

## **26.1 DEPOSITS FROM PUBLIC AND MEMBERS**

A company can accept deposits from members and public. Such deposits can be secured or unsecured.

There were many instances where unscrupulous companies duped the investors by accepting public deposits without any limit and hence control over acceptance of public deposits is provided under Companies Act.

Presently, deposits are not popular due to severe restrictions on issue of public deposits.

The provisions of 'deposits' have been revamped in the 2013 Act.

Provisions regarding deposits are contained in sections 73 to 76 of Companies Act, 2013 [corresponding to sections 58A and 58AA of the 1956 Act]

Companies (Acceptance of Deposits) Rules, 2014 make provisions in respect of deposits. [Earlier Companies (Acceptance of Deposits) Rules, 1975 framed under section 58A of the 1956 Act were held valid in *Delhi Cloth & General Mills v. UOIAIR* 1983 SC 937 = (1983) 2 Comp LJ 281 = (1983) 4 SCC 166 = 54 Comp Cas 674 (SC 3 member bench)]

### ***Borrowings which were 'deposits' as per 1956 Act but are not 'deposits' under the 2013 Act***

- The definition of 'deposit' has been considerably tightened under the 2013 Act. Many borrowings accepted prior to 1-4-2014 were 'deposits' under the 1956 Act but do not come under definition of 'deposit' under the 2013 Act e.g. deposits accepted by private companies from its members, directors and relatives prior to 1-4-2014.

It has been clarified that these shall not be considered as 'deposits' under the 2013 Act. However, its renewal or acceptance of fresh deposits will be as per provisions of Companies Act, 2013 - MCA circular No. 05/2015 dated 30-3-2015.

In fact, this clarification should apply to public companies also, since the term 'deposit' is to be interpreted on the basis of definition on the date when the deposits were accepted, and not on basis of any subsequent change in the definition.

***Matters relating to public deposits can be passed in Board meeting or through circular resolution*** - Any Board resolution to invite, accept or renew public deposits and related matters, to review or change terms and conditions of public deposits can be passed either by circular resolution of board or in board meeting.

Till 18-3-2015, these resolutions were required to be passed at meeting of Board and not through circular resolution - Rule 8(7) and 8(8) of Companies (Meetings of Board and its Powers) Rules, 2014. These sub-rules have been omitted w.e.f. 18-3-2015.

**State Government has no power in regulating public deposits** - Regulation of public deposits is Union subject. State Government cannot pass legislation in respect of default in repayment of deposits - *Vijay C Puljal v. State of Maharashtra* (2005) 64 SCL 589 (Bom HC FB).

### 26.1-1 What is a 'deposit'

"Deposit" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India [section 2(31) of Companies Act, 2013 - corresponding *Explanation* to section 58A(11) of the 1956 Act].

In *Vijay Kumar Gupta v. Eagle Paint* (1999) 95 Comp Cas 810 (CLB), it was observed that any amount borrowed shall be included in definition of 'deposit', subject to certain exceptions as spelt out in deposit rules.

**Deposits are NBNFC deposits** - Deposits are deposits by 'Non-Banking Non-Financial Companies'. Deposits by Banks and Non-Banking Financial Companies (NBFC) are under supervision of RBI.

**Deposit is an actionable claim** - The fixed deposits (public deposits) are unsecured. It is an 'actionable claim' as per section 3 of Transfer of Property Act - *Maiyan Dalip Rajeshwari Debi v. Sri S Mohan Bikram Sah* AIR 1945 All 409 - quoted and same view upheld in *A Sesha Charyulu v. Pennar Industries Ltd.* (2004) 54 SCL 127 (CLB).

**Deposit creates a relation of debtor and creditor** - Deposit creates relationship of debtor and creditor - *Shanti Prasad v. Director of Enforcement* - AIR 1962 SC 1764 = (1963) 2 SCR 297 - quoted with approval in *Siddheshwar Sahakari Sakhar Karkhana v. CIT* 2004 AIR SCW 5336.

**Wide definition of deposit** - The definition is very wide, as it includes 'any amount borrowed by the company'. Thus, it includes all loans (secured or unsecured) obtained from any source - even from banks, financial institutions or directors. This is not common understanding of the word 'deposit'.

### 26.1-2 Every loan is not 'deposit'

Though definition of 'deposit' is very wide, there is clear distinction between a 'loan' and deposit.

The terms 'deposits' and 'loan' may not be mutually exclusive, but nonetheless, in each case, intention of parties and circumstances must be considered. Distinction between deposit and lending has been made in Limitation Act. Hence, distinction between loan and deposit is fine but appreciable - *Durga Prasad Manderia v. Registrar* (1987) 61 Comp Cas 479 (Bom HC).

In both borrowing and deposit, there is relationship of debtor and a creditor. But in case of a deposit, delivery of money is usually at the instance of giver and it is for the benefit of the person who deposits the money. In the case of loan, however, it is the borrower at whose instance and for whose need the money is advanced - *Ponnwatt India Ltd. v. Registrar* (1987) 62 Comp Cas 112 (Bom HC).

Deposit is something more than a mere loan of money. It will depend on facts and circumstances of each case - *Ram Janki Devi v. Juggilal Kamalapat* AIR 1971 SC 2551 = (1971) 1 SCC 477.

Loan imports a positive act of lending coupled with an acceptance by the other side of the money as loan - *Shree Ram Mills v. CEPT* (1953) 23 ITR 120 (SC) = AIR 1953 SC 485.

Whether a transaction is loan or deposit does not depend merely on the terms of document but has got to be judged from intention of parties and all the circumstances of the case - *VEA Annamalai Chettiar v. SVVS Veerappa Chettiar* AIR 1956 SC 12.

Purpose of provisions relating to deposits was noted in *Delhi Cloth & General Mills v. UOIAIR* 1983 SC 937 = (1983) 2 Comp LJ 281 = (1983) 4 SCC 166 = 54 Comp Cas 674 (SC 3 member bench).

The distinction between deposit and loan has also been noted in *Girija Smelters v. Saraswathi Finance Corporation* (2004) 119 Comp Cas 592 (CLB) and *Gopal K Maheshwari v. Hawk Multimedia* (2005) 60 SCL 382 (CLB).

Intention of provisions relating to deposit is to safeguard interests of depositors. Applying rule of purposive construction also, distinction between loan and deposit is required to be made.

Applying aforesaid case law and rule of purposive construction, it can be safely concluded that money borrowed as loan for purpose of business is 'loan'. It is not a 'deposit'.

However, in view of wide definition of 'deposit', validity of this distinction for purpose of acceptance of deposits under provisions of sections 73 to 76 of Companies Act, 2013 is highly doubtful.

## **26.2 ACCEPTANCE OF SECURED DEPOSITS FROM PUBLIC ONLY IN SPECIFIED CASES**

No company shall invite, accept or renew deposits under the 2013 Act from the public except in any manner provided under Chapter V of Companies Act, 2013 - section 73(1) of Companies Act, 2013.

This restriction shall not apply to (a) a banking company (b) NBFC as defined in the RBI Act and (c) to such other company as the Central Government may specify, after consultation with the RBI - proviso to section 73(1) of Companies Act, 2013.

'Renew' means 'acquire again' and hence renewal amounts to receiving fresh deposit. - *Sujani Textiles v. AROC* (1980) 50 Comp Cas 276 (Mad) \* *Jagjivam Hirlalal v. ROC* (1989) 65 Comp Cas 553 (Bom.).

### **26.2-1 Acceptance of deposits from public by specified public companies after 1-4-2014**

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 section 73(2) and subject to rules prescribed by Central Government in consultation with RBI - section 76(1) of Companies Act, 2013.

A public company having net worth of not less than Rs one hundred crores or turnover of not less than Rs five hundred crores will be 'eligible company under section 76(1) of Companies Act, 2013. Such company must pass special resolution in general meeting. If deposits including other amounts borrowed are upto aggregate of paid up capital plus reserves, ordinary resolution is sufficient. The resolution should be filed with ROC before making any invitation to public for acceptance of public deposit - Rule 2(1)(e) of Companies (Acceptance of Deposits) Rules, 2014.

**Credit rating to be obtained** - The public company accepting deposits from public shall obtain the credit rating (including its net worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency. The rating shall be obtained for every year during the tenure of deposits [first proviso to section 76(3) of Companies Act, 2013].

The credit rating shall be obtained at least once in a year. Copy of the credit rating shall be submitted to ROC with return of deposits in form DPT-3. The credit rating shall be of minimum investment grade as specified in the rules - rule 3(8) of Companies (Acceptance of Deposits) Rules, 2014, inserted w.e.f. 31-3-2015.

Credit rating should be obtained from any approved credit rating agency.

**Charge on assets of the company** - Every public company accepting secured deposits from the public shall 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. The charge should be created within 30 days from accepting the deposits [second proviso to section 76(1) of Companies Act, 2013].

Note that it is not mandatory to issue secured public deposits. Unsecured public deposits can be issued after making proper disclosure.

**Other provisions of Chapter V to apply** - The provisions of Chapter V shall, *mutatis mutandis*, apply to the acceptance of deposits from public under section 76 [section 76(2) of Companies Act, 2013] [Really, sections 74 and 75 as contained in the Chapter apply to deposits accepted prior to commencement of Companies Act, 2013. Only section 73 related to deposits. Hence, only provisions of section 73 can apply to public deposits accepted under section 76]

**Procedure for application before NCLT if deposit not repaid or interest not paid** - Procedure for filing application before NCLT has been specified in rule 73(1) of NCLT Rules, 2016. Application should be in form NCLT.11. Fees payable are Rs 500. Application should be accompanied by documents as specified in Annexure B and details as specified in rule 73(2) of NCLT Rules, 2016.

NCLT can pass suitable order, including repayment of deposits within specified time, considering financial position of company.

Application can be made by RBI under section 45QA of RBI Act before NCLT if deposits were not repaid or interest was not paid. Application should be in form NCLT.11.

### **26.3 OTHER COMPANIES CAN ACCEPT DEPOSITS ONLY FROM MEMBERS**

Excluding the aforesaid companies, other companies can accept deposits only from members.

#### **26.3-1 Conditions for accepting deposits from members**

A public or private company can accept deposits from its members after passing resolution in general meeting, as per rules prescribed [section 73(2) of Companies Act, 2013]

**Relaxation in case of IFSC public company** - An IFSC (International Financial Services Centre) company can accept unsecured deposits without complying with requirements relating to circular to members, filing of circular, deposit insurance, providing security etc., upto 100% of its paid-up share capital and free reserves and securities premium account Details of moneys borrowed should be filed with ROC in form DPT-3- first proviso to rule 3(3) of Companies (Acceptance of Deposits) Rules, 2014, inserted w.e.f. 19-9-2017.

**Relaxation in case of private company and start-up private company w.e.f. 19-9-2017** - Private company can accept unsecured deposits without complying with requirements relating to circular to members, filing of circular, deposit insurance, providing security etc., upto 100% of its paid-up share capital and free reserves and securities premium account as follows - (i) start-up company for first five years or (ii) private company (a) which is not associate or subsidiary of other company (b) Borrowings from Banks or FI or other body corporate are less twice of its paid up capital or ₹ 50 crores whichever is less and (c) It should not be defaulter in repayment of borrowings subsisting at the time of accepting deposits under section 73. - - Details of moneys borrowed should be filed with ROC in form DPT-3- second proviso to rule 3(3) of Companies (Acceptance of Deposits) Rules, 2014, inserted w.e.f. 19-9-2017.

**Rules to be prescribed by Government** - Rules will be prescribed in consultation with RBI for the following - (a) terms and conditions (b) 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.

### **26.3-2 Conditions for accepting deposits from members**

Following conditions apply for accepting deposits from members.

**Circular to members with statement of financial position** - Company should issue a circular to its members including therein a statement showing (a) financial position of the company (b) the credit rating obtained (c) the total number of depositors (d) the amount due towards deposits in respect of any previous deposits accepted by the company and (e) such other particulars in such form and in such manner as may be prescribed [section 73(2)(a) of Companies Act, 2013]

**Filing copy of circular with ROC** - A copy of the circular along with the financial statement shall be filed with the Registrar within thirty days before the date of issue of the circular (i.e. circular should be filed within 30 days of filing with ROC) [section 73(2)(b) of Companies Act, 2013]

**Deposit Repayment Reserve Account in Bank** - A sum **not less than twenty per cent** (earlier it was fifteen per cent upto 15-8-2018 for current and following year) of the amount of its deposits maturing during a financial year shall be deposited in a separate bank account in a scheduled bank. This amount will be called as 'deposit repayment reserve account'. *The amount should be deposited on or before thirtieth day of April each year* [section 73(2)(c) of Companies Act, 2013 amended on 15-8-2018]

The 'deposit repayment reserve account' shall be used by the company only for purpose of repayment of deposits [section 73(5) of Companies Act, 2013].

**Liquid assets** - The company shall maintain liquid assets in form of deposit in Bank. The amount deposited can be used in repayment of deposits outstanding and repayable within next 31st March. However, such deposit shall never fall below 20% of deposits maturing during the financial year - Rule 13 of Companies (Acceptance of Deposits) Rules, 2014 amended w.e.f. 15-8-2018.

**Deposit Insurance not required** - section 73(2)(d) of Companies Act, 2013 required that deposit insurance shall be provided to the extent prescribed.

The clause has been omitted w.e.f. 15-8-2018, as such insurance is not available in India.

**Earlier rule and provision** - Contract for insurance shall be entered at least 30 days before date of circular/advertisement or its renewal. The insurance should be for principal and interest. The insurance contract must indicate aggregate monetary ceiling. However, in any case, deposit and interest upto ₹ 20,000 must be paid to all depositors by insurance company, if company makes a default. The insurance premium shall be paid by the company itself. If company fails to comply with conditions of insurance contract or fails to renew the insurance contract, company must pay amount of deposit within 15 days. If not so repaid, interest @ 15% is payable.- Rule 5 of Companies (Acceptance of Deposits) Rules, 2014. This rule has been omitted w.e.f. 15-8-2018.

Thus, insurance upto ₹ 20,000 per depositor was mandatory. Insurance above that limit was not mandatory.

However, these provisions were not applicable upto 31-3-2018 or until deposit insurance product is available, whichever is earlier - proviso to rule 5(1) of Companies (Acceptance of

Deposits) Rules, 2014 inserted w.e.f. 31-3-2015 and amended w.e.f. 11-5-2017. This rule also stands omitted w.e.f. 15-8-2018.

There no suitable insurance policy available to cover this risk. Hence, the exemption from obtaining insurance cover was granted upto 31-3-2015, *vide* Notification No. GSR 386 dated 6-6-2014. The relaxation has been extended upto 31-3-2018 and now the provision itself has been omitted w.e.f. 15-8-2018.

***Certificate that company is not in default in repayment of deposits and interest*** - Company shall certify that the company has not defaulted in the repayment of deposits accepted either before or after the commencement of Companies Act, 2013 or payment of interest on such deposits [section 73(2)(e) of Companies Act, 2013]

***Fresh deposits cannot be accepted for five years after default is made good*** - Fresh deposits cannot be accepted for five years after default in repayment of deposits and interest is made good - section 73(2)(e) of Companies Act, 2013, as amended w.e.f. 15-8-2018.

***Security for repayment of deposit and interest*** - Company may provide security 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 [section 73(2)(f) of Companies Act, 2013]

***Secured Deposits*** - If company intends to issue Secured Deposits, it shall create security in favour of trustees. Deposit trust deed should be executed with trustees in form DPT.2 at least seven days before issuing circular/advertisement. Trustees should ensure about security of depositors. If there is any default in repayment, trustees should organize meeting of depositors - Rules 6 to 8 of Companies (Acceptance of Deposits) Rules, 2014.

Note that issue of secured deposits is not mandatory. However, if deposit is not secured, it has to be clarified that deposit is 'unsecured deposit'.

***Deposit to be termed as 'Unsecured deposits' if security not provided*** - Provision of security is not mandatory. Where a company does not secure the deposits or secures such deposits partially, then, the deposits shall be termed as 'unsecured deposits'. This shall be so quoted in every circular, form, advertisement or in any document related to invitation or acceptance of deposits [*proviso* to section 73(f) of Companies Act, 2013]

***Period of Deposit*** - Secured or unsecured deposit can be accepted for minimum period of 6 months and maximum 36 months. However, for short term requirements, deposits upto 10% of aggregate paid up capital, free reserves and securities premium account can be accepted for period of less than six months but not less than three months - Rule 3(2) of Companies (Acceptance of Deposits) Rules, 2014. [The words 'securities premium account' have been inserted w.e.f. 15-9-2015].

***Deposits in joint names*** - Deposits can be in joint names upto three names, with or without any clauses i.e. 'jointly', 'Either or Survivor', 'First named or Survivor' - Rule 3(2) of Companies (Acceptance of Deposits) Rules, 2014.

Fixed deposit with Bank in joint name is a tripartite agreement between joint holders inter se and Bank. An 'either or survivor' clause means, on maturity, Bank can make payment to either of them. This tripartite agreement cannot be bilaterally modified. One of the depositor cannot pledge the deposit receipt without authority or concurrence of other deposit holder - *Anumati v. Punjab National Bank* AIR 2005 SC 29 = 2004 AIR SCW 6215.

***Limits on accepting deposit*** - A company accepting deposits from members can accept deposits upto 25% of aggregate of paid up capital, free reserves and securities premium account - Rule 3(4) of Companies (Acceptance of Deposits) Rules, 2014 [The words 'securities premium account' have been inserted w.e.f. 15-9-2015].

An 'Eligible Company' (i.e. company eligible to accept deposits from public under section 76(1) of Companies Act, 2013, can accept deposits upto 25% of paid up capital, free reserves and securities premium account from public. In addition, it can accept deposits upto 10% of aggregate of paid up share capital, free reserves and securities premium account from members - Rule 3(4) of Companies (Acceptance of Deposits) Rules, 2014 [The words 'securities premium account' have been inserted w.e.f. 15-9-2015].

A Government company, eligible to accept deposits under section 76 of Companies Act, 2013 can accept deposits upto 35% of paid up capital, free reserves and securities premium account from public [The words 'securities premium account' have been inserted w.e.f. 15-9-2015].

**Interest and brokerage payable** - Interest and brokerage that can be paid shall not exceed interest or brokerage prescribed by RBI for acceptance of deposits by NBFC. Only persons authorized by company and through whom deposits are actually procured shall be eligible to get brokerage - Rule 3(6) of Companies (Acceptance of Deposits) Rules, 2014.

**Terms of deposit cannot be changed** - Terms of deposit cannot be altered directly or indirectly to the prejudice or disadvantage of depositor, after advertisement or circular is issued. Any such condition in terms and conditions of deposit, trust deed will be void - Rule 3(7) of Companies (Acceptance of Deposits) Rules, 2014.

**Circular by company for accepting deposit from members** - A company accepting deposits from members shall issue circular in form DPT.1 to all its members by registered post, speed post or electronically. In addition, the company may publish the circular as advertisement in newspapers in English and vernacular language. The advertisement or circular shall be issued on authority and in name of Board of Directors - Rule 4(1) and 4(4) of Companies (Acceptance of Deposits) Rules, 2014.

**Certificate from statutory auditors that there has been no default in repayment of deposit and interest** - A Certificate from statutory auditors shall be attached to form DPT.1 that there has been no default in repayment of deposit and interest, and if any default was committed. If it was committed, default has been made good and five years have lapsed after making default good - *proviso* to Rule 4(1) of Companies (Acceptance of Deposits) Rules, 2014 inserted w.e.f. 15-8-2018.

**Advertisement by company for inviting deposits from public** - A company inviting deposits from public advertisement form DPT.1 in newspapers in English language having nation wide circulation and in vernacular language having statewide circulation. The advertisement shall also be uploaded on website of company. The advertisement or circular shall be issued on authority and in name of Board of Directors - Rule 4(2) and 4(3) of Companies (Acceptance of Deposits) Rules, 2014 amended w.e.f. 29-6-2016.

**Authentication of advertisement/circular** - The circular/advertisement in form DPT.1 shall be signed by majority of directors or their authorized agents, and its copy shall be filed with ROC at least 30 days before date of issue of circular/advertisement - Rule 4(5) of Companies (Acceptance of Deposits) Rules, 2014.

**Period of validity of circular/advertisement** - The circular/advertisement shall be valid till expiry of six months from date of closure of the date of closure of financial year or till financial statement of company is laid before AGM of the company, whichever is earlier. After that, fresh circular/advertisement should be published - Rule 4(6) of Companies (Acceptance of Deposits) Rules, 2014.

**Application for deposit** - Application form should be as specified by company. The application shall contain a declaration that the deposit is not being made out of any money bor-

rowed by him from any other person. Depositor can nominate any person to whom his deposits shall vest in event of his death - Rules 10 and 11 of Companies (Acceptance of Deposits) Rules, 2014.

The application form should contain details of name, address and PAN of applicant.

**Brokerage for public deposits** - A company can pay one time brokerage upto 1% for deposits upto 6 months, 1.5% for deposits upto 2 years and 2% for deposits over years.

**Deposit receipt** - A receipt of deposit must be issued to every deposit holder within 21 days from receipt of the money or realization of cheque or date of renewal - Rule 12 of Companies (Acceptance of Deposits) Rules, 2014.

**Register of public deposits** - Company must maintain a register of deposits giving particulars of name and address of depositor, PAN, date and amount of deposit, duration, rate of interest and due date of repayment etc. The entries should be authenticated by director, secretary or authorized officer. The register shall be maintained for 8 years. The contents of register are prescribed in Rule 14 of Companies (Acceptance of Deposits) Rules, 2014.

**Premature repayment of deposit** - Company can make premature repayment of deposits on expiry of 6 months. Rate of interest shall be reduced by 1%. Higher interest cannot be paid. However, if such premature repayment is to provide war risk or related benefit to naval, military or air forces or their families, full interest shall be paid.

If depositor is allowed to renew his deposit before maturity to avail higher interest rate, then interest will be paid without 1% deduction - Rule 15 of Companies (Acceptance of Deposits) Rules, 2014.

**Interest after maturity** - As per normal terms, interest on deposit ceases after maturity. However, if company does not pay the amount, interest may be held payable for subsequent period also, as held in *Mrs. Lakshmi Narayanan v. Coimbatore Lakshmi Investment & Fin Co. Ltd.* (2004) 51 SCL 100 (CLB).

**Income Tax provision in respect of TDS** - It may be noted that income-tax is required to be deducted at source at prescribed rates, unless prescribed declaration is received. Further, if repayment amount is beyond prescribed limit under sections 269SS and 269T of Income-tax Act, repayment should be only by crossed account payee cheque.

**Annual return of deposits** - Annual return of deposits accepted shall be filed with Registrar before 30th June every year, with fees, in form No. DPT.3, giving information as on 31st March - Rule 16 of Companies (Acceptance of Deposits) Rules, 2014.

Form DPT-3 shall also be used for filing return of deposits or particulars of transaction not considered as deposit or both by every company, other than Government company - - *Explanation* to Rule 16 of Companies (Acceptance of Deposits) Rules, 2014 inserted w.e.f. 22-1-2019.

The e-form DPT.3 should be pre-certified by auditors of the company - Rule 8(12)(b)(ii) of Companies (Registration Offices and Fees) Rules, 2014.

**Disclosure in financial statement about money received from directors and their relatives** - Money received from director should be disclosed by every public company. A private company shall separately disclose in financial statements by way of notes, about money received from directors or relatives of directors - rule 16A of Companies (Acceptance of Deposits) Rules, 2014 inserted w.e.f. 29-6-2016.

**One time return of outstanding receipt of money or loan received but not considered as deposit in terms of rule 2(1)(c)** - Every company (other than Government company) shall file



a one time return of outstanding money or loan as on 22-1-2019, received from 1-4-2014, but not considered as deposit, in terms of rule 2(1)(c). This should be disclosed in form DPT-3, within 90 days from 22-1-2019 -Rule 16A(3) of Companies (Acceptance of Deposits) Rules, 2014 inserted w.e.f. 22-1-2019.

Rule 2(1)(c) of Companies (Acceptance of Deposits) Rules, 2014 consists of long list of borrowings which are not considered as 'deposit'. This includes borrowings from Banks, FI, Inter company deposits, amount received from director and their relatives, debenture, advances etc. Thus, it seems practically every company (other than Government company) will be required to file such return within 90 days from 22-1-2019 i.e. before 22-4-2019.

**Repayment of deposit and payment of interest** - Every deposit accepted by a company under section 73(2) shall be repaid with interest in accordance with the terms and conditions of the agreement as specified - section 73(3) of Companies Act, 2013.

**Apply to NCLT if deposit not repaid in time** - Where a company fails to repay the deposit or part thereof or any interest thereon, the depositor concerned may apply to NCLT for an order (a) directing the company to pay the sum due or (b) for any loss or damage incurred by him as a result of such non-payment and (c) for such other orders as the NCLT may deem fit - section 73(4) of Companies Act, 2013.

NCLT has been constituted w.e.f. 1-6-2016. Earlier, these powers were exercised by CLB as per Companies (Removal of Difficulties) Second Order, 2014 dated 2-6-2014, issued by MCA.

**Procedure for application before NCLT** - Procedure for filing application before NCLT has been specified in rule 73(1) of NCLT Rules, 2016. Application should be in form NCLT.11. Fees payable are Rs 500. Application should be accompanied by documents as specified in Annexure B and details as specified in rule 73(2) of NCLT Rules, 2016.

NCLT can pass suitable order, including repayment of deposits within specified time, considering financial position of company.

Application can be made by RBI under section 45QA of RBI Act before NCLT if deposits were not repaid or interest was not paid. Application should be in form NCLT.11.

### **26.3-3 Repayment of principal and payment of interest electronically in case of listed entities**

In case of listed entities, as per regulation 12 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 effective from 1-12-2015, payment of dividend and interest and redemption or repayment amounts shall be made electronically.

Where electronic payment is not possible, 'payable at par' cheques may be issued. If amount exceeds Rs 5,000, the 'payable at par' warrants or cheques shall be sent by speed post.

In case of unlisted entities. They can pay either electronically or by cheque/demand draft.

## **26.4 REPAYMENT OF DEPOSITS**

The deposits accepted prior to commencement of Companies Act, 2013 but to be repaid later, shall be repaid (a) within *three* years (earlier limit was one year. Even the three year limit has now expired) from commencement or (b) the date on which such payments are due, whichever is earlier. *The renewal of such deposits shall be as per provisions of Chapter V and rules made thereunder* [section 74(1)(b) of Companies Act, 2013]. [The words in italics inserted w.e.f. 15-8-2018].

[Really even the three year period is now over]

However, as a relaxation, *Explanation* to Rule 19 of Companies (Acceptance of Deposits) Rules, 2014 provided that if company continues to repay such deposits with interest due on due dates, it is sufficient compliance of section 74(1)(b) of Companies Act, 2013.

***Deposits accepted by private companies from its directors, members and relatives prior to 1-4-2014 are not 'deposits' under the 2013 Act*** - Deposits accepted by private companies from its members, directors and relatives prior to 1-4-2014 shall not be considered as 'deposits' under the 2013 Act. However, its renewal or acceptance of fresh deposits will be as per provisions of Companies Act, 2013 - MCA circular No. 05/2015 dated 30-3-2015.

In fact, this clarification should apply to public companies also, since the term 'deposit' is to be interpreted on the basis of definition on the date when the deposits were accepted, and not on basis of any subsequent change in the definition.

***Filing statement with ROC in respect of unpaid deposits*** - A company which has unpaid deposits shall file a statement with ROC, within a period of three months from commencement of Companies Act, 2013 or from the date on which such payments, are due. The statement should give (a) all the deposits accepted by the company (b) sums unpaid on such amount with the interest payable thereon and (c) arrangements made for such repayment [section 74(1)(a) of Companies Act, 2013]

The statement shall be filed in form DPT.4. It should be filed before 30-6-2014 - Rule 20 of Companies (Acceptance of Deposits) Rules, 2014.

***NCLT can allow further time for repayment*** - NCLT may on an application made by the company, allow further time as considered reasonable to the company to repay the deposit, after considering (a) the financial condition of the company (b) the amount of deposit or part thereof (c) the interest payable thereon and (d) such other matters - section 74(2) of Companies Act, 2013.

Section 74(2) of Companies Act, 2013 has been notified w.e.f. 6-6-2014 and NCLT has been constituted w.e.f. 1-6-2016.

Earlier, i.e. till 1-6-2016, as per Companies (Removal of Difficulties) fourth Order, 2014 issued *vide* Notification No. SO 1460(E) dated 6-6-2014, application under section 74(2) of Finance Act, 1994 was required to be made to CLB.

In *Ansal Housing and Construction Ltd. In re* (2017) 139 SCL 20 = 76 taxmann.com 290 (NCLT), re-schedulement upto 24 months was allowed as company was facing acute financial crisis and company had never defaulted in past.

***Procedure for application before NCLT*** - Procedure for filing application before NCLT under section 74(2) has been specified in rule 73(5) of NCLT Rules, 2016. Application should be in form NCLT.1. Fees payable are Rs 5,000. Copy of application should be filed with ROC. Application should be accompanied by documents as specified in Annexure B. ROC or RD should submit report to NCLT on report on affairs of the company. The report will be considered by NCLT while passing order.

***Penalty for non-repayment of deposits or interest thereon*** - If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in section 74(1) or further time as allowed by NCLT under section 74(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.

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 - section 74(3) of Companies Act, 2013.

Section 74(2) and 74(3) of Companies Act, 2013 have been notified w.e.f. 6-6-2014 and NCLT has been constituted w.e.f. 1-6-2016.

***Punishment for offence*** - Where specific penalty is not provided, company and every officer of company who is in default is punishable with fine upto Rs 5,000 and Rs 500 per day where contravention is continuing one - Rule 21 of Companies (Acceptance of Deposits) Rules, 2014.

***No buy back if company is in default*** - If a company is in default in repayment of fixed deposits or interest thereon, it cannot engage in buy back of its own shares or securities, directly or indirectly. - section 70(1)(c) of Companies Act, 2013 [Corresponding to section 77B(c) of the 1956 Act].

#### **26.4-1 Damages for fraud in respect of deposits accepted prior to 1-4-2014**

Where a company fails to repay the deposit or part thereof or any interest thereon under section 74 within the specified time or such further time as may be allowed by NCLT under section 74(2), **and** it is proved that the deposits had been accepted with intent to defraud the depositors or for any fraudulent purpose, every officer of the company who was responsible for the acceptance of such deposit shall, without prejudice to the provisions contained in section 74(3) and liability under section 447 of Companies Act, 2013, be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by the depositors [section 75(1) of Companies Act, 2013].

Note that this provision applies only in respect of deposits accepted prior to the 2013 Act. For deposits accepted after 1-4-2014, action is permissible under section 245 of Companies Act, 2013 w.e.f. 1-6-2016.

Section 74(2) and 74(3) of Companies Act, 2013 have been notified w.e.f. 6-6-2014 and NCLT constituted w.e.f. 1-6-2016.

Section 75 has been notified and made effective from 1-6-2016.

#### **26.4-2 Punishment for contravention of provisions relating to public deposits**

If company accepts or invites public deposits (or allows or causes any other person to accept or invoice deposit on its behalf) in contravention of section 73 or section 76 or rules made thereunder, fine upto ₹ ten crore (minimum ₹ one crore *or twice the amount of deposit accepted by the company, whichever is lower*) can be imposed - section 76A(a) of Companies Act, 2013 [The words in italics inserted w.e.f. 9-2-2018]

Every officer in default is punishable with imprisonment upto seven years *and* with fine upto ₹ two crores (minimum ₹ twenty five lakhs) - section 76A(b) of Companies Act, 2013 inserted w.e.f. 29th May, 2015. [The word 'or' was replaced by 'and' w.e.f. 9-2-2018]

If the contravention was knowingly with intention to deceive the company, its shareholders, depositors or creditors or tax authorities, such officer is liable for action under section 447 of Companies Act, 2013 - *proviso* to section 76A of Companies Act, 2013 inserted w.e.f. 29th May 2015.

#### **26.4-3 Class action permissible**

Any suit, proceedings or other action may be taken by any person, group of persons or any association of persons who had incurred any loss as a result of the failure of the company to repay the deposits or part thereof or any interest thereon [section 75(2) of Companies Act, 2013].

The class action will be under section 245 of Companies Act, 2013.

Note that this provision applies only in respect of deposits accepted prior to 2013 Act.

Sections 75 and 245 of Companies Act, 2013 have been notified as NCLT has been constituted. Hence, now, such class action is permissible after 1-6-2016 in respect of deposits accepted prior to 1-4-2014.

In respect of deposits accepted after 1-4-2014, class action can be taken under section 245 of Companies Act, 2013 after 1-6-2016.

### **26.5 BORROWINGS WHICH ARE EXCLUDED FROM DEFINITION OF 'DEPOSIT'**

As per rule 2(1)(c) of Companies (Acceptance of Deposits) Rules, 2014, 'deposit' means any receipt of money by way of deposit or loan or in any other form, by a company. However, 'deposit' does not include the following -

**Amount from Government or guaranteed by government** - Amount received from State Government, Central Government or whose repayment is guaranteed by them is not 'deposit'.

**Amount received from foreign government or foreign bank** - Amount received from foreign government, foreign Bank, foreign collaborators, foreign bodies corporate, foreign citizens, PIO - subject to FEMA Act and regulations, is not 'deposit'.

**Loans from banks and FI** - Loans from banks - nationalised, State Bank or cooperative bank, Loans from and financial institutions like IDBI, IFCI, SIDBI, SFCs, UTI, LIC, State Industrial Development Corporations, Public Financial Institutions etc., is not 'deposit'.

**Amount received against commercial paper** - Amount received against commercial paper or other instruments as per RBI guidelines or notification, is not 'deposit'.

**Inter Corporate borrowings** - Any amount received by a company from another company is not 'deposit'. (These are termed as inter-corporate loans or deposits). Though there is no restriction on the company borrowing the money, the lending company has to observe limits of lending as specified in section 186 of Companies Act, 2013.

**Subscription to securities and call in advance** - Subscription for shares or debentures and calls in advance on shares is not 'deposit', so long as such amount is appropriated only against amount due on allotment of securities applied for. If amount not refunded within 15 days (after 60 days), it will be treated as deposit.

If such amounts were received prior to 31-3-2014, allotment should be completed before 1-6-2015 or the amount should be returned to the person from whom the amounts were received - proviso to *Explanation (a)* rule 2(1)(c)(vii) of Companies (Acceptance of Deposits) Rules, 2014, inserted w.e.f. 31-3-2015.

**Amount from (a) director of a public company or (b) director or relative of director of private company** - Any amount received from a person, who was director of the company or relative of director of private company the time of receipt of the amount is not 'deposit'. The director or relative of director of private company should declare in writing to company that the money he is depositing is not borrowed or accepting loans or deposits from others.

The company shall disclose details of money accepted in Board report - rule 2(1)(c)(viii) of Companies (Acceptance of Deposits) Rules, 2014, amended w.e.f. 15-9-2015. [The words 'relative of director of private company' have been inserted w.e.f. 15-9-2015].

[The requirement is that he should be director or relative of director *at the time of receipt of amount*. Thus, later he may cease to be a director].