

THE COMPANIES ACT, 2013



AUDIT, DIVIDEND AND RECENT
AMENDMENTS IN COMPANY LAW

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NATURE OF AMENDMENTS

- ❑ Amendment Act of 2017
- ❑ Various rules notified from time to time
- ❑ Ordinance

AUDIT AND AUDITOR

- ❑ Compulsory appointment for five years
- ❑ Tribunal has powers to direct Co to change auditor suo moto or on application of either CG or any person concerned.
- ❑ If application by CG, then Tribunal can pass order within 15 days for removal and CG can appoint another. The removed auditor is debarred for five years –Issue of two parallel jurisdictions

AUDIT AND AUDITOR (Contd.)

- ❑ A person who directly or indirectly renders any service u/s 144 to co/its holding /subsidiary co cannot be appointed as auditor
- ❑ Auditor of holding co to have access to accounts of *asso cos* apart from subsidiaries
- ❑ Report about the internal fin control and not system
- ❑ Earlier max penalty was 5 lakhs. Reduced to 5 lakh or 4 times fees whichever is lower. If willfully then mini 50K, max is 25 lakh or 8 times fee whichever is lower
- ❑ Liability of auditors to pay damages is restricted, now liable to only members or crs and not any person.

ASSOCIATE COMPANY

Present definition	Proposed
<p>Associate company, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. Expl: Signi infl – control of at least 20% of total share capital or of business decisions under an agreement (Total share capital: Eq+ convertible Pref)</p>	<p>Explanation: a)"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) <i>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;</i></p>

ASSO.CO. (Contd.)

- Control: 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.

DIVIDEND

- ❑ Dividend out of profits of the year or past profits
- ❑ Interim dividend after end of year and till AGM permissible out of surplus in P and L or profits of the year or even in case of loss in the preceding quarter
- ❑ Unpaid dividend to be transferred to IEPF after seven years. Underlying shares also to be transferred. However, if any subsequent dividend is encashed, then no need to transfer shares

DIVIDEND (Contd.)

- ❑ In computing profits any amount representing unrealized gains, notional gains or revaluation of assets and any change in carrying of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded
- ❑ In the case of inadequate or absence of profits, dividend can be declared out of accumulated profits earned by the company in previous years and transferred by the company to free reserves (instead of reserves).

HOLDING COMPANY

Present	Proposed
<p>Holding company, in relation to one or more companies, means a company of which such companies are subsidiary companies</p>	<p>Explanation: For the purposes of this clause, the expression "company" includes any body corporate</p> <p>LLP?</p>

PRIVATE PLACEMENT

- ❑ Total substitution
- ❑ private placement means any offer or invitation to subscribe or issue securities to a select group of persons by a company (other than by way of public offer) through private placement offer cum application and which satisfies the conditions specified in section 42.
- ❑ Thus applicable to all securities.
- ❑ No offer to more than 50 persons or such higher number as may be prescribed in a fin year excl qualified institutional buyers or employees under stock option scheme. If number exceeds, it will be public offer.

PRIVATE PLACEMENT (Contd)

- ❑ No right of renunciation. Only that person has to apply and payment by cheque/dd/other banking channels and not cash.
- ❑ New explanation: If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter

PRIVATE PLACEMENT(Contd.)

- ❑ No fresh offer unless previous offer completed/withdrawn/abandoned. Provided that a co may make more than one issue of securities subject to rules and not exceeding the limit on no. of persons
- ❑ Separate bank account for application money.
- ❑ No advt, no distribution channel.
- ❑ Return of allotment mandatory within **15 days**, otherwise penalty of Rs. 1000 per day on co, promoters and directors (max Rs. 25 lakh). Addl fee will not absolve from penalty.
- ❑ Money can't be utilised unless return is filed
- ❑ Non-compliance with section: amt involved in offer or Rs. 2 cr whichever is *lower* and co has to refund subscription money within 30 days

BACKGROUND OF BENEFICIAL OWNERSHIP PROVISIONS

- ❑ Financial Action Task Force has recommended (Note 24) that each country should develop mechanism to ensure that adequate, accurate and timely information is made available on beneficial ownership and control of companies and other legal persons (beneficial ownership information) that are created in the country
- ❑ Purpose :
- ❑ To prevent misuse of legal person/ corporate vehicle (in short lifting the corporate veil)
- ❑ To fight against issue of money laundering and funding for terrorist activities (**global concern**)
- ❑ India committed to FATF to put in place SBO rules long back. Company Law Committee recommended amendments to CA 2013

SEC 89 PROVISIONS

- ❑ Member holding shares but not holding beneficial interest to make a declaration to co. Also reqd to declare changes. Reqd to give reasons.
- ❑ Person holding beneficial interest also to make similar declaration and give reasons
- ❑ Failure to make declaration or changes will attract penal provisions- fine upto 50k and further 1k per day
- ❑ If beneficial owner does not declare, then he cannot exercise his rights.

BENEFICIAL INTEREST

- ❑ Definition inserted: Beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of person alone or together with any other person to-
 - ❑ i) exercise or cause to be exercised any or all of the rights attached to such share or
 - ❑ ii) receive or participate in any dividend or other distribution in respect of such share
- ❑ (applicable to both sec 89 and 90)
- ❑ Contentious issue: husband giving gift to wife for purchase of shares

SEC 90

- ❑ Significant beneficial owner (SBO) to make a declaration of beneficial interest to the co. SBO means an individual who alone or together or through one/more persons or trust, including a trust or persons resident outside India, holds beneficial interest of not less than 25% or prescribed percentage in shares of co or right to exercise or actual exercising of *significant influence* or *control* defined in sec 2(27) over the company.
- ❑ Contrary to popular perception, shareholding is immaterial in case of influence.

SIGNIFICANT INFLUENCE

- "significant influence" means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company *but is not control or joint control of these policies*

DEFINITION IN RULES

- ❑ 2 (1)(h) "significant beneficial owner" in relation to a reporting company means an individual referred to in sub-section (1) of section 90, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:-
 - ❑ (i) holds indirectly, or together with any direct holdings, not less than ten per cent. of the shares;
 - ❑ (ii) holds indirectly, or together with any direct holdings, not less than ten per cent. of the voting rights in the shares;

DENITION-RULES

- ❑ (iii) has right to receive or participate in not less than ten per cent. of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
- ❑ (iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct-holdings alone:
- ❑ Shares include Compulsorily Convertible Preference Shares, Compulsorily Convertible Debentures and Global Depository Receipts.

DEFINITION-RULES

- ❑ Explanation II - For the purpose of this clause, an individual shall be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria, namely.'
- ❑ (i) the shares in the reporting company representing such right or entitlement are held in the name of the individual;
- ❑ (ii) the individual holds or acquires a beneficial interest in the share of the reporting company under sub-section (2) of section 89, and has made a declaration in this regard to the reporting company.

EXAMPLE

- Mr. A
- | 80%
- ABC P Ltd Mr A
- | 10% | 5%
- DEF P. Ltd

A is SBO in DEF P Ltd as both direct and indirect holding needs to be taken into account.

RESPONSIBILITY

- Every reporting company shall take necessary steps to find out if there is any individual who is a significant beneficial owner, as defined in clause (h) of rule 2, **(or 2(1)(h)?)** in relation to that reporting company, and if so, identify him and cause such individual to make a declaration in Form No. BEN-1.

RESPONSIBILITY (Contd.)

- ❑ Co to maintain register and file return
- ❑ Co to give notice to any person whom the Co *knows or has reasonable cause to believe-* a) to be a significant beneficial owner (SBO) b) to be having knowledge of the identity of a SBO or c) to have been SBO during immediately preceding 3 years
- ❑ The person to give info within 30 days
- ❑ If he fails or gives unsatisfactory info, co to approach Tribunal

CRITICAL ISSUES

- ❑ How percentage of CCPS or conv debts to be calculated alongwith shares? Existing capital or future capital post conversion?
- ❑ Listed companies- need for continuous monitoring
- ❑ In case of significant influence, how shares are to be identified?

CRITICAL ISSUES (contd.)

- ❑ IT form requires disclosure of ultimate beneficial owner(UBO). UBO and SBO position
- ❑ Assessment of deemed dividend in the hands of SBO?
- ❑ GAAR provisions- effect?
- ❑ Related party transaction? Transfer pricing?
- ❑ Benami Transactions Law applicability

CHARGE

- ❑ To be filed within 30 days and with additional fee within 60 days.
- ❑ ROC may allow further period of 60 days on payment of ad-valorem fees.

LOANS TO DIRECTORS

- ❑ Absolute ban continued: director of co or of holding co, any partner or relative of such director or any firm in which such director or relative is partner
- ❑ Relaxation to private co in which such director is a director/member; body corporate – not less than 25% total voting power with director(s) and body corporate, the Bod/MD or manager is accustomed to act in accordance with instructions of BOD /director(s) of lending co.
- ❑ For them a SR is a must. Xplanatory statement to give reqd details and *borrowing co to utilise loans for its principal business activities*

INVESTMENT CO

- ❑ 186 limits will continue to be inapplicable to investment cos
- ❑ Scope of investment co widened
- ❑ Now if assets in the form of investment in shares/deb/other securities constitute not less than 50% or income derived from investment business is not less than 50%, then deemed to be inv co.

MANAGERIAL REMUNERATION

- ❑ No CG approval for payment of managerial remuneration in excess of limits. Can be paid with SR.
- ❑ If indebted co or default in case of NCD/secured creditor, then prior approval of banks/fin inst or trustee/cr as the case may be mandatory before passing resolution.
- ❑ Excess remuneration to be refunded by director within 2 yrs or such lesser period as decided by co. if Co approves such excess remuneration within 2 yrs, then no refund. Prior approval of lenders etc must.
- ❑ Auditor to report on compliance of provisions of MR.

OTHER PROVISIONS

- ❑ Existing director cannot act as alternate director
- ❑ If a person is appointed as a director in a defaulting co, he will not become disqualified for 6 months.
- ❑ Disqualification and vacation of director for non-filing of A/R or non payment of FD etc: will not vacate in that co but will vacate in all other cos.

OTHER PROVISIONS

- ❑ CG can appoint inspectors to investigate beneficial ownership
- ❑ Small partnerships can be converted into private cos under chapter XXI (earlier Part IX)
- ❑ Additional fees @Rs. 100 per day for specific sections. 92(AR) and 137 (copy of Fin st). For others addl fees as prescribed. Addl fee no bar for imposition of penalty etc.
- ❑ Default on two or more occasions: higher addl fee and double penalty

OTHER PROVISIONS

- ❑ Fines substituted by penalties.
- ❑ Authority shifted from NCLT to CG. Now adjudicating authority will levy the same.
- ❑ Delay in filing of AR will attract penalty of 50k and Rs. 100 per day. Max 5L
- ❑ Delay in filing of resolutions u/s 117-penalty of 1L and Rs. 500 per day for company. Max 25 L. For OID it is 50k and Rs. 500 per day. Max 5L
- ❑ In case of second and subsequent default within 3 years, penalty amount will be double.

NON-APPOINTMENT OF KMP

- ❑ For Co penalty of 5L
- ❑ Every director and KMP- 50K and 1000 per day (max 5L)

- ❑ Lesser penalties for small and OPCs

MSME

- ❑ New reporting requirement
- ❑ Consequences of delay in payment
- ❑ Probable action by MCA

OTHER POINTS

- ❑ Enhancement in penalty, appointment of prosecutors for courts and adjudicating officers for trying offences. This means enforcement of the provisions would be done seriously.
- ❑ Hence, a change in mindset necessary. “Chalta Hai” attitude needs to be abandoned.
- ❑ Likely effects:
 - a) cost of compliance
 - b) increase in compliant companies
 - c) increase in litigation, cash flow problems for private cos.
 - d) Closure of companies.

THANK YOU.