

Key amendments pertaining to:

Funds movement

(CADR, Section 185/186 & 188)

MSME requirements

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Venue: ICAI Tower, Bandra Kurla Complex

Coverage – Recent amendments covered in this presentation

Deposits
[section 73-
76 + Rules]

Loans to
directors
[185]

Loans &
investments
[186 and
188]

MSME



Deposits

Salient features of Deposits

- Section 2(31) defines the term “deposit” in an inclusive manner which provides that any receipt of money by way of deposit or loan by a company shall be termed as deposit. Rule 2 of the Deposit Rules exclude 18 line items from the definition of deposit.
- Deposits can be accepted from members. Needs thorough assessment of definition of deposit (e.g. OCD to Individuals issued by the Company will be treated as deposit.)
- Deposits from public can be invited by public company with net worth and turnover above Rs. 100 Cr and Rs. 500 Cr respectively.
- Issuance of circular and filing with RoC, advertisement in newspaper.
- Deposit repayment reserve and restriction on the use of deposit repayment reserve.
- Filing of return of deposits.
- Hefty penalties on non-compliance with the Chapter V in relation to acceptance and repayment of deposits.

Relaxations to Closely Held Entities

- Clauses (a) to (e) of section 73(2) are not applicable to following classes of closely held entities.
 - Accepted monies from members NOT exceeding the aggregate of paid up share capital, free reserves and [securities premium account]; [newly added]
 - Which is a start-up, for five years from the incorporation date;
 - Which fulfils all of the following conditions:-
 - o Not an associate company or subsidiary company;
 - o Borrowings from banks, FI or body corporate < lower of twice of paid up share capital or Rs 50 Cr
 - o No default in repayment of borrowings subsisting at the time of deposit acceptance.
- Provided that the Company shall file with the registrar details of moneys accepted.

[MCA Notification dated 13th June, 2017]

Amendments w.e.f. 15th August, 2018

Deposit repayment reserve [Section 73(2)(c)]

Before 30th April, the amount equivalent to 20% of the deposits maturing in next financial year should be kept in a separate bank account. Earlier, the amount required to be deposited was 15% of the amounts maturing in financial year and following financial year.

Deposit Insurance [Section 73(2)(d)]

The requirement with regard to deposit insurance has been omitted

Default in repayment of deposit or interest thereon [Section 73(2)(e)]

Earlier, if the Company had made default in repayment of deposit or interest, the Company could not accept deposit. This requirement was relaxed by bringing an amendment that the default occurred should have been made good and five years are elapsed from that date. Proviso to rule 4(1) of the Companies (Acceptance of deposits) Rules inserted to obtain auditor certificate about either no default or that the five years have been elapsed from the date of making the default good.

The Companies (Acceptance of Deposits) Rules, 2019

- Return of Deposits and particulars of transactions not considered as deposit (Rule 16)

It has been clarified that, every Company other than Government company must report 'Deposit or particulars of Transaction not considered as deposit or both' in e-form DPT-3 by 30th June, 2019.

- One time return of particulars of transactions not considered as deposit (Rule 16A)

Every Company other than a government company shall file by 29th June, 2019, a "onetime return" of outstanding receipt of money or loan by a Company which are not considered as Deposits, received during the period from 1st April 2014 till 31st March 2019.

Auditors certificate is mandatory in case of return to be filed under Rule 16 and not for one time return to be filed under Rule 16A. Instruction kit to DPT-3 (uploaded on 19th May, 2019) does also mention the same. Further the above forms need not be filed in case of banking company, government company, NBFC and Housing Finance Company.

FAQ's are issued by MCA for DPT-3.

- Amount received by a company from 'Real Estate Investment Trusts' won't be treated as Deposits.

Challenges

- Data collation for earlier periods from year 2014 and classification in 13 different categories
- Splitting the closing balances as on 31st March 2019 for money received prior to 1st April 2014 and thereafter.
- In case of private entities, audit may be in progress hence figures will have to be reported based on unaudited figures.
- Advance from customers [ageing more than 365 days] received during the course of business would be most common item of deliberation
- Significant back-log in filing of the forms – Corporate are looking forward for extension in timeline considering that GST audit due date is also approaching
- Companies are generally taking the stand to obtain Auditors certificate though not mandatory. Appropriate note should be appended in the auditors certificate for the views / stand taken by the company on the amounts disclosed / not included in the one time / annual return

Section 185 –
Loans to
Directors,
etc.

Relaxation in giving loan to any person in whom director is interested (effective 7th May 2018)

Restriction relaxed in new provision

The Amendment Act, 2017 allows companies to give a loan to any person in whom the director is interested subject to:

- a) Passing of special resolution by the company in general meeting and explanatory statement disclosing full particulars of the transaction and
- b) Loans are utilized by the borrowing company for its principal business activities:

Restriction in old provision

There were restrictions on providing loan, guarantee or security in connection with loan given to

- Any private company of which any such director is a director or member
- Any body-corporate at a general meeting of which 25% or more voting power may be exercised or controlled by any such director, or by two or more such directors, together
- Any body-corporate, the Board, managing director or manager, accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

Prohibition which continues post amendment

- Loans to director
- Loans to relative of director
- Loans to any firm / partner in which director is partner

Exemption to Private Company [Notification June 2015]

In case of private company - Section 185 shall not apply to a private company if following criteria satisfies (cumulative):

- No Body corporate as a shareholder;
- Borrowings from bank / FI < [twice paid up share capital OR Rs. 50 crore whichever is lower] and;
- No subsisting default in repayment of borrowings.

Exemption given in past to private company
whether will continue post this amendment ?

New section 185
replaced by the
Companies
Amendment Act,
2017

Old notification
[June 2015]
giving exemption
to private
companies not
withdrawn

Applicability of
exemption to
private
companies as per
old notification
still available?

Section 186 –
Loans &
investments
by company

Relaxations given (7th May 2018)

Loans to employees – limits of 60% / 100% will not apply.
Special resolution is not required in such cases.

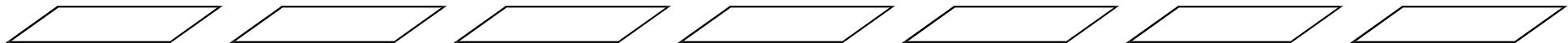
Special resolution is not required for loan or guarantee given or security provided by the Company to its WOS or JV

Special resolution not required for acquisition of securities by holding company into its WOS

Modified the definition of investment co

Earlier investment company was defined as a company whose principal business is the acquisition of shares, debentures or other securities.

Now as per amendment, they have included that the company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than 50% of its total assets, or if its income derived from investment business constitutes not less than 50% as a proportion of its gross income. i.e. 50-50 test applied in case of NBFC



Other amendment (proposed)

186(11) exempted any 'acquisition' (a) made by a NBFC registered under Chapter IIIB of the RBI Act, 1934 and whose principal business is acquisition of securities subject in respect of its investment and lending activities; (b) made by a company whose principal business is the acquisition of securities; and (c) of shares allotted in pursuance of section 62(1)(a); and (d) made by a banking company or an insurance company or a housing finance company, making acquisition of securities in the ordinary course of its business.

While the section continues to retain the existing exemptions, the 2017 Act has amended this provision to the extent of replacing the word 'acquisition' with 'investment' and extending the scope to rights issue in addition to shares allotted pursuant to section 62(1)(a).

**Related
Party
Transaction
u/s 188**

Related party definition – Section 2(76)

- Director or relative of director
- Key managerial personnel(KMP) or his relative
- Director or KMP of holding company or their relatives (Rule 3)
- Firm, in which a director, manager or his relative is a partner
- Private company in which a director or manager or his relative is a member or director
- Public company in which a director and manager is a director and holds along with his relatives, more than 2 % or more of its paid-up share capital
- 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 *
- any person on whose advice, directions or instructions a director or manager is accustomed to act*
 - * not applicable in case the services are rendered in professional capacity

Amendment to definition of RP – Section 2(76)

Any (~~company~~) body corporate which is

- Holding, subsidiary or an associate company of such company
- a subsidiary of a holding company to which it is also a subsidiary (fellow subsidiary) or
- an investing company or the venturer of the company (new)

The investing company or the venturer of a company” means a body corporate whose investment in the company would result in the company becoming an associate company of the body corporate

Conclusion

- Word ‘Company’ has been replaced with ‘body corporate’ to put to rest the confusion as to whether companies incorporated outside India should be treated related party or not.
- Investing or venture of the Company is also included in definition of related party.

Other amendments to Section 188

- Blanket ban on a member voting on Related Party Transactions (RPTs) relaxed. Now a company wherein 90% or more members in number are relatives of the promoter or are related parties, all shareholders will be entitled to vote on the ordinary resolution (9th Feb 2018).
- Section 188 (3) of the 2013 Act deals with a scenario where any contract or arrangement is entered into by a director or any other employee without obtaining the consent of the board and/or approval by an ordinary resolution in the general meeting.
- The sub section states that if the contract/arrangement is not ratified by the board or, as the case may be, by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into, then such contract or arrangement will be voidable at the option of the board.
- The 2017 Amendment Act effective 9th Feb 2018 states that apart from being voidable at the option of the board, the contract/arrangement would also be voidable at the option of the shareholders.

Approval of RPTs by Audit Committee-Sec 177

- Section 177 – amendment made to restrict applicability to listed public company instead of listed company (May 2018)
- If the Audit Committee does not approve transactions (other than those referred to in section 188), the Audit Committee will make its recommendations to the board. This will require the board to consider and approve these RPTs (as they were not covered under the approval requirement of section 188).
- RPTs between a holding company and its wholly owned subsidiaries will not require the approval of the Audit Committee. However, if these transactions require board approval u/s 188, then they will also require approval of the Audit Committee. [In case of listed entities LODR will also have to be complied]

Relaxation in taking prior approval from Audit Committee

- A director or officer of the company may enter into any transaction for an amount not exceeding Rs. 1 Crore, without obtaining prior approval of the Audit Committee.
- Ratification by the Audit Committee within 3 months from the date of the transaction.
- In the absence of such ratification, the transaction will be voidable at the option of the Audit Committee.
- Also, if the transaction is with a related party to any director or is authorised by any other director, the director concerned will indemnify the company against any loss incurred by it.



**Micro, Small &
Medium Enterprises**

MSMED (Amendment) Bill, 2018

- The proposed bill introduced in Lok Sabha on 23rd July 2018
- The bill proposed classification of MSME based on the annual turnover instead of investments in plant and machinery / in equipment.

Type of enterprise	MSMED Act, 2006		Proposed MSMED Bill, 2018
	Investment in Plant & Machinery in case of manufacturing unit	Investment in Equipment * in case of providing services	Annual turnover
Micro	Less than 25 lakhs	Less than 10 lakhs	Less than 5 crores
Small	25 lakhs to 5 crores	10 lakhs to 2 crores	5 crores to 75 crores
Medium	5 crores to 10 crores	2 crores to 5 crores	75 crores to 250 crores

- Through notification, the Government is empowered to increase the turnover limit upto three times the limits specified in the bill.
- *excluding land & building, Furniture & fixture & other items not related to service rendered

Disclosure of amount payable to Micro and small enterprises in the financial statements

- Schedule III of Companies Act & Section 22 of MSMED Act, 2006 mandates that following information will be mentioned in financial statements:

Particulars		
Principal & Interest amount due thereon (to be shown separately) remaining unpaid to suppliers at end of each accounting year		
Amount of interest paid under section 16 alongwith delayed payment of principal amount		
Amount of Interest under section 16 (due & payable but not paid) alongwith principal amount paid beyond appointed due date		
Amount of interest accrued & remaining unpaid at end of each accounting year		
The amount of further interest due and payable even in the succeeding year, until such date when the interest dues as above are actually paid to the small enterprise, for the purpose of disallowance as a deductible expenditure under section 23 of the above Act.		

- As per Schedule III, 'Trade Payables' (on face of balance sheet) to be bifurcated between amount payable to 'Micro and Small enterprises' & 'Others'.

Registering on Trade Receivable Discounting System (TReDS)

- TReDS platform was setup as per the RBI guideline on 'Guidelines for the Trade Receivables Discounting System (TReDS)'. It is an online electronic platform and an institutional mechanism for financing / factoring of trade receivables of MSME from corporate and other buyers including Government departments and PSU.
- Currently (a) Receivable Exchange of India Ltd (RXIL), (b) M1Xchange and (c) Invoicemart has the license to operate
- The main objective of the TReDS platform is to address the financing needs of MSMEs as well as the delayed payments issue.
- MSME Act vide notification dated 2nd Nov 2018 notified that all companies registered with the Companies Act, 2013 with a turnover of more than Rs. 500 crore and all Central Public Sector Enterprises shall be required to get themselves onboard on the Trade Receivables Discounting System platform .
- MCA has not provided any time line for compliance of above requirement. However, MCA has authorised
 - ROC of each state to monitor the compliance of these regulations by the companies under its jurisdiction
 - Department of Public Enterprises Government of India shall be the competent authority to monitor the compliance of such instructions by Central Public Sector Enterprises

Filing of return in MSME Form I

- Companies receiving supplies of goods or services from MICRO AND SMALL ENTERPRISES and whose payments to micro and small enterprise suppliers exceed 45 days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of section 9 of the Micro, Small and Medium Enterprises Development Act, 2006 shall submit:
 - One time return in MSME Form I in respect of amount due to micro and small enterprises as on 22nd January 2019
 - Half yearly return in MSME Form I (i.e. April to September to be filed by 31st October and October to March to be filed by 30th April)

- Due date of one time return in MSME Form I expired on 30th May 2019
 - No clarity from MCA with regard to above matters

 - As per various webinar, the Company needs to file half yearly return for the period October 2018 to March 2019. However no clarity with regard to due date has been given.

- Penal provisions – section 405 (4)- fine which may extend to Rs. 25,000 on company and every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than Rs. 25,000 but which may extend to Rs. 3.00 lakh, or with both.

FAQ's



- Is registration/filing of memorandum u/s 8(1) of MSMED act by the vendor necessary?
- Is MSME 1 Form / Schedule III covering all vendors who are Micro, Small and Medium enterprises
- Is NIL return necessary
- Is filing of half yearly return for the period October 2018 to March 2019 required & if yes, what will be the due date
- What happens if the Vendor is a trader of goods
- What if the goods are supplied but invoice is received late
- Importance of Purchase/ Service orders
- Is interest for delayed payment on simple or compounding basis
- If there is no contract or PO, whether the due date will be 45 days or 15 days

Other points

- The Company to ensure that vendor registration process captures details of enterprise registered under MSMED Act. Further, the Company should periodically (preferable annually) send vendor confirmation as to registration under MSMED Act.
- Generally, registration number and fact of registration is mentioned on the invoices issued by enterprises registered under MSMED Act.
- Latest status of enterprise registered under MSMED Act can be validated by entering UAM (Udyog Aadhaar Memorandum) number on online platform facility provided by MSME Ministry.
https://udyogaadhaar.gov.in/UA/UA_VerifyUAM.aspx
- Payment to Micro and Medium enterprises to be made within due date. However, due date can not exceed 45 days from the date of acceptance / deemed acceptance of goods or services.

Thank You

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