

Loans to Directors; Investment by  
Companies; Related Party Transactions;  
Acceptance of Deposits; Registration of  
Charge



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## Sec 184 – Disclosure of interest

- Every Director to disclose his concern / interest at;
  - First Board meeting after he is appointed as Director **or** at First Board meeting of every financial year **or** at First Board meeting after there is any change in such interest
- If Company proposes to enter in to contract / arrangement with,
  - Another company where Director holds > 2% stake or is promoter / manager / CEO; or
  - A Firm where Director is partner / owner / member,

Then Director should disclose interest and not participate in the meeting.

- Exceptions: a) in case of private companies, interested director can participate after disclosure
- b) In case of Sec. 8 company, the above provisions applicable only if the value exceeds Rs. 1 lakh.
- c) in case of unlisted companies licensed to operate by RBI/SEBI/IRDA from International Financial Services Center located in an approved multi-services SEZ, interested director can participate after disclosure





## **Sec 184 – Disclosure of interest**

- The word ‘indirect’ used means that the company does not give a loan to director through the agency of one or more intermediaries. The word ‘indirect’ cannot be read as converting what is not a loan into a loan. [Dr. Freddie Ardeshir Mehta V Union of India (1991) 70 Comp Cas 210]
- If Director does not disclose such interest / attends meeting, contract is voidable at option of company
- “Interest” means any interest, direct or indirect, which conflicts with duties towards company as a Director
- Disclosure requirements in Financial statements





## Section 185 – Loan to Directors

- No company shall directly or indirectly advance any loan, including any loan represented by a book debt to or give 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
- B) any firm in which such director or relative is a partner
- However u/s 185(2) a company may advance any loan or give guarantee/security in connection with any loan taken by any person in whom any of the director of the company is interested subject to:
  - a special resolution is passed and the explanatory statement to the notice gives the purpose of the loan and any other relevant fact as may be specified.
  - the loan are utilized by the borrowing company for its principal business activities





## Section 185 – Loan to Directors

- Meaning of “Any person in whom the director of the company is interested” –
  - a) any private company of which any such director is a director or member
  - b) any body corporate of which not less than 25% of the voting power is exercised or controlled by any director or two or more directors, together.
  - c) any body corporate, whose Board or Managing Director or Manager is accustomed to act in accordance with the directions/instructions of the Board or any director or directors of the lending company





## Sec 185 – Loan to Directors

- **Sec 185 (1)(a):** Section not applicable for loan given to MD or WTD if such loan is in accordance with the terms of services extended to all employees or is approved by shareholders by SR
- **Sec 185 (1)(b):** Not applicable if a Co. 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 1/3/5 / 10 years Government security closest to the tenor of the loan.
- **Sec 185 (1)(c):** Not applicable on any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or
- **Sec 185 (1)(d):** Section not applicable on 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 the loan is utilised by the subsidiary company specified above, for its principal business activity only
- Penalties are specified for non-compliance





## Control [Section 2(27)]

2(27) defines “Control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

\* Excludes relative of a Director





## **Section 185 – Loan to Directors**

- **Section 185 (2) : Penalty**

- For Company: Fine of Rs.5 lakhs to Rs.25 lakhs
- For director/other person to whom the loan is advanced/ security or guarantee is given:
- Imprisonment up to 6 months OR Fine of Rs.5lakhs to Rs.25 lakhs.





## Section 185 – Loan to Directors

- Mr. Osama is a Director in AK47 Pvt. Ltd.,(APL) and holds investment in Missile Pvt. Ltd (MPL) (a holding co. of APL). Examine the validity / Legality of the following transactions in view of the provisions of Section 185:
  - Case 1: APL grants loan to New Explosive Pvt. Ltd.(NEPL), where Mr. Daud (brother of Mr. Osama) holds investment of more than 25% of its Paid up Capital.
  - Case 2 : Can MPL give loan to APL or vice versa?





## Answers to the Problem

1) YES. since, New Explosive Pvt ltd does not gets covered in point d of Explanation to Sec. 185 since the condition in the referred point is in relation to directors only & not include their relative.

i] Missile pvt ltd (H Ltd) giving loan to AK47 pvt ltd (S Ltd)

Although as per point c to explanation to Sec 185, AK47 pvt ltd is a “person in whom director is interested”. But a specific exemption is given to loan by holding co. to Subsidiary co. is provided in Rule 10 of the Companies (Meetings of Board and its Powers) Rules, 2014. Therefore, it is allowed

ii] AK47 pvt ltd (S Ltd) giving loan to Missile pvt ltd (H Ltd) as per point c to explanation to Sec 185, Missile Pvt Ltd is a “person in whom director is interested” & Therefore, Loan cannot be granted





## **Section 185 – Loan to Directors**

- Mr. DM is a WTD of KH Pvt. Ltd. The policies of the Co. permits grant of loan as the part of the conditions of service extended by the company to ALL its employees. Examine the following actions of the co.
  1. Co gives loan to Mr. DM of Rs. 2.5 lakhs
  2. Co. gives guarantee for Mr. DM for Rs. 5 Lakh
  3. Co. gives letter of comfort in favour of Mr. DM





1) Yes

2) No, since the section provides exception only for giving of loan

3) Letter of comfort is not a security . Neither it is a loan / guarantee. Therefore, it is not under the scope of sec 185. Hence, company can issue such letter.

(But In commercial world, usually such letters are issued for subsidiary by holding co. & is issued to the lending institution & it acts as a confirmation that holding co. is aware of & is agreed to the decision of subsidiary as regards the financing decision. So it is very rare for such a situation to arise in practical life)





## **Section 186(1) – Loan / investment by Company**

- A company shall not make investment through more than two layers of investment companies.
- The above provision is not applicable to:
  - A company acquiring any company incorporated outside India and where it is permitted to have investment subsidiaries beyond two layers as per the laws of that country.
  - A subsidiary company for meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.



## Section 186(2) – Loan / investment by Company

- Prior approval through special resolution at AGM required if,
  - Loan given to any person\* or other body corporate
  - Guarantee / security in respect of any loan given to any person or other body corporate
  - Value of securities purchased
    - < 60% of paid up cap + free reserves + securities premium; or
    - < 100% of free reserves + securities premium; whichever is more
- *\*Person does not include any individual who is in employment of the company. [with effect from a date to be notified.]*






## **Section 186 – Loan / investment by Company**

- The limits specified in Section 186(2) shall not be applicable for any loan / guarantee to WOS/ JV & investments in WOS subject to disclosure requirements. Provisos to Section 186(3)
- In case of unlisted public company or a private company, which is licensed to operate by RBI/SEBI or IRDA from International Finance Service Centre located in approved SEZ, special resolution is not required if its Board of Directors passes a resolution at its meeting or by circulation.



- 
- Above provisions in respect of loan / guarantee not applicable to –
    - banks, insurance, or HFC in the ordinary course of business; or
    - A company established and engaged in the business of financing companies;
    - company engaged in providing infrastructural facilities
  - Above provisions in respect of investments not applicable to –
    - An investment company
    - Investments made in pursuance of acquiring shares rights issue,
    - made in respect of investment or lending activities by a NBFC whose principal business is acquisition of securities.



## Other issues

- Also requires consent of all the Directors present at the meeting and prior approval\* of the public financial institution concerned where such term loan subsists. \*prior approval shall not be required if the limits specified are not exceeded and there are no defaults in repayment of loan/interest. [Section 186(5)]. In case of unlisted IFSC public company or specified IFSC private company, a resolution passed by the Directors at its meeting or by circulation, will suffice.
- No company in default of repayment of deposits or in payment of interest can give loan/security or make investments, till such default is subsisting.
- Loan given under section shall bear interest not less than the prevailing yield of 1 / 3 / 5 / 10 year Government securities closest to its tenor.
- Thus Sec 186 is also applicable generally to private companies.
- Filing to be done with ROC within 30 days of holding AGM in case of special resolution.





## **Section 186 – Loan / investment by Company**

- Investment / loan / guarantee / security can be offered only after Board resolution is passed – All Directors present at meeting to give consent
- In case of subsisting term loan from public FI, approval of such public FI also required. Such approval not required where limits mentioned earlier not exceeded and repayment is as per plan
- Loan should not be given at yield < Government security
- Company which has defaulted on deposits repayment shall not give loan / guarantee till such default continues
- Company to maintain register to record such transactions. Such register to be maintained permanently





## **Sections 185 & 186 – Some issues faced by Co.**

### Example 1

Company A has two shareholders and directors, namely, P and Q. Company is desirous of giving loan:

- To P
- To R, a relative of Q
- To S, a director of company B, its holding company
- To T, partner of S
- To U, partner of P
- To P & Co., a firm where P is a partner
- To Y & Co., where V, a relative of Q is a partner



## Sec 186 – Loan / investment by Company

### Example 2

- XYZ Pvt. Ltd having the following Capital structure:(Rs in Crores)

Paid up Share Capital	150
Statutory reserves	50
Securities premium	80
Free Reserves	70
Net worth	350

- The co. has following decision pending:
  - Granting loan / Guarantee to PQC Ltd. Of Rs. 160 Cr.
  - Acquire through subscription shares of TCS Pvt. Ltd. of Rs 100 Cr
  - Advice the Co. under the light of prov. Of Co. Act 2013.



- 60% of Paid up Capital, Free reserves & Securities Premium=  $60\% (150+70+80) = \text{Rs. } 180 \text{ Crores.}$
- OR
- 100% of free reserves & Securities premium=  $100\%(70+80) = \text{Rs. } 150 \text{ crores}$
- Whichever is more.
- Therefore, loan can be granted to PQC ltd as per the provisions of the act. [Sec 186(2)]
- 
- Yes, XYZ pvt ltd can invest in TCS pvt ltd, after passing a resolution at board meeting with consent of all directors & taking the required approvals as prescribed in Sec 186(5) & proviso thereto.



## Sec 186 – Loan / investment by Company

### Example 3

Can Apex Pvt. Ltd. (Mfg. Co.) invest in a company with the holding- subsidiary hierarchy?

Raksha Pvt. Ltd. (Investment Co.)




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graph TD; A[Raksha Pvt. Ltd. (Investment Co.)] --> B[Adhik Raksha Pvt. Ltd. (Investment Co.)]; B --> C[Sarve Raksha Pvt. Ltd. (Investment Co.)];
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Adhik Raksha Pvt. Ltd. (Investment Co.)

Sarve Raksha Pvt. Ltd. (Investment Co.)



- 
- Apex ltd can invest in Raksha ltd. but not in a holding company of Raksha Ltd. as per the provisions of the Act.
  - More Importantly, if the holding co. of Raksha ltd is a company incorporated outside India, Then, Apex ltd can make investment in that co. as the provision this sec will not be applicable.





## **Sections 185 & 186 – Some issues faced by Co.**

- Example 4
- H and W are husband and wife having a son, S.
- Company A – H is holding 60% shares and W is holding 40% shares. H and W are Directors
- Company B – W is holding 75% shares and S is holding 25% shares. W and S are Directors.
- Can Company A give loan to Company B?
- Will the provisions of Section 186 apply, if, instead of letter of guarantee, a letter of comfort is issued.
- Will the provisions of Section 186 apply to share application, advance received pursuant to a contract.





## **Sections 185 & 186 – Some issues faced by Co.**

- 1. Whether loans to employees are hit by Section 186? If yes, what steps to be taken for loans before March 2013 and loans given\renewed after March 2013?
- 3. If interest is charged on loans to members, will provisions of Section 2 (22) (e) of Income Tax Act, 1961 apply?
- 4. Inter-corporate loans given before March 2014 and shown as short term or current, what is the position on renewal. In case of loans payable on demand, there is no due date. What steps are to be taken?
- 5. Corporate guarantee given by a subsidiary to bankers of fellow subsidiary (both 100% subsidiaries of same Holding company) after September 12, 2013- what steps are to be taken if same persons are directors in both subsidiary companies?



## **Section 187**

- Investments of company to be held in its own name
- Exceptions
  - For the collection of dividend or interest payable thereon
  - To facilitate the transfer of shares. Provided the same are re-transferred after the expiry of the purpose.
  - To deposit as security for repayment of loan or performance of any obligation undertaken by it.
  - Holding investments in the name of the a depository as a beneficial owner. Where the investments are not in its name for any reason, maintain a register of investments not held in its own name.
- Penalty – for company – Minimum Rs. 25,000/- upto Rs. 25,00,000/-
- - for officers – Imprisonment upto six months and or fine of minimum Rs. 25,000/- which may extend upto Rs. 100,000/-.

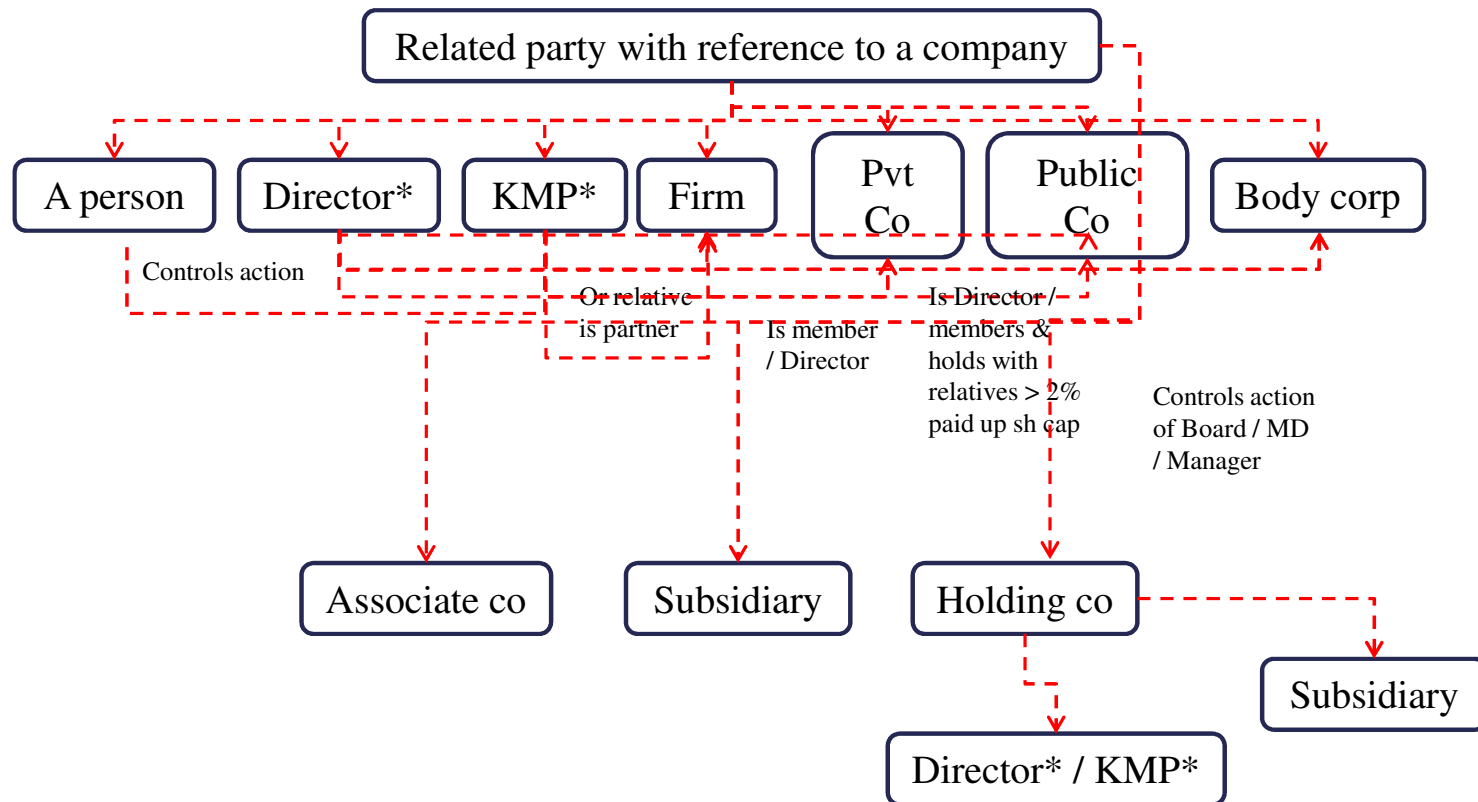




## Related Party Transactions - Definitions

- Related Party [Section 2(76)] “related party”, with reference to a company, means –
  - i. A director or his relative;
  - ii. A key managerial personnel or his relative;
  - iii. A firm, in which a director, manager or his relative is a partner;
  - iv. A private company in which a director or manager is a member or director;
  - v. A public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;
  - vi. Any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
  - vii. Any person on whose advice, directions or instructions a director or manager is accustomed to act: (professionals excluded)
  - viii. Any company which is –
    - A holding, subsidiary or an associate company of such company; or
    - A subsidiary of a holding company to which it is also a subsidiary;
  - ix. such other person as may be prescribed





- \* - includes “relatives”
- KMP–CEO/MD/Manager, CS, WTD, CFO

- Manager – manages affairs of company (may / not be Director)
- Assoc Company - > 20% of cap , JV

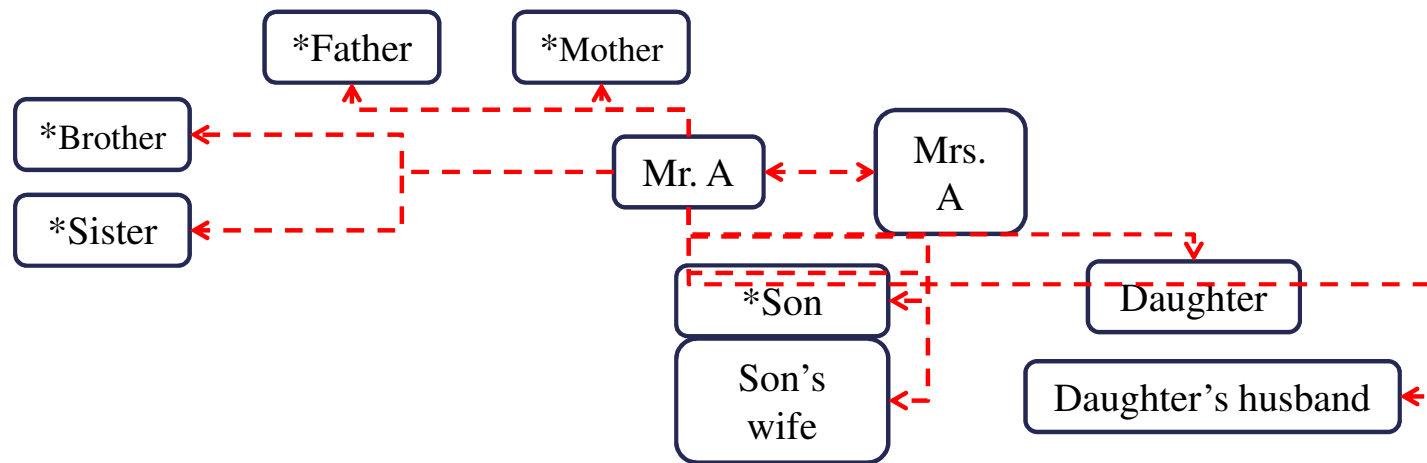


## **Related Party Transactions - Definitions (Contd.)**

- Relative [Section 2(77)]
- “relative”, with reference to any person, means any one who is related to another, if –
  - i. They are members of a Hindu Undivided Family;
  - ii. They are husband and wife; or
  - iii. One person is related to the other in such manner as may be prescribed;
- Under the Rules, a person is related to the other if he or she is related to another in the following manner:
  - Father (including Step-father) ; Mother (including step-mother)
  - Son (including Step-son); Son’s wife
  - Daughter; Daughter’s husband
  - Brother (including step-brother)
  - Sister (including step-sister)



## Sec 2 (77) – Definition of relative



- Relatives include all members of HUF
- \* includes Step-relations





## **Related Party Transactions - Definitions (Contd.)**

- Definitions
- Key Management Personnel [Section 2(51)]
- defines “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;



## Related Party Transactions - Definitions (Contd.)

- Promoter [Section 2(69)]
- “promoter” means a person—
- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:
- Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;





## Related Party Transactions – Sec. 188

- Certain transactions with the consent of the Board. Disclosure in Board's report with justification.
- Every company having paid up share capital of rupees ten crores or more shall not enter in to any contract or arrangement with related parties except with the prior approval of the company by a ~~special~~ resolution.
- No company can enter into transactions or appointment to an office of profit, exceeding the prescribed amount. Transactions at arm's length price excluded.
- Member who is a related party cannot vote.



## Related Party Transactions – Sec. 188

- Following transactions entered in to with related parties are called related party transactions **require approval by ordinary resolution of members;**
  - a) sale / purchase / supply of goods / materials - **> 10% of Annual Turnover or Rs. 100 crores, whichever is less.**
  - b) Selling / buying of property **> 10% of NW or Rs. 100 Crores, whichever is less.**
  - c) Leasing of property **>10% of NW or 10% of Turnover or Rs. 100 crores, whichever is less.**
  - d) Availing / rendering of services **> 10% of Turnover or Rs. 100 crores, whichever is less.**
  - e) Appointment of agent for purchase / sale of goods / materials / services / property
  - f) Related party's appointment to office / place of profit in company / subsidiary / associate company  
**Remuneration > Rs 2.50 lacs pm**
  - g) Underwriting subscription of securities / derivatives of company **Remuneration > 1 % of NW**
- “Office or place of profit” – any facility or remuneration received by the related party. In case of director, any facility or remuneration received above what he is entitled as director

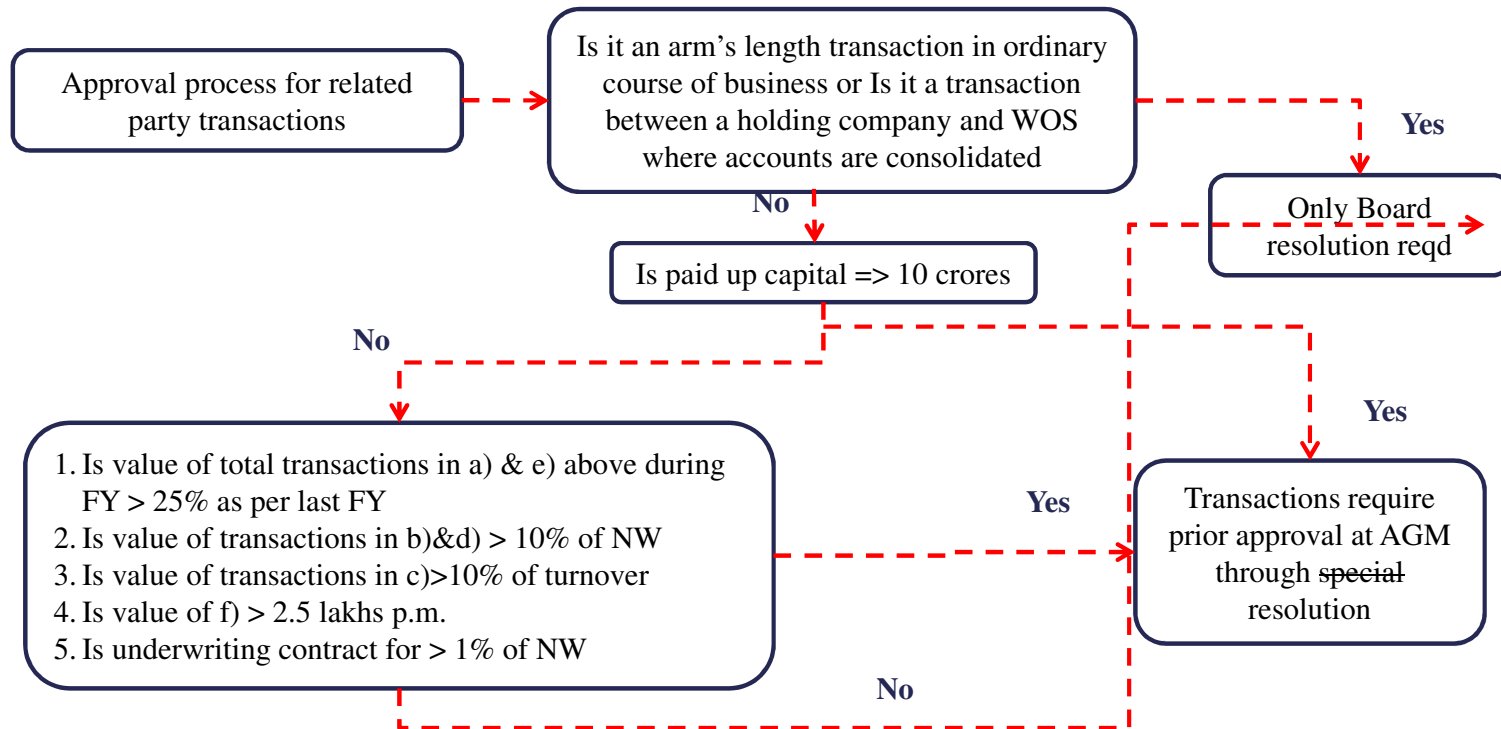


## Related Party Transactions – Sec. 188

- *\*As per Companies (Amendment) Bill, 2014, Dated 8<sup>th</sup> December 2014, Special resolution is replaced by ordinary resolution.*
- *As per Companies (Amendment) Bill, 2014, related party transactions between holding companies and wholly owned subsidiaries are exempt from the requirement of approval of non-related shareholders.*
- *Companies (Amendment) Bill, 2014 has empowered Audit Committee to give Omnibus approvals for related party transactions on annual basis.*
- *\*Amendment bill passed Lok Sabha by 17/12/2014 yet to be passed by Rajya Sabha till 13/05/15*



## Sec 188 – Procedure for approval of Related party transactions..



- All related party transactions (RPT) to be pre-approved / ratified by Board / AGM within 3 months. Interested Director not to participate
- Interested member not to vote in AGM, for deciding approval





## **Section 188 – Related party transactions.**

- **Key aspects to be considered in evaluating whether a transaction is not in the ordinary course of business:**
  - Whether the transaction is covered in the main objects or object incidental to the main objects as envisaged in the Memorandum of Association;
  - Whether a transaction is usual or unusual;
  - Frequency;
  - Whether transaction is done at arm's length;
  - Whether transaction is done on similar basis with other third parties;
  - Business purpose of the transaction;
  - Size and volume of transaction.





## **Section 188 – Related party transactions.**

- In case of 100% subsidiary, special resolution passed by holding company is enough for transactions between holding company & subsidiary
- “Arms length transaction” – transaction between 2 related parties that is conducted as if they were unrelated, so that there is no conflict of interest
- Details of RPT to be mentioned in Board report, along with justification for entering in to the same
- If Board / AGM does not ratify a RPT, contract voidable at company’s option. If contract is with related party of director, the concerned director to indemnify for any loss caused to company






## **Sec 188 – Related party transactions..**

- Case Study 1 : Mr. R, a director of ABC Ltd., is also a director sitting on the board of XYZ Pvt. Ltd., but does not hold any stake in the paid up capital of XYZ Pvt. Ltd., Will XYZ private limited be related party of ABC limited? Whether the answer would have been similar under RC49?
- Mr. R, A director of ABC limited, is also a practicing lawyer and periodically provides legal advice to XYZ limited. The board of XYZ limited acts in accordance with the legal advice provided by mr. R. Would XYZ be treated as a related party for ABC? Would Mr. R be treated as a related party for XYZ?



- 
- 1) No. As per S.2 (76) (v) of Companies Act 2013, 'related party', with reference to a company, means a public company in which a director or manager is a director AND holds along with his relatives, more than two per cent. of its paid-up share capital. XYZ Limited would be a related party of ABC Limited only if Mr. R and his relatives hold 2% or more of the paid up capital of XYZ Limited.
  - 2) Yes. As per S.2(76) (iv), 'related party', with reference to a company, means a private company in which a director or manager is a member or director. XYZ Private Limited would be a related party of ABC Limited if Mr. R is either a director or member of XYZ Private Limited.
  - The answer would remain unchanged under revised clause 49






## **Sec 188 – Related party transactions..**

- Case Study 3 : XYZ Limited has issued 10 lakh equity shares fully paid up(FV–Rs.10 each). ABC Limited holds 1.5 lakhs equity shares in XYZ Limited. It has also issued 10 lakh compulsorily convertible preference shares (FV–Rs.10 each). ABC Limited also holds 3 lakh preference shares in XYZ Limited. Is XYZ Limited related to ABC Limited?
- Case Study 4 : ABC Limited, a manufacturing company, sells or leases a vacant flat to its subsidiary? Whether this would be a transaction in the ordinary course of business? Whether the answer would be same if ABC Limited sells or leases entire building constructed solely for this purpose to the subsidiary ? Would there be any impact under RC49 on April 1,2014?



- 
- Yes. XYZ Limited is an associate of ABC Limited as per the definition of associate as per
  - Section 2(6) of the Companies Act since convertible preference shares are to be considered for assessment of significant influence. In the given case, including CCPS, ABC Limited holds 22.5% of the total share capital.
  - Sale or lease of vacant flat may get covered in 'ordinary course of business'. However, sale or lease of building may be difficult to justify as being in ordinary course of business. RC 49 does not provide any exemption for transactions in ordinary course of business



## Consequences of Default

Section & Default	Party in default	Imprisonment term	Fine range (Rupees '000s)
184 – Director does not disclose interest	Director	1 year	50 – 100
185 – Loans to Directors	Company	NA	500-2500
	Director/Other person	6 months	500-2500
186 – Loans / investment by Cos	Company	NA	25-500
	Office in default	2 years	25-100
188 – Related party transactions	Director-listed Co.	1 year	25-500
	Director-other co.	NA	25-500

- Consequences of default in the above cases are either imprisonment or fine or both





## **Register of Contracts/Arrangements, In Which Directors Are Interested**

- Register of contracts or arrangements, in which directors are interested to be maintained in Form No. MBP 4. Entry to be made within 30 days of the disclosure.
- It shall be maintained at the registered office and open for inspection during business hours. Extracts to be provided for prescribed fees. Besides, it shall also be available at the AGM for access to members.
- Non-compliance with attract a fine of Rs. 25,000.





## Acceptance of Deposits

- Section 73 – not applicable to
  - A banking company
  - A NBFC
  - A company specified by Central Government in consultation with RBI
- Sections 73 to 76 –
- Definition of “Deposit” – [Sec 2 (31)] – includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories prescribed in consultation with RBI. To refer Rule 2( c) of Companies (Acceptance of Deposits) Rules, 2014





## Acceptance of Deposits

- Definition of “Deposit” – Rule 2(1)(b) of Companies (Acceptance of Deposits) Rules, 2014 – includes any receipt of money by way of deposit / loan / other form, but does not include –
  - Amount received from Central / State Government
  - Amount received from foreign Government / approved foreign donors
  - Bank loan
  - Loan from public financial institutions / insurance companies
  - Commercial paper / instrument issued as per RBI guidelines





## Acceptance of Deposits

- Deposit does not include
  - Any amount received by a company from any other company
  - Amount received as securities application money (If securities are not allotted within 60 days of receipt of money & still not refunded within 15 days thereafter, the money to be treated as deposits)
  - Note: Amount standing to the credit of Share Application Account as on March 31, 2015 to be either refunded or allotted as the case may be. An adjustment of the amount for any other purpose will not be treated as refund
  - Amount received from person, who at the time of receipt of money was a director or a relative of a director (Such Director or his relative, as the case may be, to give declaration\* that amount given to company is not out of borrowed money)
  - Amount raised through secured bonds / Debentures or bonds / debentures compulsorily convertible in equity in 5 years






## Acceptance of Deposits.

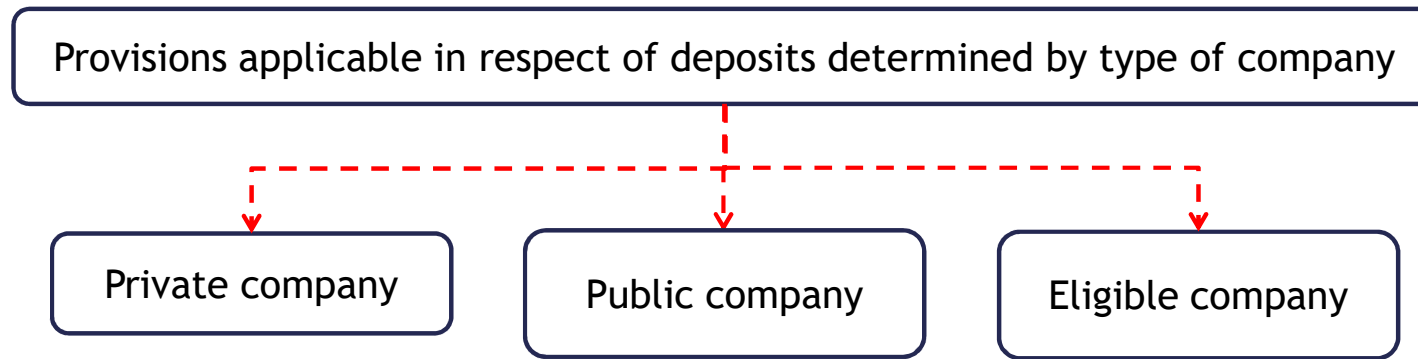
- Deposit does not include
  - Non-interest bearing security deposit received from employee, not exceeding his annual salary
  - Non-interest bearing amount received / held in trust
  - Amount received in course / purposes of business
    - As advance against goods / services provided it is appropriated within 365 days.
    - Advance received under agreement for sale of property provided it is duly registered
    - Security deposit against supply of goods / services
    - Advance received against long term projects (in any of above 4 sub-points, if amount becomes refundable because company does not have permission to deal in that business, amount to be considered as deposits)
  - Amount brought in by promoters / relatives as unsecured loan at insistence of bank / financial institution



- 
- I, \_\_\_\_\_, son/daughter/wife of \_\_\_\_\_, Residing at \_\_\_\_\_, acting in the capacity of *relative of a*\* Director of \_\_\_\_\_ **Private Limited** hereby declare that the amount of Rs. \_\_\_\_\_ (Rupees \_\_\_\_\_ only) being given as unsecured loan is not being given out of own funds and not acquired by me by borrowing or accepting from others.
  - \_\_\_\_\_
  - Director
  - \* strike off if not applicable



## Acceptance of Deposits.



- Eligible company –means a public company which has obtained prior consent of AGM through special resolution for accepting public deposits; and has
  - Net worth of at least Rs. 100 crores, or
  - Turnover of at least Rs. 500 crores,
- 
- Note: Specified IFSC public company/private company may accept deposit upto 100% of NW, provided they file the details with ROC in Form DPT3.





## Acceptance of Deposits

### ☐ Other terms and conditions:

- ☐ Issuance of a circular including therein a statement showing the financial position of the company, the credit rating obtained, total number of depositors and the amount due thereof and such other particulars as may be specified.
- ☐ Filing of the circular with the Registrar within 30 days before the date of the issue.
- ☐ Certifying that the company has not defaulted in the repayment of deposits or payment of interest on such deposits and where a default had occurred, five years have elapsed since the company made good the default.
- ☐ Providing security, if any.
- ☐ Where the company fails to repay deposit or pay interest, the depositor concerned may apply to the Tribunal for relief.





## Acceptance of Deposits.

Key questions	Private Company*	Public Company*	Eligible Company
From whom can deposits be accepted	Members	Members	Members + Public
What is the minimum tenure of deposits	6 months	6 months	6 months
Can deposits < 6 months repayment be accepted	Yes, provided such deposits are not > 10% of NW. Under no circumstances – deposits < 3 months maturity to be accepted		
What is the maximum tenure of deposits	3 years	3 years	3 years
Can deposits which are repayable on demand be accepted / renewed	No	No	No
Is there a monetary limit on total deposits o/s from members	O/s + fresh deposits to be < 35% NW	O/s + fresh deposits to be < 35% NW	O/s + fresh deposits to be < 10% NW

- NW = paid up capital + free reserves + securities premium account. \* See Note



## Section 73-76 - Acceptance of Deposits.

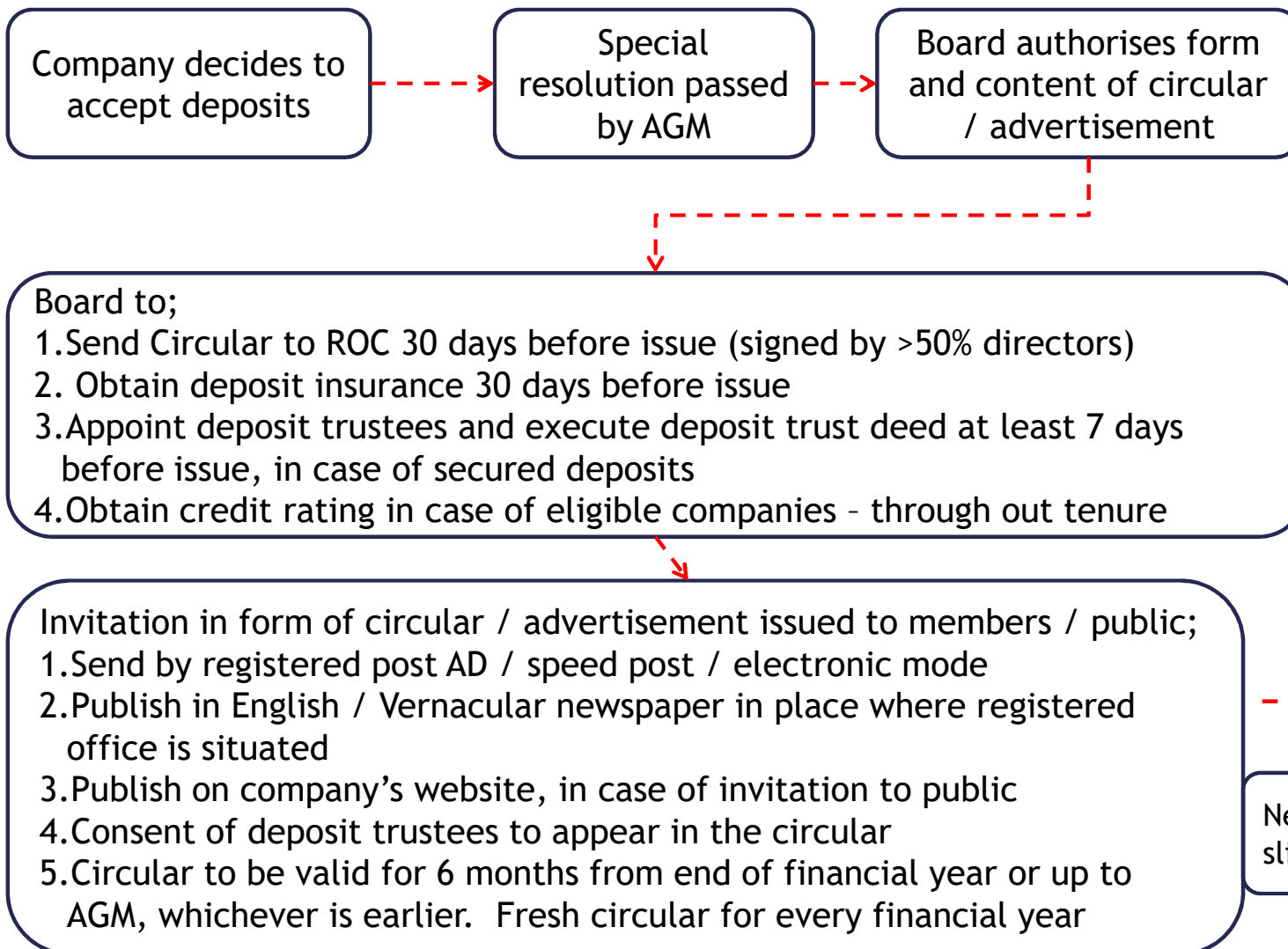
Key questions	Private Company	Public Company	Eligible Company
Is there a monetary limit on total deposits o/s from public	NA	NA	O/s + fresh deposits to be < 25% NW
What is the monetary limit for Government companies wrt deposits	O/s + fresh deposits to be < 35% NW		
What is the maximum rate of interest payable on deposits	Rate <= maximum ROI prescribed by RBI for deposit accepting NBFCs (currently 12.5%)		
Is deposit insurance compulsory in case of deposits	Yes	Yes	Yes
What is the minimum amount of deposit insurance to be taken	Rs. 20,000	Rs. 20,000	Rs. 20,000
Can the cost of deposit insurance be passed on to the depositors	No	No	No
Can unsecured deposits be accepted	Yes	Yes	Yes



## Acceptance of Deposits.

Key questions	Private Company	Public Company	Eligible Company
Is deposit insurance required even for unsecured deposits	Yes	Yes	Yes
What security is to be obtained for secured deposits	Any Assets (other than intangible assets)		
What should be quantum of security in case of secured deposits? How is it valued?	Security of assets charged should cover deposit + interest, not covered by deposit insurance. Deposits + interest not to exceed market value of assets charged (valued by registered valuer)		
What happens in case deposits are not fully secured?	Deposits will be termed as “unsecured deposits”		
Is appointment of deposit trustees compulsory	Only for secured deposits		
What happens to o/s deposits at commencement of the Act	To be repaid within 1 year, or extended time allowed by Tribunal	Existing repayment schedule to continue in case of regular repayment	







Previous slide

Form to be submitted by intending depositor

Company to accept deposits - furnish deposit receipt within 2 weeks - create charge within 30 days in case of secured deposits

Company to maintain register which contains various details pertaining to the depositor and deposits  
Entry to be made in register within 7 days of issue of deposit receipt  
Register to be maintained for 8 years from date of latest entry in register

By 30<sup>th</sup> April of every financial year, keep 20% of deposit to be repaid in current + next financial year, in a scheduled bank (Deposit repayment reserve account). Amount to be free from lien

By 30<sup>th</sup> June of every financial year, file return along with certain audited information to ROC



## Acceptance of deposits – Credit Rating

- Rule 3(8) Every eligible company shall obtain, at least once in a year, credit rating for deposits accepted by it in the manner specified herein below and a copy of the rating shall be sent to the Registrar of Companies alongwith the return of deposits in Form DPT-3;

Name of the agency	Minimum investment Rating
(a) CRISIL	FA- (FA Minus)
(b) ICRA Ltd.	MA- (MA Minus)
(c) Credit Analysis and Research Ltd.	CARE BBB(FD)
(d) Fitch Ratings India Private Ltd.	tA-(ind)(FD)
(e) Brickwork Ratings India Pvt Ltd.	BWRF FBBB
(f) SME Rating Agency of India Ltd.	SMERA A”





## Acceptance of deposits

- **Maintenance of Liquid Assets**

**Rule 13:** Every company under sub-section (2) of section 73 and every eligible company shall on or before the 30th day of April of each year deposit a sum which shall not be less than twenty per cent of the amount of its total outstanding deposits, whether secured or unsecured, maturing during the financial year ending on the 31st day of March next following, in a deposit repayment reserve account, with any scheduled bank which shall be free from charge or lien.

Provided that the amount remaining deposited, as the case may be, shall not at any time fall below fifteen per cent of the amount of deposits maturing until the 31st day of March of that year and the next financial year.

- “Deposit repayment reserve account” cannot be used for any purpose other than repayment of deposits.





## Deposit Insurance.

**Rule 5:** “Provided that the companies may accept deposits without deposit insurance contract till the 31st March, 2018 or till the availability of a deposit insurance product, whichever is earlier.”.

- The deposit insurance contract shall specifically provide that in case the company defaults in repayment of principal amount and interest thereon, the depositor shall be entitled to the repayment of principal amount of deposits and the interest thereon by the insurer up to the aggregate monetary ceiling as specified in the contract.





## **Deposit Insurance.**

- The amount of insurance premium paid on the insurance of such deposits shall be borne by the company itself and shall not be recovered from the depositors by deducting the same from the principal amount or interest payable thereon.\
- If any default is made by the co. in complying with the terms and conditions of the deposit insurance contract which makes the insurance cover ineffective, the co. shall either rectify the default immediately or enter into a fresh contract within 30 days and in case of non-compliance, the amount of deposits covered under the deposit insurance contract and interest payable thereon shall be repaid within the next 15 days and if such a co. does not repay then it shall pay 15% interest p.a. for the period of delay and shall be treated as having defaulted and shall be liable to be punished in accordance with the provisions of the Act.



## Acceptance of Deposits.

- **Creation of Security**

**Rule 6:** For the purposes of section 73(2)(f) and second proviso of section 76(1), every company under of section 73(2) and every eligible company under section 76 inviting secured deposits shall provide for security by way of a charge on its assets as referred to in Sch. II of the Act excluding intangible assets of the company for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by deposit insurance as provided in pursuance of section 73(2)(d).

The security (not being in the nature of pledge) for deposits shall be created in favor of a trustee for the deposit holders on:

- specific movable property of the company, or
- specific immovable property of the company wherever situate, or any interest therein.





## **Acceptance of Deposits.**

- Deposit trustee not to be appointed, if he is
- Director / KMP / employee of company / holding / subsidiary company or relative of aforesaid
- Depositor in the company
- Indebted to company / holding / subsidiary
- Has material pecuniary relationship with company
- Has guaranteed repayment of the company's deposits
- Deposit trustee can be removed only if approved by all directors in meeting. Such meeting to include independent director, if applicable





## **Acceptance of Deposits.**

- Duty of deposit trustee to enforce compliance as required by Law and ensure protection of depositors interest
- Depositors meeting can be called on requisition by depositors with 10% of total deposit value
- Deposits in case of banks and NBFCs to be regulated by RBI – these provisions not to apply





## **Acceptance of Deposits.**

- Section 76A:
- Contravention of the provisions of 73 or 76 in regard to acceptance of deposits:
- Company – Fine of not less than Rs. 1 crore subject to a maximum of Rs. 10 crores, in addition to payment of the deposit and interest thereon.
- Every officer who is in default – imprisonment which may extend upto seven years and fine of not less than Rs. 25 lakhs subject to a maximum of Rs. 2 crores or both.
- In case of intention to deceive, liable for action under Section 447.





## **Acceptance of Deposits.**

- Depositor has right to make nomination
- If repayment made by company after 6 months, but before expiry of period – interest rate to be reduced by 1%
- Penal rate of interest @ 18% p.a. payable on overdue period in case deposits matured & claimed but remaining unpaid





## Acceptance of Deposits.

- Any deposit accepted before the commencement of the Companies Act, 2013, needs to be repaid/refunded on or before June 30, 2015.
- Amounts received by private companies prior to 1st April, 2014 shall not be treated as 'deposits' under the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014 subject to the condition that relevant private company shall disclose, in the notes to its financial statement for the financial year commencing on or after 1st April, 2014 the figure of such amounts and the accounting head in which such amounts have been shown in the financial statement.





## Acceptance of Deposits.

- **Penalty**

Penalty under Section 74(3) (Repayment of deposits, etc., accepted before commencement of this Act):-

If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.





## Registration of Charges

- Chapter VI [Sections 77 to 87]
- **Duty to register charges etc.:** A company creating a charge, shall, register the particulars of the said charge with the ROC within 30 days of its creation. [Form No. CHG 1 for other than Debentures and Form No. CHG 9 for Debentures]
- This charge could be:
  - on its property or assets or
  - any of its undertakings
  - whether tangible or otherwise
- Situated in or outside India





## Registration of Charges

- Rule 3 (4)(a)
- where the instrument or deed relates solely to the property situate outside India, the copy (instrument evidencing the creation/modification) shall be verified by:
  - a certificate issued either under the seal of the company or
  - under the hand of
    - any director or
    - company secretary of the company; or
    - an authorised officer of the charge holder
  - or under the hand of some person other than the company who is interested in the mortgage or charge,
  - stating that it is a true copy;



## Registration of Charges

- Rule 3 (4)(b)
- where the instrument or deed relates, whether wholly or partly, to the property situate in India, the copy shall be verified by:
  - a certificate issued under the hand of
    - any director; or
    - company secretary of the company; or
    - an authorised officer of the charge holder
  - stating that it is a true copy.





## Registration of Charges

- Charges requiring registration
  - a charge created for the purpose of securing any issue of debentures or deposits;
  - a charge on uncalled share capital of the company;
  - a charge on any immovable property, wherever situate, or any interest therein;
  - a charge on any book debt of the company;
  - a charge, not being a pledge, on any movable property of the company;





## Registration of Charges

- Charges requiring registration
- a floating charge on the undertaking or any property of the company including stock-in-trade;
- a charge on calls made but not paid;
- a charge on a ship or any share in a ship;
- a charge on intangible assets, including goodwill, patent, a licence under a patent, trade mark, copyright or a licence under a copyright.





## Registration of Charges

- Application for Registration of charge in Form No. CHG 1.
- In case the company fails to get the charge registered, then the charge-holder may apply to ROC for the registration of the same
- On receiving such application, the ROC shall send notice to company
- And within 14 days, unless the company doesn't show sufficient cause as to why the said charge should not be registered, shall register the charge without signature of company
- The said charge-holder shall be entitled to recovery of fees and additional fees paid to ROC from the company





## Registration of Charges

- ROC shall issue a certificate of registration of such charge in Form No. CHG 2
- ROC shall issue a certificate of modification of charge in Form No. CHG 3
- The certificate issued by the ROC shall be conclusive evidence that the requirements of Chapter VI of the Act and the rules have been complied with.

- The liquidator or any other creditor shall not take into account





## Registration of Charges

- Intimation of satisfaction of charge to be given to the ROC in Form No. CHG 4 within a period of 30 days from the date of such satisfaction ROC to issue memorandum of satisfaction in Form No. CHG 5.
- If a form is filed without the signature of charge-holder, ROC shall send notice to the charge-holder calling upon him to show cause within such time not exceeding 14 days, as to why the satisfaction should not be recorded. If no cause shown, ROC will register.
- Where the company fails to send intimation of satisfaction of charge to the ROC, who receives evidence of the satisfaction of charge from any other person, such as charge-holder, shareholder, or purchaser. However, the power is subject to evidences being produced to his satisfaction.





## Registration of Charges

- ROC shall issue a certificate of registration of satisfaction of charge in Form No. CHG 5.
- Intimation [in Form No. CHG 6] within 30 days to the ROC of the appointment/cessation thereof, as Receiver or Manager of the property so charged [Section 84]
- Where any person obtains an order for the appointment of a receiver; or of a person to manage the property, which is already subject to a charge of a company;
- Where any person appoints such receiver/ manager under any power contained in any instrument
-





## Registration of Charges

- The provisions of registration of charges shall equally apply to:
  - a company acquiring any property subject to a charge; or
  - any modification in the terms or conditions or the extent or operation of any registered charge
- Where any person acquires a property, asset or undertaking in respect of which a charge has already been registered, it would be deemed that he has complete knowledge of that charge from the date the said charge was registered with the ROC





## Registration of Charges

- ROC may on application by the company, allow this registration within 300 days (30+270), on payment of additional fees
- This application shall be supported by a declaration from the company by its secretary or director that such belated delay shall not adversely affect rights of any other creditors of the company
- If not within 300 days, company to seek extension of time from the CG; - Form No. CHG 8

- ROC shall not register the charge unless the delay is condoned by





## Registration of Charges

- Register of Charges [Section 85]
- Every company shall keep at its registered office a register of charges which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings. The instrument creating the charge shall also have to be kept along with the register.
- The register of charges shall be in Form No. CHG 7 and enter therein particulars of all the charges registered with the Registrar as well as particulars of any modification of charge and that of satisfaction of charge





## Registration of Charges

- The entries in the said register shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.
- Entries in the register shall be authenticated by the secretary of the company or any other person authorised by the Board for the purpose.
- The register shall be preserved permanently and the instrument creating a charge shall be preserved for a period of 8 years from the date of satisfaction of charge by the company.





## Registration of Charges

- Inspection of Register
- Register of charges and the instrument of charges, shall be open for inspection during business hours:
  - by any member or creditor without any payment of fees; or
  - by any other person on payment of such fees as prescribed in Annexure B and subject to such reasonable restrictions as the company may, by its articles, impose.





## Registration of Charges

- Rectification CG in the register of charges
- CG on being satisfied that an omission that has occurred:
  - was accidental; or
  - due to inadvertence; or
  - for some other sufficient cause or
  - It is not of a nature to prejudice the position of creditors or shareholders of the company or
  - on any other grounds, it is just and equitable to grant relief





## **Penalties for non-compliance**

- Registration of Charge
- Company : Fine of not less than Rs. 100,000 but extended upto Rs. 1,000,000.
- Every officer : Imprisonment of upto six months or Fine of not less than Rs. 25,000 but extended upto Rs. 100,000

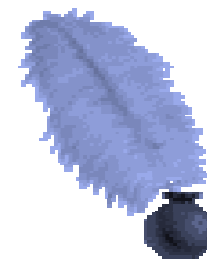




a. v. aROLKAR & CO., CHARTERED ACCOUNTANTS







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