PRIVATE COMPANIES DESERVE FULL OR PARTIAL EXEMPTIONS FROM SEVERAL PROVISIONS OF THE COMPANIES ACT, 2013

We have seen the phased implementation of the Companies Act, 2013 [the Act]. There were several provisions under the Companies Act, 1956 which were not applicable to private companies. In a similar way, the Government may issue notifications as soon as may be possible granting exemptions to private companies / small companies from several provisions so as to make it clear the provisions which do not apply to private companies or which apply with some liberty.

Under Section 462 of the Act, the Central Government may, in public interest, by notification, direct that any of the provisions of the Act shall not apply to such class or classes of companies. The Central Government has power to apply any provision of the Act with such exceptions, modifications and adaptations with respect to any class or classes of companies. In short, this provision empowers the Central Government to exempt any class of companies either wholly or partially or in a modified manner from any of the provisions of the Act. Under this Section, it is expected that the Central Government may issue a notification sooner or later to exempt private companies from certain provisions.

We expect the following provisions may be covered under the notification which may be issued under Section 462 of the Act. While doing this exercise, we have also found that certain provisions may be made applicable or inapplicable subject to regulations contained in the Articles of Association of the company concerned or may be made applicable only if the paid up capital and / or turnover of the private company concerned is not less than a specified amount.

1. Under Section 62(1)(c) of the Act, a special resolution is necessary for increasing the subscribed capital of the company otherwise than by a rights issue or pursuant to an Employees Stock Option Scheme. This requirement may not be made applicable to a private company. [This section itself has not yet been brought into force]. *Under Section 81 of the Companies Act, 1956, the corresponding provision, there was no such requirement.*

2. The requirement of giving not less than 21 days clear notice to call a general meeting under Section 101 of the Act, may not be made applicable to a private company, unless the Articles otherwise provide. [This section has not yet been brought into force]. *Under Section 171 of the Companies Act, 1956, the corresponding provision, read with Section 170 of the said Act, a* private company enjoys the liberty of specifying in its Articles of Association the length of notice which is required to be given to call a general meeting.

3. The requirement of furnishing an explanatory statement under Section 102 of the Act, may not be made applicable to a private company unless the Articles otherwise provide. *Under Section 173 of the Companies Act, 1956, the corresponding provision, read with Section 170 of the said Act, it was possible for a Private Company to state in its Articles of Association that no such explanatory statement is necessary.*

4. The right of every member enshrined under Section 105 of the Act, to appoint a proxy to attend and vote in general meetings, may not be made available to a a member of a private company unless the Articles otherwise provide. It is very amusing to note that the Central Government under the third proviso of the said section is empowered to exempt any class or

classes of companies from this Section thereby whose members would not be entitled to appoint proxies at all. [Third and fourth provisos to this Section has not yet been brought into force]. *Under Section 176 of the Companies Act, 1956, the corresponding provision, read with Section 170 of the said Act, it was possible for a private company to state in its Articles that a member is not entitled to appoint another person as his proxy to attend and vote at a meeting of the company through another person as his proxy; or it could be stated in the Articles that even though a member is entitled to attend and vote at a meeting of the company through proxy, such proxy should also be a member.*

5. Section 106(2) of the Act states *that* except on the grounds specifically stated in Section 106(1) of the Act, a company shall not prohibit any member from exercising his voting rights on any other ground. It is desirable that such a restriction may not be made applicable to a private company. The grounds on which voting rights can be so suspended as set out in sub-section (1) of Section 106 of the Act were existing *in Section 92 of the Companies Act, 1956 and Regulation 59 of the Table A of Schedule I to the said Act, the corresponding provisions.* ***However there was no provision in the Companies Act, 1956 corresponding to sub-section (2) of Section 106 of the Act.*** Therefore it is desirable to grant liberty to a private company to suspend voting rights of members on any other ground also as may be stated in its Articles of Association.

6. The requirement of a postal ballot under Section 110 of the Act may not be made applicable to a private company. [This section has not yet been brought into force]. *Under Section 192A of the Companies Act, 1956, the corresponding provision, it has been specifically stated that the provisions relating to postal ballot are applicable only to a listed public company.*

7. The qualification requirement and time limit specified under Section 111 of the Act with respect to circulation of resolution of members may not be made applicable to a private company. *There was no exemption to a private company from the strict requirements of Section 188 of the Companies Act, 1956, the corresponding provision.* However, it is desirable to grant liberty to a private company to waive such requirements as provided under the Act, if it is stated so in its Articles of Association.

8. The requirements relating to rotation of auditors under Section 139(2) of the Act may not be made applicable to a private company. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

9. The prohibition under Section 144 of the Act with respect to an auditor rendering other services may not be made applicable to a private company. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

10. The requirement under Section 149(1) of the Act to appoint a woman director may not be made applicable to a private company. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

11. The requirement under Section 162 of the Act that the appointment of directors to be voted individually may not be made applicable to a private company. *Under Section 263 of the Companies Act, 1956, the corresponding provision, there was no such requirement.*

12. For the purpose of counting the maximum number of directorships a person may hold as stipulated in Section 165 of the Act, it is desirable that the directorships in private companies (which fall within the description of “small companies”) may not be reckoned. [This section has not yet been brought into force]. *Under Section 278 of the Companies Act, 1956 read with Section 275 of the said Act, the corresponding provision, there was a specific provision declaring that directorships in private companies will not be counted for the purpose of reckoning the number of directorships.*

13. The requirement under Section 177 of the Act, with respect to Audit committee may not be made applicable to a private company unless its turnover is not less than the prescribed level. [This section has not yet been brought into force]. *Section 292A of the Companies Act, 1956, the corresponding provision, is not applicable to a private company.*

14. The requirement under Section 178 of the Act, with respect to Nomination and Remuneration Committee may not be made applicable to a private company. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

15. The restrictions on the powers of the board of directors of a company contained in Section 180 of the Act may not be made applicable to a private company. *Section 293 of the Companies Act, 1956, the corresponding provision, imposes no such restrictions on a private company.*

16. Section 184(2) of the Act prohibits an interested director from participating in any discussion at a Board meeting relating to any contract or arrangement in which he is interested. This provision may not be made applicable to a private company. [This section has not yet been brought into force]. *Under Section 300 of the Companies Act, 1956, the corresponding provision, there was no such requirement with respect to a private company.*

17. The requirement under Section 203 of the Act, with respect to appointment of key managerial personnel may not be made applicable to a private company unless it has a paid up capital and / or turnover of not less than a specified amount. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

18. The requirement under Section 204 of the Act, with respect to secretarial audit may not be made applicable to a private company unless it has a paid up capital and/ or turnover of not less than a specified amount. [This section has not yet been brought into force]. *There was no corresponding provision under the Companies Act, 1956.*

Conclusion

Hurriedly the Government had notified 98 provisions of the Companies Act, 2013 making it very clumsy with two Acts in operation adding confusion as though 9/11 was a statutory cut-off date for those provisions. Further exemptions that could be notified under Section 462 of the Act have not yet been notified. Sections 24, 58 and 59 of the Act, relating to rectification of register of members and other matters, have been brought into force. Under these sections, the law has conferred certain powers upon National Company Law Tribunal [the Tribunal] even though the Tribunal has not yet been constituted. As a result of this, the existing Company Law Board [CLB] is unable to exercise its powers under corresponding provisions of the Companies Act, 1956 while under the Act, Tribunal has not yet been constituted. Faced with difficulties, the Central Government has issued an order for 'Removal of Difficulties" apparently through its powers under Section 470 of the Act. In pursuance of this Order, the Central Government has stated that the powers of the Tribunal under those sections will be exercised by CLB. The powers of CLB are derived from Section 10E(1A) of the Companies Act, 1956. CLB has no powers under the new Act. Therefore it is intriguing how the Government has conferred powers of the Tribunal upon the CLB. Section 470 of the Act empowers Central Government to remove difficulties only to the extent not inconsistent with the provisions of the Companies Act, 2013. Confusion worse confounded!

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