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# An Introspective Analysis on Acceptance of Deposits by a Company: When and How

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## ABSTRACT

*A Company is a juristic person or a separate legal entity, in the eyes of law and it runs its business with the help of the directors, who standing in a fiduciary relationship with the company, has its mind and will. Like other forms of business such as Partnership, Sole Proprietorship etc, a Company, amongst other things, requires capital in order to run its business. In the words of most prominent Company Jurists and Economists as a Company exists in the society to make profits and nothing more and so by this type of interpretation of the existence of a Company, capital becomes all the more important. But then the question arises as to where from the Company would get its capital to run its business in a smooth manner, the answer to that quite evidently is “Public Deposits” which in its simplest terms means to get money from the public or to put it in the terms of business it means an arrangement between the company and the public whereby the public entrusts the money with the company, with a view to get profits in return. The Companies Act, 2013 read with the Companies (Acceptance of Deposit) Rules, 2014 regulates the manner in which a Company can accept deposits from the public. At this juncture it is indispensable to mention that under the Indian Company Law regime only a Public Company is eligible to invite deposits from the public, and such companies as generally under the heavy scrutiny of the MCA and SEBI as Public Money is involved. The Companies Act, 2013 read with the Companies (Acceptance of Deposit) Rules, 2014 allows a company not only to accept deposits from the public, but also allow it to accept it from its members. This paper would elaborate and analyze both situations. A Company may accept funds from public in various ways and forms such as by issuing of shares in its various forms such as equity shares, preference shares etc., by issuing Debentures in different forms such as convertible and non-convertible debentures etc. this paper would discuss and analyze the forms of deposits as a source of fund a company can accept and its effect on the Capital Structure of the Company and also how it affects the company in the long run in running its business.*

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## I. INTRODUCTION

### **(A) The Concept of “Company” Under Company Law:**

A Company is a juristic person or a separate legal entity, in the eyes of law and it runs its business with the help of the directors, who standing in a fiduciary relationship with the company, has its mind and will. To put simply, it is a form of business, in which the risk is the least, when compared to others forms owing to its limited liability i.e. the share holders are only liable till the paid up capital. This means a creditor of a company cannot go after the personal assets of the directors or the shareholders in case the company defaults, only in a very limited number of cases the directors of a company are held liable, personally.

Coming to the Indian Perspective, the law regarding Companies is the Companies Act, 2013. Sec. 2(20) of the Companies Act, 2013 defines company as a company incorporated under the Companies Act, 2013 or any other previous Company Law. The statutory definition of a company under the Companies Act, 2013 does not clearly point out as to what a company actually is. Thus, ***Kimball and Kimball***, have very appropriately defined Company as “A corporation is by nature an artificial person created or authorised by the legal stature for some specific purpose.”

Now the main issue being faced by a company is as to where from the Company would get its capital to run its business in a smooth manner, the answer to that quite evidently is “*Public Deposit*” which in its simplest terms means to get money from the public or to put it in the terms of business it means an arrangement between the company and the public whereby the public entrusts the money with the company, with a view to get profits in return. The Companies Act, 2013 read with the Companies (Acceptance of Deposit) Rules, 2014<sup>2</sup> regulates the manner in which a Company can accept deposits for the smooth functioning of its business and to strive towards its motive of making profits.

### **(B) The concept of raising funds by the company for the smooth running of its business:**

Companies generally raise funds through issue of equity or preference shares, debentures, and commercial papers and inter corporate loans. Deposits are also one of the sources available to a company to raise funds to meet the short term or long term requirements of the company.

Section 73<sup>3</sup> to 76<sup>4</sup> of the Companies Act, 2013 (herein after called the Act) read with

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<sup>2</sup> The Companies (Acceptance of Deposit) Rules, 2014 (India).

<sup>3</sup> The Companies Act, Act No. 18 of 2013, § 73, India Code (2013).

<sup>4</sup> The Companies Act, Act No. 18 of 2013, § 76, India Code (2013).

Companies (Acceptance of Deposits) Rules, 2014 made under Chapter V of the Act, regulate the invitation and acceptance of deposits being prepared by the Central Government in consultation with the Reserve Bank of India. It prohibits acceptance of deposits except from the members through ordinary resolution or acceptance deposits by ‘eligible company’ being a public company, subject to conditions specified in the rules.

The provisions under Sections 73 to 76 of the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014 shall apply to all companies except –

- a banking company and
- a non-banking financial company as defined in the Reserve Bank of India Act<sup>5</sup>, 1934 and
- a housing finance company registered with the National Housing Bank established under the National Housing Bank Act<sup>6</sup>, 1987; and
- such other company as the Central Government may, after consultation with the Reserve Bank of India, specify in this behalf. [Section 73(1) read with Rule 1(3)<sup>7</sup>]

## **II. MEANING AND SCOPE OF THE CONCEPT OF DEPOSITS**

According to the Section 2(31)<sup>8</sup> of the Act read with Rule 2(c)<sup>9</sup> of Companies (Acceptance of Deposits) Rules, 2014 “deposit” includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include the following amounts as may be prescribed in consultation with Reserved Bank of India, they are as follows :

1. Any amount received from the Central Government or a State Government or local authority or statutory authority, or any amount whose repayment is guaranteed by the Central Government or a State Government;
2. Any amount received from foreign Governments, foreign or international banks, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India;
3. Loans or facility from banks;
4. Loans from Public Financial Institutions/ Insurance Companies;
5. Any amount received against issue of commercial paper or any other instruments;

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<sup>5</sup> Reserve Bank of India Act, Act No. 2 of 1934, India Code (1934).

<sup>6</sup> National Housing Bank Act, Act. No. 53 of 1987, India Code (1987).

<sup>7</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 1(3), India Code (2014).

<sup>8</sup> The Companies Act, Act No. 18 of 2013, § 2 (31), India Code (2013).

<sup>9</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 2(c), India Code (2014).

6. any amount received by a company from any other company;
7. Any amount received through Public offer. However, if securities not allotted within 60 days and refund not made within 15 days then such amount will be treated as Deposit;
8. Any amount received from the director of the company and in case of private company also from the relative of the director of the company subject to the condition that the amount has been given from own's fund and not from borrowings.
9. Any amount raised by the issue of bonds or debentures secured by a first charge or a charge ranking pari passu with the first charge, compulsorily convertible within 10 years;
10. Any amount raised by issue of Unsecured Non-convertible debentures;
11. Non-interest-bearing security deposit from employee of the company under the contract of employment to the extent not exceeding his annual salary;
12. Any non-interest bearing amount received and held in trust;
13. Any amount received in the course of business –
  - (a) As advance for supply of good or services provided that such goods or services are supplied within 365 days of the receipt of advance;
  - (b) As advance in connection with consideration for an immovable property provided such advance is adjusted against such property in accordance with the terms of the agreement;
  - (c) As security deposit for the performance of the contract;
  - (d) As advance under long term projects for supply of capital goods;
  - (e) As advance towards consideration for future warranty or maintenance contract;
  - (f) As advance received which is allowed by any sectoral regulator;
  - (g) As advance for subscription towards publication;
14. Any amount of unsecured loan brought in by the promoters subject to the fulfilment of the following conditions:
  - (a) The loan is brought in pursuance of the stipulation imposed by the lending institutions on the promoters to contribute such finance;
  - (b) The loan is provided by the promoters themselves or by their relatives or by both; and
  - (c) The exemption under this sub-clause shall be available only till the loans of financial

institution or bank are repaid and not thereafter;

15. Any amount accepted by a Nidhi Company;
16. Any amount received by way of subscription in respect of a chit under the Chit Fund Act, 1982;
17. Any amount received by the company under any collective investment scheme;
18. An amount of 25 lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person;
19. Any amount received by a company from registered Alternate Investment Funds, Domestic Venture Capital Funds, Infrastructure Investment Trusts and Mutual Funds

### **Understanding the Scope of deposits through an example:**

Rs. 50 Lakhs from issue of bonds and debentures: Company can raise money by way of bonds and debentures provided amount is secured by a first charge against property; or such bonds or debentures should be compulsorily convertible into shares within 5 years; otherwise it would come under the definition of deposits.

### **III. ACCEPTANCE OF DEPOSITS: THE RULES AND THE PROCEDURES**

Section 73<sup>10</sup> of the Companies Act, 2013 read with the Companies (Acceptance of Deposits) Rules, 2014 made thereunder contain the restrictions and limitations subjected to which deposits may be invited or accepted by the companies. The mode of such acceptance has been categorized under two main heads-

- Acceptance of Deposits from Members of the company;
- Acceptance of Deposits from the Public.

#### **(A) Acceptance of Deposits from the Members of the Company<sup>11</sup>:**

Section 73(2) states that a company, public as well as a private company may subject to the passing of a resolution in a general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposits from its members on such terms and conditions, including the provision of security, if any, or for the repayment of such deposits with interest, as may be agreed upon between the company and its members, subjected to the fulfillment of the following conditions –

<sup>10</sup> The Companies Act, Act No. 18 of 2013, § 73, India Code (2013).

<sup>11</sup> DR. G.K. KAPOOR, et al., TAXMANN'S COMPANY LAW, 205 (23<sup>rd</sup> Ed. 2018)

- a) Issuance of a circular to its members;
- b) Filing a copy of the circular along with such statement with the Registrar within thirty days before the date of issue of the circular;
- c) Depositing, on or before the 30th day of April each year, such sum which shall not be less than twenty per cent. of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called “**Deposit Repayment Reserve Account**” and the amount so deposited shall not be utilized for any purpose other than for the repayment of deposits;
- d) Certifying that the company has not committed any default in the repayment of deposits accepted either before or after the commencement of this Act or payment of interest on such deposits and where a default had occurred, the company made good the default and a period of five years had lapsed since the date of making good the default and
- e) Providing security, if any for the due repayment of the amount of deposit or the interest thereon including the creation of such charge on the property or assets of the company:

Provided that in case where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as “**unsecured deposits**”.

***Deposit accepted before the commencement of the Act:***

Section 74(1) states that when, in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall— (a) file, within a period of three months from such commencement or from the date on which such payments, are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and (b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.<sup>12</sup>

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<sup>12</sup> Bimla Kothari v. Unitech Ltd., (2016) 199 Comp. Cas 508 (India).

As mentioned by the Hon'ble Supreme Court in the case of *Bimla Kothari v. Unitech Limited*<sup>13</sup>, it was held that there is no categorization or difference between deposits accepted prior or after 2013 Act, thus investors are entitled for the repayment filed under the 2013 Act even for the deposits that were accepted by the companies before the commencement of the said act.

**Implications for failing to repay the amount of the deposit:**

Section 74(3) states that if a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, *be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees* and *every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.*

**Exemption to small Private Companies: Ceiling Limit of Deposit**

Section 73 (2) shall not apply to any private companies having 50 or less number of members if they accept monies from their members not exceeding 25% of aggregate of the paid up capital and the free reserves or 100% of the paid up capital, whichever is more and which inform the details of such monies to the registrar in the prescribed manner<sup>14</sup>.

Now the second most followed and widely used mode of acceptance of deposit is to be discussed in the following portions.

**(B) Acceptance of Deposits from the Public, u/s 76, Companies Act 2013 :**

As per Rule 2(1)(e) of Companies (Acceptance of Deposits) Rules, 2014, "Eligible company" means a public company having a net worth of not less than 100 crore rupees or a turnover of not less than 500 crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies and where applicable, with the Reserve Bank of India before making any invitation to the Public for acceptance of Deposits

Section 76(1) states that notwithstanding anything contained in section 73, a public company, having such net worth or turnover as may be prescribed, may accept deposits from persons other than its members subject to compliance with the requirements provided in sub-section

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<sup>13</sup> *Ibid.*

<sup>14</sup> Draft Notification F. No. 1/1/2014-CL.V, dated 24-6-2014.

(2) of section 73 and subject to such rules as the Central Government may, in consultation with the Reserve Bank of India, prescribe. Every company accepting secured deposits from the public shall within thirty days of such acceptance, create a charge on its assets of an amount not less than the amount of deposits accepted in favour of the deposit holders in accordance with such rules as may be prescribed. Section 76(2) states that the provisions of this Chapter shall, Acceptance of Deposits 11 mutatis mutandis, apply to the acceptance of deposits from public under this section.

➤ **Terms and conditions for acceptance of deposits from are public as follows:**

**1) Time period:** No company under section 73(2) and no eligible company shall accept or renew any deposit, within a period of less than six months or more than thirty-six months from the date of acceptance or renewal of such deposit.

**2) Joint names:** Deposits may be accepted in joint names not exceeding three, [Rule 3(2)].

**3) Acceptance Limit for Deposits:** (i) No company (except private company) referred to in section 73(2) shall accept or renew any deposits from its Members, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal of such deposits exceeds 25% of the aggregate of the paidup share capital and free reserves of the company. [Rule 3(3)]<sup>15</sup> (ii) No Eligible company shall if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members exceeds 10% of the aggregate of the paid-up share capital and free reserves of the company; (iii) No Government company eligible to accept deposits if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds 35% of the aggregate of its paid up share capital and free reserves of the company. [Rule 3(5)]<sup>16</sup>

**4) Rate of interest and brokerage:** No company under section 73(2) or any Eligible company shall invite or accept brokerage thereon at a rate exceeding the maximum rate of interest prescribed by the Reserve Bank of India for. [Rule 3(6)]<sup>17</sup>

**5) Alteration of terms and conditions:** The Company shall not reserve to itself either directly or indirectly a right to alter, to the prejudice or disadvantage of the depositor.[Rule 3(7)]<sup>18</sup>

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<sup>15</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 3(3), India Code (2014).

<sup>16</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 3(5), India Code (2014).

<sup>17</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 3(6), India Code (2014).

<sup>18</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 3(7), India Code (2014).

**6) Credit Rating:** Every Eligible Company shall obtain, at least once in a year, credit rating for deposits accepted by it and a copy of the rating shall be sent to the Registrar of Companies along with the return of deposits in Form DPT-3. [Rule 3(8)]<sup>19</sup>

**7) Creation of Security [Rule 6] :** Every company referred to in section 73(2) including Private Company and every eligible company inviting secured deposits shall provide for security by way of a charge on its assets as referred to in Schedule III of the Act excluding intangible assets of the company for the due repayment of the amount of deposit and interest thereon for an amount which shall not be less than the amount remaining unsecured by the deposit insurance.

**8) Trustee for Depositors • Deposit trust deed:** It shall be the duty of every deposit trustee to ensure that the assets of the company on which charge is created together with the amount of deposit insurance are sufficient to cover the repayment of the principal amount of secured deposits outstanding and interest accrued thereon.[Rule 8]<sup>20</sup>

**10) Repayment of Deposit:**A company when fails to repay the deposit or part thereof or any interest thereon under sub-section the depositor concerned may apply to the Tribunal/CLB for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal/CLB may deem fit. [Section 73(4)]

**11) Deposit Repayment Reserve Account:** Every company referred in section 73(2) (except Private Company) or any Eligible Company inviting accepting deposits from members has to deposit before the 30th day of April of each year, a amount of not less than 15% of its deposits maturing during a financial year and the financial year next following, in a scheduled bank in a separate bank account to be called as deposit repayment reserve account. [Section 73(2)(c) and Rule 13]<sup>21</sup>

**12) Registers of Deposits [Rule 14]<sup>22</sup>:** Every company accepting deposits shall, from the date of such acceptance, keep at its registered office one or more separate registers for deposits accepted/renewed, in which there shall be entered separately in the case of each depositor the particulars, namely: (a) Name, address and PAN of the depositor/s; (b) Particulars of guardian, in case of a minor; (c) Particulars of the nominee; (d) Deposit receipt number; (e) Date and amount of each deposit; (f) Duration of the deposit and the date on

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<sup>19</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 3(8), India Code (2014).

<sup>20</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 8, India Code (2014).

<sup>21</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 13, India Code (2014).

<sup>22</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 14, India Code (2014).

which each deposit is repayable; (g) Rate of interest; (h) Due date(s) for payment of interest; (i) Mandate and instructions for payment of interest and for non-deduction of tax at source, if any; (j) Date or dates on which payment of interest will be made

**13) Penal rate of interest [Rule 17]<sup>23</sup>** : Every company shall pay a penal rate of interest of 18% per annum for the overdue period in case of deposits, whether secured or unsecured, matured and claimed but remaining unpaid.

#### IV. SCOPE OF RESCHEDULING REPAYMENT OF DEPOSITS:

Through a number of case laws though the span of the different years of development, the perception and limitations to the scope of rescheduling has seen numerous variations amongst which the main cases and their decisions are as follows-

Starting with the case of *Unitech Ltd., In re*<sup>24</sup>, in the year 2016, the National Company Law Tribunal observed the failure of the company in the payment of Rs. 30 crores and thus having a stricter rule dismissed its petition which was laid seeking for further extension of the repayment time period. Following this, in that very immediate year 2016, in the famous case of *Ansal Housing and Construction Ltd., In re*<sup>25</sup> a further extension of time petition was rejected even if the company had no history of any instance of previous defaults, even in the very recent case of *SRS Ltd., In re*<sup>26</sup>, and in the case of *Ind- Swift Ltd., In re, in the year 2018*<sup>27</sup>, the NCLT was again seen to not accept any plea of extension of time for the scope of repayment. Thus the scope of rescheduling does not face mush validation and implementation in the hands of law.

#### V. CONCLUSION

The provisions of Companies Act 2013 read with rules made under Chapter V, has brought several revamping aspects to protect the interest of depositors. The gist of provisions discussed above determines that a Company may accept deposit from its members by passing a resolution in general meeting and subject to conditions as may be prescribed in the Rules including Credit rating, Deposit insurance etc. Secondly, Public companies may accept deposits, if it has a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the

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<sup>23</sup> The Companies (Acceptance of Deposit) Rules, 2014, Rule 17, India Code (2014).

<sup>24</sup> *Unitech Ltd., In re*, (2015) 131 SCL 162 (India).

<sup>25</sup> *Ansal Housing and Construction Ltd., In re*, (2016) 75 taxmann.com 260 (NCLT New Delhi).

<sup>26</sup> *SRS Ltd., In re*, (2018) 90 taxmann.com 129 (NCLT Chandigarh).

<sup>27</sup> *Ind- Swift Ltd., In re*, (2018) 89 taxmann.com 149 (NCLT Chandigarh).

Registrar of Companies and where applicable, with the Reserve Bank of India before making any invitation to the Public for acceptance of Deposits. Thirdly, No company under sub-section (2) of section 73 or any eligible company shall issue a circular or advertisement inviting secured deposits unless the company has appointed one or more deposit trustees for creating security for the deposits. Fourthly, Contract providing for deposit insurance at least thirty days before the issue of circular or advertisement. Lastly, Companies accepting deposit from members or eligible companies as defined, has to fulfill the conditions specified in Companies(Acceptance of Deposits)Rules 2014. Deposits are one of the most important sources available to a company to raise funds to meet the short term or long term requirements of the company and help in the furtherance of the smooth functioning of the company.

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