



*Under the provisions of section 185 of Companies Act, 2013, can a Company grant loan/security/guarantee to its Associate Company?*

Pursuant to sub-section (2) of section 185 of the Companies Act, 2013, a company (i.e., private company or public 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. According to sub-section (3) of section 185

*(Contributed by CS Gaurav Pingle)*

of the Companies Act, 2013, sub-sections (1) and (2) of section 185 of the Act are not applicable to certain transactions relating to loans, guarantees and securities.

In sub-sections (2) and (3) of section 185 of the Companies Act, 2013, there is no reference to the loan, guarantee and security provided by a company (private company or public company) to its Associate Company. Therefore, a company can grant loan/security/guarantee to its Associate Company if requisite conditions of sub-section (2) or sub-section (3) of section 185 of the Companies Act, 2013

are fulfilled, i.e., by identifying the status of the two companies, i.e., private company and public company and applying the necessary conditions.

*Whether the provisions of section 185 of the Companies Act, 2013 (as substituted by the Companies (Amendment) Act, 2017) are retrospective in nature, i.e., whether it has any impact on the transactions already executed prior to the amendment?*

The Companies (Amendment) Act, 2017 has substituted Section 185 of the Companies Act, 2013. The provisions of Section 185 of the Act (post-amendment) are more liberal. The reference to 'save as otherwise provided in this Act' has also been deleted, whereby Section 185 and Section 186 of the Act are to be read independently for the purpose of compliance.

It has been held that statutory provisions creating substantive rights or taking away substantive rights are ordinarily prospective; they are retrospective only if by express words or by necessary implication the legislature has made them retrospective. The retrospective operation will be limited only to the extent to which it has been so made by express words, or necessary implication<sup>1</sup>. An amendment to substantive law is not retrospective unless expressly laid down<sup>2</sup>. When a rule is made and enforced with effect from a particular date, the amendment cannot be given retrospective effect contrary to the intention of the rule-making authority<sup>3</sup>. With respect to the statutes dealing with substantive rights, it is a cardinal principle of construction that every statute is *prima facie* prospective, unless it is expressly or by necessary implication made to have retrospective operation.<sup>4</sup> There is a presumption of prospectivity articulated in the legal maxim '*nova constitutio futuris formam imponere debet, non praeteritis*', i.e., 'a new law ought to regulate what is to follow, not the past'. This presumption operates unless shown to the contrary by express provision

in the statute or is otherwise discernible by necessary implication<sup>5</sup>.

Based on this discussion, the provisions of section 185 of the Companies Act, 2013 (as substituted by the Companies (Amendment) Act, 2017) are not retrospective in nature, i.e., will not have any impact on the transactions already executed prior the amendment.

*Whether provisions of section 185 of the Companies Act, 2013 are applicable to the loan provided by holding company (incorporated in India) to its subsidiary company (incorporated outside India)?*

According to sub-section (3) of section 185 of the Companies Act, 2013, sub-sections (1) and (2) of section 185 of the Act are not applicable to certain transactions relating to loans, guarantees and securities. According to clause (c) of sub-section (3) of section 185 of the Act, sub-sections (1) and (2) of section 185 of the Act are not applicable to 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. This relevant clause is not applicable and the company in question is subsidiary company and not wholly owned subsidiary company. According to clause (d) of sub-section (3) of section 185 of the Act, sub-sections (1) and (2) of section 185 of the Act are not applicable to 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. The clause is applicable to subsidiary companies but only in relation to guarantee given or security provided. Loan is not within the purview of the said clause. Therefore, the restriction under section 185 of the Companies Act, 2013 applies to the loan provided by holding company (incorporated in India) to its subsidiary company (incorporated outside India).

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