

Notes on Loan and Investment by Company

(Section 186 of Companies Act, 2013) post Companies Amendment Act, 2017

APPLICABILITY:

The provisions of the Section 186 of CA, 2013 is applicable to both:

1. Public Company
2. Private Company

EXEMPTION:

1.(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.**

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RESTRICTION ON MULTI LAYERED INVESTMENT [SECTION 186(1) OF CA, 2013]

A Company shall **unless otherwise prescribed**, make investment through **not more than two layers of Investment Companies**. Provided that above restriction is not applicable in following cases:

- 1. A company acquires any other company which is incorporated outside India and such outside company has investment subsidiary beyond 2 layers as per the law of that country;*
- 2. A subsidiary company from having any investment subsidiary for the purpose of meeting of the requirement under any law/rule/regulation;*

“Layer” in relation to a holding company means its subsidiary or subsidiaries. Section 2(87) of CA, 2013

“Investment company” means a company whose principal business is the acquisition of shares, debentures or other securities 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.

Note: Meaning of Investment Company has been made in line of NBFC Co.as per RBI Norms by the Companies Amendment Act, 2017.

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LIMITS FOR LOANS /GUARANTEE/SECURITY/INVESTMENT[SECTION 186(2)]:

No company without prior approval of members shall **directly or indirectly**:

- ❖ Give any loan/guarantee/security to any other body corporate/person;
- ❖ Acquire by way of subscription, purchase or otherwise, the securities of any other body corporate;

exceeding 60% of its paid-up share capital, free reserves and securities premium account **OR** 100% of its free reserves and securities premium account, whichever is more;

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

Note:- *Post Companies Amendment, Act, 2017, loan to employees will not be subject to restrictions under Section 186 (2).*

PRIOR APPROVAL FROM MEMBERS [SECTION 186(3)]:

In case of aggregate limit as specified under sub-section (2), exceeds, a **prior special resolution is required to be passed** in the general meeting.

However, the **shareholders' approval will not be required** 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 subject to the disclosure in financial statement **pursuant to the Companies Amendment Act, 2017.**

DISCLOSURE IN FINANCIAL STATEMENTS [SECTION 186(4)]:

The company shall disclose to the members in the financial statement the:

- a) full particulars of the loans given, investment made or guarantee given or security provided and

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- b) 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.

UNANIMOUS BOARD APPROVAL AND PRIOR APPROVAL OF FINANCIAL INSTITUTION, IF ANY [SECTION 186(5)]

- ✓ Approval of all the directors present at the meeting of the Board of Directors shall be required for making investment/loan/guarantee/security.
- ✓ Prior approval of Public Financial Institution (PFI) is also required where any term loan is subsisting. In case the limit is within 60% or 100% criteria and no default has been made for repayment of existing loan installments/payment of interest then prior approval of PFI is not required.
- ✓ *Provided further that in case of a **Specified IFSC public company/ Specified IFSC private company**, the Board can exercise powers under this sub-section by means of resolutions passed at meetings of the Board of Directors or through resolutions passed by circulation.” [MCA Notification vide Notification no. 08(E) and 9(E) dated 4th January, 2017]*

INTEREST RATE [Section 186(7)]

- ✓ *No loan shall be given at a rate of interest lower than the prevailing yield of 1/3/5/10 year Government Security closest to the tenor of the loan.*
- ✓ *Exemption to the Section 8 Company(in which CG/ SG together hold more than 26 % of paid up share capital) for funding Industrial Research and Development projects in furtherance objects as stated in its memorandum of association.* [MCA Notification dated 13th June, 2017]
- ✓ Companies which are in default in repayment of deposits accepted before or after the commencement of this Act shall not make investment and give any loan/guarantee/security since the default is in continuance; **[Section 186(8)]**

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- ✓ Every company giving loan/guarantee/security or acquisition shall be required to maintain a register in **Form No. MBP-2** in accordance with the **Rule 12 of the Companies (Meetings of Board and its Powers) Rules, 2014; [Section 186(9)]**

PENALTIES:

- The company shall be punishable with fine minimum of Rs.25 thousand and maximum of Rs.5 lacs; *and*
- Every officer of the company who is in default shall be punishable with fine of Rs.25 thousand and maximum of Rs.1 lac **AND** imprisonment upto 2 years.

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