

# **SEMINAR ON IMPORTANT ASPECTS OF COMPANIES ACT, 2013**

## **PRESENTATION ON PRACTICAL ISSUES AND REPORTING REQUIREMENTS (WITH SPECIAL FOCUS ON PRIVATE COMPANIES) FOR DEPOSITS, LOANS & BORROWINGS**

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**By**

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# TOPICS COVERED

ACCEPTANCE OF DEPOSITS

LOAN TO DIRECTORS

LOAN AND INVESTMENT BY  
COMPANY

REPORTING BY AUDITOR

# ACCEPTANCE OF DEPOSITS

- Basic provisions
- Rate of interest on Deposits
- Form of Advertisements
- Deposit Insurance
- Creation of security
- Form of Application for Deposits
- Appointment of Deposit Trustee
- Maintenance of Liquid Assets
- Repayment of Deposits
- Penalty



# ACCEPTANCE OF DEPOSITS

- **Definition**

- **Section 2(31) of the 2013 Act defines deposit as:**

“Deposit 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 of amount as may be prescribed in consultation with the Reserve Bank of India.”

# ACCEPTANCE OF DEPOSITS

## ➤ Rule 2 (1)(c) defines deposit as

“ Deposit includes any receipt of money by way of deposit or loan or in any other form, by a company but does not include:

- any amount received *from the Central Govt. or a State Govt.* or any amount on which guarantee is given by Central Govt. or State Govt. or any amount received from local authority or from a statutory authority constituted under an Act of Parliament or a State Legislature;
- any amount received from *Foreign Govt., international banks, multilateral financial institutions (including IFC, ADB, CDC, IBFR), foreign credit agencies/collaborators, bodies corporate/ citizens/ authorities or persons resident outside India subject to the provisions of FEMA, 1999;*
- any amount received as a *loan or facility from any banking company* or from the SBI or any of its subsidiary banks or from a banking institution notified by the Central Government, or a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or from a co-operative bank;

# ACCEPTANCE OF DEPOSITS

- any amount received as a *loan or financial assistance from Public Financial Institutions* or any regional financial institutions or Insurance Companies or Scheduled Banks;
- any amount received *against issue of commercial paper* or any other instruments issued in accordance with the guidelines or notification issued by the RBI;
- any amount received by a company from any other company;
- any amount received against subscription to any securities including *share application money* provided the securities are allotted within 60 days from the date of receipt of the application money or advance.

Provided that if the securities are *not allotted within 60 days* then the same should be *refunded within 15 days* else the same shall be treated as deposit after completion of 15 days.

And also any adjustment of the amount for any other purpose shall **not** be treated as refund.

# ACCEPTANCE OF DEPOSITS

- any amount received from a person who, *at the time of the receipt* of the amount, *was a director* of the company or relative of the director of the company:

Provided that the director of the company or relative of the director of the private company, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and the company shall disclose the details of money so accepted in the Board's report;

- any amount *raised by the issue of bonds or debentures secured* on any assets excluding intangible assets of the company or bonds or debentures compulsorily convertible into shares of the company within 5 years:

Provided that the amount of *such bonds* or debentures shall not exceed the market value of such assets as assessed by a *registered valuer*;

- any amount *received from an employee* of the company *not exceeding his annual salary under a contract* of employment with the company in the nature of non-interest bearing security deposit;
- any non-interest bearing amount *received or held in trust*;
- any amount *accepted by a Nidhi company*.

# ACCEPTANCE OF DEPOSITS

- any amount received in the course of, or for the purposes of, the business of the company,-
  - (a) as an *advance* (without any legal proceedings) *for the supply of goods* or provision of services accounted provided that such advance is appropriated against supply of goods or provision of services within a period of *365 days* from the date of acceptance of such advance;
  - (b) as advance received in connection with consideration for *an immovable property* under an agreement or arrangement , provided that such advance is *adjusted against such property*;
  - (c) as *security deposit for the performance of the contract* for supply of goods or provision of services;
  - (d) as *advance* received *under long term projects* for *supply of capital goods*;

Provided that if the amount received under items (a), (b) and (d) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit;

- any amount brought in by the promoters of the company by way of unsecured *loan in pursuance of the stipulation* of any *lending financial* institution or a bank;



# ACCEPTANCE OF DEPOSITS

## ○ Provision of Acceptance of Deposits

### ○ Rule 3 : On and from the commencement of these rules,—

(1) No company under sub-section (2) of section 73 and no eligible company under section 76 shall accept or renew any deposit, whether secured or unsecured, which is repayable on demand or on notice or within a period of less than six months or more than thirty-six months from the date of acceptance or renewal of such deposit:

#### **Exception:**

A company may, for the purpose of meeting any of its short-term requirements of funds, accept or renew such deposits for repayment earlier than six months from the date of deposit or renewal, as the case may be, subject to the condition that-

such deposits shall *not exceed ten per cent* of the aggregate of the **paid up share capital, free reserves and securities premium account** of the company, **and**

such deposits are repayable not earlier than three months from the date of such deposit or renewal thereof.

# ACCEPTANCE OF DEPOSITS

- (2) Where depositors so desire, deposits may be accepted in joint names not exceeding three, with or without any of the clauses, namely, “Either or Survivor”, “Number one or Survivor”, “Anyone or Survivor”.
- (3) No company under sub-section (2) of section 73 shall accept or renew any deposits if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds 25 per cent of the aggregate of the paid-up share capital and free reserves of the company.

# ACCEPTANCE OF DEPOSITS

(4) No eligible company under section 76 shall accept or renew:

(a) any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds 10% of the aggregate of the paid-up share capital and free reserves of the co.;

( b) any other deposit, if the amount of such deposit other than the deposit referred to in (a) above, together with the amount of deposits outstanding on the date of acceptance or renewal exceeds 25% of aggregate of the paid-up share capital and free reserves of the company.

(5) No Government company eligible to accept deposits under section 76 shall accept or renew any deposit, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds 35% of the aggregate of its paid up share capital and free reserves.

# ACCEPTANCE OF DEPOSITS

## ○ Rate of Interest of Deposit

**Rule 3(6):** No company under sub-section (2) of section 73 or any eligible company under section 76 shall invite or accept or renew any deposits in any form, on a rate of interest or pay brokerage thereon at a rate exceeding the maximum rate of interest or brokerage prescribed by the Reserve Bank of India for acceptance of deposits by non-banking financial companies.

*(Explanation: Only the person who is authorized, in writing, by a company to solicit deposits on its behalf and through whom deposits are actually procured will be entitled to the brokerage and payment of brokerage to any other person for procuring deposits shall be deemed to be in violation of these Rules)*

# 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 Grade Rating**

(a) The Credit Rating Information Services of India Ltd.

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 A

(f) SME Rating Agency of India Ltd.

SMERA A”

# ACCEPTANCE OF DEPOSITS

## ○ Form of Advertisement or Circulars

### Rule 4 says that

- Every company referred to in sub-section (2) of section 73 intending to invite deposit from its members shall issue a ***circular to all*** its members by ***registered post*** with acknowledgement due or speed post or by electronic mode in Form DPT-1:

Provided that in addition to issue of such circular to all members in the manner specified above, the circular may be published in English language in an English newspaper and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated.

- Every eligible company intending to invite deposits shall issue a circular in the ***form of an advertisement*** in Form DPT-1 for the purpose in English language in an English newspaper and in vernacular language in one vernacular newspaper having wide circulation in the State in which the registered office of the company is situated

# ACCEPTANCE OF DEPOSITS

- Every company inviting deposits from the public shall upload a copy of the circular on its website, if any.
- No company shall issue or allow any other person to issue any circular or a circular in the form of advertisement inviting deposits, unless is issued on the authority and in the name of the Board of directors of the company.
- No circular or a circular in the form of advertisement shall be issued unless, not less than thirty days before the date of such issue, there has been delivered to the Registrar for registration a copy thereof approve by the Board.
- A circular or circular in the form of advertisement issued shall be valid until the expiry of six months from the date of closure of the financial year in which it is issued or until the date on which the financial statement is laid before the company in annual general meeting, whichever is earlier, and a fresh circular or circular in the form of advertisement shall be issued, in each succeeding financial year, for inviting deposits during that financial year.

# ACCEPTANCE OF DEPOSITS

## ○ Deposit Insurance

### Rule 5:

- “Provided that the companies may accept deposits without deposit insurance contract till the 31st March, 2016 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.
- 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

## ○ Appointment of Deposit Trustee

**Rule 7(1)** No company under sub-section (2) of section 73 or any eligible company under section 76 shall issue a circular or advertisement inviting secured deposits unless the company has appointed one or more deposit trustees for such deposits:

Provided that a written consent shall be obtained from the deposit trustee(s) before their appointment and a statement shall appear in the circular or circular in the form of advertisement with reasonable prominence to the effect that the deposit trustee(s) have given their consent to the company to be so appointed.

**Rule 7(2)** The company shall execute a deposit trust deed appointing the deposit trustee(s) in Form No. DPT-2 at least 7 days before issuing the circular or circular in the form of advertisement.

# ACCEPTANCE OF DEPOSITS

## ○ Appointment of Deposit Trustee

**Rule 7(3)** No person including a company that is in the business of providing trusteeship services shall be appointed as a trustee for the deposit holders, if the proposed trustee –

- is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company; is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company; has any material pecuniary relationship with the company;
- has entered into any guarantee arrangement in respect of principal debts secured by the deposits or interest thereon; is related to any person specified in clause (a) above.

**Rule 7(4)** No deposit trustee may be removed from office after the issue of circular or advertisement and before the expiry of his term except for valid reasons, to be recorded in writing by the Board.

# ACCEPTANCE OF DEPOSITS

- **Form of Application of Deposits**

**Rule 10:** (1) On and from the commencement of these rules, no company shall accept, or renew any deposit, whether secured or unsecured, unless an *application*, in such form as specified by the company, is submitted by the intending depositor for the acceptance of such deposit.

(2) The form of application referred to in sub-rule (1) shall contain a declaration by the intending depositor to the effect that the deposit is not being made out of any money borrowed by him from any other person.

# 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 fifteen 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

# ACCEPTANCE OF DEPOSITS

- **Repayment of deposits, etc., accepted before commencement of this Act**
- Section 74(1) says that any deposit accepted prior to new act and interest due thereon if remains unpaid or becomes due at any time on or after commencement of new Act, then:
  - file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment {Section 74(1)(a)}
  - repay within one year from such commencement or from the date on which such payments are due, whichever is earlier. { Section 74(1)(b)}
- Under Section 74(2) Company can make an application to Tribunal for allowing further time to repay the Deposit.

# ACCEPTANCE OF DEPOSITS

- Any deposit accepted before the commencement of the Companies Act, 2013, needs to be repaid/refunded on or before 31st March,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.



# ACCEPTANCE OF DEPOSITS

## CASE STUDY

- Company PQR is planning to undertake the following transaction. Give your opinion whether the transaction will result in acceptance of deposit?
  - a) Amount received against issue of commercial paper issued in accordance with the guidelines or notification issued by the RBI
  - b) Amount stand refunded on acceptance of application money & not issuing securities within 60days. Paid after 90 days from date of receipt
  - c) Amount of Rs. 50 thousand received from a person who was director at time of receipt of amount as loan But who failed to give the declaration that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others.
  - d) Amount of Rs. 75 thousand received in advance for supply of goods which is not appropriated against supply of such goods within 365 days
  - e) In the above case he amount became refundable(without interest) because company failed to receive valid license for supply of such goods
  - f) Amount of Rs. 1 lakh received as security deposit for performance of contract of provision of service
  - g) In the above case he amount became refundable(without interest) because company failed to receive valid license for provision of service
  - h) Amount of Rs. 25 lacs brought in by the promoters of the company by way of unsecured loan in pursuance of the stipulation of any lending financial institution or a bank

# ACCEPTANCE OF DEPOSITS

## CASE STUDY

- Co. ABC is in need of funds it decides to accept deposits of Rs. 1 crore for a period of 12 months u/s 73(2). Advice

# ACCEPTANCE OF DEPOSITS

## CASE STUDY

- Co. XYZ is in need of short term funds. The management of the company decides to raise funds by accepting deposits. the financial details of the company is given below:

Paid up share Capital → Rs. 10 crores

Free Reserves → Rs. 8 crores

Securities Premium → Rs. 15 crores

Advice in each of the following unrelated situations:-

- a) what is the maximum amt of deposit the company can accept u/s 73(2) & the period for which this deposits can be accepted?
- b) If the company wants to accept deposit for a period of 4mths? If yes, what is the maximum amt of deposits the company can accept u/s 73(2)?
- c) Can the company accept deposits amounting to Rs. 5 crores, If the existing outstanding deposits on the date of acceptance of Deposits is Rs. 8 crores u/s 73(2)?
- d) Can the company renew deposits amounting to Rs. 5 crores, If the existing outstanding deposits on the date of acceptance of Deposits is Rs. 8 crores u/s 76?
- e) Will your answer change in situation (d), If Co. XYZ is a government co.?

# EXEMPTION TO PRIVATE COMPANIES THROUGH NOTIFICATION DATED 5<sup>TH</sup> JUNE, 2015

- **Existing position**

Under Section 73(2) of the 2013 Act, the acceptance of deposits by a company from its members requires the approval of the members by way of ordinary resolution and the fulfillment of certain conditions, including the issuance of circular including a statement showing financial position of the company, creation of a deposit repayment reserve account, obtaining deposit insurance, obtaining a certificate from the directors that the company has not defaulted in repayment of deposits accepted etc.

- **Revised position under the Notification**

The Notification has exempted private companies from the above requirements provided that the amount of deposit accepted by the private company does not exceed 100% of aggregate of paid-up capital and free reserves of the private company and the relevant filings with the Registrar of Companies has been made.

# ACCEPTANCE OF DEPOSITS

## ○ *UPCOMING AMENDMENTS*

### *(COMPANIES (AMENDMENT) BILL, 2016)*

- In **section 76A** of the principal Act, in clause (a), for the words "one crore rupees", the words "one crore rupees or twice the amount of deposit accepted by the company, whichever is lower" shall be substituted.
- In **section 77** of the principal Act, in sub-section (1), after the third proviso, the following proviso shall be inserted, namely:—  
"Provided also that this section shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India."
- In **section 78** of the principal Act, for the words "register the charge within the period specified in section 77", the words "register the charge within the period of thirty days referred to in sub-section (1) of section 77" shall be substituted.

# LOAN TO DIRECTORS

- Basic provisions
- Meaning of certain phrases
- Case study



# LOAN TO DIRECTORS

## What does Section 185 says?

- No company shall directly or "indirectly" advance loan to its "directors" or to "other persons in whom directors are interested".
- No company can give any guarantee or provide any security in connection with any loan taken by him or such other person.
- Company can't give loan represented by a book debt to above mentioned person".

# LOAN TO DIRECTORS

## ○ Meaning of Indirect

The word 'indirect' used means that the co 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]**



# LOAN TO DIRECTORS

## ○ Meaning of phrase, “other persons in whom directors are interested”

(a) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;

(b) any firm in which any such director or relative is a partner;

(c) any private company of which any such director is a director or member;

(d) any body corporate at a general meeting of which at least 25 % of voting power may be exercised or "controlled" by such director, or by two or more such directors, together ; or

(e) 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.

# 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 bank rate declared by the RBI
- **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

# 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.5 lakhs to Rs.25 lakhs.

# LOAN TO DIRECTORS

- Section 185 Shall not apply to **GOVERNMENT COMPANY** in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before making any loan or giving any guarantee or providing any security under the section. [NOTIFICATION NO. GSR\_463(E)[F.NO.1/2/2014-CL-V], DATED 5-6-2015]
- Section 185 shall not apply to a **PRIVATE COMPANY** by fulfilling of three conditions
  - In whose share capital no other body corporate has invested any money;
  - If the borrowings of such a company from banks or financial institutions or any body corporate is less than [lower of (i) Two times of paid up share capital or (ii) Rs. 50 Crore]; and
  - Such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.[NOTIFICATION NO. GSR 464(E) [F.NO.1/1/2014-CL-V], DATED 5-6-2015]
- Section 185 shall not apply to **NIDHI COMPANY**; provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note. [NOTIFICATION NO. GSR 465(E)[F.NO.2/11/2014-CL.V], DATED 5-6-2015]

# LOAN TO DIRECTORS

## Case Study

- Mr. Ram is Director in Lanka Pvt. Ltd and holds investment in Ayodhya Pvt. Ltd ( a holding co. of Lanka P. L.)

Examine the validity / Legality of the following Trans. Under the light of prov. of sec 185

- Case 1: Lanka grants loan to Mithila P. L. where Mr. Laxman (brother of Mr. Ram) holds investment (More than 25% of Paid up Capital)
- Case 2 : Can Ayodhya P. Ltd. give loan to Lanka P.L. or Vice Versa?

# LOAN TO DIRECTORS

## Case Study

- 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

# LOAN TO DIRECTORS

## Case Study

- Company A has two Directors Mr. X and Mr. Y. Both holds 50% share each of Company.

Sr. No.	Loan To
1	Loan to Director X.
2	Loan to a relative of Director Y.
3	Director of company D which is the holding company of A.
4	A partner of Director of Holding Company.
5	A partner of Director of company A.
6	To a firm in which Mr. X is a partner.
7	To a firm in which relative of Mr. Y is a Partner.

# LOAN TO DIRECTORS

## Case Study

### ○ PRIVATE LTD CO WITH COMMON DIRECTOR

Particulars	Company A (Pvt Ltd or Ltd)	Company B (Pvt Ltd)
Directors Cum share holder	A (shareholding 60.0%) B (shareholding 40.0%)	B (Shareholding 75.%) D (Shareholding 25% )
Only Share Holder	Nil	Nil

A and B are Husband and wife. D is their Son. Company B wish to avail loan from Company A, Whether Possible?



# LOAN TO DIRECTORS

## Case Study

- Private Ltd Co To Public Ltd Co

Particulars	Company A Pvt Ltd or Ltd	Company B (Ltd)
Directors Cum share holder	A (shareholding 60.0%) B (shareholding 20.0%) C (Shareholding 15.0%)	A (Shareholding 10.0% ) B (Shareholding 10.0% ) C (Shareholding 5.0%)
Only Share Holder	D (Shareholding 15.0%)	Others (75.0%)

Company B wishes to avail loan from Company A, Whether it is feasible in law?

# EXEMPTION TO PRIVATE COMPANIES THROUGH NOTIFICATION DATED 5<sup>TH</sup> JUNE, 2015

## ○ Existing position

Section 185 of the 2013 Act prohibited companies from advancing loans to directors and to persons in whom directors are interested or give any guarantee or provide any security in connection with any loan taken by him or such other person, a few exceptions aside.

## ○ Revised position under the Notification

The Notification currently provides that Section 185 shall not apply to a private company satisfying all of the following conditions:

No body corporate shall have invested any money in the share capital of the company; and

The borrowings of the company from banks, financial institutions or any body corporate shall not exceed twice the amount of paid-up share capital or INR 500 million – whichever is lower; and

There shall be no subsisting defaults in repayment of such borrowings at the time of making transaction.

# LOAN TO DIRECTORS

## ○ *UPCOMING AMENDMENTS (COMPANIES (AMENDMENT) BILL, 2016)*

- For section 185 of the principal Act, the following section shall be substituted, namely:—

(1) 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.

(2) 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:

# LOAN TO DIRECTORS

## *UPCOMING AMENDMENTS (CONTD.)*

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.

### *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.

# LOAN TO DIRECTORS

## UPCOMING AMENDMENTS (CONTD.)

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

(a) the giving of any loan to a managing or whole-time director—

(i) as a part of the conditions of service extended by the company to all its employees; or

(ii) 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

(c) 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

(d) 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.

# LOAN TO DIRECTORS

## *UPCOMING AMENDMENTS (CONTD.)*

(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.'

# LOANS & INVESTMENTS BY COMPANY

- Basic provisions
- Case Study



# LOAN & INVESTMENTS BY COMPANY

- **186 (1):** Investments to be made through not more than 2 layers of investment companies
- Exemptions
  - i. Company incorporated outside India has investment subsidiary beyond two layer as per the law of land
  - ii. A Subsidiary company from having investment subsidiary for the purpose of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force



# LOAN & INVESTMENTS BY COMPANY

- **Sec 186 (2):** No company shall directly or indirectly-
  - a) give any loan to any person or other body corporate;
  - b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
  - c) Acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,  
Exceeding 60% of its paid-up share capital, free reserve and securities premium account or 100% of its free reserves and securities premium account, whichever is more.
- **Sec. 186 (3):** If above limits exceeds , prior approval by means of a SR passed at a General Meeting shall be necessary
- **Sec 186 (4):** Full disclosure of Loan, investment guarantee or security in financial statements

# LOAN & INVESTMENTS BY COMPANY

- **Sec 186(5)** : Every Company shall take consent of all the directors present at the board meeting before making any investment, giving loan and guarantee and providing security. In case of Company has already taken loan etc., from any Public Financial Institutions, then it is mandatory to take prior approval from such Public Financial Institution.

Provided that prior approval of Public Financial Institution shall not be required where the aggregate loan, investment, guarantee and security proposed is within the limits as specified under section 186(2) and there is no default in **repayment** of loan or interest thereon to the Public Financials Institution.

# LOAN & INVESTMENTS BY COMPANY

- **Sec 186 (6):** Those Companies which are registered under Section 12 of SEBI Act, 1992 and other prescribed Companies can not take inter-corporate loans or deposits exceeding the prescribed limit.
- The intention of government is clear, if the Company is registered under SEBI, this section is not applicable for the part of limit but, simultaneously, prescribed a condition that Provided that such companies shall furnish details of loans or deposit in their Financial Statements.
- **Sec 186 (7):** No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.

# LOAN & INVESTMENTS BY COMPANY

- **Sec 186 (8):** No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting
- **Sec 186 (9):** Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register in Form of MBP 2.
- The Act mandates every Company to maintain a register which shall contain particulars of loan or guarantee given or security provided or investment made.

# LOAN & INVESTMENTS BY COMPANY

- **Sec 186 (10):** This register shall be opened for inspection and copies may be furnished to members who demands for the same on payment of prescribed fee.
- **Sec 186 (11):** The Section 186 (except Sub Section 1) of the Companies Act, 2013 does not apply to the following:
  - Banking Company, Insurance Company, Housing Finance Company etc.,
  - Any Company whose main business of acquisition of shares or securities etc.,
- **S. 186 (13):** Penalty
  - For Company:-fine Rs. 25000/- to Rs. 5 lacs.
  - For Officers:- Every officer of the Company who is default, imprisonment of upto Two Years and fine Rs. 25000/- to Rs. 5 lacs

# LOAN & INVESTMENTS BY COMPANY

## Case Study

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

<b>Paid up Share Capital</b>	<b>150</b>
Statutory reserve	50
Securities premium	80
Free Reserve	70
Net worth	350

The co. has following decision pending:

Granting loan / Guarantee to PQC Ltd. Of Rs. 160 Cr.

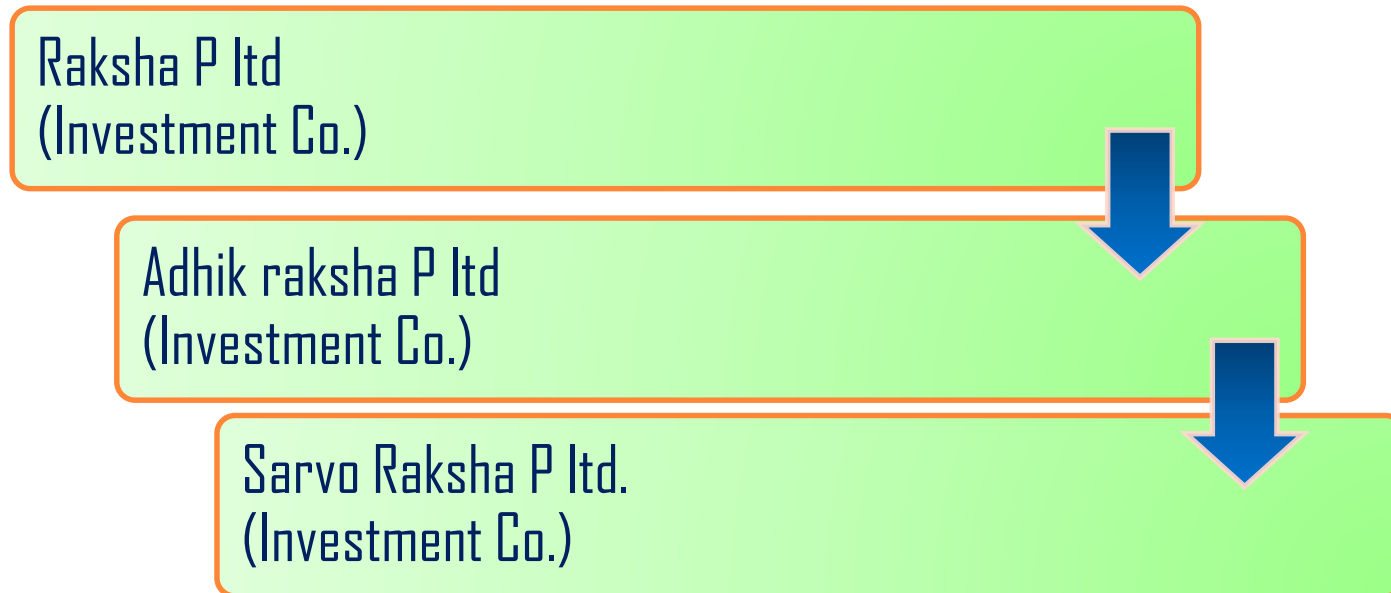
Acquire through subscription shares of TCS Pvt. Ltd. of Rs 100 Cr

Advice the Co. under the light of prov. Of Co. Act 2013

# LOAN & INVESTMENTS BY COMPANY

## Case Study

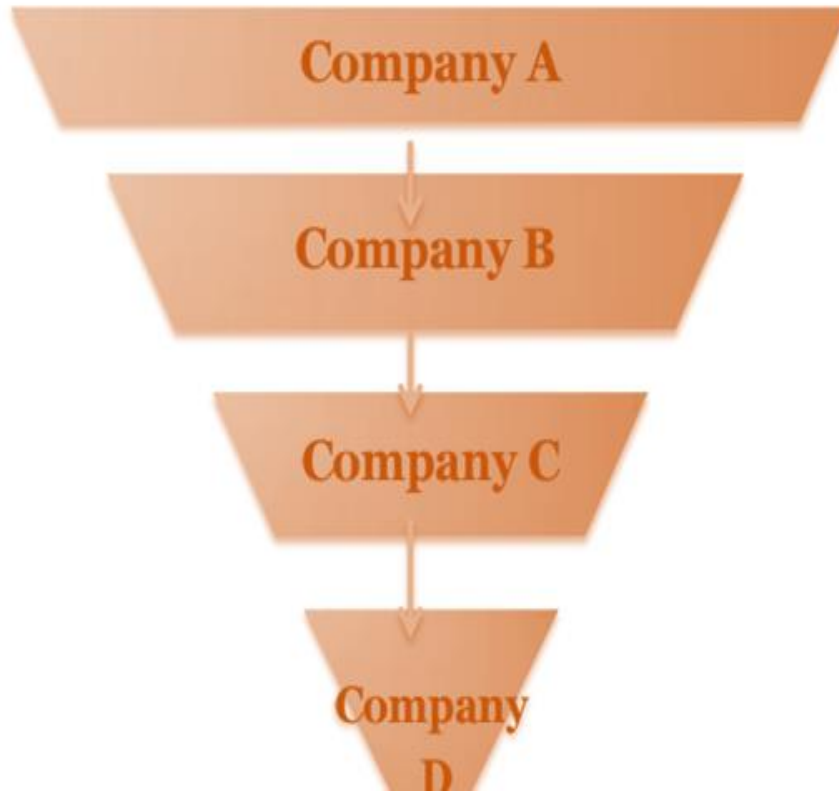
Can Apex Pvt. Ltd. (Mfg. Co.) invest in a company with the holding- subsidiary hierarchy?



# LOAN & INVESTMENTS BY COMPANY

## CASE STUDY

When is an investment said to be made through layers?

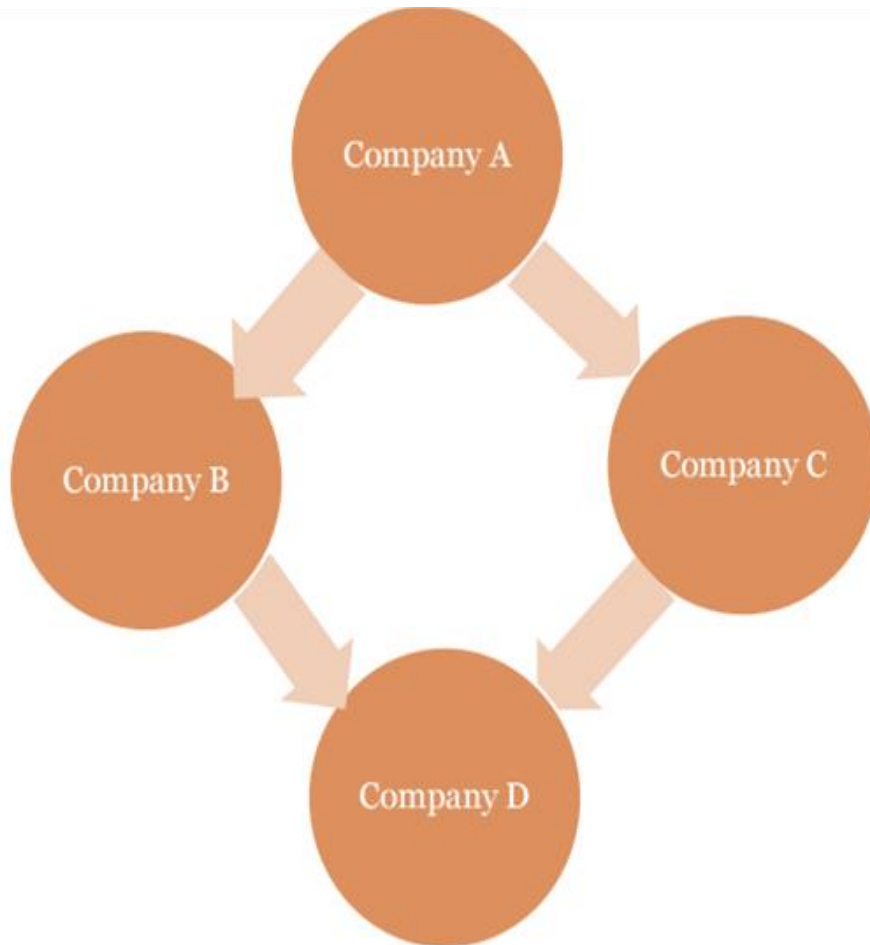


If A makes an investment in B, B with that money, goes and makes investment in C, and C with that money makes investment in D, one would say, A has invested in D, through B and C. B and C merely acted as layers, as the flow of investment was clear.



# LOAN & INVESTMENTS BY COMPANY

## CASE STUDY

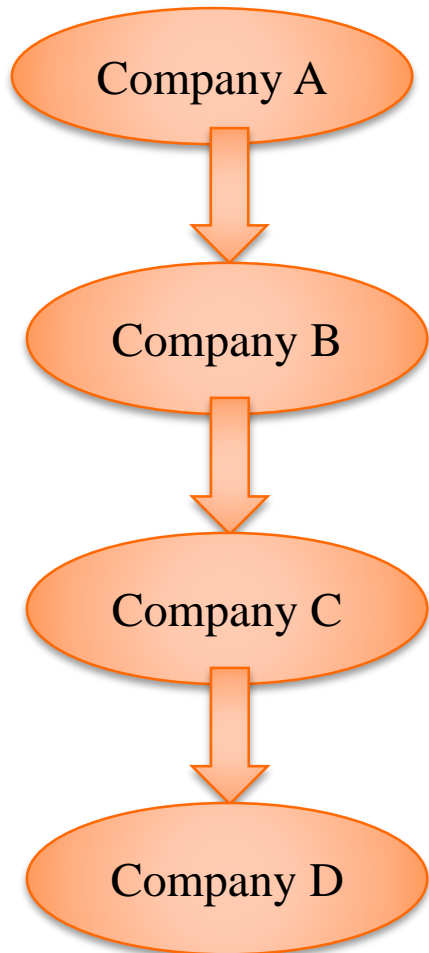


On the contrary, if A makes investment in B, and A makes investment in C as well, and B and C make an investment in D, then obviously there will be one layer only.

Thus, the restriction is not on horizontal propagation.

# LOAN & INVESTMENTS BY COMPANY

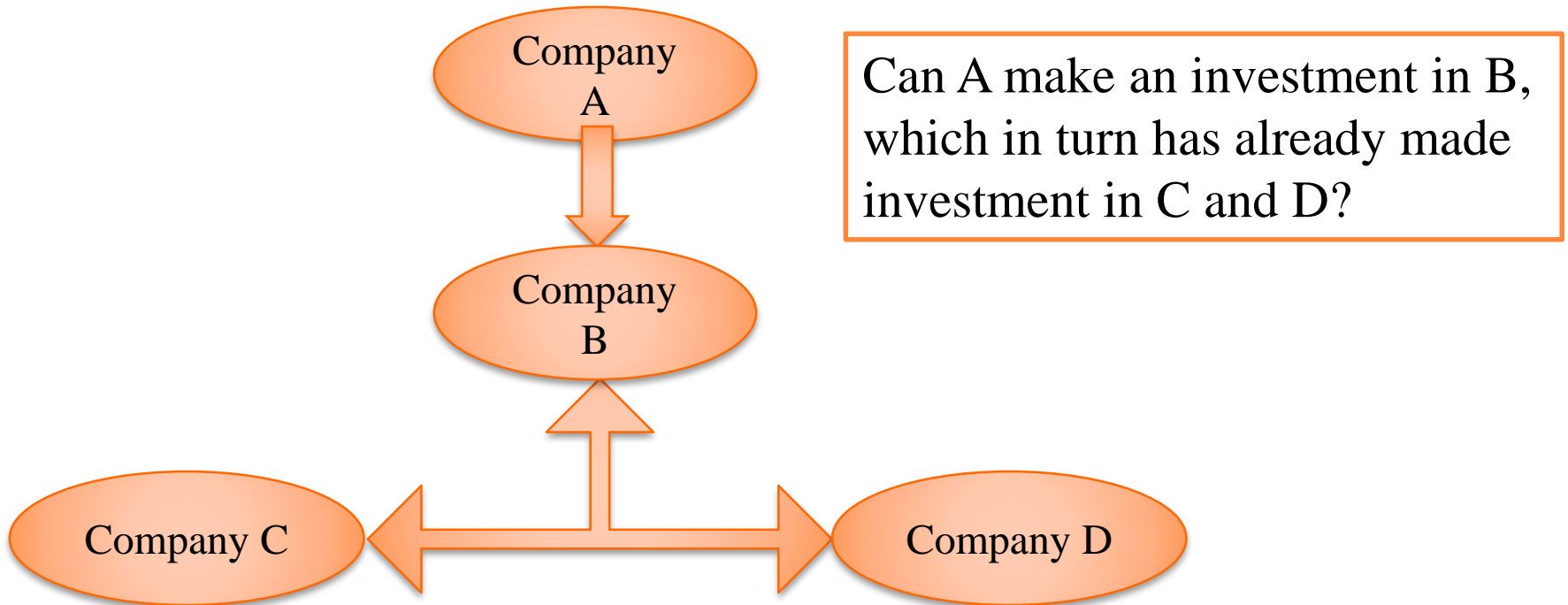
## CASE STUDY



If C is holding investments in D.  
Now A makes Investment in B & C.  
Can the section be said to be applicable???

# LOAN & INVESTMENTS BY COMPANY

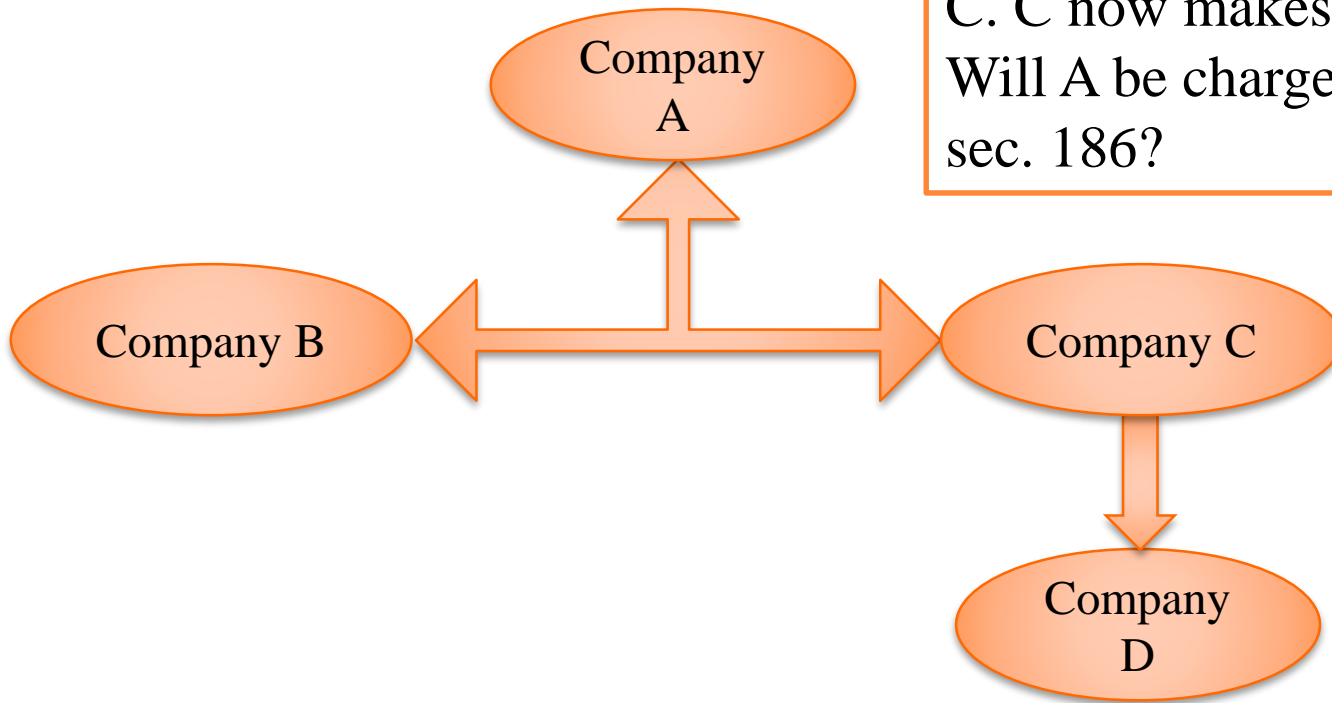
## CASE STUDY



# LOAN & INVESTMENTS BY COMPANY

## CASE STUDY

Suppose A has invested in B and C. C now makes investment in D. Will A be charged for violation of sec. 186?



# LOAN & INVESTMENTS BY COMPANY

## ○ *UPCOMING AMENDMENTS (COMPANIES (AMENDMENT) BILL, 2016)*

- Amendment of section 186.

In section 186 of the principal Act,—

(i) sub-section (1) shall be omitted;

(ii) in sub-section (2), the following *Explanation* shall be inserted, namely:—

*Explanation.*—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company.;

(iii) for sub-section (3),:- the following sub-section shall be substituted, namely:—

'(3) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting:

Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply:

Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4).

# LOAN & INVESTMENTS BY COMPANY

## UPCOMING AMENDMENTS (CONTD.)

(iv) for sub-section (11), the following sub-section shall be substituted, namely:—

"(11) Nothing contained in this section shall apply—

(a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities;

(b) to any investment—

(i) made by an investment company;

(ii) made in shares allotted in pursuance of clause (a) of sub-section (1) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate;

(iii) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities.";

(v) in the *Explanation*, in clause (a), after the words "other securities" the following shall be inserted, namely:—

"and a 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 fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income.".

# CARO, 2016 REPORTING FOR PRIVATE COMPANIES

- A private company satisfying these conditions not covered:  
Private company , not being a subsidiary or holding of a public company
  - a. With a paid up-capital and reserves and surplus not more than Rs. 1Crore
  - b. Does not have total borrowing exceeding Rs. 1Crore from any bank or financial institution at any point of time during the Financial Year
  - c. Does not have total revenue as defined in schedule III to the Companies act 2013(including revenue from discontinuing operations) exceeding Rs. 10Crores during the financial year as per the financial statements

# CARO, 2016 REQUIREMENTS FOR PROVISIONS OF SECTION 185 AND 186 [CLAUSE 3(IV)]

- *In respect of loans, investments, guarantees, and security whether provisions of section 185 and 186 of the Companies Act, 2013 have been complied with. If not, provide the details thereof. [Paragraph 3(iv)]*



# CARO, 2016 REQUIREMENTS FOR DEPOSITS [CLAUSE 3(V)]

- *In case the company has accepted deposits, whether the directives issued by the Reserve Bank of India and the provisions of sections 73 to 76 or any other relevant provisions of the Companies Act, 2013 and the rules framed thereunder, where applicable, have been complied with? If not, the nature of such contraventions be stated; if an order has been passed by Company Law Board or National Company Law Tribunal or Reserve Bank of India or any Court or any other Tribunal, whether the same has been complied with or not?*

when we are no longer able to  
change a situation,  
we are challenged to change  
ourselves!”

Victor Frank

FEEL FREE ...  
TO ASK QUESTION ...  
OR DO CLARIFY

**THANK YOU.....**