



# Proposed amendments in ‘Definitions’ in the Companies Act, 2013

## Introduction:

With an objective of addressing and resolving the ‘shoe-pinching’ issues in Companies Act, 2013 (‘the Act’), the Government on June 4, 2015, constituted 8 members’ Company Law Committee. The said Committee was headed by Secretary, Ministry of Corporate Affairs. On February 1, 2016, Committee submitted 138-pages detailed Report and suggested 100+ amendments to the Act. Based on the Report, Government drafted the Companies (Amendment) Bill, 2016 (‘Amendment Bill’) and presented the same in Lok Sabha on March 16, 2016. The Bill has suggested 87 amendments to the Companies Act, 2013. Such suggestions are in addition to the already issued clarifications, circulars, notifications, amendment in Company Rules, removal of difficulty orders and the Companies Amendment Act, 2015.

This article is a compilation and analysis of the proposed amendments in the ‘definitions’ in the Act.

## Associate Company:

Sub-Section (6) to Section 2 of the Act defines “Associate Company” as in relation to another company, associate 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. Associate Company includes a joint venture company.

The explanation to sub-section (6) to Section 2 of the Act is proposed to be amended, in relation to the expression ‘significant influence’. Pursuant to the Amendment Bill, ‘significant influence’ means control of at least 20% of total voting power (extant provision relates to ‘total share capital’), or control of or participation in business decisions under an agreement. Sub-section (89) of Section 2 defines ‘total voting power’ as “*in relation to any matter, means the total number of votes which may be cast in regard to that matter on a poll at a meeting of a company if all the members thereof or their proxies having a right to vote on that matter are present at the meeting and cast their votes*”.

The explanation to sub-section (6) to Section 2 of the Act, is also proposed to be amended, by introducing the definition of the expression ‘joint venture’ which means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement. The proposal of amending the definition of ‘associate company’ is in line with the recommendations of the Companies Law Committee Report.

## Debentures:

Sub-Section (30) to Section 2 of the Act defines “debentures”, which includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not. The phrase “*any other instrument of a company evidencing a debt*” made it very broad and included, by implication, instruments like commercial papers and other money market instruments, which were often used as an important short-term fund raising source by eligible companies and were well regulated under RBI regulations. Accordingly, the definition relating to ‘debentures’ is proposed to be amended to exclude the instruments referred to in Chapter

III-D of RBI Act, 1934 and such other instrument, as may be prescribed by Central Govt. in consultation with RBI, issued by a company.

It is noteworthy that the Rule 18 of Companies (Share Capital and Debenture) Rules, 2014 was amended in March 2015, and it was clarified that the raising of monies through commercial papers would not be governed by the Rules pertaining to the issue of debentures. The proposed amendment in the Amendment Bill is in line with the Companies Law Committee Report.

#### **Holding Company:**

Vide the Amendment Bill, it is proposed that an Explanation is inserted to Section 2(41) (relating to 'holding company') of the Act. The proposed Explanation is "*For the purposes of this clause, the expression 'company' includes any body corporate*". The definition of 'holding company' is proposed to be expanded by including company incorporated outside India along with companies incorporated in India. This proposal of amending the definition of 'holding company' is in line with the recommendations of the Companies Law Committee Report.

The Committee had observed that non-inclusion of the explanation was a minor anomaly, but which could lead to uncertainties in ascertaining the status of a company, in case of a foreign holding company; and also in determining the applicability of the Companies Act to such a company.

#### **Interested Director:**

The Amendment Bill proposes to omit the definition of 'interested director' as defined in sub-section (49) of Section 2 of the Act. Section 184(2) of the Act provides nature of interests to be disclosed by directors, but does not use the phrase 'interested director'. The only reference to the term 'interested director' is there in Section 174(3), however the Explanation to that provision clarified that the meaning of the term 'interested director' would be the same as for the purposes of Section 184(2). The definition of 'interested director', though much wider, has not been used in the Act and hence redundant. This proposal of omitting the definition of 'interested director' is in line with the recommendations of the Companies Law Committee Report.

#### **Key Managerial Personnel:**

'Key managerial personnel' ('KMP') has been defined in sub-section (51) of Section 2 of Companies Act, 2013, which means: (i) Chief Executive Officer or the managing director or the manager, (ii) Company Secretary, (iii) Whole-time director, (iv) Chief Financial Officer, and (v) such other officer as may be prescribed.

Vide the Amendment Bill, it is proposed to expand the scope of KMP, to include such other officer, not more than one level below the directors who is in whole-time employment, designated as KMP by the Board of Directors. It is noteworthy, that such amendment was not recommended by the Companies Law Committee Report.

#### **Net worth:**

Vide the Amendment Bill, it is proposed that the scope of 'net worth' is expanded by including 'debit or credit balance of profit and loss account' and adding it to the paid-up share capital and all reserves created out of the profits. It proposed amendment is in line with the amendment recommended by the Companies Law Committee Report.

#### **Subsidiary Company:**

Vide the Amendment Bill, the proviso restricting the layers of subsidiaries beyond prescribed number is proposed to be eliminated. Considering the strategic decision making and with an objective of ease of doing business, the Government has proposed amendment of such provision.

There are two tests for determining whether a company is subsidiary of another company, and on satisfaction of any one test, the holding-subsidary relationship is defined. The two tests are as follows:

- (i) Controlling the composition of the Board of Directors; or
- (ii) Exercising or controlling more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies.

The Amendment Bill also proposes to amend the definition of 'subsidiary company' with respect to one of the criteria for determining holding-subsidary relationship, i.e. the second criteria, wherein the 'total share capital' is proposed to be replaced by 'total voting power'. Therefore, the requirement of calculating the equity share capital and convertible preference shares is proposed to be eliminated vide the Amendment Bill. This is definitely a welcome move for the corporates, as the extant criteria of 'total share capital' acted an impediment in corporate restructuring and reorganizing the group companies. The proposal of amending the definition of 'subsidiary company' is in line with the recommendations of the Companies Law Committee Report.

#### **Related Party:**

Vide the Amendment Bill, one of the clauses in the definition of 'related party' is proposed to be amended along with allied definitions of 'holding company', 'subsidiary company' and 'associate company'. Clause (viii) of Section 2(76) of the Act is proposed to be substituted, whereby a related party means, any body corporate which is:

- (a) A Holding, subsidiary or an associate company of such company;
- (b) A Subsidiary of a holding company to which it is also a subsidiary; or
- (c) An investing company or the venturer of a company.

The scope of 'related party' is proposed to be expanded due to the inclusion of the words 'body corporate' in clause (viii) of Section 2(76) of the Act, whereby the holding company, subsidiary company, associate company, fellow subsidiary company, investing company or venturer company would mean a company incorporated in India and company outside India. Vide the Amendment Bill, it is proposed to include an investing company or venturer of a company as 'related party'. However, the same have not been defined in the Act, which will bring in more ambiguity and uncertainty in the identifying the 'related party' in relation to the company. This proposal of amending the definition of 'related party' is in line with the recommendations of the Companies Law Committee Report.

#### **Turnover:**

Vide the Amendment Bill, the definition of 'turnover' is proposed to be changed which means the gross amount of revenue recognised in the profit and loss account (extant provisions in Companies Act, 2013 – "aggregate value of the realisation of amount") from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company during a financial year. Pursuant to the extant provisions, the excise duty and other taxes might be specifically excluded from the purview of 'turnover'; hence there is proposed amendment to the provisions of Companies Act. Such proposal of amending the definition of 'turnover' is in line with Companies Law Committee Report's recommendations.

#### **Conclusion:**

The above proposed amendments discussed are some of the noteworthy amendments in 'key definitions' prescribed in the Companies Amendment Bill, 2016. The proposed amendments as discussed above are relevant from the perspective of determining relationships amongst companies (holding – subsidiary, associate company), determining 'related parties', consolidation of financial statements, appointment of key managerial personnel, etc. In the ensuing Parliament session, it is proposed that the Companies (Amendment) Bill, 2016 will be passed in both Houses. 87 amendments proposed by the Amendment Bill in the Companies Act, 2013, is to some extent, a great relief to corporates and compliance officers.