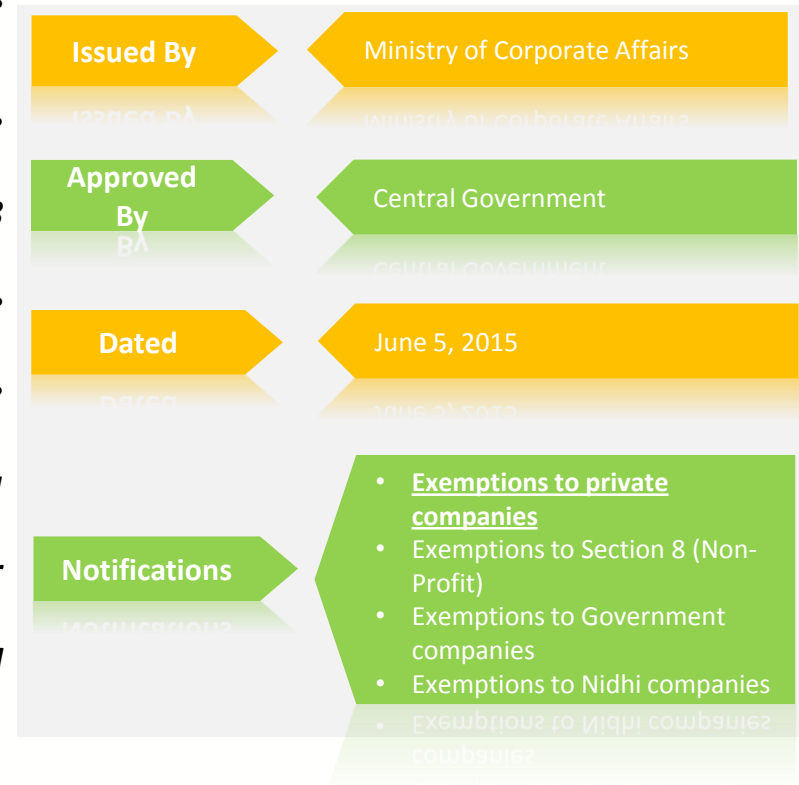




Exemptions to Private Companies – First Shower of Monsoon?

Background

“**M**inistry on June 5, 2015, showered the much awaited ‘exemptions’ to private companies, Government companies, Section 8 companies and Nidhi companies with the obvious motive of furthering the Government’s mantra – ‘Ease of Doing Business’. The exemptions range from lesser statutory filings to liberalised approval mechanism.”



This presentation includes an analysis of exemptions to private companies

Amendment Implications at a Glance

New Exemptions / Modifications

- 'Related Party' definition narrowed in case of RPT
- Related Parties can vote on RPTs
- Interested Director can participate, if interest is disclosed
- Norms for Deposits from members relaxed
- Loan to Directors, etc. not prohibited for certain private companies
- Rights Issue – Offer period and notice period made liberal
- Employees Stock Option Scheme could be passed by ordinary resolution
- Requirement of filing the Board Resolutions passed under Section 179(3) is dispensed with
- Limit of no of statutory audits relaxed
- Provisions of approval of terms of appointment including remuneration of managerial personnel Section 196 (4 & 5) not applicable
- Restrictions on purchase by company or giving of loans for purchase of its shares under Section 67 not applicable
- Exemption for kinds of share capital and voting right thereto

Key Impact Areas

- Transactions with Holding/Sub/Associate/Fellow Sub not to attract S. 188
- No deadlock situation
- No deadlock situation
- Conditions like Reserve Creation, Issue / Filing of Circular, Deposit Insurance not applicable
- Lending to Director allowed ; Prohibition continues for companies with corporate shareholding
- Procedural relaxation – Offer period can be for less than 15 days
- Approval formalities made easier
- No MGT 14 filing of Board resolutions under Section 179(3)
- OPC / Dormant / small / private companies (below 100 crs capital) excluded for limit of audit of max 20 companies
- Flexible appointment & remuneration for MD, WTD and Manager
- No imperative impact
- Flexibility to issue shares other than Equity / Preference or shares with differential rights

Provisions Aligned to Old Companies Act

- Restrictions on power of Board relaxed
- AoA to prevail over the provisions related to general meeting
- Appointment of Directors by single resolution
- Procedural norms for nominating person for Directorship liberalised

Key Impact Areas

- No approval of members for borrowing beyond limits / sale of substantial undertaking / etc.
- Procedural relaxation – Company can have liberal compliance for conduct of general meeting ; But no exemption to follow SS – 2
- Procedural simplicity
- No deposit of Rs. 1 lac for nominating any person for directorship

Exemptions for Private Companies

EXISTING PROVISIONS

- Only Un-related parties can vote on resolution to pass a Related Party Transaction under Section 188
- RPTs with Holding / Subsidiary / Associate / Fellow Sub attracts Section 188

2(76)
188

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Related Party and Related Party Transactions

Exemptions / Modifications

- (A) Now, Related Parties shall be allowed to vote on RPT under Section 188
- (B) RPTs with Holding / Subsidiary / Associate / Fellow Sub exempt from Section 188.

Comments

Exemption under (A) : Deadlock situation to pass a related party transaction in case of closely held company now resolved

Exemption under (B)

- RPTs with above mentioned RPs shall NOT be exempted from Section 188 if companies have common directorship or if Director of one company is member in the other Company (S. 2(76)(iv) & (v)). The approval of members to pass RPT in general meeting should, however, not be a concern for closely held groups now, as Related Parties can vote.
- Further, the exemption gives rise to some grey areas and it appears that the exemption might not be available in certain situations some of which are captured below :

What if Holding Co. is a Public Limited Company?

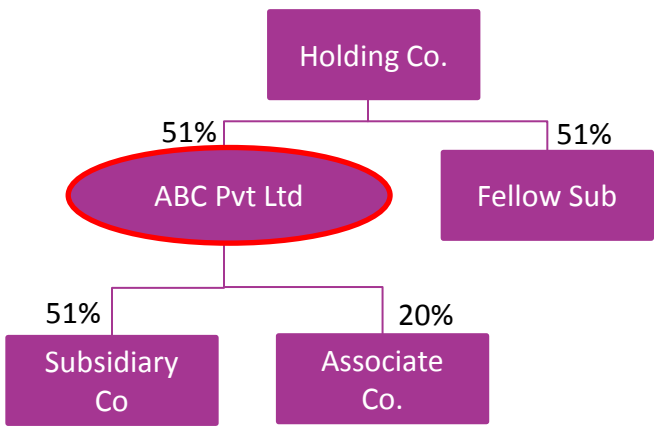
No exemption from Section 188 as ABC Pvt Ltd being subsidiary of a public company is not considered a private company. The subject Notification shall not apply.

What if Subsidiary / Fellow Subsidiary / Associate company is a Public Limited Company?

Exemption would be available for private company but not to Subsidiary / Fellow Subsidiary / Associate company

Do transactions with Directors / KMP / their relatives of Holding Co attract Section 188?

Yes! Transactions with Holding Co. only are exempted but not transactions with their Directors etc..



Exemptions for Private Companies

EXISTING PROVISIONS

Private limited companies are not permitted to borrow money from members unless they comply with the provisions of Section 73 re. acceptance of deposits

73(2)
(a) to
(e)

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Norms Relaxed - For acceptance of Deposits from members up to specified limit

Exemptions

- Private companies are permitted to borrow, from members, money up to 100% of aggregate of paid up share capital and free reserves. This shall not be subject to substantive norms of deposit-acceptance under Section 73.
- Requirement for providing security on property / asset of the company is still required to be complied with in case of secured deposits.
- Return of deposits is required to be filed with RoC.

Comments

- This is a great relief to industry, though funding is capped to 100% of net-worth and the exemption is partial, ie only from substantive conditions of Section 73(2). Other conditionality such as shareholder approval continue to apply.
- There is no restriction for members (like in case of Directors) that borrowed money cannot be provided to the company.

Loan to Directors not prohibited in certain private companies

Loan / Guarantee / Security to Director and any person in whom Director is interested was prohibited

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Exemptions

- Loan / Guarantee / Security to Director and any person in whom Director is interested allowed subject to compliance of below conditions:
 - I. No body corporate shareholder in the Company
 - II. Borrowings from Banks / Financial Institutions / any Body Corporate is limited to lower of –
 - a) Double of paid up share capital OR
 - b) 50 crores
 - III. No default in repayment of borrowings subsisting at the time of granting loans

Comments

- All 3 conditions need to be cumulatively complied with for availing the exemption
- Notably, the condition that requires nil body corporate shareholding in the lending company, makes the exemption futile for group companies with corporate shareholding

Exemptions for Private Companies

EXISTING PROVISIONS

- Section 62(1)(a)(i) requires Company to provide a offer period of min 15 to max 30 days for rights issue
- Section 62(2) requires Company to dispatch the Offer Letter to all members min 3 days before opening the issue

62(1)(a)(i)
62(2)

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Rights Issue - Offer period and Notice period made liberal

Modifications

- Company which obtains consent of 90% of members (writing / electronic mode) may specify a lesser period for -
 - Offer Period (Earlier Provisions - min 15 days)
 - Dispatch of Notice (Earlier Provisions - before 3 days of Issue Opening)

Comments

- Rights Issue offer period can now be kept open for a period of less than 15 days
- Company not required to dispatch Offer Letter before 3 days of opening issue
- The above time periods can only be reduced by obtaining consent of 90% shareholders

Restrictions on purchase by company or giving of loans for purchase of its shares under Section 67 not applicable

- Section 67 provides for restrictions on purchase by company or giving of loans by it for purchase of its shares

67

Exemption

Section 67 i.e. Restrictions on purchase by Company or giving of loans by it for purchase of its shares shall not be applicable for private companies provided below conditions are fulfilled –

- I. No body corporate shareholder in the Company
- II. Borrowings from Banks / Financial Institutions / any Body Corporate is limited to lower of –
 - a) Double of paid up share capital OR
 - b) 50 crores
- III. No default in repayment of borrowings subsisting at the time of granting loans

Comments

- All 3 conditions need to be cumulatively complied with for availing the exemption
- However, apparently, this exemption does not appear to have imperative impact on the following two counts : (a) private companies are, in any case, excluded under Section 67(2) for funding acquisition of its own shares and (b) buy back by any company including private company continues to be subject to Section 68.

Exemptions for Private Companies

EXISTING PROVISIONS

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Requirement of filing Board Resolutions passed under Section 179(3) is dispensed with

Resolutions passed under Section 179(3) to be filed with RoC in Eform MGT 14.

117(3)(g)

Exemption

Now companies get Exemption from filing Form MGT-14 to the registrar of the company for the resolution passed under section 179(3).

Comments

- There is no exemption to pass Board resolution for business mentioned under Section 179(3) like buy-back; borrowing; giving of loans, guarantee etc. Exemption is only for filing of the Board resolution passed under Section 179(3) with RoC
- Major relief to private companies

Interested Director can participate in Board meeting

Section 184 provides that Interested Director cannot participate in the meeting

184

Exemption

Interested Director is permitted to participate, provided appropriate disclosure of interest is given

Comments

This solves the concern of such private companies which could not pass resolutions due to want of (dis-interested) quorum. No deadlock situation.

Employees Stock Option Scheme could be passed by Ordinary majority instead of Special majority

Approval by way of Special Resolution required for employee stock option scheme

62(1)(b)

Modification

Employees Stock Option Scheme could be passed by ordinary resolution instead of special resolution.

Exemptions for Private Companies

EXISTING PROVISIONS

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Restrictions on power of Board removed

Restrictions on power of Board applicable to Private companies

180

Exemption

Section 180 i.e. restriction on power of Board not applicable to private companies

Comments

- Major relief to private companies. No requirement of members' approval for the following :
 - Sale / lease / dispose of whole or substantially whole of undertaking
 - Invest funds received consequent to merger
 - Borrow money exceeding paid up capital + free reserves
 - Remit, or give time for the repayment of, any debt due from a director.
- Aligned to the position of 1956 Act

AoA to prevail over the provisions related to general meeting

Following sections are applicable to private companies –

- 101: Notice of Meeting
- 102: Statement to be annexed to notice
- 103: Quorum for meetings
- 104: Chairman of meetings
- 105. Proxies
- 106: Restriction on Voting Rights
- 107: Voting by show of hands
- 109: Demand for poll

101 to 107 & 109

Exemption

If anything otherwise mentioned under the Articles of Association of the company, then the provisions of the Act shall not be applicable

Comments

- Notably, even though Section 101 to 107 & 109 relating to conduct of general meeting shall not be applicable if AoA prescribes otherwise, but provisions of Secretarial Standards on General Meeting are applicable pursuant to Section 118 (10)
- For example, even though Articles provide less stringent provisions for convening a general meeting, for eg. lesser than 21 clear days notice for convening general meeting, the private company shall still be required to observe notice period of 21 clear days pursuant to Clause 1.2.6 of SS-2.

Exemptions for Private Companies

EXISTING PROVISIONS

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Procedural norms for nominating person for Directorship liberalised

Section 160 i.e. right of persons other than retiring Directors to stand for Directorship is applicable for private companies

160

Exemption
Section 160 i.e. right of persons other than retiring Directors to stand for Directorship is not applicable for private companies

Comments
Now there is no need to comply with Section 160 by private companies

- No need to give deposit of Rs. 1 Lac
- No need to submit notice of candidature min 14 days before the general meeting

Appointment of Directors by single resolution

Appointment of Directors to be voted individually i.e. by way of a separate resolution

162

Exemption
No separate resolution for appointment of more than 1 directors needed for a private company

Comments
No imperative impact

Limit of statutory audits relaxed

Section 141(3) provides for ineligibility of person to be appointed as an auditor

141

Modification
Certain type of companies are excluded from limit of 20 companies to be audited by any auditor

Comments

- Limit of 20 on company audits will now exclude :
 - One person company
 - Dormant company
 - Small company, and
 - Private company having a paid up share capital of less than Rs. 100 Crores
- Notably, ICAI guidelines restrict the total number of statutory audits including private companies to 30

Exemptions for Private Companies

EXISTING PROVISIONS

MODIFICATIONS / ADAPTATIONS / IMPLICATIONS

Flexible appointment & remuneration for MD, WTD and Manager

Section 196(4)&(5) provides, appointment of Managing Director Whole-time Director and Manager subject to:

- Provision of Section 197 and Schedule V
- Such other terms and conditions as may be prescribed
- Remuneration payable and
- Approval of BM and GM

196(4)
&(5)

Exemption

Provisions with respect to approval of terms and conditions of appointment including remuneration of managerial personnel are not applicable to private companies

Comments

- No cap on remuneration to be paid to the managerial personnel of private companies
- Schedule V exempt.
- Filing of Form MR-1 no longer required

Exemption to kinds of share capital and voting right there to

Section 43 provides for 2 kinds of capital i.e. Equity & Preference.

Section 47 provides for voting rights of members

43
&
47

Exemption

Sections 43 and 47 are not applicable to a private company where articles so provide.

Comments

- Private company may have other kinds of share capital apart from equity and preference shares, eg. first preference shares, second preference shares, founder shares etc.

Our Take...

The Ministry's efforts to relieve closely held private companies from some of the onerous provisions of the Companies Act, 2013 come incidentally with the first shower of monsoon. Yet, the exemption notification may not bring enough excitement to such companies considering some of the conditional / partial exemptions. Perhaps, this is first of the bulk exemptions for closely held companies and we expect more such showers to enable doing business in India pragmatic yet disciplined.

Thank You....



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Corporate Office

Pantomath Advisory Services Group, 108, Madhava Premises,
Bandra Kurla Complex, Bandra (East), Mumbai - 400 051

Landline: (022) 2659 8687/91, **Fax:** (022) 2659 8690

Website: www.pantomathgroup.com

E-mail : info@pantomathgroup.com

Associate Offices at

Bhopal - Madhya Pradesh

Borivali - Mumbai

Gandhinagar - Gujarat

Kolkata - West Bengal

Pune - Maharashtra

Surat - Gujarat

Vapi - Gujarat

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