication, instruments like commercial papers and other money market instruments, which were often used as an important short-term fund raising source by eligible companies and were well regulated under RBI regulations.

# Debenture sec 2(30)

## Amendment as per CA Bill 2016

Provided that

- a) The instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and
- b) Such other instrument, as may be prescribed by the Central Government in consultation with Reserve Bank of India, issued by a company,  
**(Both) shall not be treated as debenture.**

# Financial year sec 2(41)

## Definition as per CA 2013

Section 2(41) of the Act provides that the financial year in relation to a company or a body corporate shall mean the period ending on the **31st of March** every year.

Provided that on an **application made** by a company or body corporate, which is a **holding company or a subsidiary** of a company **incorporated outside India** and is required to follow a **different financial year** for consolidation (CFS) of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year. **(allow ability of different financial year in case of CFS.. But definition covers only subsidiary (incorporated outside India) and**

**???** what about **associate or joint venture** (incorporated outside India))

# Financial year sec 2(41)

## Comment

It gives the 'National Company Law Tribunal' (NCLT) the authority to allow a company or a body corporate, which is a subsidiary or a holding company of a company incorporated outside India, to follow a different financial year, if it is required to do so, for the consolidation of its accounts outside India.

As the financial statements of “associates” and “joint ventures” were also taken into consideration in the preparation of 'consolidated financial statements' (CFS) if required. NCLT should have similar powers for associates and joint venture incorporated abroad.

# Financial year sec 2(41)

## **Amendment as per CA Bill 2016**

In clause (41), in the first proviso, after the word "subsidiary", the words "or associate company" shall be inserted and associates includes joint venture.

# Holding company sec 2(46)

## Definition as per CA 2013

Section 2(46) of the Act defines a "holding company" in relation to other companies, as a company of which such other **companies** are subsidiary companies. (**Body corporate???**)

Section 2(87) of the Act defines a "subsidiary company", in relation to any other company means a company in which the holding co.

Controls..... Composition of board or one half of the total share capital

# Holding Co.....

and Explanation (c) to section 2(87) (Subsidiary Co definition) clarifies that the expression "**company**" includes a '**body corporate**'.

And sec 2(11) "body corporate includes a company incorporated outside India"

And in case of definition of 'Holding Company' the word 'Body Corporate' is missing which means for purpose of CFS the companies incorporated outside India are not to be considered??



# Holding company sec 2(46)

## Comment

An Explanation similar to Explanation (c) to section 2(87) needs to be included in section 2(46), **so that a company incorporated outside India (being body corporate)** could be considered to be the holding company of another company, for the purposes of the Act.

## Amendment as per CA Bill 2016

'Explanation.—For the purposes of this clause, the expression "company" includes any body corporate.

# **Interested Director sec 2(49)**

## **Amendment as per CA Bill 2016**

- Clause (49) shall be omitted.

# Key Managerial person(KMP) sec 2(51)

## Definition as per CA 2013

As per clause (51) “key managerial personnel”, in relation to a company, means:-

- I. The Chief Executive Officer or the managing director or the manager;
- II. The company secretary;
- III. The whole-time director;
- IV. The Chief Financial Officer; and
- V. Such other officer as may be prescribed

# Key Managerial person(KMP) sec 2(51)

## **Amendment as per CA Bill 2016**

In clause (51):-

- a) in sub-clause (iv), the word "and" shall be omitted;
- b) for sub-clause (v), the following sub-clauses shall be substituted, namely:-
  - "(v) Such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
  - (vi) Such other officer as may be prescribed."

# Key Managerial person(KMP) sec 2(51)

## **Comment**

- 1) The amendment has been done to widen the term KMP
- 2) Was there really the need of this amendment the above “Such other persons” could have been included in definition of KMP by way of notification?

# **Net Worth sec 2(57)**

## **Definition as per CA 2013 (*credit bal of PL???*)**

Section 2(57) defines 'net worth' to mean the aggregate value of

- paid up share capital and
- all reserves created out of profits and
- securities premium account after deducting the aggregate value of accumulated losses, deferred expenditure and miscellaneous expenditure not written off.

# Net Worth sec 2(57)

## Comment

Whether profits carried forward in P&L account is to be included in net worth –

*“Amass of undistributed profits (i.e., **P&L account credit balance or 'surplus'**) **does not automatically** become a reserve. Somebody must clearly indicate that a portion thereof has been **earmarked or separated** from the general mass of profits with a view to constituting it into a general reserve or a specific reserve- Vazir Sultan Tobacco Ltd. v. CIT [1981] 7 Taxman 28 (SC).”*

Therefore, since **profit and loss balance (surplus)** have not been expressly included by definition in computation of net worth, it would appear that the same is not covered by "all reserves created out of profits" and **were not be included in computation of net worth.**"

To remove the above lacuna, the Bill proposes to substitute the words "and securities premium account" with the words "securities premium account and debit or credit balance of profit and loss account".

# Net Worth sec 2(57)

## Amendment as per CA Bill 2016

in clause (57), for the words "and securities premium account", the words "securities premium account and debit or credit balance of profit and loss account," shall be substituted.



# Public Company sec 2(71)

## Definition as per CA 2013

“Public company” means a company which:-

- a) Is not a private company; **(AND)... MISSING)**
- b) Has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

# Public Company sec 2(71)

## Comment

The intention is both conditions (a) and (b) should be satisfied. It is not clear from present definition whether the two conditions are cumulative or alternative. To bring clarity, the bill proposes to insert the word 'and' at the end of sub-cause (a).

## Amendment as per CA Bill 2016

In clause (71), in sub-clause (a), after the word "company;" the word **"and"** shall be inserted.

# Related Party sec 2(76)

## Comment

The term 'related party; as currently defined, uses the word 'company' in section 2 (76)(viii), meaning thereby that those entities that were **incorporated in India** would only come in the purview of the definition.

This resulted in the impression that companies **incorporated outside India** (such as holding/ subsidiary/ associate/ fellow subsidiary of an Indian company) were **excluded** from the purview of related party of an Indian company.

This was unintentional and would seriously affect the compliance requirements of related parties under the Act.

# Related Party sec 2(76)

## Amendment as per CA Bill 2016

In clause (76), for sub-clause (viii), the following sub-clause shall be substituted, namely:-

**Any body corporate** which is:-

- a) a holding, subsidiary or an associate company of such company;
- b) a subsidiary of a holding company to which it is also a subsidiary or
- c) an investing company or the venturer of a company.**

# Small Company sec 2(85)

## Amendment as per CA Bill 2016

### (Higher limits increased)

In clause (85):-

- a) Regarding PUC in sub-clause (i), for the words "five crore rupees", the words "ten crore rupees" shall be substituted;
- b) in sub-clause (ii):-
  - A. for the words "as per its last profit and loss account", the words "as per profit and loss account for the immediately preceding financial year" shall be substituted;  
**(same amend in CSR)**
  - A. Regarding turnover for the words "twenty crore rupees", the words "one hundred crore rupees" shall be substituted.

# Subsidiary Company sec 2(87)

## Definition as per CA 2013

Section 2(87) of the Act defines a “subsidiary company”, in relation to another Company (that is to say a holding company), as a company in which the holding Company controls the composition of the Board of Directors, or exercises or controls more than one-half of the total share capital. Further, Rule 2(1) (r) of the Companies (Specification of Definitions Details) Rules, 2014, specifies that the **‘total share capital’** shall be the aggregate of the paid up equity share capital and the convertible Preference share capital.

# Subsidiary Company sec 2(87)

## Amendment as per CA Bill 2016

In clause (87):-

- a) In sub-clause (ii), for the words "**total share capital**", the words "**total voting power**" shall be substituted;
- b) the proviso shall be omitted;  
(~~provided that such class of companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed~~)
- a) in the Explanation, item (d) dealing with definition of 'layer' Shall be omitted.

# Turnover sec 2(91)

## Definition as per CA 2013

“Turnover” means the aggregate value of the **realization** of amount of services rendered, or both, by the company during a financial year;

## Amendment as per CA Bill 2016

"Turnover" means the gross amount of revenue **recognized** in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year.



# Important Sections

# Consolidated Financial statement [Section 129]

## OLD CA 2013 Sec 129(3):

Where a company has one or more subsidiaries, it shall, in addition to financial statements provided under sub-section (2), **prepare a consolidated financial statement** of the company and of all the **subsidiaries (including associates and joint ventures)** in the same form and manner as that of its own .... **(there was difference between companies act and accounting standard )**

*Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in such form as may be prescribed. (No change)*

*Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed. (No change)*

**Explanation.—For the purposes of this sub-section, the word “subsidiary” shall include associate company and joint venture.**

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## Consolidated Financial statement [Section 129] (Cont...)

### Comments:

- The Explanation to section 129(3) provides that "for the purposes of this sub-section, the word "subsidiary" shall include associate company, and joint venture.
- **"Some difficulties arose on account of the differences in the definition of a subsidiary under Section 2(87) of the Companies Act, 2013, and the Accounting Standards.**
- The Committee recommended that to ensure the same treatment for the consolidation of accounts under the Accounting Standards and the Act, the reference to 'associates' and 'joint ventures' under Section 129 ought to be amplified/clarified, to be in accordance with the applicable Accounting Standards.
- **Hence the explanation has been removed resulting in joint ventures getting exemption from consolidation.**

## Consolidated Financial statement [Section 129] (Cont...)

### **Effect:**

The requirement of General Instruction Number 4 for the preparation of a CFS, as prescribed in Schedule III of the Act, **requires that the entity shall disclose a list** of subsidiaries, associates or joint ventures which have **not been consolidated** in the CFS, along with the reasons for not consolidating. Because of missing of words accounting standards the Instruction indicated a lack of clarity on the kind of entities to be so disclosed.

As a result of insertion of words accounting standards the requirement of General Instruction Number 4 for the preparation of a CFS, shall be at par with the accounting standard. **The Accounting Standard indicated instances where accounts of subsidiaries, associates or joint ventures was not required to be consolidated.**

## Consolidated Financial statement [Section 129] (Cont...)

### Amendment Bill 2016

**RELAXATION:** The provisions of proposed new section 129(3) read as under :

"(3) Where a company has one or more subsidiaries or **associate companies**, it shall, in addition to financial statements provided under sub-section (2) prepare a consolidated financial statement of the company and of all the subsidiaries and **associate companies** in the same form and manner as that of its own **and in accordance with applicable accounting standards** which shall also be laid before the annual general meeting of the company along with-the laying of its financial statement under sub-section (2)."

*Explanation. Removed*

~~*(—For the purposes of this sub-section, the word “subsidiary” shall include associate company and joint venture.)*~~

# Re-opening of accounts on Court's or Tribunal's Orders [Sec 130]

**Section 130 of the Act 2013** provides for the re-opening of accounts, after due approval from a court or a Tribunal.

The Proviso to Section 130(1) provides that the court or the Tribunal shall give notice to the Central Government, the Income-tax authorities, SEBI or any other statutory regulatory body or authority concerned and shall take into consideration **any representations made by them** before passing any order under this Section.

## RELAXATION

**As a result, the Auditor/ Chartered Accountant of the company were not being given an opportunity to present their point of view.**

In the interest of the principle of natural justice Clause 33 of the Bill seeks to amend section 130 of the Act to provide that in addition to authorities already specified, any other person concerned shall be given notice before passing an order for re-opening of accounts

Second amendment resulted from the fact that in the section there is no mention about the period up to which the accounts could be reopened under section 130. Therefore, the bill also seeks to provide that order for reopening of accounts can be made **up to eight years** unless there is a specific direction under section 128(5) from the Central Government for longer period.

# Constitution of National Financial Reporting Authority [Section 132]

**RELAXATION:** Clause 34 of the Bill seeks to amend section 132(4)(c)(A)(ii) of the Act to reduce the minimum fine under sub-section (4) in respect of professional or other misconduct **from rupees ten lakhs (and which can go up to ten times of the fees received by the firms) old**

**to rupees five lakhs (and which can go up to ten times of the fees received by the firms).**

**(Amendment)**

- Section 134



# Financial Statement, Board's Report, etc. [Section 134]

## First Amendment

- **Mandatory authentication of financial statements by CEO even if he is not a director [Section 134]**

Section 134(1) of the Act states that the financial statement, including the CFS, is to be signed by the chairperson of the company, where he is so authorised by the Board, or by two directors, out of which one has to be the Managing Director, and the Chief Executive Officer, if he is a director in the company, the Chief Financial Officer and the Company Secretary of the company, wherever they are appointed.

**The Committee recommended that in case a company did not have a managing director, the Chief Executive Officer, irrespective of whether he was a director or not, being a KMP, and responsible for the overall management of the company; should be mandated to sign the financial statements.** The Committee also recommended that since the appointment of a managing director was not mandatory for all companies, the words "if any", may be inserted after the words "managing director".

- It may be noted that the Bill proposes to make two changes in sub-section (1) of section 134 as under :
  - (i) Words "if any" added after the words "managing director"
  - (ii) The words "if he is a director in the company" which presently occurs in sub-section (1) after the words "Chief Executive Officer" is proposed to be omitted.

# Financial Statement, Board's Report, etc. [Sec 134] (cont...)

## PROPOSED AMENDMENT

Clause 35 of the Bill seeks to amend section 134 of the Act to provide that the Chief executive officer shall sign financial statements irrespective of whether he is a director or not.

- In view of the above recommendations of the Committee, the Bill purposes to substitute sub-section (1) of section 134.
- The proposed new sub-section (1) reads as under:

***"(1) The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorized by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon."***

## Financial Statement, Board's Report, etc. [Sec 134] (Cont...)

### Second Amendment

### Proposed modifications of disclosures requirements in Board's report [Section 134(3)(p)]

#### (THE CORRECTION IN ENGLISH:)

The Bill proposes that in clause (p) of section 134(3) for the words "*manner in which formal* "annual evaluation has been made by the Board of its own performance and that of its committees and individual directors",

the words *the manner in which* formal "annual evaluation of the performance of the Board, its Committees and of individual directors has been made" shall be substituted.

## Financial Statement, Board's Report, etc. [Sec 134] (Cont...)

### THIRD AMENDMENT

#### **No need for duplication of disclosures [Section 134(3)]**

To avoid duplication of disclosures made elsewhere in Board's report which makes, Annual report bulky and expensive to print, the Bill proposes two new provisions below section 134(3) as under:

**"Provided** that where disclosures referred to in this sub-section have been included in the financial, statements, such disclosures shall be referred to **instead of being repeated in the Board s report:**

**Provided further** that where the policy referred to in clause (e) or clause (o) is made **available on company's website, if any, it shall be sufficient compliance of the** requirements under such clauses if the salient features of the policy and any change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available."

## Financial Statement, Board's Report, etc. [Sec 134] (cont...)

### FOURTH Amendment

- Abridged Board's Report for small companies and OPCs [Section 134(3A)]

The Bill proposes to insert new sub-section (3A) in section 134 which reads as under:

"(3A) The Central Government may prescribe an **abridged Board's report**, for the purpose of compliance with this section by a **One Person Company or small company**.

- JOURNEY TO
- 135 CSR

# Corporate Socialist Responsibility [Section 135]

- There are four amendments

(i) First>>>>> Two directors instead of three directors (135(1))

(ii) Second >>> Preceding Financial year instead of any financial year (135(1))

(iii) Third>>>>> Net profit defined and confusion of exclusions removed (135(5))

(iv) Fourth>>>> areas or subject word added with activities as per sch VII

## FIRST amendment

### OLD Co. Act 2013

Sec 135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility

Committee of the Board consisting of **three or more directors**, out of which at least one director shall be an independent director. **(how would CSR committee be formed)**

## **Corporate Socialist Responsibility [Sec 135] (cont)**

- **Problem**

In case company is not required to appoint independent director in its Board than how would CSR committee would be formed?

- **Comments on Amendment :**

Clause 36 of the bill seeks to amend section 135 of the act to allow composition of CSR Committee committee with two or more directors in case the company is not required to appoint independent director under section 149.



# Corporate Socialist Responsibility [Sec 135] (cont)

## SECOND AMENDMENT

**Confusion re. the term 'any financial year' (same change in 'small company' ref TO))**

- Sec 135. (1) of the CA 20913 lays that Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during **any financial year** shall constitute a Corporate Social Responsibility Committee.

### **Problem**

- The provisions of formation of CSR committee were not clear regarding which company should constitute CSR committee as in the subsection (1) of 135 it was stated that company "exceeding threshold limit in any financial year" have to have CSR committee while the intention was 'preceding financial year' rather than 'any financial year'.

### **Amendment :**

- **Based on the Committee's recommendations as above, the Bill proposes to substitute the words "any financial year" in sub-section (1) with the words " the immediately preceding financial year".**

# Corporate Socialist Responsibility [Sec 135] (cont)

## THIRD AMENDMENT

- **Confusion between the term ‘net profit’ and ‘average net profit’**

Sec 135. (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a **net profit** of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director

And vide Sec 135 (5) The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the **average net profits** of the company made during the three immediate

And interestingly the term ‘Net profit’ has not been defined while the term ‘Average net profit’ has been defined leading to the confusions.

As per old Explanation to sec 135(5).—For the purposes of this section **“average net profit”** shall be calculated in accordance with the provisions of section 198.

## Corporate Socialist Responsibility [Sec 135] (cont)

- **Secondly there** was another problem with CSR provisions that while computing net profit for the purpose of formation of CSR Committee the **exclusions** were different than the exclusions which were applicable for calculating amount to be spent on CSR .
- As per Cos act 2013 there were two types of exclusions i.e.
  - As per Rule2(1)(f) of CSRP Rules 2014 requires dividend income etc. To be excluded while calculating net profit for the purpose of CSR committee formation.
  - While u/s 135(5) for the purpose of computing Average Net Profit allows adjustments and exclusion as contemplated by Sec 198
- As a result this would lead to an **incongruous situation** where in companies which were not required to spent on CSR would never the less would be required to constitute CSR committee.
- Amendment has come over this issue. The term 'Average Net profit' is replaced with the term 'Net Profit' which means now profit for the purpose of CSR committee as well as for the purpose of CSR spend shall be on the same line. Therefore, now company will have to form CSR committee only if company has to spend on CSR.

## Corporate Socialist Responsibility [Sec 135] (cont)

- **Third Amendment :**

The Bill proposes to resolve this difficulty by substituting the Explanation so as to define " Net profit" instead of "average net profit" . ,.....

`Explanation.—For the purposes of this section "net profit" shall **not include such sums as may be prescribed, and** shall be calculated in accordance with the provisions of section 198.'

- **IMPACT**

After the amendment both deductions as envisaged by rule as well as by sec 198 will be applicable u\s 135(1) as well u\s 135(5)

,

# Corporate Socialist Responsibility [Sec 135]

Sec 135(1) CSR Committee



Net Profit



Net Profit not defined



No Guidelines



Company can take any Profit



Rules prescribed mainly 1 exclusion i.e. Div to 135 Companies



Sec 135(5) CSR Spending



Average Net Profit



Average Net Profit is defined



Reference to Sec 198



Av. N.P as computed u/s S.198



Sec 198 prescribes rule for deletion



**N.P differs with Sec 135(5)**



**CSR Committee  
Formation without  
there being  
requirement for CSR  
spending.**

.....



**CSR spending may not  
be needed if there is -ve  
Av. Net Profit**

# Corporate Socialist Responsibility [Sec 135] (cont)

## FOURTH AMENDMENT

- Section 135(3)(a) requires that the CSR Policy shall indicate 'the activities to be undertaken by the company as specified in Schedule VII'. Schedule VII indicates broad areas, which have been further explained to be interpreted liberally in circular No. 21/ 2014 issued by MCA. The Committee recommended that it would be appropriate for the said clause to be modified to refer to subjects in Schedule VII within which CSR activities could be taken up by an eligible company.
- Based on the above recommendation of the Committee, the Bill proposes that in section 135(3)(a) for the words "as specified in Schedule VII", the words and figures **"in areas or subject, specified in Schedule VII"** shall be substituted.
- The impact is the CSR spending can be done "in areas or subject, as specified in activities listed in Schedule VII."

# Section 185

Section 185 deals with **ban/ restrictions** on **loan to directors** and **section 186** deals with procedures and restrictions to be followed while lending to **other persons**.

- Initially there was no escape route u\s 185 later on some very few relaxations like lending to WOS were introduced.
- But in the amendment bill 2016 section 185 has **been recast** providing various relaxations.



# 185 (loan to directors) at a glance

Banned	Subject to S.R	No Condition
<b>Loan/ Guarantee/ Security</b>	<b>Loan/ Guarantee/ Security</b>	<b>Loan/ Guarantee/ Security</b>
(i) Director	(i) Pvt Co. in which director is Director/member	(i) Loan to MD/ WTD: (a) extending service or (b) Scheme approved S.R
(ii) Director of Holding Co.	(ii) Body Corporate – Directors holds $\geq 25\%$ of voting power in borrowing co.	(ii) Loan in ordinary course & Interest @ prevailing yield
(iii) Partner or Relative of Directors	(iii) Body corporate – Director acts (BC) as per directions of Director (L.C)	(iii) Loan/ Guarantee/ Security to Wholly owned Subsidiary
(iv) Firm at which relative or directors is partner	-	(iv) Guarantee/ Security on behalf of Subsidiary

# Section 185 Loans to Director

## Sub Section 1: (Banned)

No company shall, directly or indirectly, **advance any loan**, including any loan represented by a book debt to, or **give any guarantee** or provide **any security** in connection with any loan taken by,—

- a. **any director** of company, or of a company which is its **holding company** or any **partner or relative** of any such director; or
- b. **any firm** in which any such director or relative is a partner.

**Note: we are slicing up this sub sec in two, and will be discussed as:**

1. w.r.t Loan to .....
2. w.r.t Guarantee/ security on loan taken by.....

# Section 185 Loans to Director

## *Sub Sec 1, Part – 1 (Banned w.r.t Loan to.....)*

1. No company shall, directly or indirectly,
  - **advance any loan**, including any loan represented by a book debt to
    - a.
      - i. any **director of company**, or
      - ii. **Director** of a company which is its **holding company** or
      - iii. any **partner or relative** of any such **director**; or
    - b. **any firm** in which any such director or relative is a partner.

# Section 185 Loans to Director

*Sub Sec 1 Part – 2 (Banned w.r.t guarantee/ security on loan taken by .....)*

1. No company shall, directly or indirectly,
  - give any **guarantee** or provide any **security** in connection with any loan taken by
    - a.
      - i. any **director of company**, or
      - ii. **Director** of a company which is its **holding company** or
      - iii. any **partner or relative** of any such **director**; or
    - b. **any firm** in which any such director or relative is a partner.

# Section 185 Loans to Director

## Sub Section 2 (*Restrictions*)

(earlier these were in banned route but now relaxation by way of certain compliances has been given)

A company may **advance any loan** including any loan represented by a book debt, or give any **guarantee** or provide any **security** in connection with any loan taken by **any person** in whom any of the **director** of the company is **interested**, subject to the condition that—

- a. a **special resolution** is passed by the company in general meeting:  
Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; **and**
- b. the loans are **utilised** by the borrowing company for its **principal business activities**.

# Section 185 Loans to Director (cont...)

*Explanation.*—For the purposes of this sub-section, the expression "**any person in whom any of the director of the company is interested**"

means—

- a. **any private company** of which any such director is a director or member;
- b. **any body corporate** at a general meeting of which not less than **twenty-five per cent.** of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
- c. **any body corporate**, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

# Section 185 Loans to Director (cont...)

**Commentary:** Company may provide loan to the following after passing Special Resolution & Loan should be utilized by Borrower for the purpose

- a. **any private company (borrowing co.)** which has common directors or director-cum-shareholders like - a subsidiary or holding or associate.;
- b. **any body corporate (borrowing co.)** whether Public/ private at a general meeting of which **twenty-five per cent** or more of the total voting power exercised by directors ?????

*For e.g. let us say there is company ABC, Mr. X & Mr. Y are two directors and there is other company say PQR, Mr. X holds 15% equity shares & Mr. Y holds 16% of equity shares in PQR.*

*Meaning thereby that ABC can grant loan to PQR as directors of ABC holds more than 25% of the voting power, provided S.R is passed in G.M of ABC*

- c. **any body corporate (borrowing co.)**, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

*For e.g say there is company Zaar an advertisement agency, Mr. A & Mr. B are directors, Mr.A's wife runs another advertisement agency in the name of VOX. Being in same line of business many of the decisions are taken by Mr.A, it means VOX runs on the directions of Mr.A and loan can be given to VOX after S.R*

# Section 185 Loans to Director (cont...)

## Sub Sec 3 (Exemptions)

Nothing contained in sub-sections (1) and (2) shall apply to—

- a. the giving of any **loan to a managing or whole-time director**—
  - as a part of the **conditions of service extended** by the company to all its employees; or
  - pursuant to any scheme approved by the members by **a special resolution**; or
  
- b. a company which in the **ordinary course of its business** provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an **interest** is charged at a rate **not less than the rate of prevailing yield** of one year, three year, five year or ten year Government security closest to the tenor of the loan; or



# Section 185 Loans to Director (cont...)

## Sub Sec 3

c. **Part 1....any loan made by a holding company** to its wholly owned subsidiary company or

**Part 2... any guarantee given or security provided** by a holding company in respect of any loan made to its **wholly owned subsidiary company**; or

c. **any guarantee given or security provided by** a holding company in respect of loan made by any bank or financial institution to its **subsidiary company**:

Provided that the loans made under **clauses (c) and (d)** are utilised by the subsidiary company for its **principal business activities**.

# Section 185 Loans to Director (cont...)

4. If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section, the company shall be punishable with fine which shall not be less than **five lakh rupees** but which may **extend to twenty-five lakh rupees**, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may **extend to six months or with fine** which shall **not be less than five lakh rupees** but which may **extend to twenty-five lakh rupees**, or with both.'.

# Section 42

# Issue of Shares on private Placement (Sec. 42)

S.No	Companies bill 2016	Comments
1.	Sec.42(1) A company may, subject to the provisions of this section, make a <b>private placement</b> of securities.	<b>Reference to Sec 26</b> was made in earlier sub sec which is now <b>removed</b>  <b>(Comments: Sec 26</b> deals with <b>prospectus</b> , In private placement <b>no allotment</b> is made <b>to public</b> , and when no allotment is made to public there does not arise question of Prospectus at all. Thus, the above amendment is mere <b>clarificatory</b> )

# Issue of Shares on private Placement (Sec. 42)

S.No	Companies bill 2016	Comments
2.	<p>Sec.42(2) A private placement shall be made only to a select group of persons who have been identified by the Board (here in referred to as "identified persons"), whose number shall <b>not exceed fifty or such higher number as may be prescribed</b> [excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of provisions of clause(b) of sub-section(1) of section 62}, in a financial year subject to such conditions as may be prescribed.</p>	<p><b>(a) Sub-Sec 2</b> provide that during a F/Y no invitation should be made to more than <b>50 persons</b></p> <p>(b) Whereas <b>Rule 14(2)(b)</b> provides that <i>“such offer or invitation shall be made to not more than <b>two hundred persons</b> in the aggregate in a financial year”</i></p> <p>(c) It means that private placement can be made to 200 persons during every F/Y.</p> <p>(d) So there comes <b>Sec 2 clause (68)</b> “private company” means a company having a <b>maximum of 200 members.</b></p>

# Issue of Shares on private Placement (Sec. 42)

S.No	Companies bill 2016	Comments
3.	<p>Sec 42(3) A company making private placement shall issue private placement offer and application in such <b>form and manner as may be prescribed to identified persons</b>, whose names and addresses are recorded by the company in such manner as may be prescribed:</p> <p style="padding-left: 40px;">Provided that the private placement offer and application shall not carry any right of <b>renunciation</b></p>	<p>Earlier law was <b>silent</b> about <b>renunciation u/s 42.</b></p> <p><b><u>AFTER AMENDMENT</u></b></p> <p>But law has now amended and it <b>restricts renunciation</b> of offer <b>u/s 42.</b></p>
	<p>Explanation I to Sub Sec (3) .—"private placement" means any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum-application, which satisfies the conditions specified in this section.</p>	<p>After amendment no need for separate invitation letter as well and application letter from now.</p> <p>Procedural relief ????</p>

# Issue of Shares on private Placement (Sec. 42)

S.No	Companies bill 2016	Comments
	<p>Explanation II to Sub Sec (3).— "<b>qualified institutional buyer</b>" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time ,made under the Securities and Exchange Board of India Act,1992.</p>	<p><b>No Change</b></p>
	<p>Explanation III to Sub Sec (3).—If a company, listed or unlisted, makes an <b>offer to allot or invites subscription</b>, or allots, or enters into an agreement to allot, securities <b>to more than the prescribed number of persons</b>, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognized stock exchange in or outside India, the same shall be <b>deemed</b> to be an <b>offer to the public</b> and shall accordingly be governed by the provisions of Part I of this Chapter.</p>	<p><b>No Change</b></p>

# Issue of Shares on private Placement (Sec. 42)

S.No	Companies bill 2016	Comments
4.	<p>Sec 42(4) Every identified person willing to subscribe to the private placement issue shall apply in the private placement and application is sued to such person along with subscription money paid either by <b>cheque or demand draft or other banking channel and not by cash:</b></p> <p>Provided that a company shall <b>not utilise</b> monies raised through private placement unless allotment is made and the <b>return of allotment</b> is filed with the Registrar in accordance with sub-section (8).</p>	<p><b>SAME</b></p> <p>Earlier law was <b>silent</b> about <b>utilization of application money before the</b> date of allotment . But <b>now</b>, law has become <b>more clear</b> over the use of application money</p> <p><b>Application money</b> can be used only <b>after filing</b> of return of <b>allotment with registrar.</b></p>



# Issue of Shares on private Placement Issue (Sec. 42)

S.No	Companies bill 2016	Comments
5.	<p>Sec 42(5) <b>No fresh offer</b> or invitation under this section shall be made <b>unless</b> the allotments with respect to any <b>offer or invitation made earlier</b> have been <b>completed</b> or that offer or invitation has been withdrawn or abandoned by the company:</p> <p>Provided that, subject to the maximum number of identified persons under sub-section(2), a company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed.</p>	<p><b>1. No fresh offer unless previous allotment has been completed.</b></p> <p><b>2. Secondly</b> once a person is identified then the <b>fresh issue of other securities</b> can be made to that person in addition to the one already made.</p>

# Issue of Shares on private Placement Issue (Sec. 42)

S.No	Companies bill 2016	Comments
6.	<p>Sec 42(6) A company making an offer or invitation under this section shall <b>allot its securities</b> within <b>sixty days</b> from the date of receipt of the application money for such securities and <b>if</b> the company is <b>not able to allot</b> the securities within that period, it shall <b>repay</b> the application money to the subscribers within <b>fifteen days</b> from the <b>expiry of sixty days</b> and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve percent. Per annum from the expiry of the sixtieth day:</p> <p>Provided that monies received on application under this section shall be kept in a <b>separate bank account</b> in a scheduled bank and shall not be utilised for any purpose other than—</p> <p>(a) for adjustment against <b>allotment of securities</b>; or</p> <p>(b) for the <b>repayment of monies</b> where the company is unable to allot securities.</p>	<p><b>No Change</b></p>

# Issue of Shares on private Placement Issue (Sec. 42)

S.No	Companies bill 2016	Comments
7.	Sec 42(7) No company issuing securities under this section shall release any <b>public advertisements</b> or utilise any media, marketing or distribution channels or agents to inform the public at large about such an issue.	<b>No Change</b>
8.	Sec 42(8) A company making any allotment of securities under this section, shall file with the Registrar a <b>return of allotment</b> within <b>fifteen days</b> from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.	Company is now to file return of allotment with registrar within 15 days of allotment.
9.	Sec 42(9) If a company defaults in filing the return of allotment within the period prescribed under sub-section (8), <b>the company, its promoters and directors</b> shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.	<b>New Penalty:</b> If company defaults in filing return of allotment than additional penalty of 1,000 per day subject to max of 5 lac over company + director + promoter.

# Issue of Shares on private Placement Issue (Sec. 42)

S.No	Companies bill 2016	Comments	
10.	Sec 42(10) Subject to sub-section (11), if a company makes an offer or accepts monies in <b>contravention of this section</b> , the company, its promoters and directors shall be liable for a penalty which may extend to the amount raised through the private placement or <b>two crore rupees</b> , whichever is lower, and the company shall also refund all monies with interest as specified in sub-section (6) to subscribers within a period of thirty days of the order imposing the penalty..	<b>No Change</b>	
11.	Sec 42(11) Notwithstanding anything contained in sub-section (9) and sub-section (10), any private placement issue not made in compliance of the provisions of the sub-section (2) shall be <b>deemed to be a public offer</b> and all the provisions of this Act and the Securities Contracts (Regulation) Act, 1956 and Securities and Exchange Board of India Act, 1992 shall be applicable.	<b>Old Act 2013- if any of the provisions of section 42 is not complied</b>	<b>Public Offer</b>
		<b>Amn't 2016-</b> If allotment is made to more than 50 persons during F/Y	Than only Public offer

- THANKS