CHAPTER I

PRELIMINARY

1. The definition of associate company under section 2(6) of the Act includes two specific terms, 'significant influence' and 'joint venture'. While 'significant influence' has been explained the latter has not been. What do these terms mean ?

The Companies (Amendment) Bill, 2016 has modified the explanation given under the existing section 2(6) as follows :

(a) The expression 'significant influence' means control of at least twenty per cent of total voting power, or control of or participation in business decisions under an agreement;

(b) The expression 'joint venture' means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement.

2. As per section 2(30) of the Companies Act, 2013, "debenture" 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. Are there any exclusions from this definition ?

As per the proviso to this section to be inserted by the Companies (Amendment) Bill, 2016, the following shall not be considered as debenture:

(a) The instruments referred to in Chapter III-D of the Reserve Bank of India Act, 1934; and

(b) Such other instrument, as may be prescribed by the Central Government in consultation with Reserve Bank of India, issued by a company.

3. The definition of 'small company' stands altered once the Companies (Amendment) Bill, 2016 is passed. What is the new definition accorded to this term in the said bill ?

"Small company" means a company, other than a public company, –

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and

(ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

4. Is the term 'vanishing company' defined under the Companies Act, 2013 ? What does it include ?

The term 'vanishing company' is not defined under section 2 of the Companies Act, 2013. Rather, it is defined under the Explanation to rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016. 'Vanishing company' means a company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable

5. A director getting remuneration is an Executive director. Can this be taken as a true and correct interpretation of the term since a proper definition of executive director is not mentioned in the Act ?

As per rule 2(k) of the Companies (Specification of Definitions Details) Rules, 2014, 'Executive Director' means, "a whole-time director as defined in clause (94) of section 2 of the Act". Further, section 2(94) defines that "whole-time director includes a director in whole-time employment of the company Hence, if a person is appointed as a director of the company and he is also in employment of the company, he becomes a director in whole-time employment of the company, accordingly will be called as whole-time director of the company and therefore, the executive director of the company.

Also, it has been provided under section 2(78) that "remuneration" means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income-tax Act, 1961.

Thus, remuneration is not the only criteria to determine whether the director

is Executive director or not. A person may be an executive director without drawing any remuneration and may also draw remuneration in professional capacity though not holding any executive position.

6. A private limited company has a paid-up share capital Rs. 40 lakh and its turnover as per the last audited financial statements is Rs. 20 crore. Will the company be treated as a small company ?

As per section 2(85), small company means a company other than a public company, –

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; and

(ii) turnover of which as per its last profit and loss account does not exceed 2 crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to –

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act .

The above section 2(85) after issuance of Companies (Removal of Difficulties) Order 2015 dated 13.02.2015 has used the word "AND" between sub clauses (i) and (ii), and not the word "OR". Accordingly, a private company fulfilling both the criteria of the abovementioned two conditions, *i.e.*, either turnover less than Rs. 2 crore or paid up capital less than Rs. 50 lacs will be considered as small company. Hence, the company in question shall not be a treated as a 'small company'.

CHAPTER II

INCORPORATION OF COMPANY AND MATTERS INCIDENTAL THERETO

1. In a company, the minimum number of members required to form a company has been stated under section 3 of the Act. What shall be the effect of the number of members falling below the minimum requirement ?

The Companies (Amendment) Bill, 2016 proposes to insert a new section 3A. The newly proposed section 3A shall provide for the effect of number of members falling below the minimum. The said section states that if at any time the number of members of a company is reduced, in the case of a public company, below seven; in the case of a private company, below two, and the company carries on business for more than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

2. SPICe Form INC-32 for incorporation of a company contains a specific list of documents to be attached therewith. Are there any additional documents in which may be attached apart from those mentioned therein ?

Certain additional documents other than those listed as attachment to SPICe Form INC-32 are required to be attached while filing the form. Some of these documents include:

(i) Consent from proposed directors in Form DIR-2 along with ID and address proof;

(ii) Certified copy of COI and Board resolution in case the subscriber/ promoter is a Company incorporated outside India (duly notarized and apostilled, as per the rule); and

(iii) Declaration from all the proposed directors holding valid DIN that the particulars in their respective DIN are same as of date and there is no change.

3. It has always remained a pre-condition that the proposed name of a company to be incorporated must not be similar or akin to the name of a company already in existence. How can a rejection on these lines be avoided at the ROC end ?

Before filing Form INC-1 or SPICe Form INC-32, it is advised that rule 8 of the Companies (Incorporation) Rules, 2014 should be referred to, so as to avoid this issue. Furthermore, the key words of proposed name must be checked beforehand at the MCA web portal as well as at the web portal of Intellectual Property India – trademarks to rule out the existence of similar name.

On a practical note, if and in case the proposed name of a company to be incorporated looks general, then one may add name of a promoter or a mix of the initials of the promoters before such general word to avoid ambiguity as well as rejection. For example, if the proposed name of a company is 'King Private Limited', then, instead of filing an application for such a name which is common and may be rejected, the initials of one or more promoters of the company may be prefixed and the form may be filed for the name 'PKM King Private Limited'. Chances are likely that the latter name shall be approved of on the basis that it being a specific word and not general.

4. A person may make an application, in such Form INC-1 accompanied by such fee, as may be prescribed, to the Registrar for the reservation of a name set out in the application as the name of the proposed company or the name to which the company proposes to change its name. What is the time limit for which such name is reserved by the Registrar against the application received in this regard ?

While the original time period for reservation of name with the Registrar was 60 days from the date of filing the application, the same was a point of concern for the fact that it began from the date of application.

However, the Amendment Bill of 2016 proposes that the time limit for

reservation of name shall be altered. As per section 4(5)(i), upon receipt of an application, the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of twenty days from the date of approval or such other period as may be prescribed.

5. A company already registered with a certain name enters into new set of activities of business which are not in consonance with the name of the company. Can a company continue with such activities of business ?

As per sub-rule (2) of rule 8 of the Companies (Incorporation) Rules, 2014,

(b) The name shall also be considered undesirable, if –

(iii) the company's main business is financing, leasing, chit fund, investments, securities or combination thereof, such name shall not be allowed unless the name is indicative of such related financial activities, *viz.*, Chit Fund or Investment or Loan, etc....

(xiii) the proposed name include words such as 'Insurance', 'Bank', 'Stock Exchange', 'Venture Capital', 'Asset Management', 'Nidhi', 'Mutual fund' etc., unless a declaration is submitted by the applicant that the requirements mandated by the respective regulator, such as IRDA, RBI, SEBI, MCA, etc., have been complied with by the applicant.

As per the law, a company can continue with the same name even when it enters a new set of activities of business provided that the name of the company would have been allowed for such business activities. For example, if a company is incorporated as a normal operating company and does not have indicative financial activities in its name, it will not be compliant for such a company to then start financing business without changing its name. The principle of law is what cannot be done directly cannot be done indirectly. Accordingly, the new business must also be evaluated in the context of name requirements to stay compliant.

6. Can a company have a registered office from the date of its incorporation ?

The Companies (Amendment) Bill, 2016 intend to remove the barrier upon

the companies of having a registered office only after 15 days of incorporation and has proposed to increase the number of days available to a company for having a registered office. As per proposed section 12(1) of the Companies Act, 2013, a company shall, within thirty days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. Presently, a company has to comply with existing provisions of section 12 of the Companies Act, 2013.

7. Can a trust or society or an LLP become a subscriber of a company ?

According to the Companies (Incorporation) Rules, 2014, the MoA and AoA of a company shall be signed by each subscriber to the memorandum. Rule 13(2), (3), (4) and (5) of the said Rules detail the various circumstances of subscription. Rule 13(4) reveals the manner in which a body corporate and an LLP being a subscriber to the memorandum of the company shall sign. While a cooperative society is categorized under body corporate under section 2(11) of the Act, there is no specific mention about trust. At the same time, under the 2013 Act there is no bar that a Trust cannot hold shares in a company. Accordingly there is no specific legal provision which bars a Trust to become a subscriber of a company.

Hence, it may be concluded that a Cooperative Society or an LLP can be a subscriber of a company, and in so far as a registered trust is concerned it can subscribe to the memorandum through its Trustee acting for the trust and all compliances similar to those applicable for a body corporate must be complied with as if the trust is a body corporate and the Trustee should sign as subscriber in the capacity of the Trustee. Further a society registered under the provisions of Society Registration Act, 1860 cannot be subscriber to Memorandum of Association.

8. For a company incorporated in the Companies Act, 2013, the AOA & MOA have already been drafted under the previous Act ? Do we need to file SPICe Forms INC-33 & INC-34 in case of alteration ?

1. Pass a special resolution in an EGM & file Form MGT-14 for alteration of AOA.
2. In case of conversion of public company to private company or vice versa – Form INC-27.

3. For the alteration of MOA the following forms are required to be filed with the MCA :
   (a) Name clause - Form INC-1, Form INC-24 and Form MGT-14
   (b) Registered Office clause - Form MGT-14, Form INC-23 & Form GNL-2
   (c) Object clause - Form MGT-14
   (d) Capital clause - Form SH-7.
4. For the alteration of AOA, for effecting the conversion of a private company into a public company or vice versa, the application shall be filed in Form INC-27.

SPICe Form INC-33 (E-Memorandum of Association) and & Form INC-34 (E-Articles of Association) are only for incorporation and not for alteration.

9. A newly incorporated company intends to receive the subscription money in cash. Can it do so ?

There is no prohibition/restriction under the Companies Act, 2013 for receiving the subscription money in cash (*i.e.*, not through account payee cheque or other banking channel). However, the company and/or subscriber(s) has(ve) to comply with the provisions of the Income Tax Act, 1961 with regard to cash transaction.

10. A company incorporated under the Companies Act, 1956 had its MOA and AOA drafted according to the said Act. Is it mandatory for the company to alter its MOA & AOA as per the Companies Act, 2013 ? Further, if the MOA and AOA are altered to fall in sync with the Companies Act, 2013, Is it mandatory for the company to file Form MGT-14 ?

Section 5(6) of the Companies Act, 2013 provides that the articles of a company shall be in respective forms specified in Tables F, G, H, I and J in Schedule I as may be applicable to such company.

However, section 5(9) provides that nothing in this section shall apply to the articles of a company registered under any previous law unless amended under the Act.

There is no mandatory provisions in the Companies Act, 2013 to alter the clauses of MOA and AOA to sync with new provisions of Companies Act 2013. However, it is advisable that whenever a company amends its

articles, it should ensure that subsequent to the amendment, the AOA is as per the format specified under the Companies Act, 2013.

Since certain provisions of Companies Act, 2013 require specific clauses in the Articles to carry out such operations, e.g., for issuance of bonus shares; it is advisable that the Articles should be altered in line with the new requirements as various provisions themselves require specific clauses to be incorporated in the Articles.

As regards the filing of form, as per the Companies Act, 2013, it is mandatory to pass a special resolution and file Form MGT-14 if the MOA or/and AOA is/are altered.

11. A company incorporated under the previous Companies Act has not adopted new AOA as per the Companies Act, 2013. The Articles of the company do not contain provisions pertaining to dematerialisation of equity shares. Should the company amend the AOA to include the clause empowering such dematerialisation or adopt new AOA as per the Companies Act, 2013 ?

It is advisable to adopt new AOA as per the Companies Act, 2013 and add a clause related to dematerialisation of shares. If the company intends to amend its existing AOA by simply adding a dematerialisation clause and file Form MGT-14, the same may invite an objection by the Registrar who may insist upon the adoption of the new Articles of Association as prescribed under the Companies Act, 2013 depending upon the provisions of the subsisting AOA. In any case, the Companies Act, 2013 by virtue of section 6 overrides any provisions in the subsisting AOA which are at variance with the Companies Act, 2013.

12. A company incorporated through SPICe Form INC-32, Form INC-33 and Form INC-34 wants to alter MOA & AOA. Are physical copies of MOA and AOA required to be attached with Form MGT-14 ? Also, is the company required to file amended SPICe Form INC-33 and Form INC-34 in case of alteration ?

The Companies Act, 2013 has provided the format of MOA (Table A to E of Schedule I) and AOA (Table F to J of Schedule I) and the SPICe Form INC-33 and Form INC-34 have also adopted the said format of respective table as applicable to the company.

Accordingly, for alteration of MOA and/or AOA, scanned copy of amended MOA and/or AOA will be required to be attached with the e-

Form MGT-14. However, the SPICe Form INC-33 and /or Form INC-34 need not be amended and filed again.

13. A company intends to change its main objects. Can it do so without changing its name ?

The main objects of a company can be changed without changing name of the company after complying with the provisions of section 13 of the Companies Act, 2013. In certain situations, there are guidelines about the name of the company and the business to be carried on by the company. The same will also be needed to be kept in view depending upon the change in the objects clause and consequential effect on the feasibility of continuing with the old name.

14. A company already registered with a certain name enters into new set of activities of business which are not in consonance with the name of the company. Can the company continue with such activities of business ?

In case the new set of activities of business is as per the approved objects of MOA, the company can continue with the same name.

15. The Companies (Incorporation) Rules, 2014 have been amended on 25th January, 2017 to substitute the existing Certificate of Incorporation issued by the Registrar in Form INC-11 so as to inculcate which important element ?

As per the Companies (Incorporation) Amendment Rules, 2017, the Certificate of Incorporation issued by the Registrar in Form INC-11, apart from the Corporate Identity Number (CIN) shall also include the Permanent Account Number (PAN) of the company issued to it by the Income-tax department.

CHAPTER III

PRIVATE PLACEMENT

1. A company intends to make a preferential offer to its existing members only. Is the company required to maintain a complete record of Private Placement Offer in Form PAS-5, in such case ?

Proviso to rule 13(1) of the Companies (Share Capital and Debentures) Rules, 2014 provides that in case of any preferential offer made by a company to one or more existing members only, the provisions of sub-rule (1) and proviso to sub-rule (3) of rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply.

Accordingly, in such cases, the company is not required to make a Private Placement offer letter in Form PAS-4 and file the same with the Registrar of Companies.

However, a complete record of private placement offer is required to be maintained in Form PAS-5 as the same has not been exempted.

It may also be noted that the proviso to rule 14(3) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply due to the insertion of a new proviso under rule 13 of the Companies (Share Capital & Debentures) Amendment Rules, 2015 notified w.e.f. 18th March, 2015, filing of record through Form PAS-5 is not required.

2. What is the time limit prescribed for filing a return of allotment under section 42 pertaining to private placement ? Are there any penalties leviable for the non-compliance of the said provisions ?

A company making any allotment of securities under section 42(9) of the Companies Act, 2013, shall file with the Registrar a return of allotment within thirty days as per rule 14(4) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 from the date of the allotment in such manner as may be prescribed, including a complete list of all allottees, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed.

There is no penalty prescribed in section 42 w.r.t. penalty for non filing of such return of allotment, so the penalty as prescribed in section 450 of the Act shall be leviable. Further, the Companies (Amendment) Bill, 2016 has proposed amendment to sub-section (9) to section 42, which states that if a company defaults in compliance of section 42 with regard to filing the return of allotment within the period prescribed under sub-section (8), the company, its promoters and directors shall be liable to a penalty for each default of one thousand rupees for each day during which such default continues but not exceeding twenty-five lakh rupees.

[The abovementioned reply takes into account the alterations to be brought about by the Companies (Amendment) Bill, 2016].