

## 'Infrastructure Projects' & 'Infrastructure Facilities' under Companies Act, 2013

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### Introduction

#### 1. 'Infrastructure Projects' & 'Infrastructure Facilities' under Companies Act, 2013

In Companies Act, 2013 ('the Act') there is no specific reference to the term 'real estate'. However, there are a few provisions where there is a reference to the term 'infrastructure projects' or 'infrastructure facilities'. The two relevant provisions are:

- (i) Section 55 of the Act relating to 'Issue and redemption of preference shares'
- (ii) Section 186 of the Act relating to 'Loan and investment by company'.

This article is an analysis of the above mentioned provisions of the Act, read with Schedule VI to the Act (that defines 'infrastructure projects' or 'infrastructure facilities').

### Issue and redemption of preference shares

2. According to Section 55 of the Act, a company (limited by shares) shall not issue any preference shares which are irredeemable. A company (limited by shares) may, if so authorised by its Articles of Association, issue preference shares which are liable to be redeemed within a period not exceeding 20 years from the date of their issue subject to such conditions as may be prescribed (i.e., in accordance with the Companies (Share Capital and Debentures) Rules, 2014). A company may issue preference shares for a period exceeding 20 years for infrastructure projects, subject to the redemption of such percentage of shares as may be prescribed on an annual basis at the option of such preferential shareholders. This provision has been further clarified in the Rules.

Rule 10 of the Companies (Share Capital and Debentures) Rules, 2014 relates to 'Issue and redemption of preference shares by company in infrastructural projects'. According to rules, a company engaged in the setting-up and dealing with infrastructural projects may issue preference shares for a period exceeding 20 years but not exceeding 30 years, subject to the redemption of a minimum 10% of such preference shares per year from the 21<sup>st</sup> year onwards or earlier, on proportionate basis, at the option



of the preference shareholders. The *Explanation* to section 55 of the Act states that the term 'infrastructure projects' means the infrastructure projects specified in Schedule VI to the Act.

The other provisions relating to redemption, sources of redemption, accounting treatment, etc., are applicable to all companies (private companies or public companies, whether engaged in setting-up and dealing with of infrastructural projects or not).

### **Loan and investment by company**

3. Section 186 of the Act relates to 'Loans and investment by company'. Sub-section (1) of section 186 of the Act states that a company shall not make investment through not more than two layers of investment companies. However, such restriction (or prohibition) is not applicable in following cases:

- (i) Company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;
- (ii) Subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

Section 186(2) of the Act introduces limits on giving of any loan to any person or other body corporate, giving of any guarantee or provide security in connection with a loan to any other body corporate or person and acquiring by way of subscription, purchase or otherwise, the securities of any other body corporate. Section 186(3) of the Act states that if the prescribed limits are exceeded then the company shall obtain the previous approval of the shareholders by passing a special resolution in general meeting. The provisions also provide for certain exceptions. Section 186(4) of the Act relates to relevant disclosure in financial statements and Section 186(5) of the Act relates to the consent of all the directors present at the meeting and the prior approval of public financial institution (in certain cases). According to Section 186(6) of the Act, a company, which is registered under section 12 of the SEBI Act, 1992 and is covered under such class or classes of companies as may be prescribed, shall not take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits. Section 186(7) of the Act imposes a prohibition on the company to lend at a rate of interest lower than the prescribed rate. Section 186(8) of the Act imposes a restriction from giving any loan or any guarantee or providing any security or making an acquisition, when there is a default in repayment of deposits. Sub-sections (9) and (10) of section 186 of the Act mandate maintenance of register in the prescribed format.

Section 186(11) of the Act creates an exception, wherein provisions of section 186 of the Act are not applicable in certain cases. However, there is no exception to the provisions relating to layers of subsidiaries. According



to section 186(11) of the Act, the above mentioned provisions (i.e., section 186(2) to section 186(10) of the Act) are not applicable in following cases:

- (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 RBI Act, 1934 whose principal business is acquisition of securities.

For the limited purpose of this article, section 186(2) to section 186(10) of the Act are not applicable to a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities (the *Explanation* to section 186 of the Act states that the expression 'infrastructure facilities' means the facilities specified in Schedule VI to the Act).

#### **Schedule VI to the Act relates to 'Infrastructure Projects/Infrastructural Facilities'**

4. According to the Schedule VI to the Act, the term 'infrastructural projects' or 'infrastructural facilities' includes the following projects or activities:

- (1) Transportation (including inter-modal transportation), includes the following:—
  - (a) Roads, national highways, State highways, major district roads, other district roads and village roads, including toll roads, bridges, highways, road transport providers and other road-related services;
  - (b) Rail system, rail transport providers, metro-rail roads and other railway related services;
  - (c) Ports (including minor ports and harbours), inland waterways, coastal shipping including shipping lines and other port related services;
  - (d) Aviation, including airports, heliports, airlines and other airport related services;
  - (e) Logistics services.
- (2) Agriculture, including the following, namely:—
  - (a) Infrastructure related to storage facilities;
  - (b) Construction relating to projects involving agro-processing and supply of inputs to agriculture;
  - (c) Construction for preservation and storage of processed agro-products, perishable goods such as fruits,



vegetables and flowers including testing facilities for quality.

(3) Water management, including the following, namely:—

- (a) Water supply or distribution;
- (b) Irrigation;
- (c) Water treatment.

(4) Telecommunication, including the following, namely:—

- (a) Basic or cellular, including radio paging;
- (b) Domestic satellite service (i.e., satellite owned and operated by an Indian company for providing telecommunication service);
- (c) Network of trunking, broadband network and internet services.

(5) Industrial, commercial and social development and maintenance, including the following, namely:—

- (a) Real estate development, including an industrial park or special economic zone;
- (b) Tourism, including hotels, convention centres and entertainment centres;
- (c) Public markets and buildings, trade fair, convention, exhibition, cultural centres, sports and recreation infrastructure, public gardens and parks;
- (d) Construction of educational institutions and hospitals;
- (e) Other urban development, including solid waste management systems, sanitation and sewerage systems.

(6) Power, including the following:—

- (a) Generation of power through thermal, hydro-nuclear, fossil fuel, wind and other renewable sources;
- (b) Transmission, distribution or trading of power by laying a network of new transmission or distribution lines.

(7) Petroleum and natural gas, including the following:—

- (a) Exploration and production;
- (b) Import terminals;
- (c) Liquefaction and re-gasification;
- (d) Storage terminals;
- (e) Transmission networks and distribution networks including city gas infrastructure.

(8) Housing, including the following:—

- (a) Urban and rural housing including public/mass housing, slum rehabilitation, etc.;
- (b) Other allied activities such as drainage, lighting, laying of roads, sanitation and facilities.

(9) Other miscellaneous facilities/services, including the following:

- (a) Mining and related activities;
- (b) Technology related infrastructure;
- (c) Manufacturing of components and materials or any other utilities or facilities required by the infrastructure

sector like energy saving devices and metering devices;

- (d) Environment related infrastructure;
- (e) Disaster management services;
- (f) Preservation of monuments and icons;
- (g) Emergency services (including medical, police, fire and rescue).

(10) Such other facility service as may be prescribed.

The scope of 'infrastructure projects' or 'infrastructural facilities' is very wide. Importantly, the projects or activities mentioned in the Schedule VI to the Act are inclusive in nature. It does not relate to manufacturing activities only. It relates to transportation, agriculture, water management, telecommunication, industrial, social development (which includes real estate development, including an industrial park or special economic zone), power, petroleum, natural gas, housing (which includes urban and rural housing including public/mass housing, slum rehabilitation, etc.).

For limited purpose, it can be observed that the provisions of section 186(2) to section 186(10) of the Act are not applicable to any loan made, any guarantee given or any security provided or any investment made by a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities (*i.e.*, as discussed above).

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