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[PROSPECTUS]

Detailed provisions w.r.t. Prospectus for CS Inter and CA PCC Students

Prospectus

The provisions regarding prospectus are applicable to both listed and unlisted public limited companies.

A private company cannot invite public to subscribe for its shares in or debentures, therefore, it cannot issue prospectus. [Section 3(1)(*iii*)]

Meanings of 'prospectus' and 'abridged prospectus'

The term 'prospectus' under section 2(36) means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting offers from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures securities of a body corporate.

The term 'abridged prospectus' under section 2(1) means a memorandum containing such salient features of a prospectus as may be prescribed.

Only a public company has power and privilege to issue prospectus to public for subscription of shares in or debentures of the company. The prospectus issued by a public company shall contain matters specified in Part I of Schedule II to the Companies Act, 1956. If a public company does not issue a prospectus with reference to its formation then it has to file a statement in lieu of prospectus (SLP) with the concerned Registrar of Companies as desired by Section-70.

Public companies can not allotment shares unless S.L.P. filed with ROC

Section 70(1) provides that a company having a share capital, (which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription,) shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures, there has been delivered to the Registrar for registration a statement in lieu of prospectus signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in Part I of Schedule III and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule.

Dating of prospectus

Section 55 of the Act provides that a prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that the date so stated in the prospectus shall be taken as the date of its publication.

Powers of the Securities and Exchange Board of India

Section 55A provides that the provisions contained in sections 55 to 58, 59 to 84, 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall—

(*a*) in case of listed public companies;

(*b*) in case of those public companies which intend to get their securities listed on any recognised stock exchange in India, be administered by the Securities and Exchange Board of India; and

(*c*) in any other case, be administered by the Central Government.

Content of prospectus

As per section 56(1) of the Act, every prospectus shall state the matters specified in Part I of Schedule II and the said Parts I and II shall have effect subject to the provisions contained in Part III of Schedule II.

Who is Authorised to issue prospectus

As per section 56(1) of the Act, a prospectus can be issued—

(*i*) by or on behalf of a company; or

(*ii*) by or on behalf of any person who is or has been engaged or interested in the formation of a company.

The prospectus can be issued on or with reference to the formation of a company.

Application Form + Memorandum containing salient features of prospectus

Section 56(3) of the Act, provides that form of application for shares in, or debentures of a company, must be accompanied by a memorandum containing salient features of prospectus. The memorandum containing salient features of prospectus shall contain all particulars as specified in Form 2A of the Companies (Central Government's) General Rules and Forms, 1956.

However, section 56(3) does not apply, where form of application was issued either:—

(*i*) in connection with a bona fide invitation to person to enter into an underwriting agreement with respect to the shares or debentures; or

(*ii*) in relation to shares or debentures which were not offered to the public.

Violation of Section-56 shall be punishable with fine which may extend to fifty thousand rupees. The powers of prosecution under section 56 have been delegated to the SEBI.

Defense available to directors

A director or other person responsible for prospectus shall not incur any liability by reason of non-compliance or contravention of prospectus provisions in the following cases: [Section 56(4)]

(*i*) as regards any matter not disclosed, if he proves that he had no knowledge thereof;

(*ii*) if he proves that the non-compliance or contravention arose from an honest mistake of fact on his part;

(*iii*) he shows that the form of application was issued either,—

(*a*) in connection with a *bona fide* invitation to person to enter into an underwriting agreement with respect to the shares or debentures; or

(*b*) in relation to the shares or debentures which were not offered to the public;

(*iv*) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case or otherwise were immaterial and having regard to the circumstances of the case, reasonably to be excused.

Non-application Section-56 [Section-56(5)]

Section 56(5) of the Act provides that section 56 do not apply in the following cases:—

(*i*) if a company issue shares or debentures of the company, to the existing members or debenture holders of the company as right issue;

(*ii*) if a company issue shares or debentures which are, or are to be, in all respects uniform with the shares or debentures previously issued and for the time being dealt in or quoted on a recognised stock exchange.

Expert's statement

A prospectus inviting persons to subscribe for shares in or debentures of a company may contain a statement purporting to be made by an 'expert' only when the expert is a person who is not, or has not been, engaged or interested in the formation or promotion, or in the management of the company. [Section 57]

Section 58 of the Act provides that a prospectus inviting persons to subscribe for the shares in or debentures of a company and including a statement purporting to be made by an expert shall be issued only after fulfillment of following conditions, namely:—

(*i*) the expert has given his written consent to the issue of prospectus with the statement included in the form and context in which it is included, and has not withdrawn such consent before the delivery of a copy of the prospectus to the Registrar for registration;

(*ii*) the statement that he has given and has not withdrawn his consent as aforesaid appears in the prospectus.

Section 59(2) of the Act has also defined the term 'Expert', which includes an engineer, a valuer, an accountant and any other person whose profession gives authority to a statement made by him.

A company, which includes statements of expert must ensure that:—

(*i*) the expert has given his written consent to the issue of prospectus containing his statement;

(*ii*) the expert's statement has been included in the prospectus in the same form and context in which he has given the same;

(*iii*) the expert has not withdrawn his consent as given in writing before the delivery of a copy of a prospectus to the Registrar of Companies for registration;

(*iv*) prospectus shall contain a statement that the expert has given his consent and has not withdrawn the same; and

(*v*) the expert must be a person who is not or has not been engaged or interested in the formation or promotion, or in the management of the company.

Penalty

If any prospectus is issued in contravention of section 57 or 58 of the Companies Act, 1956, the company, and every person, who is knowingly a party to the issue thereof, shall be punishable with a fine which may extend to fifty thousand rupees. [Section 59(1)]

Registration of prospectus and related formalities

After approval by the Board, the prospectus will be signed by the directors or their duly constituted attorneys in writing. The Board may also authorize the company secretary or any other official to deliver a copy of prospectus to the Registrar of Companies for its registration. Delivery of a copy of prospectus to the concerned Registrar for registration is a pre-condition to issue of a prospectus by or on behalf of a company.

Section 60(2) specify that every prospectus issued by or on behalf of a company or in relation to an intended company shall state following facts on the face of it:—

(*i*) a copy of prospectus has been delivered to the concerned Registrar of Companies for registration as required by section 60 of the Companies Act, 1956;

(*ii*) mention that if any documents which are required by section 60 of the Act to be endorsed on or attached to the copy so delivered to Registrar, or refer to any statements included in the prospectus which specify those documents.

Prospectus must be issued within 90 days after the date of delivery to the Registrar

As per Section 60(4) no prospectus shall be issued more than ninety days after the date on which a copy thereof is delivered to the concerned Registrar of Companies for registration under section 60(1) of the Act.

If a prospectus is issued more than ninety days after the date on which a copy thereof is delivered to the concerned Registrar of Companies u/s 60(1), it shall be deemed to be a prospectus, which has not been delivered under section 60(1) to the Registrar.

Person who violats the above provisions shall be punishable with fine which may extend to Rs. 50,000. [Section 60(5)]

Shelf prospectus

"Shelf prospectus" means a prospectus issued by any financial institution or bank for one or more issues of the securities or class of securities specified in that prospectus.

Under the Act, a company must issue a full-fledged prospectus each time it accesses the capital market, it certainly leads to needless repetition more so when a company takes recourse to capital markets more than once in a given year.

Section 60A provides that the financial institutions may issue a "shelf prospectus" for a specified time period. Such a prospectus has a limited life during which it remains on the "shelf", and is updated for any changes that may have occurred between two successive offerings.

According to section 60A(1), any public financial institution, public sector bank or scheduled bank whose main object is financing shall file a shelf prospectus.

Validity period of shelf prospectus

Shelf prospectus will be valid for a period of one year from the date of opening of the first issue of securities under a shelf prospectus. Section 60A(2) provides that a company filing a shelf prospectus with the Registrar shall not be required to file prospectus afresh at every stage of offer of securities by it within a period of validity of such shelf prospectus.

Requirement for filing of information memorandum on all material facts for changes

Section 60A(3) provides that a company filing a shelf prospectus shall be required to file an information memorandum on all material facts relating to new charges created, changes in the financial position as have occurred between the first offer of securities, previous offer of securities and the succeeding offer of securities within such time as may be prescribed by the Central Government, prior to making of a second or subsequent offer of securities under the shelf prospectus.

An information memorandum shall be issued to the public along with the shelf prospectus filed at the stage of the first offer of securities and such prospectus shall be valid for a period of one year from the date of opening of the first issue of securities under that prospectus.

Therefore, an update of information memorandum is required to be filed every time if an offer of securities is made, such memorandum together with the shelf prospectus shall constitute the prospectus.

Information memorandum (IM)

Section 60B contains provisions in relation to 'information memorandum'. The procedure for circulation of information memorandum and inviting subscription are as follows:—

(1) A public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus. [Section 60B(l)]

(2) It is mandatory for a company inviting subscription by an information memorandum to file a prospectus prior to the opening of the subscription lists & the offer as a red-herring prospectus, at least 3 days before the opening of the offer. [Section 60B(2)]

(3) The information memorandum and red-herring prospectus shall carry same obligations as are applicable in the case of a prospectus. [Section 60B(3)]

(4) Any variation between the information memorandum and the red-herring prospectus shall be highlighted as variations by the issuing company. [Section 60B(4)]

For the purposes of sub-sections (2), (3) and (4), "red-herring prospectus" means a prospectus which does not have complete particulars on the price of the securities offered and the quantum of securities offered. [*Explanation* to section 60B(4)]

(5) Every variation as made and highlighted in accordance with sub-section (4) above shall be individually intimated to the persons invited to subscribe to the issue of securities. [Section 60B(5)]

(6) In the event of the issuing company or the underwriters to the issue have invited or received advance subscription by way of cash or post-dated cheques the company or such underwriters or bankers to the issue shall not encash such subscription moneys or post-dated cheques before the date of opening of the issue, without having individually intimated the prospectus subscribers of the variation and without having offered an opportunity to such prospective subscribers to withdraw their application and cancel their post-dated cheques or stock-invest or return of subscription paid. [Section 60B(6)]

(7) The applicant or proposed subscriber shall exercise his right to withdraw from the application on any intimation of variation within seven days from the date of such intimation and shall indicate such withdrawal in writing to the company and the underwriters. [Section 60B(7)]

(8) Any application for subscription which is acted upon by the company or underwriters or bankers to the issue without having given enough information of any variations, or the particulars of withdrawing the offer or opportunity for cancelling the post-dated cheques or stop payments for such payments shall be void and the applicants shall be entitled to receive a refund or return of its post-dated cheques or subscription moneys or cancellation of its application, as if the said application had never been made and the applicants are entitled to receive back their original application and interest at the rate of fifteen per cent, from the date of encashment till payment or realisation. [Section 60B(8)]

(9) Upon the closing of the offer for securities, a final prospectus stating therein the total capital raised, whether by way of debt or share capital and the closing price of the securities and any other details as were not complete in the red-herring prospectus shall be filed in a case of a listed public company with the Securities and Exchange Board and Registrar, and in any other case with the Registrar only. [Section 60B(9)]

Terms of contract mentioned in prospectus or SLP not to be varied

A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus without the approval of the company in general meeting. If terms of a contract mentioned in prospectus are varied subject to the approval of the company then the approval of the general meeting shall be obtained subsequently. [Section 61]

Liability for misstatements in prospectus

1. Civil liability

Being a primary document in respect of every public issue of securities the prospectus of the company must not suppress any material fact or omission of which may affect the decision of the investors. There are two kinds of liabilities provided under the Companies Act, 1956 for misstatements in prospectus. One is the civil liability provided under section 62 and the other is a criminal liability prescribed under section 63 of the Act.

The following persons shall be liable to pay compensation to every person who subscribes for any shares in or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement contained in the prospectus:—

(*a*) every person who is a director of the company at the time of the issue of the prospectus;

(*b*) every person who has authorised himself to be named and is named in the prospectus either as a director, or as having agreed to become a director, either immediately or after an interval of time;

(*c*) every person who is a promoter of the company; and

(*d*) every person who has authorised the issue of the prospectus.

Consent given by a person as an expert in respect of his statement contained in the prospectus under section 58 or consent in writing given by any person named as auditors, etc., in the prospectus under section 60(3) shall not make such person liable as a person who has authorised the issue of the prospectus and such person can be held liable only in respect of an untrue statement, if any, purporting to be made by him as an expert.

Defance

However, a person shall not be liable for misstatements in prospectus under section 62(1), if he proves that:—

(*a*) having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;

(*b*) the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent;

(*c*) after the issue of the prospectus and before allotment thereon, becoming aware of any untrue statement contained therein, withdrew his consent to the prospectus and gave reasonable public notice of the withdrawal and of the reasons therefor; or

(*d*) (*i*) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and

(*ii*) as regards every untrue statement by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement; and

` (*iii*) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or a correct copy of, or a correct and fair extract from, the document.

It has been provided that section 62(2) shall not apply in the case of a person liable, by reason of his having given a consent required of him by section 58, as a person who has authorised the issue of the prospectus in respect of an untrue statement, purporting to be made by him as an expert.

2. Criminal liability

Section 63 of the Act says that where a prospectus issued, if it includes any untrue statement, <u>every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to Rs. Fifty thousand rupees, or with both</u>, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

<u>Defance</u>

For defending from the criminal liability to such person has to prove that:—

(*a*) either that the statement was immaterial; or

(*b*) that he was having reasonable ground to believe, that the statement was true and did so up to the time of the issue of the prospectus.

However, the auditor, legal adviser, attorney, solicitor, banker and broker of the prospective company and even an expert giving his consent under section 58 will also be deemed to be persons who authorised the issue of the prospectus subject to the limited sphere of their liability.

ground for an action in the nature of an action for misrepresentation. There must be some active misstatement of facts. The withholding of facts should be such, withholding which if not stated, makes that which is stated, absolutely false.

It may be concluded that in order to make a prospectus fraudulent it is not necessary that there should be false representation in it; even if every word is true, the suppression of material facts may render it fraudulent. To judge its effect, it should be read as a whole. It is not necessarily enough if the prospectus refers to the contracts and puts the intending shareholder upon enquiry as to their contents. As is said that sometimes half a truth is no better than downright falsehood.

Deemed prospectus (Section-64)

Section 64 contains provisions as regards any document containing offer of shares in or debentures for sale shall be deemed to be prospectus. Following are the provisions in this regard:—

(*i*) Where a company allots or agrees to allot any shares in, or debentures of the company with a view to all or any of those shares in or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall, for all the purposes, be deemed to be a prospectus issued by the company. The condition for deemed prospectus is that the intention of the company behind allotment or agreement to allot shares in or debentures is that all or any of such shares in or debentures be offered for sale to the public and all enactments and rules of law as to the contents of prospectus shall apply.

(*ii*) It can be assumed that the shares in or debentures have been issued to public for subscription and the persons accepting the offer for shares in or debentures are subscribers for these shares in or debentures. But liability of persons by whom offer is made in respect of misstatements contained in the document or otherwise in respect thereof shall remain unaffected.

Pre-conditions

(*iii*) It shall, unless the contrary is proved, be evidence that an allotment of, or agreement to allot, shares in or debentures was made with a view to the shares in or debentures being offered for sale to the public if it is shown:—

(*a*) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(*b*) that at the date when the offer was made, the whole consideration to be received by the company in respect of the shares or debentures had not been received by it.

(*iv*) Section 56 as applied by this section shall have effect as if it required a prospectus to state in addition to the matters specified in Part I of Schedule II and reports specified in Part II of Schedule II, the prospectus to be stated in a prospectus: [Section 64(3)]

(*a*) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates; and

(*b*) the place and time at which the contracts under which the said shares or debentures have been or are to be allotted may be inspected.

(*v*) The provisions of section 60 read with section 64 shall have effect as if the persons making the offer were persons named in a prospectus as directors of a company.

Signature requirements

(*vi*) Where any person making an offer to which section 64 of the Act relates is a company or a firm, it shall be sufficient if the document referred in section 64(1) is signed on behalf of the company or firm by two directors of the company or by not less than one half of the partners in the firm, as the case may be and any such directors or partner may sign by his agent authorised in writing. [Section 64(5)] (*vii*) An offer or invitation shall not be treated as made to the public if following two conditions are satisfied: [Section 67(3)]

(*a*) if the offer or invitation can properly be regarded as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(*b*) if the offer or invitation can properly be regarded as being a domestic concern of the persons making and receiving the offer or invitation.

Newspaper advertisements of prospectus

Where any prospectus is published as a newspaper advertisement, it is not necessary in the advertisement to specify following, namely:—

(*i*) contents of memorandum;

(*ii*) signatories to memorandum;

(*iii*) the numbers of shares subscribed for by signatories.

Mandatory contents of Prospectus announcements

Following matters must be included in the announcement of prospectus:—

(1) Date of incorporation of the company.

(2) Location of registered office.

(3) Names of the Stock Exchanges where listing is proposed.

(4) Minimum subscription.

(5) Dates of opening, closing and earliest closing of subscription list.

(6) Disclaimer clause of SEBI.

(7) Capital structure of the company.

(8) Highlights and risk factors.

(9) Brief history of the company.

(10) Main objects of the company.

(11) Present business activities of the company.

(12) Names and description of promoters/directors and changes if any.

(13) Management of the company.

(14) Objects of the present issue.

(15) Cost of the project.

(16) Means of financing.

(17) Details of the projects includes:—

— Location of project.

— Requirement of plant and machinery and arrangements made there for.

— Land and building.

— Technical arrangements.

— Manufacturing process.

— Infrastructure facilities.
— Requirement and source of raw materials.
— Requirement of power and arrangements made therefor.
— Requirement of water and arrangements made therefor.
— Status of Pollution control and clearance obtained for that purpose.

(18) Justification of premium.

(19) Outstanding litigations/disputes against the company and promoters and its impact on the company.

(20) Material developments since the date of the last balance-sheet.

(21) Authority for the present issue.

(22) Profitability projections and comments regarding appraisal, etc.

(23) Name and address of Company Secretary and Compliance Officer.

(24) Name and address of Legal Advisor.

(25) Auditor.

(26) Agents and Trustees for debentureholders.

(27) Credit rating.

(28) Underwriters to the issue.

(29) Bankers to the issue and their collecting branches.

(30) Availability of application forms and prospectus.

(31) Lead managers to the issue.

(32) Co-managers to the issue.

(33) Legal Advisor to the issue.

(34) Registrar to the issue.

Penalty for impersonation for acquisition, etc., of shares

Section 68A(1) provides that any person who:—

(*a*) makes in a fictitious name, an application to a company for acquiring, or subscribing for, any shares in or debentures therein, or

(*b*) otherwise induces a company to allot, or register any transfer of shares therein to him, or any other person in a fictitious name, shall be punishable with imprisonment for a term which may extend to five years. The provisions as contained in section 68A(1) shall be prominently reproduced in every prospectus issued by the company and in every form of application for shares, which is issued by the company to any person. It is a general practice to reproduce the provisions of section 68A(1) in bold letters in the prospectus and form of application issued by companies.

Any person who, either knowingly or recklessly by making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into or to offer to enter into:—

(*a*) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting shares or debentures; or

(*b*) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by references to fluctuations in the value of shares or debentures;

shall be punishable with imprisonment for a term which may extend to five years or with a fine which may extend to one lakh rupees, or with both.